

1995

The 1994 Amendments to the Wyoming Rules of Civil Procedure

Joel L. Selig

Follow this and additional works at: https://scholarship.law.uwyo.edu/land_water

Recommended Citation

Selig, Joel L. (1995) "The 1994 Amendments to the Wyoming Rules of Civil Procedure," *Land & Water Law Review*: Vol. 30 : Iss. 1 , pp. 151 - 178.

Available at: https://scholarship.law.uwyo.edu/land_water/vol30/iss1/9

This Article is brought to you for free and open access by Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Land & Water Law Review by an authorized editor of Law Archive of Wyoming Scholarship.

University of Wyoming
College of Law

LAND AND WATER LAW REVIEW

VOLUME XXX

1995

NUMBER 1

THE 1994 AMENDMENTS TO THE WYOMING RULES OF CIVIL PROCEDURE

*Joel L. Selig**

On August 31, 1994, the Supreme Court of Wyoming amended sixteen of the Wyoming Rules of Civil Procedure. The amendments became effective on November 29, 1994. In this Article, Professor Selig describes and analyzes these amendments for practitioners and other interested readers.

The Wyoming amendments adopt, with some additions and modifications, many but not all of the 1993 amendments to the Federal Rules of Civil Procedure. Part I of this Article analyzes the amended Rule 11, which governs the signing of pleadings, motions, and other papers, the consequent representations to the court, and sanctions for frivolous litigation. Part II notes Wyoming's rejection of the federal self-executing mandatory disclosure regime and then considers the changes in discovery procedures effected by amendments to Rules 26, 28, 29, 30, 31, 33, 34, and 37. Part III(A)

* Centennial Distinguished Professor of Law, University of Wyoming. A.B. 1965, J.D. 1968, Harvard University.

The author serves as the reporter for the Civil Division of the Permanent Rules Advisory Committee of the Supreme Court of Wyoming. The able and conscientious members of this committee have contributed significantly to the author's understanding of the subject of this Article. The author is grateful to all of them, and especially to the chair, G. G. "Greg" Greenlee, for a pleasant and productive association. The views expressed herein are those of the author and do not necessarily represent the views of the committee or any individual member thereof.

The author acknowledges with gratitude the support provided by the George Hopper Faculty Research Fund of the University of Wyoming College of Law.

describes amendments to Rules 1 and 16; Part III(B) covers technical amendments to Rules 38, 50, and 52; and Part III(C) discusses amendments to Rules 54 and 58 relating to judgments, costs, and attorneys' fees. The Article concludes that notwithstanding significant differences between the Wyoming Rules and the Federal Rules, the general congruence between the Wyoming and federal procedural systems continues to provide the benefits of uniformity while accommodating local variations.

INTRODUCTION	153
I. Rule 11: Representations to the Court and Sanctions for Frivolous Litigation	156
II. Discovery	162
A. Overview; Rejection of the Mandatory Disclosure Regime	162
B. Wyoming Rules Amendments Relating to Discovery . . .	165
1. Rule 26: General Provisions Governing Discovery . .	165
2. Rule 28: Persons Before Whom Depositions May Be Taken	166
3. Rule 29: Stipulations Regarding Discovery Procedure	166
4. Rule 30: Depositions Upon Oral Examination	167
5. Rule 31: Depositions Upon Written Questions	170
6. Rule 33: Interrogatories to Parties	170
7. Rule 34: Production of Documents	171
8. Rule 37: Orders Compelling Discovery; Sanctions . .	172
III. Other Wyoming Rules Amendments	173
A. Miscellaneous Amendments	173
1. Rule 1: Scope and Purpose of Rules	173
2. Rule 16: Pretrial Conferences; Scheduling; Management	173
B. Technical Amendments	174
1. Rule 38: Jury Trial of Right	174
2. Rule 50: Judgment as a Matter of Law in Jury Trials	174
3. Rule 52: Judgment on Partial Findings	175
C. Judgments, Costs, and Attorneys' Fees	175
1. Rule 54: Judgment; Costs	175
2. Rule 58: Entry of Judgment	177
Conclusion	178

INTRODUCTION

A study published in 1986 surveyed state procedural systems to assess the degree of similarity between state court civil procedure and the Federal Rules of Civil Procedure (FRCP).¹ The states most closely approximating the approach of the Federal Rules were classified as federal "replica" jurisdictions, based on a strict test requiring that nine separate criteria be met; other states were classified according to the kind and degree of their variation from federal replica status.² Wyoming was one of 23 states in the group that met the criteria for federal replica status.³ With respect to these states, it could be said without significant qualification that there was one system of procedure for state and federal courts.⁴ Wyoming's federal replica status was summarized in this study as follows:

In 1957, the Wyoming Rules of Civil Procedure transformed Wyoming's civil procedure from code pleading into a notice pleading replica of the Federal Rules. Amendments effective in 1971 conformed the Wyoming rules to the joinder and discovery provisions of the amended FRCP, preserving Wyoming's replica status. The Wyoming Supreme Court considers federal rules decisions persuasive authority in interpreting its own similar rules. The Court has enjoyed "complete rulemaking power" by statute since 1947.⁵

Developments since this 1986 study have maintained Wyoming's status as a Federal Rules replica jurisdiction. Of course, there are today, as there have been from the beginning, significant differences between the Federal Rules and the Wyoming Rules. Those differences reflect, for example, Wyoming procedures that do not exist in the federal system, and vice versa;⁶ numerous differences in detail;⁷ and, in some cases, differences between Wyoming and federal procedural policy.⁸ For the most part, however, the Wyoming Rules and the Federal Rules are the same. The benefits of this federal-state procedural uniformity are obvious both to practitioners and to the judiciary.

1. John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986).

2. *Id.* at 1369, 1372-75.

3. *Id.* at 1377.

4. *Id.* at 1372.

5. *Id.* at 1424 (footnotes omitted).

6. *See, e.g.*, WYO. R. CIV. P. 40.1(b)(1) (peremptory disqualification of judge); FED. R. CIV. P. 72-76 (trial by federal magistrate judge and appeal from magistrate judge to district judge).

7. *E.g.*, compare WYO. R. CIV. P. 6(c) (motion practice) with FED. R. CIV. P. 6(d) (same).

8. *E.g.*, compare WYO. R. CIV. P. 51(b) (court shall instruct jury on law before argument) with FED. R. CIV. P. 51 (court, at its election, may instruct jury before or after argument, or both).

In recent years, a process of review and revision of the Wyoming Rules has generally reinforced this procedural uniformity by incorporating amendments to the Federal Rules to the extent considered appropriate and desirable for Wyoming civil practice. The Supreme Court of Wyoming has been assisted in this endeavor by the Civil Division of its Permanent Rules Advisory Committee of practitioners and judges. The process of federal amendment and Wyoming review is a continuous federal-state interaction. Tinkering at the federal level seems never to cease, and states like Wyoming are obliged to decide to what extent they wish to adopt the federal amendments. As a result of a comprehensive review of the Wyoming Rules of Civil Procedure (WRCP) comparing them to the FRCP as amended over the years, the Wyoming Supreme Court issued orders in 1991 and 1992 making extensive amendments to the WRCP.⁹ Most recently, in response to the 1993 amendments to the FRCP,¹⁰ the court issued an order on August 31, 1994, adopting amendments to the WRCP which became effective on November 29, 1994.¹¹ These 1994 Wyoming amendments are the focus of this Article.

The 1993 FRCP amendments affected 30 federal rules.¹² Although many of the federal amendments were technical or otherwise relatively noncontroversial, some were controversial, and there were disagreements

9. 818-822 P.2d Wyo. Rep. xlvii-cxxxviii (1991) (order of December 20, 1991, revising WRCP [effective April 28, 1992]); 823-832 P.2d Wyo. Rep. xxiv-xxvii (1992) (order of April 28, 1992, amending WRCP [effective April 28, 1992]); 837-839 P.2d Wyo. Rep. xvii-xxi (1992) (order of October 22, 1992, amending WRCP [effective January 12, 1993]); 837-839 P.2d Wyo. Rep. xxxii-xliv (1992) (order of November 30, 1992, amending WRCP [effective February 25, 1993]).

10. 146 F.R.D. 405-500 (1993).

