

# Memorandum

August 2, 2012

TO: Members of the Bar and Public  
FROM: Louise York, Chief Deputy Clerk  
RE: Public Comment Period for Proposed Amendments to the Local Rules

The Committee on the Local Rules of Practice have proposed amendments to the following rules:

[DUCivR 5-2 Filing Cases and Documents Under Court Seal](#)

[DUCivR 7-1 Motions and Memoranda](#)

[DUCivR 26-2 Effect of Filing a Motion For Protective Order](#)

[DUCivR 56-1 Summary Judgment: Motions and Supporting Memoranda](#)

[DUCivR 72-2 Magistrate Judge Functions and Duties in Civil Matters](#)

[DUCrimR 11-1 Plea Agreements](#)

[DUCrimR 57-15 Magistrate Judge Authority in Criminal Cases](#)

The following local rule is proposed be enacted:

[DUCivR 15-1 Amended Complaints](#)

The following rule is proposed to be deleted to correspond to deletion of Rule 74 of the Federal Rules of Civil Procedure:

[DUCivR 74- 1 Appeal of Magistrate Judge Orders and Judgments in Civil Matters](#)

There will be a question and answer session held by the members of the Committee on Monday, August 13, 2012 at 4:00 pm in Judge Waddoups Courtroom, Room 102, at the Frank E. Moss Courthouse, 350 South Main Street, Salt Lake City.

The comment period will end on August 31, 2012. Comments may be sent by email to [Louise\\_York@utd.uscourts.gov](mailto:Louise_York@utd.uscourts.gov), or sent by mail to the following address:

District Court Local Rules Comment  
Office of the Clerk of Court  
350 South Main Street, Suite 150  
Salt Lake City, Utah 84101

## Summary of Proposed Amendments to Local Rules of Practice

The Local Rules Committee submits the proposed amendments to the local civil rules for public comment. The proposed amendments are as follows:

- DUCivR 5-2** The amendment establishes additional requirements for filing documents under seal including the filing of redacted versions. The intent of the rule is to discourage over designation of material as sealed, which limits public access to court documents.
- DUCivR 7-1** The amendment requires for the consolidation of motions and memoranda in support into a single document.
- DUCivR 15-1** The new rule provides guidance on the process of obtaining permission of the court to file an amended complaint and the procedure for filing that complaint if the permission is granted.
- DUCivR 26-2** The amendment promotes timely discovery by providing a standard protective order to govern discovery in cases in which discovery issues have arisen and before a more specific protective order has been entered. The standard protective order is adopted in the appendix to the rules.
- DUCivR 56-1** The amendment changes the requirements for briefing summary judgment motions, providing an organizational framework for presenting the elements, the facts, applicable law, and arguments.
- DUCivR 72-2** This amendment corrects a statutory citation.
- DUCivR 74-1** This rule is deleted to reflect the abrogation of Rule 74 of the Federal Rules of Civil Procedure.
- DUCrimR 11-1** The amendment prescribes docketing a sealed docket entry for each statement in advance of plea which will mask the existence of any cooperation agreements.
- DUCrimR 57-15** These amendments reflect current practice of magistrate judge duties including presiding over specialized courts such as RISE and the Veterans Court.

## DUCivR 5-2 FILING CASES AND DOCUMENTS UNDER COURT SEAL

**Reporter's Note: This rule is amended to provide additional requirements for filing material under seal emphasizing the need to minimize sealed filings in order to promote public access to court documents. The rule provides for subsequent filings of redacted versions of sealed documents. Privacy concerns are to be balanced against the presumption of open courts.**

**Approved by the Committee on July 10, 2012.**

### **(a) General Rule.**

The records of the court are presumptively open to the public. The court has observed that counsel are increasingly and improperly overdesignating sealed materials in pleadings and documents filed with the court. In order to prevent such overdesignation, the court is now requiring counsel to be highly selective in filing documents under seal. A portion of a document or portion of a pleading shall be filed under seal only if the document or pleading, or portions thereof, are privileged or protectable as a trade secret or otherwise entitled to protection under the law. A stipulation, or a blanket protective order that allows a party to designate documents as sealable, will not suffice to allow the filing of documents under seal. To prevent the overdesignation of sealed materials in the court record, counsel shall:

- (1) Refrain from filing memoranda under seal merely because the attached exhibits contain confidential information;
- (2) Redact personal identifiers, discussed in DuCivR 5.2-1, and not use the presence of personal identifiers as a basis for sealing an entire document; and
- (3) Redact documents when the confidential portions are not directly pertinent to the issues before the court and to publicly file the documents.

The court recognizes that on rare occasions, statutes, rules, and orders in specific cases may require restriction of public access. On motion of ~~one or more parties~~ a party and a showing of good cause, ~~the court or, upon referral, a magistrate judge may order all or a portion of the documents filed in a civil case to be sealed~~ a judge may order a case, a document, or a portion of a document filed in a civil case to be sealed.

### **(b) Sealing of New Cases.**

(1) On Ex Parte Motion. ~~A case may be sealed at the time it is filed upon ex parte motion of the plaintiff or petitioner and execution by the court of a written order.~~ In extraordinary circumstances, and upon a judge's order granting an ex parte motion of the plaintiff or petitioner, an entire case may be sealed at the time it is filed. The case will be listed on the clerk's case index as *Sealed Plaintiff vs. Sealed Defendant*.

(2) Civil Actions for False Claims. When an individual files a civil action on behalf of the

individual and the government ~~alleging violation of~~ pursuant to 31 U.S.C. § 3729, the clerk will seal the complaint for a minimum of sixty (60) days. Extensions may be approved by the court on motion of the government.

**(c) Sealing of Pending Cases.**

A pending case may be sealed at any time upon ~~motion of either party and execution by the court of a written order.~~ a judge's sua sponte order or the granting of a motion by any party. Unless the court otherwise orders, neither the clerk's automated case index nor the existing case docket will be modified.

**(d) Procedure for Filing Documents Under Seal.**

~~Documents ordered sealed by the court or otherwise required to be sealed by statute must be placed unfolded in an envelope with a copy of the cover page of the document affixed to the outside of the envelope. The pleading caption on the cover page must include a notation that the document is being filed under court seal. The sealed document, together with a judge's copy prepared in the same manner, must be filed with the clerk. No document may be designated by any party as *Filed under Seal* or *Confidential* unless:~~

- ~~(1) it is accompanied by a court order sealing the document;~~
- ~~(2) it is being filed in a case that the court has ordered sealed; or~~
- ~~(3) it contains material that is the subject of a protective order entered by the court. Documents ordered sealed by the court or otherwise required to be sealed by statute must be delivered to the court for filing in the following manner:~~

(1) Original Document. The original document must be unfolded in an envelope with a copy of the document's cover page affixed to the outside of the envelope. The cover page must include a notation that the document is being filed under court seal and must indicate one of the following reasons why the document has been filed under seal:

- (A) it is accompanied by a court order sealing the document;
- (B) it is being filed in a case that the court has ordered sealed; or
- (C) the document contains material that is the subject of a protective order.

Any exhibits filed must include a paper index to the exhibits, including the title (description) of the exhibit and the exhibit number.

(2) CD-ROM. The sealed filing must be accompanied by a CD-ROM (or other tangible electronic media) containing a PDF version of each document filed, including exhibits and the index of exhibits. The CD-ROM shall be placed in the same envelope as the original document and shall be marked with the case name, case number, and the date of delivery,

(3) Courtesy Copies. Courtesy copies of both the document and the CD-ROM, prepared

in the manner described above, shall be delivered at the same time as the originals. Individual chambers may also notify counsel that an electronic version of the sealed document shall be emailed to chambers.

