Agenda
Advisory Committee on Rules of Civil Procedure

August 3, 2011
4: 00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Judicial Council Room, Suite N31

Approval of minutes.	Tab 1	Fran Wikstrom
Disclosure and Discovery Rules	Tab 2	Fran Wikstrom
Comments to Disclosure and Discovery Rules	Tab 3	

Committee Web Page: http://www.utcourts.gov/committees/civproc/

Meeting Schedule

September 28, 2011
October 26, 2011
November 16, 2011
January 25, 2012

Tab 1

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE OF THE RULES OF CIVIL PROCEDURE

Wednesday May 25, 2011
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Chair, W. Cullen Battle, Professor David Moore, Honorable Kate Toomey, Terrie T. McIntosh, Leslie W. Slaugh, Honorable Lyle R. Anderson, James T. Blanch, W. Todd Shaughnessy, David W. Scofield, Lincoln L. Davies, Robert J. Shelby, Jonathan O. Hafen

EXCUSED: Trystan B. Smith, Honorable David O. Nuffer, Barbara L. Townsend

TELEPHONE: Honorable Derek P. Pullan, Lori Woffinden

STAFF: Timothy M. Shea, Sammi V. Anderson, Diane Abegglen

GUESTS: Steven G. Johnson (Chair of the Advisory Committee for the Rules of Professional Conduct), Honorable Randall N. Skanchy (Third District Judge)

I. APPROVAL OF MINUTES:

Mr. Wikstrom called the meeting to order at 4:00 p.m. Mr. Wikstrom entertained comments from the committee concerning the April 27, 2011 minutes. The committee unanimously approved the minutes.

II. DISQUALIFICATION OF COLLABORATIVE LAWYERS.

Mr. Steven G. Johnson, Chair of the Advisory Committee for the Rules of Professional Conduct, presented to the committee on the issue of collaborative lawyering. Collaborative lawyering was the subject of a bill introduced during the 2011 legislative session. The bill was sponsored by Mr. Brian Florence. Parties can agree to use collaborative lawyering where they wish to resolve the dispute as amicably as possible and without litigation. The attorneys under such an agreement agree to provide full disclosure absent discovery and to otherwise cooperate fully toward resolution. A potential problem arises if the matter nonetheless is not resolved and heads toward litigation. Mr. Florence's bill would provide for disqualification of the prior attorneys in this event. The courts agreed to look at the issue and consider whether it might better fit as an amendment to a court rule, as opposed to a statute. Mr. Johnson explained that the Professional Conduct Rules committee did not see this as an ethical issue since it does not seem a matter of right or wrong, and since there is no defined conflict of interest scenario articulated in the current Rules of Professional

Conduct that would apply. Mr. Johnson expressed a reluctance to deviate from the Model Rules of Professional Conduct and questioned whether the committee might create a specific subset to Civil Procedure Rule 74 governing disqualification. Mr. Slaugh advocated reserving the issue to the contracting parties. Judge Anderson pointed out the difficulty in defining "collaborative law" for purposes of a rule amendment or a statute. Mr. Shaughnessy queried how attorney-client privilege issues are addressed in the collaborative lawyer arrangement. Mr. Blanch queried whether the committee or more generally, the courts, should work with the legislature to reach mutually agreeable language for the statute, reasoning that, since it is essentially a matter of contract, a statute may be the best place to address it.

Mr. Wikstrom suggested inviting the bill's sponsor, Mr. Brian Florence, to talk with the committee about the collaborative law issue. Mr. Wikstrom asked Mr. Johnson to leave the relevant materials and confirmed with Mr. Johnson that it is acceptable to table this issue until the September 2011 meeting.