The 1993 FRCP amendments and related materials are published at 146 F.R.D. 401-728 (1993), and citations herein are to the F.R.D. page numbers. Readers who do not have Federal Rules Decisions may find the same materials printed in identical form at 113 S. Ct. 475-802 (1993). To convert from the F.R.D. citation to the S. Ct. citation, add 74 to the F.R.D. page number to produce the italicized page number in volume 113 of the Supreme Court Reporter. The italicized page numbers in S. Ct. denote pages of the volume that precede the pages reporting cases, which are separately numbered.

The materials published in the foregoing locations include, in addition to the rules as amended, the unamended rules with new material underlined and deleted material lined through, federal advisory committee notes, and other related materials.

11. Order Amending Rules 1, 11, 16, 26, 28, 29, 30, 31, 33, 34, 37, 38, 50, 52, 54, and 58, Wyoming Rules of Civil Procedure (Wyo. Aug. 31, 1994), 878 P.2d cxlv - clxxvi (advance sheets) (will not appear in P.2d bound volume, but will appear in P.2d Wyo. Rep. bound volume). The order provided that the amended rules "shall become effective 60 days after their publication in the advance sheets of the Pacific Reporter." *Id.* at cxlv. Since the amended rules were published in the September 30, 1994, advance sheets, they became effective on November 29, 1994. *Id.* at i.

12. 146 F.R.D. 405-500.

The rules affected are Rules 1, 4, 5, 11, 12, 15, 16, 26, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 50, 52, 53, 54, 58, 71A, 72, 73, 74, 75, and 76, and new Rule 4.1. In addition, Form 18-A is abrogated, new Forms 1A, 1B, and 35 are added, and Forms 2, 33, 34, and 34A are amended. *Id.*

within both the federal advisory committee and the federal Judicial Conference committee that prepared and approved the various changes.¹³

In an unusual action, Chief Justice Rehnquist's letter transmitting the 1993 FRCP amendments to the Speaker of the House contained a sentence which could be construed as distancing the Court from the actual content of the amendments: "While the Court is satisfied that the required [Rules Enabling Act] procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted."¹⁴ Justice White issued a separate statement discussing the limited role of the Court (as opposed to the originating committees) in the rulemaking process.¹⁵ Justice Scalia issued a statement dissenting from the amendments to Rule 11 (relating to sanctions for frivolous litigation), and from the amendments to Rules 26, 30, 31, 33, and 37 (relating to discovery).¹⁶ Justice Thomas joined both parts of Justice Scalia's dissenting statement; Justice Souter joined the part relating to the discovery rules.¹⁷ However, despite efforts that some thought would persuade the Congress to delay or delete some provisions,¹⁸ the federal amendments went into effect on December 1, 1993, without any delays, deletions, or revisions. Now that these amendments have gone into effect, it seems considerably less likely that any of them will soon be altered by legislative action.

Many of the 1993 federal amendments have been adopted in the 1994 Wyoming amendments. The 1994 WRCP amendments affect 16 Wyoming rules.¹⁹ The overall impact generally enhances federal-state

13. 146 F.R.D. at 518.

14. *Id.* at 403.

15. *Id.* at 501-06. Justice White stated:

[A]s I have seen the Court's role over the years, it is to transmit the Judicial Conference's recommendations without change and without careful study, as long as there is no suggestion that the committee system has not operated with integrity. . . . This has been my practice, even though on several occasions, based perhaps on out-of-date conceptions, I had serious questions about the wisdom of particular proposals to amend certain rules.

Id. at 505.

16. *Id.* at 507-13.

17. *Id.* at 507.

18. The Rules Enabling Act provides:

The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted *unless otherwise provided by law.*

28 U.S.C. § 2074(a) (1988) (emphasis added).

19. *Order, supra* note 11, 878 P.2d at cxlv (advance sheets).

The rules affected are Rules 1, 11, 16, 26, 28, 29, 30, 31, 33, 34, 37, 38, 50, 52, 54, and 58. *Id.*

Some of the 1993 FRCP amendments not adopted in Wyoming affect Federal Rules 4, 5, 12, 15, 32, 36, 53, 71A (corresponding to Wyoming Rule 71.1), 72-76 (no corresponding Wyoming rules), and new Federal Rule 4.1. *Compare id.* with 146 F.R.D. 405-500.

uniformity, with one major exception involving discovery. This Article surveys the 1994 WRCP amendments to assist practitioners and other interested readers.

I. RULE 11: REPRESENTATIONS TO THE COURT AND SANCTIONS FOR FRIVOLOUS LITIGATION

Rule 11 is an effort to promote candor and care in litigation. The basic mechanism of the revised rule consists of a declaration that an attorney or unrepresented party "signing, filing, submitting, or later advocating . . . a pleading, written motion, or other paper"²⁰ is certifying the positions being advocated and is subject to sanctions if the rule's standards for proper certification are not met. The rule as last revised in 1983 had been the subject of considerable criticism and a large amount of satellite litigation.²¹ The 1993 FRCP amendments represent an effort to respond to the criticisms and to increase the rule's effectiveness while reducing litigation over sanctions.²² The federal rule has been extensively revised, and the 1994 Wyoming amendments have adopted the federal revisions so that the Wyoming rule is now virtually identical to the new federal rule.²³

The new rule tightens to some degree the obligations imposed by certification while also loosening to some degree the standards for proper certification. It narrows the circumstances under which sanctions will be imposed, and it attempts to equalize the rule's impact on plaintiffs and defendants. The most important changes are as follows.

Rule 11 certifications are now made not only by signing a particular paper, but also by "later advocating" the paper.²⁴ Thus, the rule is violated by continuing to advocate a position that did not initially

20. Rule 11(b).

The shortened format 'Rule ___' is used here and hereinafter for citations to the rules. It usually is clear from the context of the text to which the footnote is attached whether the citation is to a federal rule or a Wyoming rule. When this is not clear, the format 'Federal Rule ___' or 'Wyoming Rule ___' is used. When the text itself identifies the specific rule discussed, there is no redundant footnote citation.

21. See GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE § 48, at 204-05 (2d ed. 1994); *id.* at 204 n.5 ("Probably more has been written about Rule 11 since 1983 than about any other civil procedure topic."); *id.* at 205 & n.10 ("Between 1983 and 1989, there were 1000 reported Rule 11 cases," which "indicates that there may have been as many as 10,000 Rule 11 cases altogether [including unreported cases] in this six-year period.").

22. See Advisory Committee Note, 146 F.R.D. at 583-84.

23. The one difference is that the Wyoming rule does not contain the reference to "disclosures" that appears in Federal Rule 11(d), because Wyoming has not adopted the new Federal Rule 26(a) on self-executing required disclosures. See *infra* text accompanying notes 65-84.

24. Rule 11(b).

violate the rule but at a later stage lacks sufficient support. Although the paper need not be amended or withdrawn under these circumstances,²⁵ the rule imposes a continuing duty on the advocate who subsequently learns that the position lacks merit, rather than a more limited duty merely to satisfy the rule's requirements at the time the paper is initially filed (the "snapshot" approach). Moreover, the certification now clearly applies not only to the paper as a whole, but also to individual "claims, defenses, and other legal contentions,"²⁶ and to individual "allegations and other factual contentions."²⁷ These changes significantly strengthen the rule's requirements.

With regard to claims, defenses, and other legal contentions, the advocate is now certifying that they "are warranted by existing law or by a *nonfrivolous* argument for the extension, modification, or reversal of existing law *or the establishment of new law*."²⁸ This differs in two respects from the previous standard. By substituting "nonfrivolous"²⁹ for "good faith,"³⁰ the new rule replaces a subjective standard with an objective standard, thus "eliminat[ing] any 'empty-head pure-heart' justification for patently frivolous arguments."³¹ This change strengthens the rule's requirements. On the other hand, the new rule's allowance of nonfrivolous arguments for "the establishment of new law"³² is more generous in accommodating novel legal contentions.

With regard to allegations and other factual contentions, the standard also is more generous, requiring only that they "have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."³³ This language replaces the old requirement that the paper be "well grounded in fact."³⁴ The new rule also provides that "denials of factual contentions" must be "warranted on the evidence or, if specifically so identified, . . . reasonably based on a lack of information

25. Advisory Committee Note, 146 F.R.D. at 586.

26. Rule 11(b)(2).

27. Rule 11(b)(3).

28. Rule 11(b)(2) (emphasis added).

29. Rule 11(b)(2).

30. Old Rule 11(a).

31. Advisory Committee Note, 146 F.R.D. at 586-87.

A quasi-hypothetical example of the "empty-head pure-heart" approach: "Your Honor, my legal research wasn't very good but I was acting in good faith when I asked the court to declare the United States government's printing of paper money unconstitutional." Cf. *Skurdal v. State ex rel. Stone*, 708 P.2d 1241, 1242 (Wyo. 1985) ("perhaps the most frivolous appeal ever filed here").