(4) Notice of Conventional Filing. When a sealed document is delivered to the court, the filer shall electronically file a “Notice of Conventional Filing.”

**(e) Filing Memoranda That Contain Material Subject to a Protective Order**

(1) Two Versions of Memorandum Must Be Filed. If a party refers in a memorandum to material subject to a protective order, two versions of the memorandum must be filed with the court: a confidential, sealed memorandum and a nonconfidential, redacted memorandum.

(A) Sealed Memorandum. One memorandum shall be labeled “FILED UNDER SEAL.” The specific confidential material must be highlighted, put in brackets, or otherwise designated as confidential. This memorandum shall be filed as set forth above in 5.2(d).

(B) Nonconfidential, Redacted Memorandum. A memorandum from which confidential matter has been redacted shall be labeled “REDACTED-NONCONFIDENTIAL” and electronically filed with the court. The caption of the redacted version of each sealed document and the docket entry created when the document is filed shall identify the title of the sealed document, its docket number, and the date on which the sealed version was filed. The redacted version of the memorandum must be filed within fourteen (14) days of filing the sealed version. Failure to file a redacted version within the time prescribed may result in the court’s unsealing the memorandum.

(2) Exceptions. Subsection (e)(1) does not apply to:

(A) Filings in cases that have been sealed pursuant to statute or court order; or

(B) A memorandum that contains such an abundance of confidential information that filing a redacted version of the memorandum would not be meaningful. In this situation, counsel shall file a declaration so stating.

(3) Declaration Required. The lead attorney on the case shall file a declaration certifying that the sealed exhibits, memoranda, and/or other documents are privileged or protectable as a trade secret or otherwise entitled to protection under the law and that the sealed filing has been narrowly tailored to protect only the specific information truly deserving of protection.

(4) Resolutions of Disputes; Party Seeking Protection Bears Burden.

- (A) If a party intends to refer to and file a document that has been designated by another party as confidential pursuant to a protective order, and the filing party is unable to ascertain what information was intended to be protected, the filing party shall notify the designating party of the uncertainty, and the parties shall meet and confer so that the protected information may be highlighted as confidential as required in 5.2(e)(1)(A) and then redacted in the publicly filed version as required in 5.2(e)(1)(B).
- (i) If the uncertainty is not resolved by the time the filing is made, the filing party shall:
- (a) file the document(s) under seal;
  - (b) file a certification that the parties attempted to confer in good faith and that a Declaration, as required by 5.2(e)(3), cannot be filed; and
  - (c) file a notice to opposing counsel to prepare a redacted version for the filing party to file in the public docket within fourteen (14) days.
- (ii) If the party seeking protection does not provide to the filing party a redacted version of the memorandum within fourteen (14) days of the filing of the sealed document, the filing party shall file, within seven (7) days, a notice that the court may unseal the document.
- (B) A party who contends that a document was improperly filed under seal may notify the filing party of the contention. The parties shall then meet and confer. If conferral does not result in agreement, the party challenging the designation may file a Notice of Dispute Regarding Sealed Document(s).
- (i) The party to whom a Notice of Dispute is directed must file, within fourteen (14) days of filing date of the notice, a motion to preserve the seal. If no such motion is timely filed, the other party may file a brief motion to remove the seal, attaching the notice given. The motion to remove the seal shall be summarily granted without briefing or hearing. If a motion is timely filed, the opposing side need not respond, unless ordered to do so by the court.

**(f) Access to Sealed Cases and Documents.**

Unless otherwise ordered by the court, the clerk will provide access to cases and documents under court seal only on court order. Unless otherwise ordered by the court, the clerk will make no copies of sealed case files or documents.

## DUCivR 7-1 MOTIONS AND MEMORANDA

**Reporter's Note: The rule is amended to eliminate the requirement to file a motion and a memorandum in support as separate documents. The rule allows for the filing of a single document which contains the motion and the memorandum in support. Other amendments were made to correspond to amendments in the summary judgment rule.**

**Approved by the Rules Committee on July 10, 2012.**

### **(a) Motions.**

All motions must be filed with the clerk of court, or presented to the court during proceedings, except as otherwise provided in this rule and in [DUCivR 5-1](#). Copies shall be provided as required by DUCivR 5-1. Motions must set forth succinctly, but without argument, the specific grounds of the relief sought. Failure to comply with the requirements of this section may result in sanctions that may include (i) returning the motion to counsel for resubmission in accordance with the rule, (ii) denial of the motion, or (iii) other sanctions deemed appropriate by the court. Merely to repeat the language of a relevant rule of civil procedure does not meet the requirements of this section.<sup>±</sup>

### **~~(b) Supporting Memoranda.~~**

~~(1) Memoranda of Supporting Authorities. Except as noted below or otherwise permitted by the court, each motion must be accompanied by a memorandum of supporting authorities that is filed or presented with the motion. Although all motions must state grounds for the request and cite applicable rules, statutes, or other authority justifying the relief sought, no memorandum of supporting authorities is required for the following types of motions:~~

~~(A) to extend time for the performance of an act, whether required or permitted, provided the motion is made prior to expiration of the time originally prescribed or previously extended by the court;~~

~~(B) to continue either a pretrial hearing or motion hearing;~~

~~(C) to appoint a next friend or guardian ad litem;~~

~~(D) to substitute parties;~~

~~(E) for referral to or withdrawal from the court's [ADR](#) program;~~

~~(F) for settlement conferences; and~~

~~(G) for approval of stipulations between the parties.~~

~~(2) Concise Memoranda. Memoranda must be concise and state each basis for the motion and limited citations to case or other authority.~~

### **(1) No Separate Supporting Memorandum for Written Motion.**

The motion and any supporting memorandum must be contained in one document, except as otherwise allowed by this rule. The document must include the

following:

- (A) An initial separate section stating succinctly the precise relief sought and the specific grounds for the motion; and
- (B) One or more additional sections including a recitation of relevant facts, supporting authority, and argument.

Specific instructions regarding Motions for Summary Judgment are provided in DUCivR 56-1. Failure to comply with the requirements of this section may result in sanctions, including (i) returning the motion to counsel for resubmission in accordance with the rule, (ii) denial of the motion, or (iii) any other sanction deemed appropriate by the court.

- (2) Exceptions to Requirement That a Motion Contain Facts and Legal Authority. Although all motions must state grounds for the request and cite applicable rules, statutes, case law, or other authority justifying the relief sought, no recitation of facts and legal authorities beyond the initial statement of the precise relief sought and grounds for the motion shall be required for the following types of motions:

- (A) to extend time for the performance of an act, whether required or permitted, provided the motion is made prior to expiration of the time originally prescribed or previously extended by the court;
- (B) to continue either a pretrial hearing or motion hearing;
- (C) to appoint a next friend or guardian ad litem;
- (D) to substitute parties;
- (E) for referral to or withdrawal from the court's ADR program;
- (F) for settlement conferences; and
- (G) for approval of stipulations between the parties.

For such motions, a proposed order shall be attached as an exhibit to the motion and also emailed in an editable format to the chambers of the assigned judge.

- (3) Length of ~~Motions~~ Memoranda.