III. RULE 65C. POST-CONVICTION RELIEF.

The committee next considered proposed revisions to Rule 65C, governing post-conviction relief. Judge Toomey led the discussion on the proposed revisions, which are intended to flag for the parties and judiciary that Utah Code Ann. Section 78-B-109 provides for appointment of pro bono counsel upon request of an indigent petitioner, to represent the petitioner in the post-conviction court on post-conviction appeal. The proposed revisions also highlight Section 78B-9-202, which governs the appointment and payment of counsel in death penalty cases. The committee suggested amending the title of the revised subsection (j) to "Appointment of Counsel" and shortened the proposed amendment to read "The court may appoint counsel pursuant to Sections 78B-9-109 or 78B-9-202." The proposed amendments were thus revised and unanimously approved.

IV. RULE 83. VEXATIOUS LITIGANTS.

The committee next turned to the topic of a proposed rule addressing vexatious litigants. Judge Skanchy presented the topic and led the discussion. The District Board of Judges has proposed the rule after drafting by a subcommittee of judges and two reviews by the District Board of Judges. The vexatious litigant rule is directed at serial litigants that frequently submit voluminous filings, using imagined courts, etc. Judge Skanchy noted that he is currently a named defendant in an imagined court and Mr. Slaugh noted that his firm is a defendant in similar litigation.

Mr. Blanch asked how courts are without power to deal with vexatious litigants under their inherent powers. Mr. Shea explained that judges would like to have a standard and defined terms and Mr. Slaugh explained that the lack of standards and/or definitions governing the process make it very expensive to get these frivolous actions dismissed. Judge Skanchy noted the difficulty in trying to define a concept that is easy to understand, but can be difficult to define and enforce.

The committee expressed concerns with the proposed rule as drafted. Mr. Slaugh noted that the phrase "tribal courts" is used at line 18 and queried whether the rule should include a definition of "tribal courts", possibly including the phrase "federally recognized." Judge Pullan discussed his

earlier e-mail and proposed revisions. Judge Pullan's main concerns are that the rule as drafted bring together pre-filing orders in a pending action and pre-filing orders as to future claims. Judge Pullan would prefer the rule were redrafted to separate and distinguish between those kinds of orders. Judge Pullan also favored including a section that identifies the different options available to the court for imposing orders dealing with these issues. Judge Pullan further expressed concern about appeals of orders barring future claims. Judge Pullan opined that the rule should tread carefully where the Open Courts provision of the Utah Constitution is concerned because it is the unusual situation where courts are defining access to the courts. Mr. Shea noted that the appeal provision was borrowed from an Ohio statute addressing vexatious litigants. Mr. Slaugh suggested coordinating with the Appellate Rules committee on this issue. Mr. Shea noted the draft should say "there is no appeal of right" because a vexatious litigant could still petition for a writ.

Mr. Wikstrom asked about attorneys fees. Judge Pullan assumed that fees would be awarded, if appropriate, under Rules 11 or 37. Mr. Wikstrom noted that the committee does not have authority to "award" attorneys fees as it happens, for example, under statute or contract. Judge Skanchy stated that the rule is only intended to provide for the bond to be posted to secure fees in the event they are awarded.

Judge Pullan offered to chair a subcommittee to examine the proposed rule more closely and asked Mr. Shaughnessy to participate. Mr. Slaugh volunteered to serve on the subcommittee and Judge Skanchy agreed to work with the subcommittee as well.

V. PUBLIC COMMENTS ON THREE RULES PUBLISHED FOR COMMENT.

Mr. Shea led the discussion as to public comments posted in response to proposed revisions to Rules 101, 64D and 108. The only proposed amendment to Rule 101 was to delete a paragraph and move it to Rule 108. There were no comments as to this proposed amendment. The committee will recommend adoption of the rule as amended.

As to the proposed amendments to Rule 64D, requiring that a party seeking garnishee liability would first be required to show they had "met and conferred" with the garnishee, there were a limited number of comments. The majority of those argued that the proposed revision is not fair because the garnishee has already been given an opportunity to respond appropriately and has failed to do so. Mr. Slaugh noted that it is essentially a discovery issue and should therefore include some meet and confer requirement. Mr. Wikstrom asked the committee for a motion to change the proposed rule in light of the public comments. Hearing no motion, the committee adopted no changes in response to the comments. The committee will recommend adoption of the rule as amended.