32. Rule 11(b)(2).

33. Rule 11(b)(3).

34. Old Rule 11(a).

or belief."³⁵ These two changes taken together are intended to equalize the burdens on plaintiffs and defendants.³⁶

In addition to the foregoing provisions, of course the new rule retains the provision making it a violation to present a paper "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."³⁷ On the other hand, the new rule makes clear that certification standards and sanctions regarding discovery, which are covered by Rules 26 through 37, are to be dealt with under those rules rather than under the more general provisions of Rule 11, which now "do not apply" to such matters.³⁸

Perhaps the most significant changes to Rule 11 involve the question of sanctions. First, the new rule contains a "safe harbor" provision allowing a party to withdraw or amend a covered paper or position upon notice by the opposing party of its intention to seek sanctions if the party does not do so. Thus, a sanctions motion is to be served "but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected."³⁹ This provision, allowing a party to correct a possible violation by withdrawing or amending the offending submission, should substantially reduce satellite litigation, permitting many problems to be resolved without judicial intervention. The safe harbor also removes what had been a disincentive to abandoning questionable contentions created by fear that to do so would provide evidence of a rule violation and lead to mandatory sanctions.⁴⁰ The new approach should achieve the salutary purposes of the rule in many cases without litigation. Moreover, withdrawal or amendment of the offending submission may frequently result from a telephone call or other informal contact which does not require the potential moving party to expend the time necessary actually to prepare a sanctions motion.⁴¹ An informal resolution facilitated or induced by the safe harbor provision is plainly superior to the "slash

35. Rule 11(b)(4).

36. Advisory Committee Note, 146 F.R.D. at 586.

On the subject of the impact of Rule 11 on civil rights plaintiffs, see Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11*, 77 IOWA L. REV. 1775 (1992); Carl Tobias, *Certification and Civil Rights*, 136 F.R.D. 223 (1991); Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485 (1988/89).

37. Rule 11(b)(1).

38. Rule 11(d); Advisory Committee Note, 146 F.R.D. at 592.

39. Rule 11(c)(1)(A).

40. See Advisory Committee Note, 146 F.R.D. at 591.

41. See *id.*

and burn” sanctions motion now sometimes encountered in overzealous or tactically motivated Rule 11 litigation.

Second, even if informal resolution proves impossible and a sanctions motion is filed, under the new rule sanctions are discretionary rather than mandatory.⁴² The rule also states that sanctions “may consist of, or include, directives of a nonmonetary nature.”⁴³ The federal advisory committee note lists a wide variety of nonmonetary sanctions, as well as a large number of factors to inform the court’s discretionary determination whether to issue sanctions and what sanctions would be appropriate under the circumstances.⁴⁴

Third, since the rule’s purpose is deterrence rather than compensation for expenses occasioned by a violation,⁴⁵ the revised version provides that any sanction “shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated.”⁴⁶ One possible monetary sanction specifically mentioned by the rule is “an order to pay a penalty into court.”⁴⁷ This is not the only possible monetary sanction, because the rule goes on to authorize an order compensating the moving party for attorneys’ fees and expenses occasioned by the violation “if imposed on motion and warranted for effective deterrence.”⁴⁸ However, the federal advisory committee note emphasizes that the latter remedy should be reserved for “unusual circumstances, particularly for (b)(1) [improper purpose] violations,” and that “if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty.”⁴⁹ On the other hand, an award of fees and expenses “incurred in presenting or opposing the [sanctions] motion”⁵⁰ (as opposed to those “incurred as a direct result of the violation”⁵¹) may be made “[i]f warranted”⁵² (as opposed to “if . . . warranted for effective deterrence”⁵³); such an award is not reserved for unusual circumstances.

42. The new rule provides that “the court may, subject to the conditions stated below, impose an appropriate sanction.” Rule 11(c). The previous version of the rule provided that “the court . . . shall impose . . . an appropriate sanction.” Old Rule 11(a).

43. Rule 11(c)(2).

44. Advisory Committee Note, 146 F.R.D. at 587.

The possible nonmonetary sanctions listed are: “striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; . . . referring the matter to disciplinary authorities (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head), etc.” *Id.*

45. *Id.*

46. Rule 11(c)(2).

47. *Id.*

48. *Id.*

49. Advisory Committee Note, 146 F.R.D. at 587-88.

50. Rule 11(c)(1)(A).

51. Rule 11(c)(2).

52. Rule 11(c)(1)(A).

53. Rule 11(c)(2).

Finally, two other provisions of the new rule are notable because their purpose is to change the law declared in two United States Supreme Court decisions. First, contrary to *Pavelic & Leflore v. Marvel Entertainment Group*,⁵⁴ the new rule explicitly provides that “[a]bsent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.”⁵⁵ This desirable change encourages proper law firm supervision of those acting on its behalf. Moreover, “[s]ince [a sanctions] motion may be filed only if the offending paper is not withdrawn or corrected within 21 days after service of the motion, it is appropriate that the law firm ordinarily be viewed as jointly responsible under established principles of agency.”⁵⁶

Second, the new rule changes an interpretation of the old rule’s language announced in *Business Guides, Inc. v. Chromatic Communications Enterprises*,⁵⁷ which held that sanctions can be imposed on a represented party who signs a paper that is subject to Rule 11. The *Business Guides* interpretation of the old rule’s language probably was legally correct albeit unfortunate as a matter of policy. Contrary to *Business Guides*, the language of the new rule specifically provides that only *unrepresented* parties are held to the certification requirement of what is now subdivision (b) (which in the case of represented parties applies only to their attorneys).⁵⁸ The new rule further provides that sanctions may be imposed only “upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.”⁵⁹ Although the actual result in *Business Guides* itself might have been the same under the new rule because the represented party there may well have been “responsible for the violation,”⁶⁰ in most cases the sanction would be against the attorneys of a represented party and not the represented party, because only the attorneys could violate subdivision (b). In addition, even if a represented party is “responsible for the violation,” the new rule further provides that “[m]onetary sanctions may not be awarded against a represent-

54. 493 U.S. 120 (1989) (Rule 11 does not authorize court to impose sanction against law firm of signing attorney, even when attorney explicitly signs “on behalf of” firm) (8-1 decision, with Marshall, J., dissenting).

55. Rule 11(c)(1)(A).

56. Advisory Committee Note, 146 F.R.D. at 588-89.

57. 498 U.S. 533 (1991) (5-4 decision, with Kennedy, J., joined by Marshall & Stevens, JJ., and joined in part by Scalia, J., dissenting).

58. Rule 11(b).

59. Rule 11(c).

60. See *Business Guides*, 498 U.S. at 535-39 (reviewing the facts); *id.* at 550 (quoting the district court’s conclusion that “[t]he entire lawsuit was a mistake. . . . This entire scenario could have been avoided if, prior to filing the suit, Business Guides simply had spent an hour . . . and checked the accuracy of the purported seeds.”).

ed party for a violation of subdivision (b)(2) [frivolous legal contentions],”⁶¹ monetary responsibility for which, like the relevant expertise, properly is assumed to reside with the represented party’s attorneys.⁶²

From a policy standpoint, the new rule makes more sense both in theory and in practice than the interpretations of the old rule adopted in *Pavelic & Leflore* and *Business Guides*. In both cases the effect of the revisions is best understood as a strengthening of the rule. More broadly, considering all the revisions to Rule 11, and Justices Scalia and Thomas to the contrary notwithstanding, the revisions do not “render the [r]ule toothless.”⁶³

61. Rule 11(c)(2)(A).

62. See also Advisory Committee Note, 146 F.R.D. at 589 (this limitation insulates the rule from attack under the Rules Enabling Act).

