Wyoming Law Journal

Volume 2 | Number 4 Article 3

December 2019

Proposed Rules of Civil Procedure for Court of Record in Wyoming

Wyoming State Bar

PROPOSED RULES OF CIVIL PROCEDURE FOR COURTS OF RECORD IN WYOMING

I. SCOPE OF RULES—ONE FORM OF ACTION

RULE 1. SCOPE OF RULES.

These rules, except as otherwise provided in Rule 81, govern the procedure in all courts of record in the State of Wyoming now existing or hereafter created, in all actions, suits or proceedings of a civil nature, all special statutory proceedings and all appeals in criminal cases. They shall be liberally construed to secure the just, speedy, inexpensive and efficient determination of all litigation on its merits. [From Fed. Rule 1.]

RULE 2. ONE FORM OF ACTION.

There shall be one form of action to be known as "civil action".

II. COMMENCEMENT OF ACTION: SERVICE OF PROCESS, PLEADINGS, MOTIONS AND ORDERS

RULE 3. COMMENCEMENT OF ACTION.

(a) **How Commenced.** A civil action is commenced by filing a complaint.

(b) **When Commenced.** An action shall be deemed commenced on the date of filing the complaint as to each defendant, if service is made on him or on a co-defendant who is a joint contractor or otherwise united in interest with him, within sixty days after the filing of the complaint. If such service is not made within sixty days the action shall be deemed commenced on the date when service is made. The voluntary waiver, acceptance or acknowledgment of service by a defendant shall be the same as personal service on the date when such waiver, acceptance or acknowledgment is made. When service is made by publication, the action shall be deemed commenced on the date of the first publication. [From Sec. 3-517, 3-518.]

RULE 4. PROCESS.

(a) **Summons: Issuance.** Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the sheriff or to a person specially appointed to serve it. Upon request of

the plaintiff separate or additional summons shall issue against any defendant at any time. [From Fed. Rule 4 (a); Sec. 3-1007.]

(b) Same: Form. The summons shall be signed by the Clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint.

(c) By Whom Served. Process may be served:

(1) Within the state, by the sheriff of the county where the service is made, or by his undersheriff or deputy, or by any other person over the age of 21 years, not a party to the action, appointed for such purpose by the clerk.

(2) In another state or United States territory, by the sheriff of the county where the service is made, or by his undersheriff or deputy, or by a United States marshal, or his deputy, or any other person over the age of 21 years, not a party to the action, appointed for such purpose by the clerk.

(3) In a foreign country, by a United States consul, vice consul, or by some person over the age of 21 years appointed by such consul or vice consul. [New.]

(d) Personal Service. The summons and complaint shall be served together by delivery of copies thereof as follows:

(1) Upon a natural person over the age of 14 years, by delivery to the defendant in person, or at his usual place of residence to some member of his family or other person in his employ over the age of 14 years or at the defendant's usual place of business to any employee then in charge of such place of business, or by delivery thereof to an agent authorized by appointment or by law to receive service of process. [From Sec. 3-1009.]

(2) When the defendant is under the age of 14 years, the service must be upon him and also upon his guardian or his father, or if neither his guardian nor his father can be found, then upon his mother or the person having the care of such infant or with whom he lives; if neither of these can be found, or if the defendant is a minor over 14 years of age, service upon the defendant alone shall be sufficient, and the manner of service shall be the same as in the case of adults. [Sec. 3-1015.]

(3) Upon a person for whom a conservator, trustee or guardian has been appointed, by delivery of copies to such conservator, trustee or guardian. [New.]

(4) Upon a partnership, or other unincorporated association, by delivery of copies to one or more of the partners or associates, or a managing or general agent thereof, or by leaving same at the usual place of business of such defendant with any employee then in charge thereof. [From Sec. 3-1009.]

(5) Upon a corporation, by delivery of copies to any officer, manager, general agent, or agent for process. If no such officer, manager or agent can be found in the county in which the action is brought such copies may be delivered to any agent or employee found in such county. If such delivery be to a person other than an officer, manager, general agent or agent for process, the clerk, at least 20 days before default is entered, shall mail copies to the corporation at its last known address as shown by affidavit of plaintiff or his attorney. [From Secs. 3-1012, 3-1013, 3-1014 and 14-206.]

(6) Upon a municipal corporation, by delivery of copies to the mayor or clerk of such corporation. [From Sec. 29-207.]

(7) Upon a county or the Board of County Commissioners thereof, by delivery of copies to any member of the Board of County Commissioners. [From Sec. 26-306.]

(8) Upon a school district, by delivery of copies to any member of its Board of Directors or Trustees. [New.]

(9) Upon a department or agency of state, subject to suit, by delivery of copies to the principal officer, chief clerk or other executive employee thereof. [New.]

(e) Service by Publication. Service by publication may be had where specifically provided for by statute, and in the following cases:

(1) When the defendant resides out of the state, or his residence cannot be ascertained, and the action is:

(i) For the recovery of real property or of an estate or interest therein;

(ii) For the partition of real property;

(iii) For the sale of real property under a mortgage, lien or other encumbrance or charge;

(iv) To compel specific performance of a contract of sale of real estate;

(2) In actions to establish or set aside a will, where the defendant resides out of the state, or his residence cannot be ascertained;

(3) In actions in which it is sought by a provisional remedy to take, or appropriate in any way, the property of the defendant, when the defendant is a foreign corporation, or a non-resident of this state, or the defendant's place of residence is unknown, and in actions against a corporation incorporated under the laws of this state, which has failed to elect officers, or to appoint an agent, upon whom service of summons can be made as provided by these rules and which has no place of doing business in this state;

(4) In actions which relate to, or the subject of which is real or personal property in this state, when a defendant has or claims a lien thereon, or an actual or contingent interest therein or the relief demanded consists wholly or partly in excluding him from any interest therein, and such defendant is a non-resident of the state, or a dissolved domestic corporation which has no trustee for creditors and stockholders, who resides at a known address in Wyoming, or a domestic corporation which has failed to elect officers or appoint other representatives upon whom service of summons can be made as provided by these rules, or to appoint an agent as provided by Section 44-301, W. C. S. 1945, and which has no place of doing business in this state, or a domestic corporation, the certificate of incorporation of which has been forfeited pursuant to law and which has no trustee for creditors and stockholders who resides at a known address in Wyoming, or a foreign corporation, or defendant's place of residence cannot be ascertained;

(5) In actions against executors, administrators or guardians, when the defendant has given bond as such in this state, but at the time of the commencement of the action is a non-resident of the state, or his place of residence cannot be ascertained;

(6) In actions where the defendant, being a resident of this state, has departed from the county of his residence with the intent to delay or defraud his creditors, or to avoid the service of process, or keeps himself concealed with like intent;

(7) When an appellee has no attorney of record in this state, and is a non-resident of, and absent from the same, or has left the same to avoid the service of notice or process, or so conceals himself that notice or process cannot be served upon him;

(8) In action or proceeding under Rule 60 hereof or Article 38 of Chapter 3, W. C. S. 1945, or to impeach a judgment or order for fraud, or to obtain an order of satisfaction thereof, when a defendant is a non-resident of the state;

(9 In suits for divorce, for alimony, to affirm or declare a marriage void, or the modification of any decree therefor entered in such suit, when the defendant is a non-resident of the state or conceals himself or herself in order to avoid service of process;

(10) In all actions or proceedings which involve or relate to the waters, or right to appropriate the waters of the natural streams, springs, lakes, or other collections of still water within the boundaries of the state, or which involve or relate to the priority of appropriations of such waters, including appeals from the determination of the State Board of Control, and in all actions or proceedings which involve or relate to the ownership of irrigating ditches situated wholly or partly within this state, when the defendant, or any of the defendants are non-residents of the state. [From Sec. 3-1101.]

(f) Requirements for Service by Publication. Before service by publication can be made, an affidavit of the party, his agent or attorney, must be filed showing that service of a summons cannot be made within this state, on the defendant to be served by publication, and showing his address, if known, or that his address is unknown and cannot with reasonable diligence be ascertained, and that the case is one of those mentioned in paragraph (e) of this rule; and when such affidavit is filed, the party may proceed to make service by publication. In any case in which service by publication is made when the address of a defendant is known, it must be stated in the publication. Immediately after the first publication the party making the service shall deliver to the clerk copies of the publication, and the clerk shall mail a copy to each defendant by registered mail with return receipt requested, directed to his address named therein, and make an entry thereof on the appearance docket.

In all cases in which a defendant is served by publication of notice and there has been no delivery of the notice mailed to him by the clerk, the party who makes the service, his agent or attorney, at the time of the hearing and prior to entry of judgment, shall make and file an affidavit showing the address of such defendant as then known to him, or if unknown, that he has been unable to ascertain the same with reasonable diligence. Such additional notice, if any, shall then be given as may be directed by the court. [From Secs. 3-1101, 3-1102.]