Comments on the proposed amendments to Rule108 - Objections to Court Commissioner's Recommendations - essentially fell into three categories: 1) The policy should be that a party has an absolute right to present evidence to the district court judge, regardless of what happens before a commissioner; 2) The proposed revisions could become palatable with some modifications to the proposed language. 3) Advocating for deletion of paragraphs having to do with the timing of objections based on issues surrounding a party's ability to obtain a record of the hearing.

The committee discussed the comments. Mr. Shea noted that it is the universal perception that the commissioner system needs to be addressed. The process before commissioners is quite varied in terms of standards and procedures and there is wide recognition that the systems needs those standards and procedures to be fixed and not variable.

The proposed revisions wrestle with what is required by due process versus the reality of the courts' burgeoning case loads and the important roles played by commissioners within that framework. Mr. Shea explained that the system is set up so that the recommendation becomes order by operation of law absent a timely objection. However, problems may arise where the system gives so much deference to the commissioner's recommendation that the commissioner becomes the de facto decision maker. Mr Shea explained that under the revisions, if a party files an objection to a commissioner's recommendation on a custody issue, that party will receive an evidentiary hearing. An objection to a noncustody issue will not result in an evidentiary hearing, at least prior to the evidence being heard in open court at trial.

Mr. Shea noted that the amendments have been approved by the Board of District Judges. Mr. Shea also explained that he had spoken with the IT Department about the time frame for producing audio recordings of the hearings before commissioners. Mr. Shea suggested that the time frames for objecting to a recommendation could be driven by the availability of the record.

Mr. Shaughnessy expressed concern regarding Senator Hillyard's comment indicating that when commissioners were authorized by the legislature, that authorization was with the understanding that all matters would be resolved by a *de novo* hearing in front of the district judge, regardless of the issue before the commissioner. Mr. Shea stated that he could find nothing supporting Senator Hillyard's comment in the legislative history.

Messrs. Battle, Hafen and Wikstrom suggested forwarding this to the Family Law section for feedback. Mr. Hafen moved to send the proposed amendments to the Executive Committee of the Family Law Section requesting a single, uniform response regarding serious concerns or suggested clarifying language. Mr. Hafen's motion was seconded and unanimously approved.

VI. RULE 4. SERVICE OF PROCESS.

The current rule requires that alternative service by publication be made in the English language. Mr. Shea proposed that the publication of notice may be made in a language other than English, especially where it is known that one or more defendants are proficient in a different language. Mr. Hafen moved to approve the language proposed by Mr. Shea at line 138, striking the requirement that alternative service must be made in English. Mr. Hafen's motion was amended to remove the word "other" fr line 127. This motion was seconded and unanimously approved.

VII. ADJOURMENT.

The meeting adjourned at 5:35 p.m. The next committee meeting will be held at 4:00 p.m. on Wednesday August 3, 2011, at the Administrative Offices of the Courts.

Tab 2

Rule 1. General provisions.

Scope of rules. These rules govern the procedure in the courts of the state of Utah in all actions of a civil nature, whether cognizable at law or in equity, and in all statutory proceedings, except as governed by other rules promulgated by this court or statutes enacted by the Legislature and except as stated in Rule 81. They shall be liberally construed and applied to achieve the just, speedy, and inexpensive determination of every action. These rules govern all actions brought after they take effect and all further proceedings in actions then pending. If, in the opinion of the court, applying a rule in an action pending when the rule takes effect would not be feasible or would be unjust, the former procedure applies.