- (A) Motions filed Pursuant to Rules 12(b), 12(c), 56 and 65 of the Federal Rules of Civil Procedure: ~~Motions Memoranda supporting or opposing motions~~ filed pursuant to Fed. R. Civ. P. 12(b), 12(c), 56, and 65 must not exceed twenty-five (25) pages, exclusive of any of the following items: face sheet, table of contents, **statement of precise relief sought and grounds**

for relief, concise introduction and/or background section, statements of issues and facts, statement of elements and undisputed material facts and exhibits. Reply memoranda in support of any motion must be limited to ten (10) pages, exclusive of face sheet, table of contents, and exhibits and must be limited to rebuttal of matters raised in the memorandum opposing the motion. No additional memoranda will be considered without leave of court.

- (B) All Other Motions: ~~Memoranda supporting or opposing all motions that are not filed pursuant to Fed. R. Civ. P. 12(b), 12(c), 56 and 65~~ All motions that are not listed above must not exceed ten (10) pages, exclusive of any of the following items: face sheet, table of contents, statement of precise relief sought and grounds for relief, concise introduction and/or background section, statements of issues and facts, and exhibits. Reply memoranda in support of any motion must be limited to ten (10) pages, exclusive of face sheet, table of contents, and exhibits and must be limited to rebuttal of matters raised in the memorandum opposing the motion. No additional memoranda will be considered without leave of court.

**(b) Response and Reply Memoranda.**

(1) Motions Are Not to Be Made in Response or Reply Memoranda; Evidentiary Objections Permitted.

- (A) No motion, including but not limited to cross-motions and motions pursuant to Fed. R. Civ. P. 56(d), may be included in a response or reply memorandum. Such motions must be made in a separate document.
- (B) For motions for which evidence is offered in support, the response memorandum may include evidentiary objections. If evidence is offered in opposition to the motion, evidentiary objections may be included in the reply memorandum. While the court prefers objections to be included in the same document as the response or reply, in exceptional cases, a party may file evidentiary objections as a separate document. If such an objection is filed in a separate document, it must be filed at the same time as that party's response or reply memorandum. If new evidence is proffered in support of a reply, any evidentiary objection must be filed within seven (7) days. A party proffering evidence to which there has been an objection may file a response to the objection at the same time any responsive memorandum, if allowed, is due, or no later than seven (7) days after the objection is filed, whichever is longer. Motions to strike evidence as inadmissible are no longer appropriate and should not be filed. The proper procedure is to make an objection. See Fed. R. Civ. P. 56(c)(2).

(2) Length of Response and Reply Memoranda.

- (A) Memoranda Filed Regarding Motions Made Pursuant to Rules 12(b), 12(c), 56, and 65 of the Federal Rules of Civil Procedure: Memoranda in opposition to motions made pursuant to Fed. R. Civ. P. 12(b), 12(c), 56, and 65 must not exceed twenty-five (25) pages, exclusive of any of the following items: face sheet, table of contents, concise introduction, response to the statement of elements and undisputed material facts, any statement of additional elements and/or undisputed material facts, and exhibits. Reply memoranda must be limited to ten (10) pages, exclusive of face sheet, table of contents, any additional facts, and exhibits and must be limited to rebuttal of matters raised in the memorandum opposing the motion. No additional memoranda will be considered without leave of court.
- (B) All Other Motions: Response memoranda related to all motions that are not listed above must not exceed ten (10) pages, exclusive of any of the following items: face sheet, table of contents, concise introduction, statements of issues and facts, and exhibits. Reply memoranda in support of any motion must be limited to ten (10) pages, exclusive of face sheet, table of contents, and exhibits and must be limited to rebuttal of matters raised in the memorandum opposing the motion. No additional memoranda will be considered without leave of court.

(34) Filing Times.

- (A) Motions Filed Pursuant to Rules 12(b), 12(c) and 56 of the Federal Rules of Civil Procedure: A memorandum opposing motions filed pursuant to Fed. R. Civ. P. 12(b), 12(c), and 56 must be filed within twenty-eight (28) days after service of the motion or within such time as allowed by the court. A reply memorandum to such opposing memorandum may be filed at the discretion of the movant within fourteen (14) days after service of the opposing memorandum. The court may order shorter briefing periods and attorneys may also so stipulate.
- (B) All other Motions, Including Motions Filed Pursuant to Rule 65 of the Federal Rules of Civil Procedure: A memorandum opposing any motion that is not a motion filed pursuant to Fed. R. Civ. P. 12(b), 12(c) and 56 must be filed within fourteen (14) days after service of the motion or within such time as allowed by the court. A reply memorandum to such opposing memorandum may be filed at the discretion of the movant within fourteen (14) days after service of the memorandum opposing the motion. The court may order shorter briefing periods and attorneys may also so stipulate.

- (45) Citations of Supplemental Authority. When pertinent and significant authorities come to the attention of a party after the party's memorandum has been filed, or after oral argument but before decision, a party may promptly file a notice with the court and serve a copy on all counsel, setting forth the citations. There must be a reference either to the page of the memorandum or to a point argued orally to which the citations pertain, but the notice must state, without argument, the reasons for the supplemental citations. Any response must be made, filed promptly, and be similarly limited.

**(c) Supporting Exhibits to Memoranda.**

- (1) If any motion or memorandum cites documents, interrogatory answers, deposition testimony, or other discovery materials, relevant portions of those materials must be attached to or submitted with the motion or memorandum when it is filed with the court and served on the other parties.
- (2) For motions requiring admissible evidence, such evidentiary materials must be admissible under the Federal Rules of Evidence, which require that the materials be authenticated by a sworn affidavit, declaration, or other sworn testimony, such as a deposition, or as otherwise provided in the Rules of Evidence.

~~If any memorandum in support of or opposition to a motion cites documents, interrogatory answers, deposition testimony, or other discovery materials, relevant portions of those materials must be attached to or submitted with the memorandum when it is filed with the court and served on the other parties.~~

**(d) Failure to Respond.**

Failure to respond timely to a motion may result in the court's granting the motion without further notice.

**(e) Leave of Court and Format for Lengthy **Motions and Memoranda.****

If a memorandum is to exceed the page limitations set forth in this rule, leave of court must be obtained. A motion for leave to file a lengthy memorandum must include a statement of the reasons why additional pages are needed and specify the number required. The court will approve such requests only for good cause and a showing of exceptional circumstances that justify the need for an extension of the specified page limitations. Absent such showing, such requests will not be approved. A lengthy **motion or** memorandum must not be filed with the clerk prior to entry of an order authorizing its filing. **Motions or m**Memoranda exceeding page limitations, for which leave of court has been obtained, must contain **a table of contents, with page references, listing the titles or headings of each section and subsection.** ~~under appropriate headings and in the order here indicated.~~

- ~~(1) a table of contents, with page references, listing the titles or headings of each section and subsection;~~  
~~(2) a statement of the issues related to the precise relief sought;~~  
~~(3) a concise statement of facts, with appropriate references to the record, relevant to the issues~~

~~concerning the precise relief sought;~~

~~(4) argument, preceded by a summary, containing the contentions of the party with respect to the issues presented and the reasons for them, with citations to the authorities, statutes, and parts of the record relied on; and~~

~~(5) a short conclusion stating the precise relief sought.~~

**(f) Oral Arguments on Motions.**

The court on its own initiative may set any motion for oral argument or hearing. Otherwise, requests for oral arguments on motions will be granted on good cause shown. If oral argument is to be heard, the motion will be promptly set for hearing. Otherwise, motions are to be submitted to and will be determined by the court on the basis of the written memoranda of the parties.