(g) Publication of Notice. The publication must be made for four (4) consecutive weeks in a newspaper published in the county where the complaint is filed; or if there is no newspaper published in the county, then in a newspaper published in this state, and of general circulation in such county; if it be made in a daily newspaper, one insertion a week shall be sufficient; and it must contain a summary statement of the object and prayer of the complaint, mention the court wherein it is filed, and notify the person or persons thus to be served when they are required to answer. [From Sec. 3-1103.]

(h) When Service Complete—How Proved. Service by publication shall be deemed complete at the date of the last publication, when made in the manner and for the time prescribed in the preceding sections; and such service shall be proved by affidavit. [Sec. 3-1104.]

(i) Service Upon Unknown Persons. When an heir, devisee, or legatee of a deceased person, or a bondholder, lienholder or other person claiming an interest in the subject matter of the action is a necessary party, and it appears by affidavit that his name and address are unknown to the party making service, proceedings against him may be had by designating him as an unknown heir, devisee or legatee of a named decedent or defendant, or in other cases as an unknown claimant, and service by publication may be had as provided in these rules for cases in which the names of the defendants are known. [From Laws 1947, Ch. 113, Sec. 1.]

(j) Publication May Be Made in Another County. When it is provided by rule or statute that a notice shall be published in a newspaper, and no such paper is published in the county, or if such paper is published there and the publisher refuse, on tender of his usual charge for a similar notice, to insert the same in his newspaper, then a publication in a newspaper of general circulation in the county shall be sufficient. [From Sec. 3-1107.]

(k) Costs of Publication. The lawful rates for any legal notice published in any qualified newspaper in this state in connection with or incidental to any cause or proceeding in any court of record in this state shall be and become a part of the court costs in such action or proceeding, which costs shall be paid to the clerk of the court in which such action or proceeding is pending by the party causing such notice to be published and finally assessed as the court may direct. [From Sec. 3-1108.]

(l) Other Service: Personal Service Outside the State; Service by Registered Mail. In all cases where service by publication can be made under these rules, the plaintiff may obtain service without publication by either of the following methods:

(1) *Personal Service Outside the State.* By delivery to the defendant of copies of the summons and complaint. [From Sec. 3-1105.]

(2) *Service by Registered Mail.* Upon the request of any party the clerk shall send by registered mail a copy of the complaint and summons addressed to the party to be served at the address given in the affidavit required under Section (f) of this rule, requesting a return receipt signed by addressee only. When such return receipt is received signed by the addressee the clerk shall file the same and enter a certificate in the cause showing the making of such service. [New.]

(m) Return: Proof of Service.

(1) *Return.* 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. [From Fed. Rule 4 (g).]

(2) *Proof of Service.* Proof of service of process shall be made as follows:

(i) If served by a Wyoming sheriff, undersheriff or deputy by his certificate with a statement as to date, place and manner of service, except that a special deputy appointed for the sole purpose of making service shall make proof by his affidavit containing such statement.

(ii) If by any other person, by his affidavit thereof with a statement as to date, place and manner of service.

(iii) If by registered mail, by the certificate of the clerk showing the date of the mailing and the date he received the return receipt.

(iv) If by publication by the affidavit of publication together with the certificate of the clerk as to the mailing of copies where required.

(v) By the written admission, acceptance or waiver of service by the person to be served, duly acknowledged. [New]

(n) 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 clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued. [Fed. Rule 4 (h).]

(o) 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. [New]

RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS.

(a) Service: When Required. Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties affected thereby, but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in rule 4. [From Fed. Rule 5 (a).]

(b) Same: How Made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon the party shall be made by delivering a copy to him or by mailing it to him at his last known address, or by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or leaving it in a conspicuous place therein, or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some member of the family over the age of 14 years then residing therein. Service by mail is complete upon mailing. [From Fed. Rule 5 (b).]

(c) Same: Numerous Defendants. In any action in which there are unusually large numbers of defendants, the court, upon motion or

of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any crossclaim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(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.

(e) Filing With the Court Defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

RULE 6. TIME.

(a) Computation. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court, or a commissioner thereof, for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 25, 50 (b), 52 (b), 59 (b), (d) and (e), 60 (b), 73 (a) and (g), and 75 (a), except to the extent and under the conditions stated in them. [From Fed. Rule 6 (b).]

(c) Unaffected by Expiration of Term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term

of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

(d) For Motions—Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59 (c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

(e) Additional Time After Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period, provided however, this rule shall not apply to service of process by registered mail under rule 4 (l) (2). [From Fed. Rule 6 (e).]

III. PLEADINGS AND MOTIONS

RULE 7. PLEADINGS ALLOWED; FORM OF MOTIONS.

(a) Pleadings. There shall be a complaint and an answer; and there shall be a reply to a counter-claim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if leave is given under Rule 14 to summon a person who was not an original party; and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

(b) Motions and Other Papers.

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules, but the names of all parties shall be set out in the caption of all orders to show cause, final orders, judgments and decrees. [From Fed. Rule 7 (b) (2) and Laws 1947 c. 80.]

(c) Demurrers, Pleas, Etc., Abolished. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

RULE 8. GENERAL RULES OF PLEADING.

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded. Where the case arises under the original jurisdiction of the supreme court, or is brought in any court of record of limited jurisdiction which may hereafter be created, the pleading shall also contain a short and plain statement of the grounds upon which the court's jurisdiction depends. [From Fed. Rule 8 (a).]

(b) Defenses; Form of Denials. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When

a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) **Affirmative Defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) **Effect of Failure to Deny.** Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) **Pleading To Be Concise and Direct; Consistency.**

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

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

(f) **Construction of Pleadings.** All pleadings shall be so construed as to do substantial justice.

RULE 9. PLEADING SPECIAL MATTERS.

(a) **Capacity.** It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge. [From Fed. Rule 9 (a).]

(b) **Fraud, Mistake, Condition of the Mind.** In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) **Conditions Precedent.** In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity, and when so made the party pleading the performance or occurrence shall establish on the trial the facts showing such performance or occurrence. [From Fed. Rule 9 (c) and Sec. 3-1413.]

(d) **Official Document or Act.** In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law. When a party desires to raise an issue as to the validity of an official document or an official act, he shall do so by specific negative averment which shall include such supporting particulars as are within the pleader's knowledge. [From Fed. Rule 9 (d).]

(e) **Judgment.** In pleading a judgment or decision of the court, judicial or quasi judicial tribunal, or of a board or officer rendered within the United States or within a territory or insular possession subject to the dominion of the United States, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it. A denial of jurisdiction shall be made specifically and with particularity and when so made the party pleading the judgment or decision shall establish on the trial all controverted jurisdictional facts. [From Fed. Rule 9 (e) and Sec. 3-1412.]

(f) **Time and Place.** For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) **Special Damage.** When items of special damage are claimed, they shall be specifically stated.

(h) **Private Statute.** In pleading a private statute or a right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage. [Sec. 3-1414.]

(i) **Municipal Ordinance.** In pleading a municipal ordinance or a right derived therefrom, it shall be sufficient to refer to such ordinance by its title or other applicable designation, the date of its passage and the name of the municipality which adopted the same. [New]

RULE 10. FORM OF PLEADINGS.

(a) **Caption; Names of Parties.** Every pleading shall contain a caption setting forth the name of the court, the title of the action, and a designation as in Rule 7 (a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(b) **Paragraphs, Separate Statements.** All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) **Adoption by Reference; Exhibits.** Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. An exhibit to a pleading is a part thereof for all purposes. [From Fed. Rule 10 (c).]

RULE 11. SIGNING AND VERIFICATION.

(a) **Signing of Pleadings.** Every pleading of a party represented by an attorney shall be signed in his individual name by at least one attorney, licensed to practice in this state. A party who is not represented by an attorney shall sign his pleading and state his address. Pleadings need not be verified or accompanied by affidavit, except as required under Rules 23 (b), 27 (a), 65 (b), and 66. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted. [From Fed. Rule 11.]

(b) Verification. When a verification is required, it shall be by affidavit of a party, his agent or attorney. A pleading, verified as herein required, shall not be used against a party in any criminal prosecution, or action or proceeding for a penalty or forfeiture as proof of a fact admitted or alleged in such pleading. Such verification shall not make other or greater proof necessary on the part of an adverse party. [From Secs. 3-1601, 3-1608, 3-1609.]

RULE 12. DEFENSES AND OBJECTIONS—WHEN AND HOW PRESENTED—BY PLEADING OR MOTION—MOTION FOR JUDGMENT ON PLEADINGS.

(a) When Presented. A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, or if service be made without the state, or by publication, within 30 days after such service or after the last day of publication. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement. [From Fed. Rule 12 (a).]