Advisory Committee Notes

A primary purpose of the 2011 amendments is to give effect to the long-standing but often overlooked directive in Rule 1 that the Rules of Civil Procedure should be construed and applied to achieve "the just, speedy and inexpensive determination of every action." The amendments serve this purpose by limiting parties to discovery that is proportional to the stakes of the litigation, curbing excessive expert discovery, and requiring the early disclosure of documents, witnesses and evidence that a party intends to offer in its case-in-chief. The committee's purpose is to restore balance to the goals of Rule 1, so that a just resolution is not achieved at the expense of speedy and inexpensive resolutions, and greater access to the justice system can be afforded to all members of society.

Rule 8. General rules of pleadings.

(a) Claims for relief. An original claim, counterclaim, cross-claim or third-party claim shall contain a simple, short and plain:

(a)(1) statement of facts showing that the party is entitled to relief;

(a)(2) statement of the legal theory on which the claim rests; and

(a)(3) demand for judgment for specified relief. Relief in the alternative or of several different types may be demanded.

A party who claims damages but does not plead an amount shall plead that their damages are such as to qualify for a specified tier defined by Rule 26(c)(3).

(b) Defenses; form of denials. A party shall state in simple, short and plain terms any defenses to each claim asserted and shall admit or deny the statements in the claim. A party without knowledge or information sufficient to form a belief about the truth of a statement shall so state, and this has the effect of a denial. Denials shall fairly meet the substance of the statements denied. A party may deny all of the statements in a claim by general denial. A party may specify the statement or part of a statement that is admitted and deny the rest. A party may specify the statement or part of a statement that is denied and admit the rest.

(c) Affirmative defenses. An affirmative defense shall contain a simple, short and plain:

(c)(1) statement of facts establishing the affirmative defense;

(c)(2) statement of the legal theory on which the defense rests; and

(c)(3) a demand for relief.

A party shall set forth affirmatively in a responsive pleading accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. If a party mistakenly designates a defense as a counterclaim or a counterclaim as a defense, the court, on terms, may treat the pleadings as if the defense or counterclaim had been properly designated.

(d) Effect of failure to deny. Statements in a pleading to which a responsive pleading is required, other than statements of the amount of damage, are admitted if not denied in the responsive pleading. Statements in a pleading to which no responsive pleading is required or permitted are deemed denied or avoided.

(e) Consistency. A party may state a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. If statements are made in the alternative and one of them is sufficient, the pleading is not made insufficient by the insufficiency of an alternative statement. A party may state legal and equitable claims or legal and equitable defenses regardless of consistency.

(f) Construction of pleadings. All pleadings shall be construed to do substantial justice.

Advisory Committee Notes

The 2011 amendments remove from Rule 8 prior language requiring a statement of the party's "claim." Instead, the rule now requires a short and plain statement of both (1) "facts showing that the party is entitled to relief" and (2) "the legal theory on which the claim rests." The purpose of this amendment is twofold. First, the amendment clarifies that parties must give notice of both the facts and the law that support their claim. The amendment thus reconfirms longstanding case law that courts, on a Rule 12 motion, will "accept the plaintiff's description of facts alleged in the complaint to be true, but . . . need not accept extrinsic facts not pleaded nor . . . legal conclusions in contradiction of the pleaded facts." *Allred v. Cook*, 590 P.2d 318, 319 (Utah 1979). Second, by clarifying that parties should plead facts, this amendment to Rule 8 encourages further and earlier disclosure of facts, consistent with the general approach of the 2011 amendments, including those to Rule 26's disclosure requirements.

To facilitate access to justice, the committee intends that all pleadings—both complaints and answers—provide more and earlier notice of the facts alleged with less reliance on discovery. However, by requiring parties to plead "facts," this amendment does not resurrect any prior requirement of technical or "code" pleading. Nor does the amendment seek to import any heightened pleading requirement, such as interpretations of the Federal Rules of Civil Procedure in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), which mandate a

heightened standard of “plausibility” pleading under the Federal Rules. Rather, the longstanding “liberal” standard of notice pleading remains in effect in Utah. E.g., *Canfield v. Layton City*, 2005 UT 60, ¶ 14, 122 P.3d 622. *Accord, Adam N. Steinman*, The Pleading Problem, 62 Stanford L. Rev. 1293 (2010).