*See [DUCivR 56-1](#) for specific provisions regarding summary judgment motions and **related** memoranda. ~~in support and opposition to such motions.~~*

## DUCivR 26-2 STANDARD PROTECTIVE ORDER AND STAYS OF DEPOSITIONS

**Reporter's Note: The proposed amendment would facilitate the discovery process by ensuring that discovery can continue in the absence of a case-specific protective order by providing a standard protective order.**

**Approved by the Rules Committee – July 10, 2012**

**(a) Standard Protective Order**

This rule shall apply in every case involving the disclosure of any information designated as confidential. Except as otherwise ordered, it shall not be a legitimate ground for objecting to or refusing to produce information or documents in response to an opposing party's discovery request ( e. g. interrogatory, document request, request for admissions, deposition question ) or declining to provide information otherwise required to be disclosed pursuant to Fed.R. Civ. P. 26 (a)(1) that the discovery request or disclosure requirement is premature because a protective order has not been entered by the court. Unless the court enters a different protective order, pursuant to stipulation or motion, the Standard Protective Order in Appendix \_\_\_ hereto shall govern and discovery under the Standard Protective Order shall proceed. The Standard Protective Order is effective by virtue of this rule and need not be entered in the docket of the specific case.

**(b) Motion for Protective Order and Stay of Deposition**

A party or a witness may stay a properly noticed oral deposition by filing a motion for a protective order or other relief by the third business day after service of the notice of deposition. The deposition will be stayed until the motion is determined. Motions filed after the third business day will not result in an automatic stay.

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH

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\_\_\_\_\_,  
Plaintiffs,  
vs.  
\_\_\_\_\_,  
Defendants.

STANDARD PROTECTIVE ORDER

Civil No.

Honorable

Magistrate

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Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure and for good cause,

IT IS HEREBY ORDERED THAT:

1. Scope of Protection

This Standard Protective Order shall govern any record of information produced in this action and designated pursuant to this Standard Protective Order, including all designated deposition testimony, all designated testimony taken at a hearing or other proceeding, all designated deposition exhibits, interrogatory answers, admissions, documents and other discovery materials, whether produced informally or in response to interrogatories, requests for admissions, requests for production of documents or other formal methods of discovery.

This Standard Protective Order shall also govern any designated record of information produced in this action pursuant to required disclosures under any federal procedural rule or local rule of the Court and any supplementary disclosures thereto.

This Standard Protective Order shall apply to the parties and to any nonparty from whom discovery may be sought who desires the protection of this Protective Order.

Nonparties may challenge the confidentiality of the protected information by filing a motion to intervene and a motion to de-designate.

2. Definitions

(a) The term PROTECTED INFORMATION shall mean confidential or proprietary technical, scientific, financial, business, health, or medical information designated as such by the producing party.

(b) The term CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, shall mean PROTECTED INFORMATION that is so designated by the producing party. The designation CONFIDENTIAL - ATTORNEYS EYES ONLY may be used only for the following types of past, current, or future PROTECTED INFORMATION: (1) sensitive technical information, including current research, development and manufacturing information and patent prosecution information, (2) sensitive business information, including highly sensitive financial or marketing information and the identity of suppliers, distributors and potential or actual customers, (3) competitive technical information, including technical analyses or comparisons of competitor's products, (4) competitive business information, including non-public financial or marketing analyses or comparisons of competitor's products and strategic product planning, or (5) any other PROTECTED INFORMATION the disclosure of which to non-qualified people subject to this Standard Protective Order the producing party reasonably and in good faith believes would likely cause harm.

(c) The term CONFIDENTIAL INFORMATION shall mean all PROTECTED INFORMATION that is not designated as "CONFIDENTIAL - ATTORNEYS EYES ONLY" information.

(d) The term TECHNICAL ADVISOR shall refer to any person who is not a party to this action and/or not presently employed by the receiving party or a company affiliated through common ownership, who has been designated by the receiving party to receive another party's PROTECTED INFORMATION, including CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, and CONFIDENTIAL INFORMATION. Each party's TECHNICAL ADVISORS shall be limited to such person as, in the judgment of that party's counsel, are reasonably necessary for development and presentation of that party's case. These persons include outside experts or consultants retained to provide technical or other expert services such as expert testimony or otherwise assist in trial preparation.

3. Disclosure Agreements

(a) Each receiving party's TECHNICAL ADVISOR shall sign a disclosure agreement in the form attached hereto as Exhibit A. Copies of any disclosure agreement in the form of Exhibit A signed by any person or entity to whom PROTECTED INFORMATION is disclosed shall be provided to the other party promptly after execution by facsimile and overnight mail. No disclosures shall be made to a TECHNICAL ADVISOR for a period of five (5) business days after the disclosure agreement is provided to the other party.

(b) Before any PROTECTED INFORMATION is disclosed to outside TECHNICAL ADVISORS, the following information must be provided in writing to the producing party and received no less than five (5) business days before the intended date of disclosure to that outside TECHNICAL ADVISOR: the identity of that outside TECHNICAL ADVISOR, business address and/or affiliation and a current curriculum vitae of the TECHNICAL ADVISOR, and, if not contained in the TECHNICAL

ADVISOR's curriculum vitae, a brief description, including education, present and past employment and general areas of expertise of the TECHNICAL ADVISOR. If the producing party objects to disclosure of PROTECTED INFORMATION to an outside TECHNICAL ADVISOR, the producing party shall within five (5) business days of receipt serve written objections identifying the specific basis for the objection, and particularly identifying all information to which disclosure is objected. Failure to object within five (5) business days shall authorize the disclosure of PROTECTED INFORMATION to the TECHNICAL ADVISOR. As to any objections, the parties shall attempt in good faith to promptly resolve any objections informally. If the objections cannot be resolved, the party seeking to prevent disclosure of the PROTECTED INFORMATION to the expert shall move within five (5) business days for an Order of the Court preventing the disclosure. The burden of proving that the designation is proper shall be upon the producing party. If no such motion is made within five (5) business days, disclosure to the TECHNICAL ADVISOR shall be permitted. In the event that objections are made and not resolved informally and a motion is filed, disclosure of PROTECTED INFORMATION to the TECHNICAL ADVISOR shall not be made except by Order of the Court.

(c) Any disclosure agreement executed by any person affiliated with a party shall be provided to any other party who, based upon a good faith belief that there has been a violation of this order, requests a copy.

(d) No party shall attempt to depose any TECHNICAL ADVISOR until such time as the TECHNICAL ADVISOR is designated by the party engaging the TECHNICAL ADVISOR as a testifying expert. Notwithstanding the preceding sentence, any party may depose a TECHNICAL ADVISOR as a fact witness provided that the party

seeking such deposition has a good faith, demonstrable basis independent of the disclosure agreement of Exhibit A or the information provided under subparagraph (a) above that such person possesses facts relevant to this action, or facts likely to lead to the discovery of admissible evidence; however, such deposition, if it precedes the designation of such person by the engaging party as a testifying expert, shall not include any questions regarding the scope or subject matter of the engagement. In addition, if the engaging party chooses not to designate the TECHNICAL ADVISOR as a testifying expert, the non-engaging party shall be barred from seeking discovery or trial testimony as to the scope or subject matter of the engagement.