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters

outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) **Motion for Judgment on the Pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) **Preliminary Hearings.** The defenses specifically enumerated (1)—(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) **Motion for More Definite Statement.** If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) **Motion to Strike.** Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) **Consolidation of Defenses.** A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule.

(h) Waiver of Defenses. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15 (b) in the light of any evidence that may have been received.

RULE 13. COUNTERCLAIM AND CROSS-CLAIM.

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.

(b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) Counterclaim Exceeding Opposing Claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) Counterclaim Against the State. These rules shall not be construed to enlarge beyond the limits fixed by law the right to assert counterclaims or claim credits against the state or against a county, municipal corporation or other political subdivision, public corporation, or any officer or agency thereof. [From Fed. Rule 13 (d).]

(e) Counterclaim Maturing or Acquired After Pleading. A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(f) Omitted Counterclaim. When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

(g) Cross-Claim Against Co-Party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(h) Additional Parties May Be Brought In. When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained. [From Fed. Rule 13 (h).]

(i) Separate Judgments. Judgment on a counterclaim or cross-claim may be rendered even if the claims of the opposing party have been dismissed or otherwise disposed of. [From Fed. Rule 13 (i).]

RULE 14. THIRD-PARTY PRACTICE.

(a) When Defendant May Bring in Third Party. Before the service of his answer a defendant may move *ex parte* or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counter-claims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counter-claims and cross-claims as provided in Rule 13. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

(b) When Plaintiff May Bring in Third Party. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS.

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served, or if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence and in Furtherance of Justice. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, or if the court rules at the trial that a pleading does not state a claim upon which relief can be granted, or a sufficient defense, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the allowance of the amendment would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such amendment. [From Fed. Rule 15 (b).]

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the

pleading sought to be supplemented. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.

RULE 16. PRE-TRIAL PROCEDURE; FORMULATING ISSUES.

In any action, the court may in its discretion, and upon request of any party shall, direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions. [From Fed. Rule 16.]

IV. PARTIES

RULE 17. PARTIES PLAINTIFF AND DEFENDANT; CAPACITY.

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought, and when a person forfeits his bond or renders his sureties liable, any person injured thereby or who is by law entitled to the benefit of the cerurity may sue in his own name to recover the amount to which he is entitled. [From Fed. Rule 17 (a) and Sec. 3-602.]

(b) Capacity to Sue or be Sued. A married woman may sue or be sued in all respects as if she were single. A partnership or other unincorporated association may sue or be sued in its common name. [New]

(c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative, or such representative fails to act, he may sue by his next friend or by guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order at it deems proper for the protection of the infant or incompetent person. [From Fed. Rule 17 (c).]

(d) Suing Person by Fictitious Name. When the plaintiff is ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding by any name and description, and when the true name is discovered the pleading or proceeding may be amended accordingly; and the plaintiff in such case must state in his complaint that he could not discover the true name, and the summons must contain the words, "real name unknown," and a copy thereof must be served personally upon the defendant. [Sec. 3-1708.]

RULE 18. JOINDER OF CLAIMS AND REMEDIES.

(a) Joinder of Claims. The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules

19, 20, and 22 are satisfied. There may be a like joinder of cross-claims or third-party claims if the requirements of Rules 13 and 14 respectively are satisfied.

(b) Joinder of Remedies; Fraudulent Conveyances. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudlent as to him, without first having obtained a judgment establishing the claim for money.

RULE 19. NECESSARY JOINDER OF PARTIES.

(a) Necessary Joinder. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, or his consent cannot be obtained, he may be made a defendant. [From Fed. Rule 19 (a).]

(b) Effect of Failure to Join. When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to service of process, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them can be acquired only by their consent or voluntary appearance; but the judgment rendered therein does not affect the rights or liabilities of absent persons. [From Fed. Rule 19 (b).]

(c) Same: Names of Omitted Persons and Reasons for Nonjoinder to be Pleaded. In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted.

RULE 20. PERMISSIVE JOINDER OF PARTIES.

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative if any substantial question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative any right to relief and if any substantial question of law or fact common to all of them will arise in the action. A

plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities. [From Sec. 3-613.]

(b) Separate Trials. The court may make such orders as will prevent a party from being embarassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

RULE 21. MISJOINDER AND NON-JOINDER OF PARTIES.

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

RULE 22. INTERPLEADER.

Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20. [From Fed. Rule 22.]

RULE 23. CLASS ACTIONS.

(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

(b) Secondary Action by Shareholders. In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort. [From Fed. Rule 23 (b).]

(c) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it.

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 representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof. [From Fed. Rule 24 (a).]

(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. 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. [From Fed. Rule 24 (b).]

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. [From Fed. Rule 24 (c).]

RULE 25. SUBSTITUTION OF PARTIES.

(a) **Death.** (1) If a party dies and the claim is not thereby extinguished, the court within 1 year after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party, but may be revived by agreement of all parties. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons. [From Fed. Rule 25 (a) and Secs. 3-2313 and 3-2314.]

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) **Incompetency.** If a party becomes incompetent, the court upon motion served as provided in subdivision (a) of this rule may allow the action to be continued by or against his representative.

(c) **Transfer of Interest.** In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

(d) **Public Officers; Death or Separation from Office.** When any public officer is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 1 year after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object. [From Fed. Rule 25 (d).]

(e) **Substitution at Any Stage.** Substitution of parties, under the provisions of this rule, may be made by the trial court, either before or after judgment, and by the supreme court in proceedings on appeal. [New]

V. DEPOSITIONS AND DISCOVERY

RULE 26. DEPOSITIONS PENDING ACTION.

(a) **When Depositions May Be Taken.** Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. After commencement of an action depositions may be taken upon the giving of notice as hereinafter provided. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes. [From Fed. Rule 26 (a).]

(b) **Scope of Examination.** Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

(c) **Examination and Cross-Examination.** Examination and cross-examination of deponents may proceed as permitted at the trial under the provisions of Rule 43 (b).

(d) **Use of Depositions.** At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, body politic, or association which is a party may be used by an adverse party. [From Fed. Rule 26 (d) (2).]

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is absent from the county where the trial or hearing is held unless it appears that the absence of the wit-

ness was procured by the party offering the deposition; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5, upon motion and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used. [From Fed. Rule 26 (d) (3).]

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.

Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of record of this state or of the United States has been dismissed or otherwise concluded and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. [From Fed. Rule 26 (d).]

(e) Objections to Admissibility. Subject to the provisions of Rule 32 (c), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(f) Effect of Taking or Using Depositions. A party shall not be deemed to have waived his objection to the competency of nor to have made a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent waives any objection to the competency of such witness, and makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in paragraph (2) of subdivision (d) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party. [From Fed. Rule 26 (f).]

RULE 27. DEPOSITIONS BEFORE ACTION OR PENDING APPEAL.

(a) Before Action.

(1) *Petition.* A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be

cognizable in any court of the state may file a verified petition in the district court of the district of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a court of the state but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and his interest therein, 3, the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, 4, the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony. [From Fed. Rule 27 (a) (1).]

(2) *Notice and Service.* The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served either within or without the district or state in the manner provided in Rule 4 (d) for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4 (d), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17 (c) apply.

(3) *Order and Examination.* If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) *Use of Deposition.* If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it

may be used in any action involving the same subject matter subsequently brought in a district court of the state, in accordance with the provisions of Rule 26 (d). [From Fed. Rule 27 (a) (4).]

(b) Pending Appeal. If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. The motion shall show (1) the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.

(c) Perpetuation by Action. This rule does not limit the power of a court to entertain an action to perpetuate testimony.

RULE 28. PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN.

(a) Within the United States. Within the United States or within a territory or possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of this state or of the United States or of the place where the examination is held, or before a person apponited by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony. [From Fed. Rule 28 (a).]

(b) In Foreign Countries. In a foreign state or country depositions shall be taken (1) on notice before a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or (2) before such person or officer as may be appointed by commission or under letters rogatory. A commission or letters rogatory shall be issued only when necessary or convenient, on application and notice, and on such terms and with such directions as are just and appropriate. Officers may be designated in notices or commissions either by name or descriptive title and letters rogatory may be addressed "To the Appropriate Judicial Authority in (here name the country)."

(c) **Disqualification for Interest.** No deposition shall be taken before a person who is a relative, employee, attorney or counsel of any of the parties, or is financially interested in the action. [From Fed. Rule 28 (c).]

RULE 29. STIPULATIONS REGARDING THE TAKING OF DEPOSITIONS.

If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions.

RULE 30. DEPOSITIONS UPON ORAL EXAMINATION.

(a) **Notice of Examination: Time and Place.** A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action not in default, which notice shall be served personally on the party or his attorney of record. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. On motion the court may for cause shown enlarge or shorten the time. [From Fed. Rule 30 (a).]