63. Statement of Justice Scalia, joined by Justice Thomas, dissenting from the Court’s adoption of the amendments to the federal rule, 146 F.R.D. at 507. Justice Scalia stated:

The proposed revision would render the Rule toothless, by allowing judges to dispense with sanction[s], by disfavoring compensation for litigation expenses, and by providing a 21-day “safe harbor” within which, if the party accused of a frivolous filing withdraws the filing, he is entitled to escape with no sanction at all.

Id. at 507-08.

Justice Scalia’s argument against the safe harbor is perhaps at its strongest in the situation where an attorney avoids Rule 11 sanctions by voluntarily dismissing a baseless complaint pursuant to Rule 41(a)(1)(i). Under the old rule, the Supreme Court had held that sanctions could not be avoided by such a voluntary dismissal. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990). The Court there stated:

Baseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay. Even if the careless litigant quickly dismisses the action, the harm triggering Rule 11’s concerns has already occurred. Therefore, a litigant who violates Rule 11 merits sanctions even after a dismissal.

Id. at 398.

However, a court is not burdened if a baseless complaint is withdrawn before the court has to rule on a motion to dismiss. *Id.* at 411 (Stevens, J., concurring in part and dissenting in part). Although the burden on the defendant is a legitimate concern, *but see id.* (burden on individuals “is irrelevant”), the countervailing consideration is that the court’s burdens are substantially reduced if a voluntary dismissal is taken during the safe harbor period before the court has to rule on a motion to dismiss and a sanctions motion.

Of course, if an answer or motion for summary judgment has been served, then Rule 41(a)(1)(i) is inapplicable and a voluntary dismissal is available only by stipulation under Rule 41(a)(1)(ii). Moreover, if the court dismisses the complaint before the plaintiff files a voluntary dismissal, then a Rule 11 sanction is available against the plaintiff who resisted or ignored the motion to dismiss, because in that event the boat has been expelled from the safe harbor: the plaintiff cannot “withdraw” the complaint after it has been involuntarily dismissed. More fundamentally, the operation of the safe harbor in the *Cooter & Gell* situation creates a salutary incentive on the plaintiff to take a voluntary dismissal rather than a disincentive to do so, and properly prefers voluntary, cooperative action over “hardball” litigation by the plaintiff or the defendant. *Cf. id.* at 412 (Stevens, J., concurring in part and dissenting in part) (“The only result of the Court’s interpretation will be to increase the frequency of Rule 11 motions and decrease that of voluntary dismissals.”).

It should also be noted that the safe harbor provision applies only to sanctions on motion of another party. For extreme situations, the court retains the power to order sanctions on its own initiative under Rule 11(c)(1)(B), although Rule 11(c)(2)(B) provides that “[m]onetary sanctions may not be awarded on the court’s initiative unless the court issues its order to show cause before a voluntary dismissal” See also Advisory Committee Note, 146 F.R.D. at 592 (“[S]how cause orders [un-

“Rather, [the rule] has been defanged and only the poisonous elements that reduced civility and chilled advocacy have been removed.”⁶⁴ Indeed, in all important respects the new rule is a decided improvement on its predecessor.

II. DISCOVERY

A. Overview; Rejection of the Mandatory Disclosure Regime

The 1993 FRCP amendments made a substantial number of changes in the rules governing discovery. Unlike the situation regarding Rule 11, however, the 1994 WRCP amendments rejected significant portions of the federal amendments. Although the rejection of some of the FRCP discovery amendments creates a major difference between the Wyoming Rules and the Federal Rules, Wyoming’s selectivity in this regard is not inconsistent with, and does not alter, its status as a Federal Rules replica jurisdiction.⁶⁵

The major difference between the FRCP amendments and the WRCP amendments is that Wyoming has rejected, at least for the time being, the regime of self-executing required disclosures adopted by the federal amendments. The federal amendments in question are contained in Rules 26(a), (d), (e)(1), and (f), and in a number of other federal rules⁶⁶ that were amended to interact with the Rule 26 amendments.

The federal Rule 26 amendments introduce a mandatory discovery conference⁶⁷ and a prohibition on formal discovery prior to the conference,⁶⁸ mandatory disclosures that must be made without awaiting a formal discovery request,⁶⁹ and a broad duty to supplement the mandatory disclosures.⁷⁰ The mandatory disclosures include initial disclosures of potential witnesses and documents “relevant to disputed facts alleged with particularity in the

der Rule 11(c)(1)(B)] will ordinarily be issued only in situations that are akin to a contempt of court”).

In sum, although *Cooter & Gell* probably was correctly decided under the language and structure of the old rule, the contrary result under the new rule’s safe harbor provision reflects the preferable policy.

64. Jerold Solovy, Laura Kaster & Kenneth Wittenberg, *Curbing Frivolity in the Courts: Updated Cure*, NAT’L L.J., May 2, 1994, at A19, A20.

65. The pertinent Oakley & Coon criteria for federal replica status require that “the substance of the state rules of civil procedure conform generally to the federal discovery rules as amended in 1970,” and that “to the extent the terms of the state rules . . . are . . . idiosyncratic or unconventional by federal standards, such variation in practice is not at bottom inconsistent with the Federal Rules’ philosophy of ‘procedure as the handmaiden of justice.’ ” OAKLEY & COON, *supra* note 1, at 1374.

66. Rules 11, 16, 29, 30, 31, 33, 34, 36, and 37.

67. Rule 26(f).

68. Rule 26(d).

69. Rule 26(a).

70. Rule 26(e)(1).

pleadings,⁷¹ of damages computations and supporting evidence,⁷² and of insurance agreements;⁷³ subsequent disclosures concerning expert testimony,⁷⁴ and pretrial disclosures concerning trial witnesses and exhibits.⁷⁵

This mandatory disclosure regime was by far the most controversial element of the 1993 FRCP amendments. Justice Scalia, joined by Justices Souter and Thomas, dissented from the Court's adoption of the amendments to some of the discovery rules.⁷⁶ They complained that the disclosure provisions "ha[d] been recommended in the face of nearly universal criticism from every conceivable sector of our judicial system, including judges, practitioners, litigants, academics, public interest groups, and national, state and local bar and professional associations."⁷⁷ Although "nearly universal" is hyperbolic, criticism had been widespread. Many observers were surprised that the effort to derail the mandatory disclosure regime in Congress did not succeed.⁷⁸ The House passed by voice vote a bill that would have deleted Rule 26(a)(1), but the bill never reached the floor of the Senate.⁷⁹

Wyoming's rejection of the mandatory disclosure regime perpetuates a significant disuniformity between Wyoming civil procedure and federal civil procedure.⁸⁰ The disuniformity is sufficiently significant that, in light of the unpopularity of mandatory disclosure with many members of the bar, it may be a significant forum selection factor in cases that could be brought either in

71. Rules 26(a)(1)(A) and (B).

72. Rule 26(a)(1)(C).

73. Rule 26(a)(1)(D).

74. Rule 26(a)(2).

75. Rule 26(a)(3).

76. Rules 26, 30, 31, 33, and 37.

77. 146 F.R.D. at 512.

Justice Scalia also stated:

This proposal is promoted as a means of reducing the unnecessary expense and delay that occur in the present discovery regime. But the duty-to-disclose regime does not replace the current, much-criticized discovery process; rather, it *adds a further layer of discovery*. It will likely *increase the discovery burdens* on district judges, as parties litigate about what is "relevant" to "disputed facts," whether those facts have been alleged with sufficient particularity, whether the opposing side has adequately disclosed the required information, and whether it has fulfilled its continuing obligation to supplement the initial disclosure.

Id. at 510.

Justice Scalia further argued that the new regime is inconsistent with the adversary system, places "intolerable strain" on lawyers' ethical duties to their clients, and "should not be adopted nationwide without a trial run." *Id.* at 511, 513.

78. For the source of Congress' authority, see *supra* note 18.

79. RICHARD H. FIELD, BENJAMIN KAPLAN & KEVIN M. CLERMONT, 1994 SUPPLEMENT TO MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 11 (1994) (referring to H.R. 2814, 103d Cong., 1st Sess. § 2 (1993)).