4. Designation of Information

(a) Documents and things produced or furnished during the course of this action shall be designated as containing CONFIDENTIAL INFORMATION by placing on each page, each document (whether in paper or electronic form), or each thing a legend substantially as follows:

CONFIDENTIAL INFORMATION

(b) Documents and things produced or furnished during the course of this action shall be designated as containing information which is CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY by placing on each page, each document (whether in paper or electronic form), or each thing a legend substantially as follows:

CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY

(c) During discovery a producing party shall have the option to require that all or batches of materials be treated as containing CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY during inspection and to make its

designation as to particular documents and things at the time copies of documents and things are furnished.

(d) A party may designate information disclosed at a deposition as CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY by requesting the reporter to so designate the transcript at the time of the deposition.

(e) A producing party shall designate its discovery responses, responses to requests for admission, briefs, memoranda and all other papers sent to the court or to opposing counsel as containing CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY when such papers are served or sent.

(f) A party shall designate information disclosed at a hearing or trial as CONFIDENTIAL INFORMATION or as CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY by requesting the court, at the time the information is proffered or adduced, to receive the information only in the presence of those persons designated to receive such information and court personnel, and to designate the transcript appropriately.

(g) The parties will use reasonable care to avoid designating any documents or information as CONFIDENTIAL INFORMATION or as CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY that is not entitled to such designation or which is generally available to the public. The parties shall designate only that part of a document or deposition that is CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, rather than the entire document or deposition. For example, if a party claims that a document contains pricing information that is CONFIDENTIAL – ATTORNEYS EYES ONLY, the party will designate only that

part of the document setting forth the specific pricing information as ATTORNEYS EYES ONLY, rather than the entire document.

(h) In multi-party cases, Plaintiffs and/or Defendants shall further be able to designate documents as CONFIDENTIAL INFORMATION – NOT TO BE DISCLOSED TO OTHER PLAINTIFFS or CONFIDENTIAL INFORMATION – NOT TO BE DISCLOSED TO OTHER DEFENDANTS for documents that shall not be disclosed to other parties.

5. Disclosure and Use of Confidential Information

Information that has been designated CONFIDENTIAL INFORMATION or as CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY shall be disclosed by the receiving party only to Qualified Recipients. All Qualified Recipients shall hold such information received from the disclosing party in confidence, shall use the information only for purposes of this action and for no other action, and shall not use it for any business or other commercial purpose, and shall not use it for filing or prosecuting any patent application (of any type) or patent reissue or reexamination request, and shall not disclose it to any person, except as hereinafter provided. All information that has been designated CONFIDENTIAL INFORMATION or as CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY shall be carefully maintained so as to preclude access by persons who are not qualified to receive such information under the terms of this Order.

In multi-party cases, documents designated as CONFIDENTIAL INFORMATION – NOT TO BE DISCLOSED TO OTHER PLAINTIFFS or CONFIDENTIAL INFORMATION – NOT TO BE DISCLOSED TO OTHER DEFENDANTS shall not be disclosed to other plaintiffs and/or defendants.

6. Qualified Recipients

For purposes of this Order, "Qualified Recipient" means

(a) For CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY:

(1) Outside counsel of record for the parties in this action, and the partners, associates, secretaries, paralegal assistants, and employees of such counsel to the extent reasonably necessary to render professional services in the action, outside copying services, document management services and graphic services;

(2) Court officials involved in this action (including court reporters, persons operating video recording equipment at depositions, and any special master appointed by the Court);

(3) Any person designated by the Court in the interest of justice, upon such terms as the Court may deem proper;

(4) Any outside TECHNICAL ADVISOR employed by the outside counsel of record, subject to the requirements in Paragraph 3 above; and

(5) Any witness during the course of discovery, so long as it is stated on the face of each document designated CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY being disclosed that the witness to whom a party is seeking to disclose the document was either an author, recipient, or otherwise involved in the creation of the document. Where it is not stated on the face of the confidential document being disclosed that the witness to whom a party is seeking to disclose the document was either an author, recipient, or otherwise involved in the creation of the document, the party seeking disclosure may nonetheless disclose the confidential document to the witness, provided that: (i) the party seeking disclosure has a reasonable basis for believing that the

witness in fact received or reviewed the document, (ii) the party seeking disclosure provides advance notice to the party that produced the document, and (iii) the party that produced the document does not inform the party seeking disclosure that the person to whom the party intends to disclose the document did not in fact receive or review the documents. Nothing herein shall prevent disclosure at a deposition of a document designated CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY to the officers, directors, and managerial level employees of the party producing such CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, or to any employee of such party who has access to such CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY in the ordinary course of such employee's employment.

(b) FOR CONFIDENTIAL INFORMATION:

- (1) Those persons listed in paragraph 6(a);
- (2) In-house counsel for a party to this action who are acting in a legal capacity and who are actively engaged in the conduct of this action, and the secretary and paralegal assistants of such counsel to the extent reasonably necessary;
- (3) The insurer of a party to litigation and employees of such insurer to the extent reasonably necessary to assist the party's counsel to afford the insurer an opportunity to investigate and evaluate the claim for purposes of determining coverage and for settlement purposes; and
- (4) Employees of the parties.

7. Use of Protected Information

(a) In the event that any receiving party's briefs, memoranda, discovery requests, requests for admission or other papers of any kind which are served or filed shall

include another party's CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, the papers shall be appropriately designated pursuant to paragraphs 4(a) and (b), and pursuant to DUCivR 5.2, and shall be treated accordingly.

(b) All documents, including attorney notes and abstracts, which contain another party's CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, shall be handled as if they were designated pursuant to paragraph 4(a) or (b).

(c) Documents, papers and transcripts filed with the court which contain any other party's CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY shall be filed in sealed envelopes and labeled according to DUCivR 5-2.

(d) To the extent that documents are reviewed by a receiving party prior to production, any knowledge learned during the review process will be treated by the receiving party as CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY until such time as the documents have been produced, at which time any stamped classification will control. No photograph or any other means of duplication, including but not limited to electronic means, of materials provided for review prior to production is permitted before the documents are produced with the appropriate stamped classification.

(e) In the event that any question is asked at a deposition with respect to which a party asserts that the answer requires the disclosure of CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, such question shall nonetheless be answered by the witness fully and completely. Prior to answering, however, all persons present shall be advised of this Order by the party making

the confidentiality assertion and, in the case of information designated as CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY at the request of such party, all persons who are not allowed to obtain such information pursuant to this Order, other than the witness, shall leave the room during the time in which this information is disclosed or discussed.

(f) Nothing in this Protective Order shall bar or otherwise restrict outside counsel from rendering advice to his or her client with respect to this action and, in the course thereof, from relying in a general way upon his examination of materials designated CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, provided, however, that in rendering such advice and in otherwise communicating with his or her clients, such counsel shall not disclose the specific contents of any materials designated CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY.

8. Inadvertent Failure to Designate

(a) In the event that a producing party inadvertently fails to designate any of its information pursuant to paragraph 4, it may later designate by notifying the receiving parties in writing. The receiving parties shall take reasonable steps to see that the information is thereafter treated in accordance with the designation.

(b) It shall be understood however, that no person or party shall incur any liability hereunder with respect to disclosure that occurred prior to receipt of written notice of a belated designation.

9. Challenge to Designation

(a) Any receiving party may challenge a producing party's designation at any time. A failure of any party to expressly challenge a claim of confidentiality or any

document designation shall not constitute a waiver of the right to assert at any subsequent time that the same is not in-fact confidential or not an appropriate designation for any reason.