(b) **Orders for the Protection of Parties and Deponents.** After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarassment, or oppression.

(c) **Record of Examination; Oath; Objections.** The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by some one acting under his direction and in his presence, record the testimony of the witness. The testimony shall

be taken stenographically and transcribed unless the parties agree otherwise. All objections made at the time of the examination to the qualifications of the officer taking the deposition or to the manner of taking it or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties served with notice of taking a deposition may transmit written interrogatories to the officer, who shall propound them to the witness and record the answers verbatim.

(d) Motion to Terminate or Limit Examination. At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarass, or oppress the deponent or party, the court in which the action is pending may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subdivision (b). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable. [From Fed. Rule 30 (d).]

(e) Submission to Witness; Changes; Signing. When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and the parties. Any changes in form or substance which the witness desires to make shall be added to the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, of any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress under Rule 32 (d) the court holds that the reasons given for the regusal to sign require rejection of the deposition in whole or in part. [From Fed. Rule 30 (e).]

(f) Certification and Filing by Officer; Copies; Notice of Filing.
(1) The officer shall certify on the deposition that the witness

was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of (here insert name of witness)" and shall promptly file it with the court in which the action is pending or send it by registered mail to the clerk thereof for filing. It shall remain under seal until opened by the clerk by order of the court or at the request of a party to the action or proceeding or his attorney. [From Fed. Rule 30 (f) (1).]

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(g) Failure to Attend or to Serve Subpoena; Expenses.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

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

(h) Notice to Absent or Unknown Parties. In the event any party not in default who has not made an appearance, is a non-resident, or cannot be found within the state, the court, upon satisfactory showing of such non-residence or of a diligent effort to locate such party within the state and failure of such effort, may order the giving of the notice described in Rules 30 (a) and 31 (a) by registered mail to the last known address of such party, or, if the court is satisfied that the party desiring to take the deposition does not know and cannot ascertain the address of such party, or if unknown persons are made parties, the court may order the giving of notice to such party or unknown persons by the delivery of one copy thereof to the clerk. [New]

RULE 31. DEPOSITIONS OF WITNESSES UPON WRITTEN INTERROGATORIES.

(a) Serving Interrogatories; Notice. A party desiring to take the deposition of any person upon written interrogatories shall serve them in the manner provided by Rule 30 upon every other party not in default with a notice stating the name and address of the person who is

to answer them and the name or descriptive title and address of the officer before whom the deposition is to be taken. Within 10 days thereafter a party so served may serve cross interrogatories upon the party proposing to take the deposition. Within 5 days thereafter the latter may serve redirect interrogatories upon a party who has served cross interrogatories. Within 3 days after being served with redirect interrogatories, a party may serve recross interrogatories upon the party proposing to take the deposition. [From Fed. Rule 31 (a).]

(b) Officer to Take Responses and Prepare Record. A copy of the notice and copies of all interrogatories served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30 (c), (e) and (f), to take the testimony of the witness in response to the interrogatories and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the interrogatories received by him.

(c) Notice of Filing. When the deposition is filed the clerk shall promptly give notice thereof to all parties. [From Fed. Rule 31 (c).]

(d) Orders for the Protection of Parties and Deponents. After the service of interrogatories and prior to the taking of the testimony of the deponent, the court in which the action is pending, on motion promptly made by a party or a deponent, upon notice and good cause shown, may make any order specified in Rule 30 which is appropriate and just or an order that the deposition shall not be taken before the officer designated in the notice or that it shall not be taken except upon oral examination.

RULE 32. EFFECT OF ERRORS AND IRREGULARITIES IN DEPOSITIONS.

(a) As to Notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(b) As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(c) As to Taking of Deposition.

(1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(3) Objections to the form of written interrogatories submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other interrogatories and within 3 days after service of the last interrogatories authorized.

(d) As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

RULE 33. INTERROGATORIES TO PARTIES.

Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, or body politic, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may be served after commencement of the action and without leave of court, except that, if service is made by the plaintiff within 10 days after such commencement, leave of court granted with or without notice must first be obtained. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the service of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Within 10 days after service of interrogatories a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined.

Interrogatories may relate to any matters which can be inquired into under Rule 26 (b), and the answers may be used to the same extent as provided in Rule 26 (d) for the use of the deposition of a party. Interrogatories may be served after deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party inter-

rogated, may make such protective order as justice may require. The number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarassment, or oppression. The provisions of Rule 30 (b) are applicable for the protection of the party form whom answers to interrogatories are sought under this rule. [From Fed. Rule 33.]

RULE 34. DISCOVERY AND PRODUCTION OF DOCUMENTS AND THINGS FOR INSPECTION, COPYING, OR PHOTOGRAPHING.

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30 (b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26 (b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, sampling, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26 (b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just. [From Fed. Rule 34.]

RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS.

(a) **Order for Examination.** In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) **Report of Findings.**

(1) If requested by the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions. After such request and delivery the party causing the

examination to be made shall be entitled upon request to receive from the party examined a like report of any examination, previously or thereafter made, of the same mental or physical condition. If the party examined refuses to deliver such report the court on motion and notice may make an order requiring delivery on such terms as are just, and if a physician fails or refuses to make such a report the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

RULE 36. ADMISSION OF FACTS AND OF GENUINENESS OF DOCUMENTS.

(a) Request for Admission. After commencement of an action a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of facts set forth in the request. If a plaintiff desires to serve a request within 10 days after commencement of the action leave of court, granted with or without notice, must be obtained. Copies of the documents shall be served with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such shorter or longer time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part, together with a notice of hearing the objections at the earliest practicable time. If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party deny only a part or a qualification of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder.

(b) Effect of Admission. Any admission made by a party pursuant to such request is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding.

RULE 37. REFUSAL TO MAKE DISCOVERY: CONSEQUENCES.

(a) **Refusal to Answer.** If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in which the action is pending for an order compelling an answer. Upon the refusal of a deponent to answer any interrogatory submitted under Rule 31 or upon the refusal of a party to answer any interrogatory submitted under Rule 33, the proponent of the question may on like notice make like application for such an order. If the motion is granted and if the court finds that the refusal was without substantial justification the court may require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court may require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees. [From Fed. Rule 37 (a).]

(b **Failure to Comply with Order.**

(1) *Contempt.* If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in which the action is pending, the refusal may be considered a contempt of that court. [From Fed. Rule 37 (b).]

(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from in-

troducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeeding or any part thereof, or rendering a judgment by default against the disobedient party;

(c) Expenses on Refusal to Admit. If a party, after being served with a request under Rule 36 to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document, or the truth of any such matter of fact, he may apply to the court for an order requiring the other party to pay to him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. Unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the order shall be made.

(d) Failure of Party to Attend or Serve Answers. If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or wilfully fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

VI. TRIALS

RULE 38. JURY TRIAL OF RIGHT.

(a) Right Preserved. Issues of law must be tried by the court, unless referred as hereinafter provided; and issues of fact arising in actions for the recovery of money only, or specific real or personal property, shall be tried by a jury unless a jury trial be waived, or a reference be ordered. All other issues of fact shall be tried by the court, subject to its power to order any issue to be tried by a jury, or referred. [Sec. 3-2105, and from Sec. 3-2104.]

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by filing a demand therefor in writing with the clerk of the court accompanied by a deposit of Twelve Dollars as a jury fee at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party. The jury fees in cases where jury trials are demanded shall be paid to the clerk of the court, and by him paid into the county treasury at the close of each week, and he shall tax as costs in each such case, and in all other cases in which a jury trial is had, a jury fee of Twelve Dollars, to be recovered of the unsuccessful party, as other costs, and in case the party making such deposit is successful, he shall recover such deposit from the opposite party, as part of his costs in the case. [From Fed. Rule 38 (b) and Sec. 3-2422.]

(c) Same: Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) Waiver. The failure of a party to file a demand as required by this rule constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties. [From Fed. Rule 38 (d).]

RULE 39. TRIAL BY JURY OR BY THE COURT.

(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury, or (2) the court upon motion or of its own initiative finds that a

right of trial by jury of some or all of those issues does not exist, or (3) by consent of the party appearing when the other party to the issue fails to appear at the trial. [From Fed. Rule 39 (a) and Sec. 3-2422.]

(b) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

(c) Advisory Jury and Trial by Consent. In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury, or, except in actions against the State of Wyoming when a statute provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right. [From Fed. Rule 39 (c).]

RULE 40. ASSIGNMENT OF CASES FOR TRIAL.

The district courts shall prescribe the time of hearing all motions, and shall provide by rule for the placing of actions upon the trial calendar in such manner as they deem expedient. Precedence shall be given to actions entitled thereto by any statute. [From Fed. Rule 40 and Sec. 3-2108.]

RULE 41. DISMISSAL OF ACTIONS.