Rule 9. Pleading special matters.

(a)(1) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. A party may raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity by specific negative averment, which shall include facts within the pleader's knowledge. If raised as an issue, the party relying on such capacity, authority, or legal existence, shall establish the same on the trial.

(a)(2) Designation of unknown defendant. When a party does not know the name of an adverse party, he may state that fact in the pleadings, and thereupon such adverse party may be designated in any pleading or proceeding by any name; provided, that when the true name of such adverse party is ascertained, the pleading or proceeding must be amended accordingly.

(a)(3) Actions to quiet title; description of interest of unknown parties. In an action to quiet title wherein any of the parties are designated in the caption as "unknown," the pleadings may describe such unknown persons as "all other persons unknown, claiming any right, title, estate or interest in, or lien upon the real property described in the pleading adverse to the complainant's ownership, or clouding his title thereto."

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

(c) Conditions precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity, and when so made the party pleading the performance or occurrence shall on the trial establish the facts showing such performance or occurrence.

(d) Official document or act. In pleading an official document or act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it. A denial of jurisdiction shall be made specifically and with particularity and when so made the party pleading the judgment or decision shall establish on the trial all controverted jurisdictional facts.

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

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

(h) Statute of limitations. In pleading the statute of limitations it is not necessary to state the facts showing the defense but it may be alleged generally that the cause of action is barred by the provisions of the statute relied on, referring to or describing such statute specifically and definitely by section number, subsection designation, if any, or otherwise designating the provision relied upon sufficiently clearly to identify it. If such allegation is controverted, the party pleading the statute must establish, on the trial, the facts showing that the cause of action is so barred.

(i) Private statutes; ordinances. In pleading a private statute of this state, or an ordinance of any political subdivision thereof, or a right derived from such statute or ordinance, it is sufficient to refer to such statute or ordinance by its title and the day of its passage or by its section number or other designation in any official publication of the statutes or ordinances. The court shall thereupon take judicial notice thereof.

(j) Libel and slander.

(j)(1) Pleading defamatory matter. It is not necessary in an action for libel or slander to set forth any intrinsic facts showing the application to the plaintiff of the defamatory matter out of which the action arose; but it is sufficient to state generally that the same was published or spoken concerning the plaintiff. If such allegation is controverted, the party alleging such defamatory matter must establish, on the trial, that it was so published or spoken.

(j)(2) Pleading defense. In his answer to an action for libel or slander, the defendant may allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages, and, whether he proves the justification or not, he may give in evidence the mitigating circumstances.

(k) Renew judgment. A complaint alleging failure to pay a judgment shall describe the judgment with particularity or attach a copy of the judgment to the complaint.

(l) Allocation of fault.

(l)(1) A party seeking to allocate fault to a non-party under Title 78B, Chapter 5, Part 8 shall file:

(l)(1)(A) a description of the factual and legal basis on which fault can be allocated; and

(l)(1)(B) information known or reasonably available to the party identifying the non-party, including name, address, telephone number and employer. If the identity of the non-party is unknown, the party shall so state.

(l)(2) The information specified in subsection (l)(1) must be included in the party's responsive pleading if then known or must be included in a supplemental notice filed within a reasonable time after the party discovers the factual and legal basis on which fault can be allocated. The court, upon motion and for good cause shown, may permit a party to file the information specified in subsection (l)(1) after the expiration of any period permitted by this rule, but in no event later than 90 days before trial.

(l)(3) A party may not seek to allocate fault to another except by compliance with this rule.

Rule 16. Pretrial conferences.