(b) Notwithstanding anything set forth in paragraph 2(a) and (b) herein, any receiving party may disagree with the designation of any information received from the producing party as CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY. In that case, any receiving party desiring to disclose or to permit inspection of the same otherwise than is permitted in this Order, may request the producing party in writing to change the designation, stating the reasons in that request. The producing party shall then have five (5) business days from the date of receipt of the notification to:

- (i) advise the receiving parties whether or not it persists in such designation; and
- (ii) if it persists in the designation, to explain the reason for the particular designation.

(c) If its request under subparagraph (b) above is turned down, or if no response is made within five (5) business days after receipt of notification, any producing party may then move the court for a protective order or any other order to maintain the designation. The burden of proving that the designation is proper shall be upon the producing party. If no such motion is made within five (5) business days, the information will be de-designated to the category requested by the receiving party. In the event objections are made and not resolved informally and a motion is filed, disclosure of information shall not be made until the issue has been resolved by the Court (or to any limited extent upon which the parties may agree).

No party shall be obligated to challenge the propriety of any designation when made, and failure to do so shall not preclude a subsequent challenge to the propriety of such designation.

(d) With respect to requests and applications to remove or change a designation, information shall not be considered confidential or proprietary to the producing party if:

- (i) the information in question has become available to the public through no violation of this Order; or
- (ii) the information was known to any receiving party prior to its receipt from the producing party; or
- (iii) the information was received by any receiving party without restrictions on disclosure from a third party having the right to make such a disclosure.

10. Inadvertently Produced Privileged Documents

The parties hereto also acknowledge that regardless of the producing party's diligence an inadvertent production of attorney-client privileged or attorney work product materials may occur. In accordance with Fed. R. Civ. P. 26(b)(5) and Fed. R. Evid. 502, they therefore agree that if a party through inadvertence produces or provides discovery that it believes is subject to a claim of attorney-client privilege or attorney work product, the producing party may give written notice to the receiving party that the document or thing is subject to a claim of attorney-client privilege or attorney work product and request that the document or thing be returned to the producing party. The receiving party shall return to the producing party such document or thing. Return of the document or thing shall not constitute an admission or concession, or permit any inference, that the returned

document or thing is, in fact, properly subject to a claim of attorney-client privilege or attorney work product, nor shall it foreclose any party from moving the Court pursuant to Fed. R. Civ. P. 26(b)(5) and Fed. R. Evid. 502 for an Order that such document or thing has been improperly designated or should be produced.

11. Inadvertent Disclosure

In the event of an inadvertent disclosure of another party's CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY to a non-Qualified Recipient, the party making the inadvertent disclosure shall promptly upon learning of the disclosure: (i) notify the person to whom the disclosure was made that it contains CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY subject to this Order; (ii) make all reasonable efforts to preclude dissemination or use of the CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY by the person to whom disclosure was inadvertently made including, but not limited to, obtaining all copies of such materials from the non-Qualified Recipient; and (iii) notify the producing party of the identity of the person to whom the disclosure was made, the circumstances surrounding the disclosure, and the steps taken to ensure against the dissemination or use of the information.

12. Limitation

This Order shall be without prejudice to any party's right to assert at any time that any particular information or document is or is not subject to discovery, production or admissibility on the grounds other than confidentiality.

13. Conclusion of Action

(a) At the conclusion of this action, including through all appeals, each party or other person subject to the terms hereof shall be under an obligation to destroy or return to the producing party all materials and documents containing CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY and to certify to the producing party such destruction or return. Such return or destruction shall not relieve said parties or persons from any of the continuing obligations imposed upon them by this Order.

(b) After this action, trial counsel for each party may retain one archive copy of all documents and discovery material even if they contain or reflect another party's CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY. Trial counsel's archive copy shall remain subject to all obligations of this Order.

(c) The provisions of this paragraph shall not be binding on the United States, any insurance company, or any other party to the extent that such provisions conflict with applicable Federal or State law. The Department of Justice, any insurance company, or any other party shall notify the producing party in writing of any such conflict it identifies in connection with a particular matter so that such matter can be resolved either by the parties or by the Court.

14. Production by Third Parties Pursuant to Subpoena

Any third party producing documents or things or giving testimony in this action pursuant to a subpoena, notice or request may designate said documents, things, or testimony as CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY. The parties agree that they will treat CONFIDENTIAL

INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY produced by third parties according to the terms of this Order.

15. Compulsory Disclosure to Third Parties

If any receiving party is subpoenaed in another action or proceeding or served with a document or testimony demand or a court order, and such subpoena or demand or court order seeks CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY of a producing party, the receiving party shall give prompt written notice to counsel for the producing party and allow the producing party an opportunity to oppose such subpoena or demand or court order prior to the deadline for complying with the subpoena or demand or court order. No compulsory disclosure to third parties of information or material exchanged under this Order shall be deemed a waiver of any claim of confidentiality, except as expressly found by a court or judicial authority of competent jurisdiction.

16. Jurisdiction to Enforce Standard Protective Order

After the termination of this action, the Court will continue to have jurisdiction to enforce this Order.

17. Modification of Standard Protective Order

This Order is without prejudice to the right of any person or entity to seek a modification of this Order at any time either through stipulation or Order of the Court.

18. Confidentiality of Party's own Documents

Nothing herein shall affect the right of the designating party to disclose to its officers, directors, employees, attorneys, consultants or experts, or to any other person, its own information. Such disclosure shall not waive the protections of this Standard Protective Order and shall not entitle other parties or their attorneys to disclose such

information in violation of it, unless by such disclosure of the designating party the information becomes public knowledge. Similarly, the Standard Protective Order shall not preclude a party from showing its own information, including its own information that is filed under seal by a party, to its officers, directors, employees, attorneys, consultants or experts, or to any other person.

SO ORDERED AND ENTERED BY THE COURT PURSUANT TO DUCivR 26-2  
EFFECTIVE AS OF THE COMMENCE OF THE ACTION.

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH

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<p>_____, Plaintiffs, vs. _____, Defendant.</p>	<p>DISCLOSURE AGREEMENT</p> <p>Honorable Magistrate Judge</p>
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I, \_\_\_\_\_, am employed by \_\_\_\_\_. In connection with this action, I am:

\_\_\_\_\_ a director, officer or employee of \_\_\_\_\_ who is directly assisting in this action;

\_\_\_\_\_ have been retained to furnish technical or other expert services or to give testimony (a "TECHNICAL ADVISOR");

\_\_\_\_\_ Other Qualified Recipient (as defined in the Protective Order) (Describe: \_\_\_\_\_).

I have read, understand and agree to comply with and be bound by the terms of the Standard Protective Order in the matter of \_\_\_\_\_, Civil Action No. \_\_\_\_\_, pending in the United States District Court for the District of Utah. I further state that the Standard Protective Order entered by the Court, a copy of which has been given to me and which I have read, prohibits me from using any PROTECTED INFORMATION, including documents, for any purpose not appropriate or necessary to my participation in this action or disclosing such documents or information to

any person not entitled to receive them under the terms of the Standard Protective Order. To the extent I have been given access to PROTECTED INFORMATION, I will not in any way disclose, discuss, or exhibit such information except to those persons whom I know (a) are authorized under the Standard Protective Order to have access to such information, and (b) have executed a Disclosure Agreement. I will return, on request, all materials containing PROTECTED INFORMATION, copies thereof and notes that I have prepared relating thereto, to counsel for the party with whom I am associated. I agree to be bound by the Standard Protective Order in every aspect and to be subject to the jurisdiction of the United States District Court for the District of Utah for purposes of its enforcement and the enforcement of my obligations under this Disclosure Agreement. I declare under penalty of perjury that the foregoing is true and correct.