(a) Voluntary Dismissal:

(1) *By Plaintiff; By Stipulation.* Subject to the provisions of Rule 23 (c), of Rule 66, and of any statute, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court an action in which service was obtained based on or including the same claim. [From Fed. Rule 41 (a) (1).]

(2) *By Order of Court*: Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice. [From Fed. Rule 41 (a) (2).]

(b) Involuntary Dismissal:

(1) *By Defendant.* For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdicton or for improper venue, operates as an adjudication upon the merits. [From Fed. Rule 41 (b).]

(2) *By the Court.* Upon its own motion the Court may dismiss without prejudice any action not prosecuted or brought to trial with due diligence. [New]

(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served, or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of Previously-Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

RULE 42. CONSOLIDATION; SEPARATE TRIALS.

(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) Separate Trials. The court in furtherance of convenience or to avoid prejudice, embarrassment, delay or expense to any party may order a separate trial of any claim, cross-claim, counterclaim, or

third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues. [From Fed. Rule 42 (b) and Sec. 3-613.]

RULE 43. EVIDENCE.

(a) Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of this state, or under the rules of evidence heretofore applied in the courts of this state. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner. [From Fed. Rule 43 (a).]

(b) Scope of Examination and Cross-Examination. A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party, his assignor or any person for whose benefit the action or proceeding is prosecuted or defended, or an officer, director, agent or employee of a public or private corporation, partnership, association or body politic which is an adverse party, or a person who was such officer, director, agent or employee at the time of the occurrence of the fact made the subject of the examination, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief. [From Fed. Rule 43 (b) and Sec. 3-2604.]

(c) Record of Excluded Evidence. In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

(d) Affirmation in Lieu of Oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(e) Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

RULE 44. PROOF OF OFFICIAL RECORD.

(a) Authentication of Copy. An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a certified copy attested by the officer having the legal custody of the record, or by his deputy. If the office in which the record is kept is outside of the State of Wyoming but within the United States or within a territory or insular possession subject to the dominion of the United States, a certificate that such officer has the custody of the record shall be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, such certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept and authenticated by the seal of his office. [From Fed. Rule 44 (a).]

(b) Proof of Lack of Record. A written statement signed by an officer having the custody of an official record of by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contain no such record or entry.

(c) Other Proof. This rule does not prevent the proof of official records or of entry or lack of entry therein by any method authorized by any applicable statute or by the rules of evidence at common law.

(d) Seal Dispensed With. In the event any office or officer, authenticating any documents under the provisions of this rule, has no official seal, then authentication by seal is dispensed with. [New]

RULE 45. SUBPOENA.

(a) For Attendance of Witnesses; Form; Issuance. Every subpoena, except for the taking of depositions as provided in subdivision (d) of this rule, shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence,

signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service. [From Fed. Rule 45 (a).]

(b) For Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

(c) Service. Service of a subpoena upon a person named therein shall be made either by reading or by delivering a copy thereof to such person or by leaving a copy at his usual place of residence. Proof of service shall be made as in Rule 4 (g). A subpoena may be served by the sheriff, coroner or any constable of the county or by the party or any other person; but when not served by the sheriff, coroner or constable, proof of service shall be shown by affidavit, and costs of service shall not be taxed. [From Sec. 3-2607 and 3-2610.]

(d) Subpoena for Taking Pepositions; Place of Examination.

(1) Proof of service of a notice to take a deposition as provided in Rules 30 (a) and 31 (a), or a stipulation for the taking thereof, constitutes a sufficient authorization for the issuance by the clerk of the district court for the county in which the deposition is to be taken or by the notary public or other officer authorized to take the deposition of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce designated books, papers, documents, or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26 (b), but in that event the subpoena will be subject to the provisions of subdivision (b) of Rule 30 and subdivision (b) of this Rule 45. [From Fed. Rule 45 (d) (1).]

(2) A resident of the state in which the deposition is to be taken may be required to attend an examination only in the county wherein he resides or is employed or regularly transacts his business in person or at such other convenient place as is fixed by an order of court. A non-resident of the state may be required to attend only in the county wherein he is served with a subpoena or at such other convenient place as is fixed by an order of court. [From Fed. Rule 45 (d) (2).]

RULE 46. EXCEPTIONS UNNECESSARY.

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of

the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if the party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

RULE 47. JURORS.

(a) Examination of Jurors. The parties, or their attorneys, shall conduct the examination of prospective jurors and the court may itself conduct such examination as it deems proper. [New]

(b) Alternate Juror. The court may direct that one juror in addition to the regular panel be called and impanelled to sit as an alternate juror. The alternate juror shall replace any juror who, prior to the time the jury retires to consider its verdict, becomes unable or disqualified to perform his duties. The alternate juror shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities and privileges as the principal jurors. An alternate juror who does not replace a principal juror shall be discharged when the jury retires to consider its verdict. If an alternate juror is called each party is entitled to one peremptory challenge in addition to those otherwise allowed by law. The additional peremptory challenge may be used only against the alternate juror, and the other peremptory challenges allowed by law shall not be used against the alternate. [From Fed. Rule 47 (b) and Sec. 12-145.]

(c) Challenge to Individual Jurors. A challenge to an individual juror may be for cause or peremptory. [New]

RULE 48. JURIES OF LESS THAN TWELVE—MAJORITY VERDICT.

The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

RULE 49. SPECIAL VERDICTS AND INTERROGATORIES.

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submit-

ted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.

RULE 50. MOTION FOR A DIRECTED VERDICT.

(a) When Made: Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.

(b) Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after entry of a judgment on a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed

verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial. [From Fed. Rule 50 (b).]

RULE 51. INSTRUCTIONS TO JURY: OBJECTION.

When any party desires special instructions he shall tender same to the court in writing. All instructions given by the court shall be in writing, numbered and signed by the judge and then submitted to the parties, who may make objections thereto before they are given to the jury stating distinctly the grounds of objection. Only the grounds so specified shall be considered on motion for a new trial or on appeal. Before argument of the cause is begun the court shall give its instructions to the jury but shall not comment upon the evidence. Such written instructions shall be taken by the jury when it retires. All instructions offered by the parties, or given by the court, shall be filed with the clerk and, with the indorsements thereon indicating the action of the court, shall be a part of the record of the cause. [From Sec. 3-2408.]

RULE 52. FINDINGS BY THE COURT.

(a) General and Special Findings by Court. Upon the trial of questions of fact by the court, or with an advisory jury, it shall not be necessary for the court to state its findings, except, generally, for the plaintiff or defendant, unless one of the parties request it before the introduction of any evidence, with the view of excepting to the decision of the court upon the questions of law involved in the trial, in which case the court shall state in writing the conclusions of fact found separately from the conclusions of law. Requests for findings are not necessary for purposes of review. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. [From Sec. 3-2423.]

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend special findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When special findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to

support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment. [From Fed. Rule 52 (b).]

RULE 53. MASTERS.

(a) Appointment and Compensation. The court in which any action is pending may appoint a master therein. As used in these rules the word "master" includes a referee, an auditor, or an examiner. The compensation to be allowed to a master shall be fixed by the court, and may be charged against such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party. [From Fed. Rule 53 (a).]

(b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it.

(c) Powers. The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence received, offered and excluded in the same manner and subject to the same limitations as provided in Rule 43 (c) for a court sitting without a jury. [From Fed. Rule 53 (c).]

(d) Proceedings.

(1) *Meetings.* When a reference is made, the clerk shall forth-

with furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed ex parte, or in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) *Witnesses.* The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(3) *Statement of Accounts.* When matters of accounting are in issue before the master, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

(e) Report.

(1) *Contents and Filing.* The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6 (d). The court, after hearing, may adopt the report

or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) *In Jury Actions.* In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) *Stipulation as to Findings.* The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) *Draft Report.* Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

VII. JUDGMENT

RULE 54. JUDGMENT; COSTS.

(a) Definition: Form. A judgment is the final determination of the rights of the parties in action; and a direction of a court or judge, made or entered in writing, and not included in a judgment, is an order. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings. [From Fed. Rule 54 (a) and Sec. 3-3501.]

(b) Judgment upon Multiple Claims. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may enter judgment upon one or more but less than all of the claims. The judgment shall terminate the action with respect to the claim or claims so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered. [From Fed. Rule 54 (b).]

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

(d) Costs. Except when express provision therefor is made either in a statute or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the State of Wyoming, its officers or agencies, shall be imposed only to the extent permitted by law. [From Fed. Rule 54 (d).]

RULE 55. DEFAULT.

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, his default shall be entered by the clerk upon application of the adverse party. [From Fed. Rule 55 (a).]

(b) Judgment. Judgment by default may be entered as follows:

(1) *By the Clerk.* When the plaintiff's claim against a defendant arises upon an account, or written instrument, or other contract, express or implied, for the payment of money only, or is for a sum certain, or for a sum which can by computation be made certain, the

clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person. [From Fed. Rule 55 (b) (1) and Sec. 3-2107.]