(a) Pretrial conferences. The court, in its discretion or upon motion, may direct the attorneys and, when appropriate, the parties to appear for such purposes as:

(a)(1) expediting the disposition of the action;

(a)(2) establishing early and continuing control so that the case will not be protracted for lack of management;

(a)(3) discouraging wasteful pretrial activities;

(a)(4) improving the quality of the trial through more thorough preparation;

(a)(5) facilitating mediation or other ADR processes for the settlement of the case;

(a)(6) considering all matters as may aid in the disposition of the case;

(a)(7) establishing the time to join other parties and to amend the pleadings;

(a)(8) establishing the time to file motions;

(a)(9) establishing the time to complete discovery;

(a)(10) extending fact discovery;

(a)(11) the date for pretrial and final pretrial conferences and trial;

(a)(12) provisions for preservation, disclosure or discovery of electronically stored information;

(a)(13) any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production; and

(a)(14) any other appropriate matters.

(b) Trial settings. Unless an order sets the trial date, any party may and the plaintiff shall, at the close of all discovery, certify to the court that discovery is complete, that any required mediation or other ADR processes have been completed or excused and that the case is ready for trial. The court shall schedule the trial as soon as mutually convenient to the court and parties. The court shall notify parties of the trial date and of any final pretrial conference.

(c) Final pretrial conferences. The court, in its discretion or upon motion, may direct the attorneys and, when appropriate, the parties to appear for such purposes as settlement and trial management. The conference shall be held as close to the time of trial as reasonable under the circumstances.

(d) Sanctions. If a party or a party's attorney fails to obey an order, if a party or a party's attorney fails to attend a conference, if a party or a party's attorney is substantially unprepared to participate in a conference, or if a party or a party's attorney fails to participate in good faith, the court, upon motion or its own initiative, may take any action authorized by Rule 37(e).

Advisory Committee Notes

For the purposes of this rule, “ADR” is as defined in CJA Rule 4-510.

Rule 26. General provisions governing disclosure and discovery.

(a) Disclosure. This rule applies unless changed or supplemented by a rule governing disclosure and discovery in a practice area.

(a)(1) Initial disclosures. Except in cases exempt under paragraph (a)(2), a party shall, without waiting for a discovery request, provide to other parties:

(a)(1)(A) the name and, if known, the address and telephone number of:

(a)(1)(A)(i) each individual likely to have discoverable information supporting its claims or defenses, unless solely for impeachment, identifying the subjects of the information; and

(a)(1)(A)(ii) each fact witness the party may call in its case-in-chief and a summary of the expected testimony;

(a)(1)(B) a copy of all documents, data compilations, electronically stored information, and tangible things in the possession or control of the party that the party may offer in its case-in-chief, except charts, summaries and demonstrative exhibits that have not yet been prepared and must be disclosed in accordance with paragraph (a)(4)(C);

(a)(1)(C) a computation of any damages claimed and a copy of all discoverable documents or evidentiary material on which such computation is based, including materials about the nature and extent of injuries suffered;

(a)(1)(D) a copy of any agreement under which any person may be liable to satisfy part or all of a judgment or to indemnify or reimburse for payments made to satisfy the judgment; and

(a)(1)(E) a copy of all documents to which a party refers in its pleadings.

(a)(1)(F) The disclosures required by paragraph (a)(1) shall be made:

(a)(1)(F)(i) by the plaintiff within 14 days after service of the first answer to the complaint; and

(a)(1)(F)(ii) by the defendant within 28 days after the plaintiff's first disclosure or after that defendant's appearance, whichever is later.

(a)(2) Exemptions.

(a)(2)(A) Unless otherwise ordered by the court or agreed to by the parties, the requirements of paragraph (a)(1) do not apply to actions:

(a)(2)(A)(i) for judicial review of adjudicative proceedings or rule making proceedings of an administrative agency;

(a)(2)(A)(ii) governed by Rule 65B or Rule 65C;

(a)(2)(A)(iii) to enforce an arbitration award;

(a)(2)(A)(iv) for water rights general adjudication under Title 73, Chapter 4.