\_\_\_\_\_  
Signed by Recipient

\_\_\_\_\_  
Name (printed)

Date: \_\_\_\_\_

## **DUCivR 56-1 SUMMARY JUDGMENT: MOTIONS AND SUPPORTING MEMORANDA**

**Reporter's Note: Extensive modifications have been made to the format of memoranda in support of or in opposition to motions for motions for summary judgment. The amendment also incorporates the requirement that the motion and memorandum in support be filed as a single document. Additional clarification is made in the rule about the appropriate procedure for objecting to evidence presented in summary judgment briefing.**

**Approved by the Committee on July 10, 2012.**

### **(a) Motions.**

The original and a copy of a summary judgment motion must be filed with the clerk of court, or presented to the court during proceedings, except as otherwise provided in this rule and in [DUCivR 5-1](#). Motions for summary judgment must set forth succinctly, but without argument, the specific grounds of the judgment sought. Failure to comply with the requirements of this section may result in sanctions that may include (i) returning the motion to counsel for resubmission in accordance with the rule, (ii) denial of the motion, or (iii) other sanctions deemed appropriate by the court. Merely to repeat the language of a relevant rule of civil procedure does not meet the requirements of this section.

### **Length and Fact Statement of Summary Judgment Memoranda; Filing Times. [Summary Judgment Motions and Memoranda; Length and Filing Times.](#)**

A motion for summary judgment and the supporting memorandum must clearly identify itself in the case caption and introduction. The memorandum in support of a motion for summary judgment must begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts must be numbered and refer with particularity to those portions of the record on which movant relies. Filing times and length of memoranda are governed by [DUCivR 7-1\(b\)\(3\)](#) and [\(4\)](#). [DUCivR 7-1](#).

### **(b)**

### **(c) Contested Facts Declared in Summary Judgment Motion.**

A memorandum in opposition to a motion for summary judgment must begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute must be numbered, must refer with particularity to those portions of the record on which the opposing party relies and, if applicable, must state the number of the movant's fact that is disputed. All material facts of record meeting the requirements of Fed. R. Civ. P. 56 that are set forth with particularity in the statement of the movant will be deemed admitted for the purpose of summary judgment, unless specifically controverted by the statement

~~of the opposing party identifying material facts of record meeting the requirements of Fed. R. Civ. P. 56.~~

**Motion; Elements and Undisputed Material Facts; and Background Facts.**

A motion for summary judgment must include the following sections:

- (i) An introduction summarizing why summary judgment should be granted;
- (ii) A section entitled "Statement of Elements and Undisputed Material Facts" that contains the following:
  - a. Each legal element required to prevail on the motion;
  - b. Citation to legal authority supporting each stated element (without argument);<sup>1</sup>
  - c. Under each element, a concise statement of the material facts necessary to meet that element as to which the moving party contends no genuine issue exists. Only those facts that entitle the moving party to judgment as a matter of law should be included in this section. Each asserted fact must be presented in an individually numbered paragraph that cites with particularity the evidence in the record supporting each factual assertion (e.g., deposition transcript, affidavit, declaration, and other documents).
- (iii) An argument section explaining why under the applicable legal principles the asserted undisputed facts entitle the party to summary judgment.

The motion may, but need not, include a separate background section that contains a concise statement of facts, *whether disputed or not*, for the limited purpose of providing background and context for the case, dispute, and motion. This section may follow the introduction and may, but need not, cite to evidentiary support. The motion may also include a concise conclusion explaining the relief requested.

**(c) Memorandum in Opposition; Response to Elements and Facts; and Background Facts.**

A memorandum in opposition to a motion for summary judgment must include the following sections:

- (i) An introduction summarizing why summary judgment should be denied;
- (ii) A section entitled "Response to Statement of Elements and Undisputed Material Facts" that contains the following:

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<sup>1</sup>**ADVISORY COMMITTEE NOTE:** The purpose of the Statement of Elements and Undisputed Material Facts and the corresponding section in the memorandum in opposition to a motion for summary judgment is to distill the relevant legal issues and material facts for the court while reserving arguments for the respective argument sections of the motion and opposition memorandum.

- a. A concise response to each legal element stated by the moving party. If the non-moving party agrees with a stated element, state "agreed" for that element. If the party disagrees with a stated element, state what the party believes is the correct element and provide citation to legal authority supporting the party's contention (without argument). If the non-moving party agrees that any stated element has been met, so state.
  - b. A response to each stated material fact. Under each element that a party disputes as having been met, restate each numbered paragraph from the statement of material facts provided in support of that element in the motion. If a fact is undisputed, so state. If a fact is disputed, so state and concisely describe and cite with particularity the evidence on which the non-moving party relies to dispute that fact (without legal argument).<sup>2</sup>
  - c. A statement of any additional material facts, if applicable. If additional material facts are relevant to show that an element has not been met or that there is a genuine issue for trial, state each such fact separately in an individually numbered paragraph that cites with particularity the evidence in the record supporting each factual assertion (e.g., deposition transcript, affidavit, declaration, and other documents).
  - d. A statement of additional elements and material facts, if applicable. If there are additional legal elements not stated by the moving party that the non-moving party contends preclude summary judgment, state each such element along with citation to legal authority that supports the element (without argument) and any additional material facts that create a genuine issue for trial on these elements. Each additional asserted fact must be presented in an individually numbered paragraph that cites with particularity the evidence in the record supporting each factual assertion (e.g., deposition transcript, affidavit, declaration, and other documents).
- (iii) An argument section explaining why, under the applicable legal principles, summary judgment should be denied.

The opposition may, but need not, include a separate background section that contains a concise statement of facts, whether disputed or not, for the limited purpose of providing background and context for the case, dispute, and motion. This section may follow the introduction and may, but need not, cite to evidentiary support. The memorandum may also provide a concise conclusion.

For the purpose of summary judgment, all material facts of record meeting the requirements of Fed. R. Civ. P. 56 that are set forth with particularity in the movant's statement of material facts will be deemed admitted unless specifically controverted by the statement of the opposing party identifying and citing to material facts of record meeting the requirements of Fed. R. Civ. P. 56.

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<sup>2</sup> **ADVISORY COMMITTEE NOTE:** Parties who wish to raise evidentiary objections may do so pursuant to DUCivR 7-1(b)(1)(B) and Fed. R. Civ. P. 56(c)(2).

**(d) Reply**

The moving party may file a reply memorandum consistent with DUCiv R 7-1. In the reply, a moving party may only cite additional evidence not previously cited in the opening memorandum to rebut a claim that a material fact is in dispute. Otherwise, no additional evidence may be cited in the reply memorandum, and if cited, the court will disregard it.

**(d) (e) Citations of Supplemental Authority.**

When pertinent and significant authorities come to the attention of a party after the party's memorandum in support of or in opposition to a summary judgment motion has been filed, or after oral argument but before decision, a party may promptly file a notice with the court and serve a copy on all counsel, setting forth the citations. There must be a reference either to the page of the memorandum or to a point argued orally to which the citations pertain, but the notice must state, without argument, the reasons for the supplemental citations. Any response must be made, filed promptly, and be similarly limited.