(2) *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, guardian ad litem, trustee, or other such representative who has appeared therein. If the party against whom a judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper, and shall accord a right of trial by jury to the parties when and as required by any statute. [From Fed. Rule 55 (b) (2).]

(c) Setting aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered may likewise set it aside in accordance with Rule 60 (b).

(d) Plaintiffs, Counterclaimants, Cross-Claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54 (c).

RULE 56. SUMMARY JUDGMENT.

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the service of the pleading in which the claim is asserted or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. [From Fed. Rule 56 (a).]

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of recovery. [From Fed. Rule 56 (c).]

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not renedered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees. [From Fed. Rule 56 (g).]

RULE 57. DECLARATORY JUDGMENTS.

The procedure for obtaining a declaratory judgment pursuant to Section 3-5801 to 3-5816 inclusive of W. C. S. 1945, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar. [From Fed. Rule 57.]

RULE 58. ENTRY OF JUDGMENT.

In all cases, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The transcription of a judgment in the journal as provided by Rule 79 (a) constitutes the entry of the judgment; and the judgment is not effective before such entry. The entry of the judgment shall not be delayed for the taxing of costs. [From Fed. Rule 58.]

RULE 59. NEW TRIALS, AMENDMENT OF JUDGMENTS.

(a) Grounds. A new trial may be granted to all or any of the parties, and on all or part of the issues. On a motion for a new trial in an action tried without a jury, the court may open the judgment, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment. Subject to the provisions of Rule 61, a new trial may be granted for any of the following causes:

(1) Irregularity in the proceedings of the court, jury, referee, master or prevailing party, or any order of the court or referee, or abuse of discretion, by which the party was prevented from having a fair trial;

(2) Misconduct of the jury or prevailing party;

(3) Accident or surprise, which ordinary prudence could not have guarded against;

(4) Excessive damages appearing to have been given under the influence of passion or prejudice;

(5) Error in the assessment of the amount of recovery, whether too large or too small, when the action is upon a contract or for the injury to or detention of property;

(6) That the verdict, report or decision is not sustained by sufficient evidence or is contrary to law;

(7) Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial;

(8) Error of law occurring at the trial, and excepted to by the party making the application. [From Fed. Rule 59 (a) and Sec. 3-3401.]

(b) Time for Motion. A motion for a new trial shall be served not later than ten days after the entry of the judgment. When the motion for new trial is based upon causes numbered 2, 3 and 7 of paragraph (a) of this rule, or either of them, a supplemental motion may be filed and presented on any or all such grounds at any time before the trial court passes upon the motion for a new trial. [New]

(c) Time for Serving Affidavits. When a motion or supplemental motion for new trial is based upon affidavits they shall be served with the motion or supplemental motion. The opposing party has ten days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding twenty days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits. [From Fed. Rule 59 (c).]

(d) On Initiative of Court. Not later than ten days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment may be made at any time during the term in which the judgment was entered. [From Fed. Rule 59 (e).]

(f) Motion for New Trial; Time Limit. Motions for new trial shall be determined within sixty days after the entry of the judgment, and if not so determined shall be deemed denied, unless within such sixty days the determination is continued by order of the court or by stipulation. [From Sec. 3-3404.]

RULE 60. RELIEF FROM JUDGMENT OR ORDER.

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the Supreme Court, and thereafter while the appeal is pending may be so corrected with leave of the Supreme Court. [From Fed. Rule 60 (a).]

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion, and upon such terms as are just, the court may relieve a party or his legal representative from a final

judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding as provided in Sections 3-3801, 3-3805, and 3-3810, W. C. S. 1945, or to grant relief to a party against whom a judgment or order has been rendered without other service than by publication as provided in Section 3-3802, as amended. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. [From Fed. Rule 60 (b).]

RULE 61. HARMLESS ERROR.

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

RULE 62. STAY OF PROCEEDINGS TO ENFORCE A JUDGMENT.

(a) Stay on Motion for New Trial or for Judgment. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52 (b). [From Fed. Rule 62 (b).]

(b) **Stay of Judgment upon Multiple Claims.** When a court has ordered a final judgment on some but not all of the claims presented in the action under the conditions stated in Rule 54 (b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered. [From Fed. Rule 62 (h).]

RULE 63. DISABILITY OF A JUDGE.

If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then his successor or any district judge designated by the Supreme Court may perform those duties; but if his successor or other judge so designated is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial. [From Fed. Rule 63.]

VIII. PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS

RULE 64. SEIZURE OF PERSON OR PROPERTY.

All remedies provided by statute for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under these rules. [From Fed. Rule 64.]

RULE 65. INJUNCTIONS.

(a) Preliminary; Notice. No preliminary injunction shall be issued without notice to the adverse party.

(b) Temporary Restraining Order; Notice, Hearing; Duration. When a motion for a preliminary injunction is filed, a temporary restraining order may be granted without notice to the adverse party if it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after service thereof, not to exceed 20 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, a motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require. [From Fed. Rule 65 (b).]

(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

A surety upon a bond or undertaking under this rule submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability and that of the party obtaining the restraining order or preliminary injunction may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known. [From Fed. Rule 65 (c).]

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) When Inapplicable. This rule shall not apply to suits for divorce, alimony, separate maintenance, or custody of infants. [New]

RULE 66. RECEIVERS.

An action wherein a receiver has been appointed shall not be dismissed except by order of the court. A receiver shall have authority to sue in any district court of the state but actions against receivers shall not be commenced without leave of the court appointing him except when authorized by statute. The practice in the administration of estates by receivers shall be in accordance with the practice heretofore followed in the courts of Wyoming. In all other respects the action in which the appointment of a receiver is sought or which is brought by or against a receiver is governed by these rules. [From Fed. Rule 66.]

RULE 67. DEPOSIT IN COURT.

In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or of any other thing capable or delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing, to be held by the clerk of the court subject to withdrawal in whole or in part at any time thereafter upon order of the court or written stipulation of the parties. [From Fed. Rule 67.]

RULE 68. OFFER OF JUDGMENT.

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof or service thereof and thereupon the court shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. [From Fed. Rule 68.]

RULE 69. EXECUTION.

Process to enforce a judgment for the payment of money shall be by writ of execution, unless the court otherwise direct. In aid of the judgment or execution, and in addition to the proceedings now provided by statute, the judgment creditor or his successor in interest when that interest appears of record, may examine any person, including the judgment debtor, in the manner provided in these rules for taking depositions. [From Fed. Rule 69.]

RULE 70. JUDGMENT FOR SPECIFIC ACTS; VESTING TITLE.

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution upon application to the clerk. [From Fed. Rule 70.]

RULE 71. PROCESS IN BEHALF OF AND AGAINST PERSONS NOT PARTIES.

When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party.

IX. APPEALS

RULE 72. GENERAL PROVISIONS.

(a) "Final Order" Defined. An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right, made in a special proceeding, or upon a summary application in an action, after judgment, is a final order which may be vacated, modified or reversed, as provided in these rules. [Sec. 3-5301.]

(b) Review by District Court. A judgment rendered or final order made by a justice of the peace, or any other tribunal, board or officer, exercising judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated or modified by the district court. [Sec. 3-5302.]

(c) Review by Supreme Court. A judgment rendered or final order made by the district court may be reversed in whole or in part, vacated or modified by the supreme court for errors appearing on the record. [From Sec. 3-5303.]

(d) Proceedings in Error Abolished. Proceedings in error are hereby abolished and any judgment or final order reviewable by the district court or supreme court may be reviewed only by appeal in accordance with the rules hereinafter provided, relating to appeals from the district court to the supreme court, and the words "proceedings in error" where used in the laws of this state shall be held to mean "appeal." [New]

(e) When Rules Shall Govern. All appeals to the district court and supreme court shall be governed by these rules, except appeals to the district court from justice of the peace and police courts and administrative officers and boards, for trial de novo in the district court. [New]

(f) Designation of Parties. In all appeals governed by these rules, the party taking the appeal shall be known as the appellant and the adverse party as the appellee, and in the caption of the cause in the appellate court appellant's name shall first appear. [New]

(g) Immaterial Errors Disregarded. No judgment or final order shall be reversed or affected by reason of any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party. [From Sec. 3-1705.]

(h) Reversal in Part. Where a judgment is reversed in part for error relating only to an issue which is in no way dependent for its proper trial on any other issue or issues founds to have been properly tried, and a partial new trial may be had without prejudice or injustice

to any of the parties concerned, the cause may be remanded for the trial of the issue alone upon which the error was committed. [From Sec. 3-5303.]