80. The federal district court for the District of Wyoming has its own disclosure regime. See *infra* note 84 and accompanying text.

federal or in state court. In any event, there also is substantial disuniformity on this issue within the federal court system itself. The Federal Rules, in addition to allowing the parties to stipulate out of Rule 26(a)(1)'s mandatory initial disclosures, allow federal district courts to opt out both by local rule and by orders in individual cases.⁸¹ Many district courts have opted out of Rule 26(a)(1) by local rule, leading to what some have called the "balkanization" of federal civil procedure,⁸² although a recent survey indicates that about "two-thirds of the [federal] district courts have implemented the initial disclosure [requirements of Rule 26(a)(1)] or implemented a similar local rule."⁸³ The federal district court for the District of Wyoming has opted out of Rule 26(a)(1) but has continued to implement an amended version of its previously adopted disclosure regime; its Local Rule 26(e) is similar to Federal Rule 26(a)(1).⁸⁴

81. Rules 26(a)(1), (d), and (f); Rule 29.

82. FIELD, KAPLAN & CLERMONT, *supra* note 79, at 12.

Precise statistics vary according to the source and the time of survey. Field, Kaplan & Clermont report as follows:

Many federal districts (currently about two-thirds of the 94 districts, including most major ones) seem to have opted out of Rule 26(a)(1) in varying terms. Accordingly, one cannot say that the era of mandatory disclosure has fully arrived. . . .

Nevertheless, one cannot ignore mandatory disclosure. Rule[s] 26(a)(2) [disclosure of expert testimony] and (3) [pretrial disclosures] [are] generally in effect. Moreover, about one-half of those districts opting out of Rule 26(a)(1) had or have implemented their own schemes of disclosure, sometimes by local rule and sometimes by some sort of standing order more or less buried at the local level. A recent short article tried to warn practitioners of this situation and give some guidance in finding the relevant provisions in their particular district, or for their case's particular judge. Carl Tobias, *Finding the New Federal Civil Procedures*, 151 F.R.D. 177 (1993). On a less practical level, the riotous variety of approaches to disclosure—part of what has been termed the balkanization of civil procedure—raises concern for the future of the Federal Rules' goal of general rules uniform across the nation.

Id. at 11-12.

See also SHREVE & RAVEN-HANSEN, *supra* note 21, at 307 n.3 ("As of January 1994, 48 of the 94 district courts had [opted out of the required disclosure provisions]. . . . Of these, 28 have adopted their own variants of the required disclosure rule. We therefore describe the 'default rule' here; at this writing there is no uniform rule."). *See also infra* note 83 and accompanying text.

83. Kenneth J. Nunnenkamp & Mark J. Pino, *The Three Faces of Mandatory Disclosure*, THE WASHINGTON LAWYER, May/June 1994, at 37.

A survey by the Federal Judicial Center reported that of the 94 federal district courts, 37 had implemented or opted in to Rule 26(a)(1)'s mandatory initial disclosure requirements; 26 had opted out of Rule 26(a)(1) but implemented disclosure in some form through a local Civil Justice Reform Act plan; and 31 had opted out of mandatory disclosure altogether. *Id.* at 46. "When categories one and two are combined, sixty-three federal district courts have implemented some form of initial mandatory-disclosure requirement." *Id.* at 38.

The federal district court for the District of Wyoming is reported by this survey in category two—opted out of Rule 26(a)(1) but implemented disclosure in some form through a local CJRA plan. *Id.* at 46.

84. Order, In the Matter of Adoption of Amended Rules of Court, at 37-39 (D. Wyo. June 17, 1994) (Local Rule 26(e)) (self-executing routine discovery exchange). *See also* Order, In the Matter of Adoption of Amended Rules of Court, at 37-39 (D. Wyo. Nov. 30, 1993) (same).

B. Wyoming Rules Amendments Relating to Discovery

Because Wyoming rejected the mandatory disclosure features of the 1993 FRCP amendments, the 1994 WRCP amendments relating to discovery are considerably less extensive than their federal counterparts. Nevertheless, the Wyoming amendments have adopted, either in whole or with appropriate modifications, federal amendments making significant changes to eight of the discovery rules. The more significant of these changes are now reviewed in numerical order of the Wyoming rules affected.

1. Rule 26: General Provisions Governing Discovery

Rule 26(b)(4)(A)(ii) as amended unconditionally authorizes any party to depose any person who has been identified as an expert whose opinions may be presented at trial, eliminating the previous requirement of a motion and court order. Under the old rule experts were routinely deposed upon motion and court order, or by voluntary agreement of the parties without involvement of the court. The new rule sensibly dispenses with the formality of a court order, in view of the fact that potential trial experts are routinely deposed. However, court involvement may still be necessary absent agreement of the parties concerning significant details, because under the new rule such depositions continue to be subject to such restrictions as to scope and such provisions concerning fees and expenses as the court may deem appropriate.

A new provision, Rule 26(b)(5), applies to the withholding of information otherwise discoverable based on claims of privilege, or protection of trial preparation materials. Such claims must be made expressly, describing the nature of the materials not produced (without revealing information itself privileged or protected) so that other parties may assess the applicability of the claimed privilege or protection. The federal advisory committee note states that “[t]o withhold materials without such notice . . . may be viewed as a waiver of the privilege or protection.”⁸⁵

The revised Rule 26(e)(2) reformulates the second part of the limited duty to supplement discovery responses that were complete when made but with respect to which other information is thereafter acquired. Under the old formulation, such supplementation was required if the responding party obtained information demonstrating that the prior response was incorrect when made or, though correct when made, was no longer true and the circumstances were such that a failure to amend the response was in substance a

85. Advisory Committee Note, 146 F.R.D. at 639.

knowing concealment. The new formulation simplifies this duty to supplement in a way that should avoid thorny problems of interpretation and application, and that enlarges the scope of the duty to supplement. Under the new rule, a party must amend a prior response to an interrogatory, request for production, or request for admission (but not deposition testimony) if the party learns that the response is in some material respect incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

2. Rule 28: Persons Before Whom Depositions May Be Taken

Rule 28(b), on depositions taken in foreign countries, is amended to provide that such depositions may be taken pursuant to any applicable treaty or convention. The purpose of the amendment is to permit effective use of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, and of any future applicable treaty.⁸⁶ The term 'letter rogatory' is replaced by the more modern term 'letter of request' (whether or not captioned a letter rogatory).

3. Rule 29: Stipulations Regarding Discovery Procedure

Rule 29 is amended to expand the ability of litigants to stipulate to alterations in the otherwise prescribed discovery procedures and limitations. Unless the court orders otherwise, the parties may by written stipulation modify procedures governing or limitations placed upon discovery. However, court approval is required for stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery, if such extensions would interfere with any time set for completion of discovery, for hearing of a motion, or for trial.

The amendment encourages counsel "to agree on less expensive and time-consuming methods to obtain information, as through voluntary exchange of documents, use of interviews in lieu of depositions, etc."⁸⁷ For example, even though Wyoming has rejected the mandatory disclosure regime, counsel can agree to abide by it or some variation on it if they wish, or simply to exchange certain information informally, as is frequently arranged and implemented by letters or pursuant to oral agreements. In addition, "when more depositions or interrogatories are needed than allowed under [the] rules . . . [counsel] can, by agreeing to the additional discovery, eliminate the need for a special motion addressed to the court."⁸⁸

86. Advisory Committee Note, 146 F.R.D. at 646.

87. Advisory Committee Note, 146 F.R.D. at 648.

88. *Id.*

4. Rule 30: Depositions Upon Oral Examination

Prior to the 1993 FRCP amendments, the Federal Rules did not contain any presumptive numerical limits on depositions or interrogatories, although some federal district courts imposed such limits by local rule. The 1993 federal amendments adopt presumptive numerical limits⁸⁹ but, as in the case of mandatory initial disclosures,⁹⁰ permit parties to stipulate out of the limits,⁹¹ and also permit district courts to opt out either by local rule or by orders in particular cases.⁹² The federal district court for the District of Wyoming imposed a presumptive limit on the number of interrogatories prior to the 1993 federal amendments,⁹³ and it has opted out of the 1993 presumptive limits on the number of depositions.⁹⁴

Before the situation at the federal level had evolved to the position of the 1993 FRCP amendments, the Supreme Court of Wyoming adopted presumptive deposition and interrogatory limits which could not be stipulated away by the parties but could be modified by the court in any case for good cause shown.⁹⁵ These Wyoming presumptive limits were as follows: depositions upon oral examination—each party was limited to the deposition of any other party, the deposition of one expert witness, and three other depositions;⁹⁶ depositions upon written questions—each party was limited to three depositions, in addition to the depositions upon oral examination;⁹⁷ and interrogatories—each party could serve on any other party interrogatories not exceeding 30 in number including subparts.⁹⁸

89. Rules 30(a)(2)(A) (no more than a total of 10 depositions upon oral examination or upon written questions may be taken by the plaintiffs, or by the defendants, or by third-party defendants); 31(a)(2)(A) (same); 33(a) (no party may serve on any other party more than 25 interrogatories including discrete subparts).