**(e) (f) Supporting Exhibits to Memoranda.**

If any memorandum in support of or opposition to a summary judgment motion cites documents, interrogatory answers, deposition testimony, or other discovery materials, relevant portions of those materials must be attached to or submitted with the memorandum when it is filed with the court and served on the other parties. **Such evidentiary materials must be admissible under the Federal Rules of Evidence, which require that the material be authenticated by a sworn affidavit, declaration, or other sworn testimony, such as a deposition, or as otherwise provided in the Rules of Evidence.**

**(f) (g) Failure to Respond.**

Failure to respond timely to a motion for summary judgment may result in the court's granting the motion without further notice.

See [DUCivR 7-1](#) for guidelines regarding motions and memoranda in general, and [DU](#)

## DUCivR 72-2 MAGISTRATE JUDGE FUNCTIONS AND DUTIES IN CIVIL MATTERS

Approved by the Rules Committee on July 10, 2011

Published for Public Comment

Reporter's Note. This rule is amended to correct a statutory citation.

### **(a) General Authority.**

Unless otherwise directed by the court, magistrate judges are authorized to:

- (1) grant applications to proceed without prepayment of fees;
- (2) authorize levy, entry, search, and seizure requested by authorized agents of the Internal Revenue Service under 26 U.S.C. §6331 upon a determination of probable cause;
- (3) conduct examinations of judgment debtors and other supplemental proceedings in accordance with Fed. R. Civ. P. 69;
- (4) authorize the issuance of postjudgment collection writs pursuant to the Federal Debt Collection Act;
- (5) conduct initial scheduling conferences under Fed. R. Civ. P. 16, enter stipulated scheduling orders, and grant or deny stipulated motions to amend scheduling orders; and
- (6) conduct all pretrial proceedings contemplated by 28 U.S.C. §636(b) and Fed. R. Civ. P. 72 in cases assigned to them under General Order 07-001.

*The remainder of the current rule is unchanged.*

## **DUCrimR 11-1 PLEA AGREEMENTS**

Reporter's Note: This provision requires the filing a sealed document and related docket entry in all criminal cases following the docketing of a plea agreement. If the defendant has a formal cooperation agreement, it will be made part of the court's record and remain under seal. If there is no cooperation agreement, the docket will have an entry and related sealed document which serves as a placeholder entry. Because the entry will appear in all cases pursuant to this rule, the defendant will not be identified as cooperating by those accessing the docket via the internet.

Approved by the Rules Committee on February 14, 2011.

All plea agreements must be in writing and signed by counsel and the defendant. The plea agreement must be accompanied by a written stipulation of facts relevant to a plea of guilty which, if appropriate, includes the amount of restitution and a list of victims. If the agreement involves the dismissal of other charges or stipulates that a specific sentence is appropriate, the court will review and consider the presentence report before accepting or rejecting the plea agreement. **All plea agreements shall be accompanied by a sealed document entitled "Plea Supplement."** The Plea Supplement will be electronically filed under seal.

## **DUCrimR 57-15 MAGISTRATE JUDGE AUTHORITY IN CRIMINAL CASES**

**Reporter's Note.** This rule is amended to reflect current practice.

**Approved by the Committee on July 10, 2012.**

### **(a) General Authority.**

Unless otherwise ordered by the court, magistrate judges are authorized to:

- (1) accept criminal complaints, determine whether probable cause exists, and issue arrest warrants, summons, and search warrants, including those based on oral or telephonic testimony;
- (2) administer oaths and affirmations; take acknowledgments, affidavits, and depositions;
- (3) conduct initial appearance proceedings, inform defendants of their rights, set bail, **enter orders of detention** and impose conditions of release;
- (4) dismiss complaints in criminal proceedings prior to indictment or information upon motion of the United States attorney;
- (5) appoint counsel for indigent defendants,
- (6) conduct detention **and pretrial release revocation** hearings;
- (7) issue subpoenas, writs of habeas corpus ad testificandum or habeas corpus ad prosequendum, and other orders necessary to secure the presence of parties, witnesses or evidence for court proceedings;
- (8) order the forfeiture or exoneration of bonds;
- (9) issue warrants of removal;
- (10) conduct hearings under Fed. R. Crim. P. 20;
- (11) conduct full preliminary examinations;
- (12) set bail and appoint counsel if appropriate, for material witnesses;
- (13) issue orders (i) authorizing the installation of devices such as traps/traces and pen registers, and (ii) directing a communication common carrier, as defined in 47 U.S.C. § 153(h) including a telephone company, to provide assistance to a named federal investigative agency in accomplishing the installation of traps, traces and pen registers;
- (14) receive grand jury returns **and pretrial release violation petitions** and authorize the issuance of arrest warrants or summons thereupon; and
- (15) take a plea of guilty on (i) appropriate reference from the district judge assigned to the case, and (ii) the consent of the parties.

### **(b) Criminal Pretrial Authority.**

After an indictment or felony information has been filed and assigned to a district judge under [DUCrimR 57-2](#), magistrate judges are authorized to:

- (1) conduct arraignments;
- (2) accept or enter not guilty pleas;
- (3) order presentence reports;
- (4) hear and rule on motions to modify bail and/or conditions of release; and,
- (5) conduct scheduling hearings pursuant to Fed. R. Crim. P. 17.1.

**(c) Authority to Conduct Hearings, Prepare Report and Recommendations, and Determine Preliminary Matters.**

Upon entry by a district judge of an order of reference under 28 U.S.C. § 636(b)(1)(A), magistrate judges are authorized to determine nondispositive pretrial matters, manage the discovery process, and rule on motions by attorneys appointed under the Criminal Justice Act for services under that act including appointment of experts and investigators. Upon entry by a district judge of an order of reference under 28 U.S.C. § 636(b)(1)(B), magistrate judges are authorized to (i) hear motions to dismiss or quash an indictment and motions to suppress evidence, and (ii) submit to the assigned district judge a report with proposed findings of fact and recommendations.

**(d) Criminal Trial Authority.**

Magistrate judges are authorized (i) to try persons accused of and (ii) to sentence persons convicted of misdemeanors committed within this district in accordance with 18 U.S.C. § 3401 and as otherwise provided by statute.

**(e) Extradition Proceedings.**

Unless otherwise ordered by a judge of this court, when a foreign government requests the arrest of a fugitive pursuant to a treaty or convention for extradition between the United States and the requesting country and on the basis of a complaint under oath, a magistrate judge of this court is authorized to issue warrants and conduct extradition proceedings in accordance with the provisions set forth in 18 U.S.C. § 3184.

**(f) Specialized Courts.**

Upon entry by a district court of an order of reference or consistent with a sentencing order, a magistrate judge is authorized to preside over matters in a specialized court. Specialized courts may address issues confronting offenders as they return to their communities including overseeing services providing diagnostic and risk assessment, education and job training, substance abuse and mental health treatment and mentoring.

## **DUCivR 15-1 AMENDED COMPLAINTS**

Reporter's Note: This rule is enacted to reflect current practice in obtaining permission to file an amended complaint and the procedure for filing that complaint once leave has been granted.

Approved by the Committee on July 10, 2012.

### **Amended Complaints.**

Parties moving under FRCP 15-1 to amend a complaint must attach the proposed amended complaint as an exhibit to the motion for leave to file. A party who has been granted leave to file must subsequently file the amended complaint with the court. The amended complaint filed must be the same complaint proffered to the court, unless the court has ordered otherwise.