(i) Proceedings After Reversal. When a judgment or final order is reversed, either in whole or in part, in the district court, or the supreme court, the court reversing the same shall proceed to render such judgment as the court below should have rendered, or remand the cause to the court below for such judgment. The district court so reversing a judgment shall, upon the request of either party, specify in writing the ground or grounds of such reversal, which shall be filed and kept with the papers in the case. The court reversing or affirming such judgment or final order shall not issue execution in causes that are so brought before it, on which it pronounces judgment as aforesaid, but shall send a special mandate to the court below, as the case may require, for execution thereon, and the court to which such special mandate is sent, shall proceed in the same manner as if such judgment or final order had been rendered therein; and on motion and good cause shown, it may suspend any execution made returnable before it by order of the district court, or supreme court, in the same manner as if the execution had been issued from its own court; but such suspension shall not extend further than to stay proceedings until the matter can be further heard by the district court, or the supreme court, as the case may be; but this rule shall not apply to judgments of justices of the peace. [Sec. 3-5318.]

(j) Costs on Reversal. When a judgment or final order is reversed, the appellant shall recover his costs, and when reversed in part and affirmed in part, the court may apportion the costs between the parties in such manner as it deems equitable; and there shall be taxed as a part of such costs the cost of making the transcript of the evidence in the case, and such costs shall be computed at the rate allowed by law for making the transcript of such evidence, and for typewriting or printing of briefs; provided, however, that the supreme court may, by order entered of record, refuse to allow as part of such costs, such costs as may result from the insertoin in the transcript of the evidence or in the briefs such parts as may clearly appear to have been unnecessary. [Sec. 3-5319.]

(k) Penalties on Affirmance. When, in any case, the judgment or final order is affirmed, there shall be taxed as part of the costs in the case, a reasonable fee, to be fixed by the court, not less than twenty-five ($25.00) dollars nor more than three hundred dollars ($300.00), to the counsel of the appellee; and the court shall adjudge to the appellee damages in such sum as may be reasonable, not exceeding five hundred dollars ($500.00), unless the judgment or final order directs the payment of money, and execution thereof was stayed, when in lieu

of such penalty, it shall bear additional interest at a rate not exceeding five (5) per centum per annum, for the time for which it was stayed, to be ascertained and awarded by the court; but if the court certify in its judgment that there was reasonable cause for the appeal, neither such fee, nor additional interest, nor penalty, shall be taxed, adjudged or awarded. [From Sec. 3-5304.]

RULE 73. APPEAL TO THE SUPREME COURT.

(a) When and How Taken. When an appeal is permitted by law from a district court to the supreme court, the time within which an appeal may be taken shall be ten days from the entry of the judgment or final order appealed from unless a different time is provided by law, except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment, the district court in any action may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50 (b); or granting or denying a motion under Rule 52 (b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.

A party may appeal from a judgment by filing with the district court a notice of appeal, and serving the same in accordance with the provisions of Rule 5. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal. If an appeal has not been docketed, the parties, with the approval of the district court, may dismiss the appeal by stipulation filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant. [From Fed. Rule 73 (a).]

(b) Notice of Appeal. The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken. [From Fed. Rule 73 (b).]

(c) Bond on Appeal. Whenever a bond for costs on appeal is required by law, the bond shall be filed with the notice of appeal. The bond shall be in the sum of one hundred dollars ($100.00), unless the court fixes a different amount or unless a supersedeas bond is filed, in which event no separate bond on appeal is required. The bond on appeal shall have sufficient surety and shall be conditioned to secure the payment of costs if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified. If a bond on appeal in the sum of one hundred dollars ($100.00) is given, no approval thereof is necessary. After a bond on appeal is filed an appellee may raise objections as to the form of the bond or to the sufficiency of the surety for determination by the clerk. [From Fed. Rule 73 (c).]

(d) Supersedeas Bond; Restitution Undertaking.

(1) *Supersedeas Bond.* Whenever an appellant entitled thereto desires a stay of execution on appeal, he may present to the court at or before the time of filing his notice of appeal, a supersedeas bond in such amount as shall be fixed by the district court and with surety or sureties to be approved by the court or by the clerk thereof. The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is not perfected or is dismissed, or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the supreme court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, and interest, unless the court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property is in the custody of the sheriff or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay.

When the judgment directs the execution, assignment or delivery of a conveyance or other instrument, appellant may execute, assign or deliver the conveyance or other instrument, leaving same in the custody of the clerk of the district court in which the judgment was rendered, there to remain and abide the judgment of the supreme court, and in such case appellant shall give bond only for costs on appeal and damages for delay.

Executors, administrators and guardians who have given bond in this state, with surety according to law, shall not be required to give a supersedeas bond. [From Fed. Rule 73 (d) and Secs. 3-5312 and 3-5313.]

(2) *Bond in Criminal Case.* In any bailable criminal case an appellant, at or before the time of filing his notice of appeal, may apply to the judge of the district court to fix the amount of bond for stay of execution of the judgment and sentence of the court, and the judge of the district court thereupon shall admit the appellant to bail in such sum as the court shall deem proper. [From Sec. 3-5414.]

(3) *Restitution Undertaking.* In an action on a contract for the payment of money only, or in an action for injuries to the person, if the appellee give adequate security to make restitution in case the judgment be reversed or modified, he may, on leave obtained from the trial court, proceed to enforce the judgment notwithstanding the execution of a supersedeas bond. Such security must be an undertaking executed to the appellant, by at least two sufficient sureties, to the effect that if the judgment be reversed or modified he will make full restitution to the appellant of the money by him received under the judgment; but the provisions of this rule shall not apply to judgments recovered in actions for libel, slander, malicious prosecution, false imprisonment or assault and battery. [From Sec. 3-5314.]

(e) Failure to File or Insufficiency of Bond. If a bond on appeal or a supersedeas bond is not filed within the time specified, or if the bond filed is found insufficient, and if the action is not yet docketed with the supreme court, a bond may be filed at such time before the action is so docketed as may be fixed by the district court. After the action is so docketed, application for leave to file a bond may be made only in the supreme court.

(f) Judgment Against Surety. By entering into an appeal or supersedeas bond given pursuant to subdivisions (c) and (d) of this rule, the surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the surety if his address is known.

(g) Docketing and Record on Appeal. The record on appeal as provided for in Rules 75 and 76 shall be filed with the supreme court and the appeal there docketed within sixty days from the date of filing the notice of appeal; except that, when more than one appeal is taken from the same judgment, the district court may prescribe the time for filing and docketing, which is no event shall be less than sixty days

from the date of filing the first notice of appeal. In all cases the district court for good cause shown may extend the time for filing the record on appeal and docketing the appeal, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or as extended by a previous order; but the district court shall not extend the time to a day more than six months from the date of filing the first notice of appeal. [From Fed. Rule 73 (g).]

RULE 74. JOINT OR SEVERAL APPEALS.

Parties interested jointly, severally, or otherwise in a judgment may join in an appeal therefrom; or any one or more of them may appeal separately or any two or more of them may join in an appeal.

RULE 75. RECORD ON APPEAL TO THE SUPREME COURT.

(a) Designation of Contents of Record On Appeal. Within thirty days after filing the notice of appeal the apellant shall serve upon the appellee and file with the district court a designation of the portions of the record, proceedings, and evidence to be contained in the record on appeal, unless the appellee has already served and filed a designation. In all cases, the district court for good cause shown may extend the time for serving and filing the designation, if its order for extension is made before the expiration of the period for serving and filing the designation as originally prescribed or as extended by a previous order; but the district court shall not extend the time to a day more than four months from the date of filing the notice of appeal. Within ten days after the service and filing of such a designation, any other party to the appeal may serve and file a designation of additional portions of the record, proceedings, and evidence to be included. If the appellee files the original designation, the parties shall proceed under subdivision (b) of this rule as if the appellee were the appellant. [From Fed. Rule 75 (a).]

(b) Transcript. If there be designated for inclusion any evidence or proceeding at a trial or hearing which was stenographically reported, the appellant shall file with his designation a copy of the reporter'stranscript of the evidence or proceedings included in his designation. If the designation includes only part of the reporter's transcript, the appellant shall file a copy of such additional parts thereof as the appellee may need to enable him to designate and file the parts he desires to have added, and if the appellant fails to do so the court on motion may require him to furnish the additional parts needed. The copy so filed by the appellant shall be available for the use of the other parties. In the event that a copy of the reporter's transcript or of the necessary portions thereof is already on file, the appellant shall not be required to file an additional copy. [From Fed. Rule 75 (b).]

(c) Form of Testimony. Testimony of witnesses designated for inclusion need not be in narrative form, but may be in question and answer form. A party may prepare and file with his designation a condensed statement in narrative form of all or part of the testimony, and any other party to the appeal, if dissatisfied with the narrative statement, may require testimony in question and answer form to be substituted for all or part thereof.