90. See *supra* text accompanying note 81.

91. Rules 29, 30(a)(2), 31(a)(2), and 33(a).

92. Rule 26(b)(2) ("By order or by local rule, the court may alter the limits in these rules on the number of depositions and interrogatories . . .").

93. Order, In the Matter of Adoption of Revised Rules of Court, at 51 (D. Wyo. Nov. 2, 1992) (effective Nov. 15, 1992) (Local Rule 33(b)) ("No party shall serve on any other party more than one set of thirty (30) interrogatories in the aggregate, including all subparts, without leave of Court. Subparagraphs of any interrogatory shall relate directly to the subject matter of the interrogatory.").

94. Order, In the Matter of Adoption of Amended Rules of Court, at 48 (D. Wyo. Nov. 30, 1993) (Local Rule 30(h)) ("Absent good cause shown, there shall be no limit on the number or length of depositions."); *id.* at 49 (Local Rule 31) ("Absent good cause shown there shall be no limit on the number or length of depositions upon written questions.").

95. Old Rules 30(a)(2) and (3); 31(a)(4) and (5); 33(a). These limits became effective in Wyoming on April 28, 1992. 823-832 P.2d Wyo. Rep. xxiv-xxvii (1992).

96. Old Rule 30(a)(2).

97. Old Rule 31(a)(4).

98. Old Rule 33(a).

The 1994 WRCP amendments replace the previous Wyoming deposition limits with the presumptive limits of the 1993 FRCP amendments.⁹⁹ The new Wyoming Rule 30(a)(2)(A) limits the total number of depositions—including those upon oral examination and those upon written questions—to ten “by the plaintiffs,” ten “by the defendants,” and ten “by third-party defendants.” These limits may be exceeded pursuant to the written stipulation of the parties,¹⁰⁰ or by leave of court, “which shall be granted to the extent consistent with the principles stated in Rule 26(b)(1)(B).”¹⁰¹

Although the effect of these new presumptive limits as compared to the previous ones will vary from case to case, depending on the number and configuration of the parties and the kinds of depositions desired, it seems fair to assume that in many cases the new limits will operate more generously than the old ones. The provision allowing the parties to exceed the limits upon written stipulation without court approval is a welcome change from the previous prohibitory Wyoming rule. Most attorneys will not stipulate to obviously unnecessary depositions either for the purpose of keeping their own options open or for the purpose of increasing their own fees. In any event, judges are unlikely to be able to identify such abuses with any confidence.

In addition to the foregoing limitations on the number of depositions, the new Rule 30(a)(2)(B) adopts the federal amendment requiring leave of court, absent written stipulation of the parties, to depose a person who already has been deposed in the case.

The unamended Federal/Wyoming Rule 30(c) provided that “[e]xamination and cross-examination of [deposition] witnesses may proceed as permitted at the trial under the provisions of the Federal/Wyoming Rules of Evidence.” The 1993 FRCP amendments add: “except Rules 103 and 615.” The 1994 WRCP amendments add only: “except Rule 103.”

Evidence Rule 103 deals with objections, motions to strike, and offers of proof that must be made at trial to preserve for appeal errors in evidentiary rulings. The federal and Wyoming amendments make it inapplicable to depositions because if it were applicable, it would conflict with Rule 32(d)(3)(A)’s more lenient provision that non-avoidable objections are not waived by failure to make them at depositions.¹⁰²

99. For the new Wyoming position on the interrogatory limit, see *infra* text accompanying notes 105-08.

100. Rule 29; Rule 30(a)(2).

101. Rule 30(a)(2).

102. Rule 32(d)(3)(A) provides:

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

As to Evidence Rule 615 on exclusion of witnesses ("The Rule"), the federal amendment makes it inapplicable to depositions so that other witnesses are not automatically excluded from a deposition by the unilateral request of a party, although they can be excluded by the court when appropriate pursuant to Federal Rule 26(c)(5).¹⁰³ The Wyoming amendment, by mentioning Evidence Rule 103 but not Evidence Rule 615, adopts the contrary philosophy, thought to be reflected in Wyoming custom and practice, of allowing any party the unfettered discretion to invoke The Rule at a deposition in the same circumstances and to the same extent as at trial.

Finally, the Wyoming amendments adopt the new federal provisions which become Rules 30(d)(1) and (2). The new Rule 30(d)(1) provides that "[a]ny objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner." It further provides that "[a] party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion" for a court order terminating, or limiting the scope and manner of the taking of, the deposition under what is now Rule 30(d)(3).¹⁰⁴ The new Rule 30(d)(2) explicitly authorizes the court to regulate the time permitted for the conduct of a deposition, and to impose sanctions, including costs and attorneys' fees, on persons who impede, delay, or otherwise frustrate the fair examination of the deponent.

Each of these Rule 30(d) amendments is aimed at improperly disruptive or obstructive tactics, discovery abuses which are particularly aggravating and undoubtedly too common. However, there are limits to the efficacy of this kind of rulemaking. The litigators and judges who administer the discovery rules are, after all, human beings. That inexorable fact sometimes seems to beget a continuous quest by the guardians of the Federal Rules to anticipate every conceivable problem, real or imagined, and, some would say, to fortify and refortify the ramparts against human imperfection. Nevertheless, this kind of quest is not unique to the law of procedure, and the federal efforts at improvement in the procedural area

the deposition, unless the ground of objection is one which might have been obviated or removed if presented at that time.

Id.

103. Advisory Committee Note, 146 F.R.D. at 664.

Wyoming Rule 26(c)(1)(E) is the counterpart of Federal Rule 26(c)(5).

104. The problems addressed by the new Rule 30(d)(1) also are regulated by Wyoming's Uniform District Court Rule 601. The Supreme Court of Wyoming's order adopting the 1994 WRCP amendments provides that "they shall supersede all other court rules that are in conflict therewith, including but not limited to Rule 601, Uniform Rules of District Courts." *Order, supra* note 11, 878 P.2d at cxlv (advance sheets).

Pursuant to the Supreme Court's request, the Civil Division of the Permanent Rules Advisory Committee will be recommending appropriate amendments to Uniform District Court Rule 601.

are usually beneficent in their intent and frequently constructive in their effect—or so it seems at least to this observer. In the present instance, the problems are not imaginary, and the Rule 30(d) amendments specifically addressing them are appropriate.

5. Rule 31: Depositions Upon Written Questions

The new Rule 31(a)(2)(A), which is consistent with the new Rule 30(a)(2)(A), replaces the previous Wyoming presumptive limit on the number of depositions upon written questions. Absent written stipulation of the parties or leave of court, both new rules limit the total number of depositions, whether upon oral examination or upon written questions, to ten by the plaintiffs, ten by the defendants, and ten by third-party defendants. Similarly, the new Rule 31(a)(2)(B), like the new Rule 30(a)(2)(B), requires written stipulation or leave of court to depose a person who already has been deposed in the case.

In addition, the new Rule 31(a)(4) adopts the federal amendments reducing the time limits for serving cross questions, redirect questions, and recross questions, so that the total time for developing such questions is reduced from 50 to 28 days.

Finally, Rules 31(b) and (c) are amended to correct an oversight in the previous Wyoming amending process by making Rule 31 consistent with Rule 30(f) on the subject of delivery and custody of depositions.

6. Rule 33: Interrogatories to Parties

Although Rules 30 and 31 as amended adopt the federal presumptive limits on the number of depositions,¹⁰⁵ Rule 33(a) retains the previous Wyoming presumptive limit of 30 interrogatories, rather than the federal limit of 25. This difference is appropriate because the lower federal limit was promulgated in the context of the federal mandatory disclosure regime, under which the required initial disclosures provide substantial information that in Wyoming remains a potential subject of interrogatories.

As in the case of the deposition limit, the new Rule 33(a) adopts the federal position that the interrogatory limit may be exceeded either pursuant to written stipulation or by leave of court. The new Rule 33(a) also incorporates the federal language providing that in counting the number of interrogatories against the limit, “all discrete subparts” are to be counted as separate interrogatories. Under the old Wyoming Rule 33(a), “subparts” were to

105. See *supra* text accompanying notes 99-101.

be counted separately, but no elaboration was provided on what constitutes a subpart. The federal advisory committee note characterizes the more discriminating criterion of "discrete" subparts as encompassing "questions that seek information about discrete separate subjects."¹⁰⁶ The aim is to prevent evasion of the numerical limit by the device of joining such questions as subparts.¹⁰⁷ The note goes on to give an example of subparts that would not be considered discrete: "a question asking about communications of a particular type should be treated as a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately for each such communication."¹⁰⁸

The new Rule 33(b) incorporates federal amendments on interrogatories to which the responding party objects. Rule 33(b)(4) requires that all grounds for an objection be stated with specificity, and further provides that any ground not stated in a timely objection is waived unless failure to object is excused by the court for good cause shown. Rule 33(b)(1) requires the objecting party to answer the interrogatory to the extent it is not objectionable, rather than to provide no answer even to the portions that are not objectionable. For example, if an interrogatory is objected to as overbroad or burdensome, it should be answered more narrowly or to the extent that providing an answer is not burdensome.¹⁰⁹ This common-sense approach should help keep the objecting party honest, better define the contours of the objection, expedite discovery of the nonobjectionable information, and reduce disputes leading to motions to compel.

7. Rule 34: Production of Documents

Rule 34 is amended to provide, consistently with Rule 33(b), that if a request for production is objectionable only in part, the nonobjectionable portions must be produced.

106. Advisory Committee Note, 146 F.R.D. at 675.

107. *Id.*

108. *Id.* at 675-76.

109. *See id.* at 676.

The note provides the following other examples:

If . . . an interrogatory seeking information about numerous facilities or products is deemed objectionable, but an interrogatory seeking information about a lesser number of facilities or products would not have been objectionable, the interrogatory should be answered with respect to the latter even though an objection is raised as to the balance of the facilities or products. Similarly, the fact that additional time may be needed to respond to some questions (or to some aspects of questions) should not justify a delay in responding to those questions (or other aspects of questions) that can be answered within the prescribed time.

Id.

8. Rule 37: Orders Compelling Discovery; Sanctions

Rule 37(a)(1), designating the appropriate court in which to make a motion for an order compelling discovery, incorporates the federal amendments. The rule now provides, with appealing simplicity, that an application for an order to a party shall be made to the court in which the action is pending, and an application for an order to a nonparty shall be made to the court where the discovery is being, or is to be, taken. The old rule divided such orders into three categories. The new rule reduces the categories to two and broadens the second category, placing the deposition of a party into one category covering all types of discovery involving a party, and placing the deposition of a nonparty into a second category covering all types of discovery involving a nonparty.

Rule 37 also is amended to incorporate federal provisions requiring a party moving either for an order compelling discovery or for certain kinds of sanctions to confer or attempt to confer in good faith with the person against whom relief is sought to try to resolve the matter voluntarily. A certification that this has been done is a precondition for moving for relief from the court. The old Wyoming rule contained such a requirement, but it was worded somewhat differently, and it applied only to a motion to compel discovery.¹¹⁰ The new Wyoming rule adopts the federal wording for the sake of uniformity. It also follows the federal rule in imposing the requirement not only as a certification precondition for a Rule 37(a)(2) motion to compel, but also as a certification precondition for a motion for sanctions against a delinquent party under Rule 37(d)(2) or (3), and as a basis for denying sanctions under Rule 37(a)(4) if the court finds that the good faith effort at voluntary resolution was not in fact made. The confer-in-good-faith requirement does not apply to sanctions involving failure to comply with a court order,¹¹¹ failure to admit,¹¹² or a party's failure to appear at the party's own deposition.¹¹³

In addition to incorporating some federal technical amendments, Rule 37 is changed in one other significant respect: the new Rule 37(a)(4) makes sanctions available not only if a motion to compel discovery is granted, but also even if the court does not have to grant the motion to compel because the requested discovery is provided after the motion is filed. The policy here is to avoid exempting from sanctions (and thereby rewarding) the dilatory tactic of waiting until a motion to compel is filed

110. Old Rule 37(a)(5).

111. Rule 37(b).

112. Rule 37(c).

113. Rule 37(d)(1).

and only then providing the discovery requested. This approach is entirely reasonable, particularly since there must already have been an effort to secure voluntary cooperation before the motion to compel was filed.¹¹⁴ The approach is analogous to the carrot and stick created by Rule 11's safe harbor provision.¹¹⁵

III. OTHER WYOMING RULES AMENDMENTS

The remaining 1994 WRCP amendments, which are drawn largely but not entirely from the 1993 FRCP amendments, are now reviewed in numerical order.

A. *Miscellaneous Amendments*

1. Rule 1: Scope and Purpose of Rules

Rule 1 as amended incorporates the federal amendment adding the phrase 'and administered' to the second sentence, which now reads: "[These rules] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." The federal advisory committee note explains that the purpose of the amendment is "to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay."¹¹⁶ The note goes on to state that "[a]s officers of the court, attorneys share this responsibility with the judge to whom the case is assigned."¹¹⁷

2. Rule 16: Pretrial Conferences; Scheduling; Management

Rule 16(c) is amended to expand the list of subjects that may be considered and acted upon at any pretrial conference. The new or reworded items on the list, adapted from the federal amendments, are: limitations or restrictions on expert testimony;¹¹⁸ the appropriateness and timing of summary adjudication under Rule 56;¹¹⁹ the control and scheduling of discovery, including orders affecting discovery pursuant to Rule 26 and Rules 29 through 37;¹²⁰ settlement and the use of special procedures to assist in resolving the

114. Rule 37(a)(2).

115. See *supra* text accompanying notes 39-41.

116. Advisory Committee Note, 146 F.R.D. at 535.

117. *Id.*

118. Rule 16(c)(4).

119. Rule 16(c)(5).

120. Rule 16(c)(6).

dispute under Rule 40(b) or other alternative dispute resolution procedures,¹²¹ separate trial pursuant to Rule 42(b) of a claim, counterclaim, cross-claim, third-party claim, or a particular issue;¹²² early presentation of evidence on a manageable issue that could be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);¹²³ time limits for presenting evidence;¹²⁴ and other matters that may facilitate the just, speedy, and inexpensive disposition of the action.¹²⁵

The revised Rule 16(c) also incorporates the federal amendment providing that “[i]f appropriate, the court may require that a party or its representative be present [at the pretrial conference] or reasonably available by telephone in order to consider possible settlement of the dispute.” The federal advisory committee note states that “[w]hether [the participant] would be the individual party, an officer of a corporate party, a representative from an insurance carrier, or someone else would depend on the circumstances. . . . The selection of the appropriate representative should ordinarily be left to the party and its counsel.”¹²⁶

B. Technical Amendments

1. Rule 38: Jury Trial of Right

Rule 38(b)(1) and Rule 38(d) are amended to make clear that a jury demand must be filed as well as served, and that failure to meet both requirements results in a waiver of jury trial.

2. Rule 50: Judgment as a Matter of Law in Jury Trials

Rule 50(a)(1) is amended to make clear “that judgments as a matter of law in jury trials may be entered against both plaintiffs and defendants and with respect to issues or defenses that may not be wholly dispositive of a claim or defense.”¹²⁷

121. Rule 16(c)(9).

122. Rule 16(c)(13).

123. Rule 16(c)(14).

124. Rule 16(c)(15).

125. Rule 16(c)(16).

126. Advisory Committee Note, 146 F.R.D. at 605.

The note further states:

Particularly in litigation in which governmental agencies or large amounts of money are involved, there may be no one with on-the-spot settlement authority, and the most that should be expected is access to a person who would have a major role in submitting a recommendation to the body or board with ultimate decision-making responsibility.

Id.