(d) Statement of Points. No assignment of errors is necessary. If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal.

(e) Record to be Abbreviated. All matter not essential to the decision of the questions presented by the appeal shall be omitted. Formal parts of all exhibits and more than one copy of any document shall be excluded. Documents shall be abridged by omitting all irrelevant and formal portions thereof. For any infraction of this rule or for the unnecessary substitution by one party of evidence in question and answer form for a fair narrative statement proposed by another, the supreme court may withhold or impose costs as the circumstances of the case and discouragement of like conduct in the future may require; and costs may be imposed upon offending attorneys or parties.

(f) Stipulation as to Record. Instead of serving designations as above provided, the parties by written stipulation filed with the clerk of the district court may designate the parts of the record, proceedings and evidence to be included in the record on appeal.

(g) Preparation of Record on Appeal.

(1) *Record to be Prepared by Clerk—Necessary Parts.* The clerk of the district court, under his hand and seal of the court, shall transmit to the supreme court a true copy of the matter designated by the parties, but shall always include, whether or not designated, copies of the following: the material pleadings without unnecessary duplication; the verdict; the master's report, if any; the judgment or final order appealed from, including all findings of fact and conclusions of law made by the district court; the notice of appeal with date of filing; the designations or stipulations of the parties as to matter to be included in the record; and any statement by the appellant of the points on which he intends to rely. The matter so certified and transmitted constitutes the record on appeal. The copy of the transcript filed as provided in subdivision (b) of this rule shall be certified by the clerk as a part of the record on appeal. [From Fed. Rule 75 (g).]

(2) *Record in Criminal Case.* In criminal cases appealed to the supreme court the record on appeal shall be prepared in the same manner except that in lieu of the pleadings the record shall include

the indictment or information, motions or demurrers addressed thereto, and any special plea, and shall also include the verdict and the judgment and sentence of the court or final order from which the appeal is prosecuted. [From Sec. 3-5407.]

(h) Power of Court to Correct or Modify Record. It is not necessary for the record on appeal to be approved by the district court or judge thereof except as provided in Rule 76, but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the supreme court, or the supreme court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court. All other questions as to the content and form of the record shall be presented to the supreme court. [From Fed. Rule 75 (h).]

(i) Order as to Original Papers or Exhibits. Whenever the district court is of opinion that original papers or exhibits should be inspected by the supreme court or sent to the supreme court in lieu of copies, it may make such order therefor and for the safekeeping, transportation, and return thereof as it deems proper.

(j) Record for Preliminary Hearing in Supreme Court. If, prior to the time the complete record on appeal is settled and certified as herein provided, a party desires to docket the appeal in order to make in the supreme court a motion for dismissal, for a stay pending appeal, for additional security on the bond on appeal or on the supersedeas bond, or for any intermediate order, the clerk of the district court at his request shall certify and transmit to the supreme court a copy of such portion of the record or proceedings below as is needed for that purpose.

(k) Several Appeals. When more than one appeal is taken to the supreme court from the same judgment, a single record on appeal shall be prepared containing all the matter designated or agreed upon by the parties, without duplication.

(l) Rule For Transmission of Original Papers. Whenever the supreme court provides by rule for the hearing of appeals on the original papers, the clerk of the district court shall transmit them to the supreme court in lieu of the copies provided by this Rule 75. The transmittal shall be within such time or extended time as is provided in Rule 73 (g), except that the district court by order may fix a shorter time. The clerk shall transmit all the original papers in the file dealing

with the action or the proceeding in which the appeal is taken, with the exception of such omissions as are agreed upon by written stipulation of the parties on file, and shall append his certificate identifying the papers with reasonable definiteness. If a transcript of the testimony is on file the clerk shall transmit that also; otherwise the appellant shall file with the clerk for transmission such transcript of the testimony as he deems necessary for his appeal subject to the right of an appellee either to file additional portions or to procure an order from the district court requiring the appellant to do so. After the appeal has been disposed of, the papers shall be returned to the custody of the district court. The provisions of subdivisions (h), (j) and (k) shall be applicable; but with reference to the original papers as herein provided rather than to a copy or copies. [From Fed. Rule 75 (o).]

RULE 76. RECORD ON APPEAL TO THE SUPREME COURT; AGREED STATEMENT.

When the questions presented by an appeal to the supreme court can be determined without an examination of all the pleadings, evidence, and proceedings in the court below, the parties may prepare and sign a statement of the case showing how the questions arose and were decided in the district court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the questions by the supreme court. The statement shall include a copy of the judgment appealed from, a copy of the notice of appeal with its filing date, and a concise statement of the points to be relied on by the appellant. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the questions raised by the appeal, shall be approved by the district court and shall then be certified to the supreme court as the record on appeal. [From Fed. Rule 76.]

X. DISTRICT COURTS AND CLERKS

RULE 77. DISTRICT COURTS AND CLERKS.

(a) District Courts Always Open. The district courts shall be deemed always open for the purpose of filing any pleading or other paper, of issuing and returning any mesne or final process, and of making and directing all interlocutory motions, orders and rules. Each term shall be deemed open and continuous until the commencement of the next succeeding term. [From Fed Rule 77 (a).]

(b)Trials and Hearings; Orders in Chambers. All trials upon the merits shall be conducted in open court and so far as convenient in a regular court room. All other acts or proceedings may be done or conducted in chambers without the attendance of the clerk or other court officials and at any place within the state; but no hearing; other than one ex parte, shall be conducted outside of the county in which the action is pending without the consent of all parties affected thereby who are not in default. [From Fed. Rule 77 (b).]

(c) The Clerk's Office. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Sundays and legal holidays. All motions and applications in the clerk's office for issuing mesne process, for issuing final process to enforce and execute judgments, for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but his action may be suspended, altered or rescinded by the court upon cause shown.

(d) Notice of Orders or Judgments. Immediately upon the entry of a final order or judgment the clerk shall mail a copy thereof in the manner provided in Rule 5 to every adverse party who is not in default for failure to appear, and who has not in person or by attorney acknowledged receipt of a copy thereof. The copies necessary for such mailing shall be furnished to the clerk by the prevailing party, and clerk shall make a note of the mailing on the docket. Such mailing is sufficient notice for all purposes for which notice of the entry of an order or judgment is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 73 (a). [From Fed. Rule 77 (d).]

RULE 78. MOTION DAY.

Unless local conditions make it impractical, each district court shall establish regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring

notice may be heard and disposed of; but the judge at any time or place and on such notice, if any, as he considers reasonable may make orders for the advancement, conduct and hearing of actions.

To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

RULE 79. BOOKS AND RECORDS KEPT BY THE CLERK AND ENTRIES THEREIN.

(a) Books and Records. Except as herein otherwise specifically provided, the Clerk of Court shall keep books and records as provided by statute. [New]

(b) Other Books and Records. The Clerk of Court shall also keep such other books and records as may be required from time to time by the supreme court or the judge of the district in which such clerk is acting. [From Fed. Rule 79 (d).]

RULE 80. STENOGRAPHER: STENOGRAPHIC REPORT OR TRANSCRIPT AS EVIDENCE.

(a) Official Stenographer. There shall be an official stenographer of each judicial district designated as Court Reporter, appointed and with duties as provided by statute. [New]

(b) Stenographic Report or Transcript as Evidence. Whenever the testimony of a witness at a trial or hearing which was stenographically reported is admissable in evidence at a later trial it may be proved by the transcript thereof duly certified by the person who reported the testimony.

XI. GENERAL PROVISIONS

RULE 81. APPLICABILITY IN GENERAL.

Specific statutory provisions relating to special proceedings shall apply except where inconsistent with these rules. [New]

RULE 82. JURISDICTION AND VENUE UNAFFECTED.

These rules shall not be construed to extend or limit the jurisdiction of any court or the venue of actions therein. [From Fed. Rule 82.]

RULE 83. RULES BY DISTRICT COURTS.

The judge of each district court may from time to time make and amend rules governing its practice not inconsistent with these rules or applicable statutes. Copies of rules and amendments so made by any judge shall upon their promulgation be furnished to the supreme court. In all cases not provided for by rule or statute, the judge may regulate the practice in any manner not inconsistent with these rules or applicable statutes. [From Fed. Rule 83.]

RULE 84. FORMS.

The forms contained in the appendix of forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.

RULE 85. TITLE.

These rules may be known and cited as Wyoming Rules of Civil Procedure. [From Fed. Rule 85.]

RULE 86. EFFECTIVE DATE.

(a) Rules. These rules will take effect and be in force from and after the.....day of....., A. D. 194..... They shall govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies. [From Fed. Rule 86.]

(b) Amendments and Additions. Amendments or additions to these rules shall take effect on dates to be fixed by the Supreme Court subject to the exception above set out as to pending actions. [From Fed. Rule 86.]