127. Advisory Committee Note, 146 F.R.D. at 694.

3. Rule 52: Judgment on Partial Findings

Rule 52(c), which applies to nonjury trials, is amended for the same purpose as Rule 50(a)(1): to make clear “that judgments as a matter of law . . . may be entered against both plaintiffs and defendants and with respect to issues or defenses that may not be wholly dispositive of a claim or defense.”¹²⁸

C. *Judgments, Costs, and Attorneys’ Fees*

1. Rule 54: Judgment; Costs

One amendment to Rule 54(a) deletes a cryptic sentence of the old Wyoming rule that has no counterpart in the Federal Rules: “A direction of a court or judge, made or entered in writing, and not included in a judgment, is an order.”¹²⁹ The purpose of this deleted Wyoming provision is unclear. To the extent it was intended to ensure that such an “order” is not regarded as an appealable judgment, that purpose may be better served by the sentence added to the amended rule to replace the deleted sentence: “A court’s decision letter or opinion letter, made or entered in writing, is not a judgment.”¹³⁰

This addition to Rule 54(a), drafted with Wyoming judicial practice specifically in mind, interacts with another special Wyoming provision added as an amendment to Rule 58(b). Federal Rule 58, which corresponds to Wyoming Rule 58(b), states: “Every judgment shall be set forth on a separate document.” Wyoming Rule 58(b) as amended states: “Every judgment shall be set forth on a separate document, shall be identified as such, and may include findings of fact and conclusions of law.” The last clause of this Wyoming provision, which permits the judgment to include findings of fact and conclusions of law, is inconsistent with federal practice, under which the Rule 58 judgment set out on a separate document is to be distinct from any opinion or memorandum.¹³¹ However, the Wyoming provision is not intended to vitiate the separate document rule, and

128. Advisory Committee Note, 146 F.R.D. at 695.

129. Old Rule 54(a).

130. Rule 54(a).

131. 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2785, at 14 (1973) (“It no longer is possible, as it was prior to 1963, for an opinion to have the effect of a judgment. Instead, there must be a separate document on which the judgment is set forth.”); *id.* at 14-15 n.44 (“The amended rule eliminates . . . uncertainties by requiring that there be a judgment set out on a separate document—distinct from any opinion or memorandum—which provides the basis for the entry of judgment. . . .” Advisory Committee Note to 1963 amendment of Rule 58, 31 F.R.D. at 650.”); *see also* Federal Form 32.

as the amendment to Rule 54(a) makes clear, it does not allow a decision letter or opinion letter to serve as a judgment. Rather, the result of the amendments to Wyoming Rules 54(a) and 58(b) is that the judgment must still be set forth on a separate document; must be identified as such; may not be a decision letter or an opinion letter; but *may* include findings of fact and conclusions of law.

While the Wyoming rule thus permits the judgment and findings of fact and conclusions of law to be contained in the same document, it also permits the federal practice of keeping the judgment entirely separate from (although it may refer to) findings of fact, conclusions of law, or an opinion. The federal practice is preferable because it eliminates any conceivable confusion as to the contents or the date of entry of the appealable judgment, although the new Wyoming rule is drafted in a manner intended and designed to avoid such confusion.

The revised Rule 54 also incorporates a federal amendment providing a detailed procedure for initiating claims for attorneys' fees and related expenses which—unlike fees sought under the terms of a contract, for example—are not an element of damages to be proved at trial. First, the old Rule 54(d) becomes Rule 54(d)(1), and is amended to make clear that it applies only to costs other than attorneys' fees (even if such fees are characterized as part of the costs by the statute that makes them available). Then an entirely new Rule 54(d)(2) is added which prescribes the procedure for advancing claims for attorneys' fees and related nontaxable expenses "unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial."¹³²

The procedure prescribed begins with the filing of a motion.¹³³ There is a potential trap for the unwary here, because the motion must be filed no later than 14 days after entry of judgment, unless a statute or court order otherwise provides.¹³⁴ However, although the motion must be filed within the 14-day period, and although it must provide specified information including the amount sought or a fair estimate thereof, evidentiary material including documentation and final calculations may be filed later in connection with the proceedings to determine what amount, if any, is to be awarded.¹³⁵ The rule also provides that the court may refer issues relating to the value of services to a master.¹³⁶

132. Rule 54(d)(2)(A).

133. *Id.*

134. Rule 54(d)(2)(B).

135. Rules 54(d)(2)(B)-(D); Advisory Committee Note, 146 F.R.D. at 701.

136. Rule 54(d)(2)(D).

The new Wyoming rule makes clear in language added to the federal version that this provision is not intended to create any new right to attorneys' fees or related expenses or to add to any such rights that already exist under Wyoming or other controlling law: Rule 54(d)(2)(A) states that claims for attorneys' fees and expenses may be pursued under the procedure provided "[w]hen [such claims are] allowed by law." The federal advisory committee note explains that the purpose of the new Rule 54(d)(2) is to provide a procedure for "litigation not initially contemplated by the rules—disputes over the amount of attorneys' fees to be awarded in . . . actions in which prevailing parties may be entitled to such awards or in which the court must determine the fees to be paid from a common fund."¹³⁷ In Wyoming as in federal courts, the procedure will apply to any case in which fees are recoverable but are not an element of damages to be proved at trial. Some such cases in Wyoming courts arise under Wyoming law.¹³⁸ Others arise under federal law: fees are available to the prevailing party in various actions under federal civil rights laws which can be and often are brought in state court.¹³⁹

Finally, it should be noted that the Rule 54(d)(2) procedure does not apply to claims for fees and expenses as sanctions for violations of the rules of civil procedure.¹⁴⁰

2. Rule 58: Entry of Judgment

One amendment to Rule 58, discussed above in connection with Rule 54,¹⁴¹ is the addition of language to Rule 58(b)'s separate document rule, which now reads: "Every judgment shall be set forth on a separate document, shall be identified as such, and may include findings of fact and conclusions of law."

The other amendment to Rule 58 relates to routine taxation of costs, and to motions for attorneys' fees under the provision of Rule 54 discussed above.¹⁴² A sentence added to Rule 58(c) provides:

Entry of the judgment shall not be delayed, nor the time for

137. Advisory Committee Note, 146 F.R.D. at 700.

138. *E.g.*, *State v. DDM*, 877 P.2d 259 (Wyo. 1994) (affirming fee award against Department of Family Services to party who successfully defended allegation of paternity) (award authorized by WYO. STAT. §§ 1-14-126(b) (Cum. Supp. 1994), 14-2-114 (1994)).

139. *E.g.*, actions under 42 U.S.C. § 1983 (1988), in which the prevailing party may recover attorneys' fees and related nontaxable expenses under 42 U.S.C. §§ 1988(b) (Supp. IV 1992) (attorneys' fees), 1988(c) (Supp. IV 1992) (expert fees).

140. Rule 54(d)(2)(E).

141. *See supra* text accompanying notes 130-31.

142. Rule 54(d)(2); *see supra* text accompanying notes 132-40.

appeal extended, in order to tax costs or award fees, except that, when a timely motion for attorney's fees is made under Rule 54(d)(2), the court, before the appellate court acquires jurisdiction, may order that the motion have the same effect on the time for appeal for all parties as a timely motion under Rule 59.

Thus, although the filing of a Rule 54(d)(2) motion for attorneys' fees does not of itself affect the finality of the underlying judgment on the merits or the time for appeal from that judgment, Rule 58(c) permits (but does not require) the court to suspend finality in the event of a timely Rule 54(d)(2) motion in order to ensure that only one appeal need be taken to cover both the merits and attorneys' fees. The federal advisory committee's observations on the court's discretion in this regard are set out in the margin.¹⁴³

CONCLUSION

The 1994 amendments to the Wyoming Rules of Civil Procedure have adopted many but not all of the 1993 amendments to the Federal Rules of Civil Procedure. The most significant federal amendments not adopted involve the regime of self-executing required disclosures that is now tacked on top of the federal discovery system. Notwithstanding this recent example of selectivity and other significant differences between the Wyoming Rules and the Federal Rules, Wyoming remains a federal replica jurisdiction. The general congruence between the Wyoming and federal procedural systems provides the benefits of uniformity while accommodating the need, or in some instances simply the desire, for local variations.

143. Advisory Committee Note, 146 F.R.D. at 705. The note states:

Ordinarily the pendency or post-judgment filing of a claim for attorney's fees will not affect the time for appeal from the underlying judgment. See *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988). Particularly if the claim for fees involves substantial issues or is likely to be affected by the appellate decision, the district court may prefer to defer consideration of the claim for fees until after the appeal is resolved. However, in many cases it may be more efficient to decide fee questions before an appeal is taken so that appeals relating to the fee award can be heard at the same time as appeals relating to the merits of the case.

Id.