(a)(2)(B) In an exempt action, the matters subject to disclosure under paragraph (a)(1) are subject to discovery under paragraph (b).

(a)(3) Disclosure of expert testimony.

(a)(3)(A) Expert Testimony. A party shall, without waiting for a discovery request, provide to the other parties the following information regarding any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Utah Rules of Evidence and who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony: (i) the expert's name and qualifications, including a list of all publications authored within the preceding 10 years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years, (ii) a brief summary of the opinions to which the witness is expected to testify, (iii) all data and other information that will be relied upon by the witness in forming those opinions, and (iv) the compensation to be paid for the witness's study and testimony.

(a)(3)(B) Limits on Expert Discovery. Further discovery may be obtained from an expert witness either by deposition or by written report. A deposition shall not exceed four hours and the party taking the deposition shall pay the expert's reasonable hourly fees for attendance at the deposition. A report shall be signed by the expert and shall contain a complete statement of all opinions the expert will offer at trial and the basis and reasons for them. Such an expert may not testify in a party's case-in-chief concerning any matter not fairly disclosed in the report. The party offering the expert shall pay the costs for the report.

(a)(3)(C) Timing for Expert Discovery.

(a)(3)(C)(i) The party who bears the burden of proof on the issue for which expert testimony is offered shall provide the information required by paragraph (a)(3)(A) within seven days after the close of fact discovery. Within seven days thereafter, the party

opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(3)(B) and Rule 30, or a written report pursuant to paragraph (a)(3)(B). The deposition shall occur, or the report shall be provided, within 28 days after the election is made. If no election is made, then no further discovery of the expert shall be permitted.

(a)(3)(C)(ii) The party who does not bear the burden of proof on the issue for which expert testimony is offered shall provide the information required by paragraph (a)(3)(A) within seven days after the later of (i) the date on which the election under paragraph (a)(3)(C)(i) is due, or (ii) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(3)(C)(i). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(3)(B) and Rule 30, or a written report pursuant to paragraph (a)(3)(B). The deposition shall occur, or the report shall be provided, within 28 days after the election is made. If no election is made, then no further discovery of the expert shall be permitted.

(a)(3)(C)(iii) In multiparty actions, all parties opposing the expert must agree on either a report or a deposition. If all parties opposing the expert do not agree, then further discovery of the expert may be obtained only by deposition pursuant to paragraph (a)(3)(B) and Rule 30.

(a)(3)(D) If a party intends to present evidence at trial under Rules 702, 703, or 705 of the Utah Rules of Evidence from any person other than an expert witness who is retained or specially employed to provide testimony in the case or a person whose duties as an employee of the party regularly involve giving expert testimony, that party must provide a written summary of the facts and opinions to which the witness is expected to testify in accordance with the deadlines set forth in paragraph (a)(3)(C). A deposition of such a witness may not exceed four hours.

(a)(4) Pretrial disclosures. A party shall, without waiting for a discovery request, provide to other parties:

(a)(4)(A) the name and, if not previously provided, the address and telephone number of each witness, unless solely for impeachment, separately identifying witnesses the party will call and witnesses the party may call;

(a)(4)(B) the name of witnesses whose testimony is expected to be presented by transcript of a deposition and a copy of the transcript with the proposed testimony designated; and

(a)(4)(C) a copy of each exhibit, including charts, summaries and demonstrative exhibits, unless solely for impeachment, separately identifying those which the party will offer and those which the party may offer.

(a)(4)(D) Disclosure required by paragraph (a)(4) shall be made at least 28 days before trial. At least 14 days before trial, a party shall serve and file counter-designations of deposition testimony, objections and grounds for the objections to the use of a deposition and to the admissibility of exhibits. Other than objections under Rules 402 and 403 of the Utah Rules of Evidence, objections not listed are waived unless excused by the court for good cause.

(b) Discovery scope.

(b)(1) In general. Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below.

(b)(2) Proportionality. Discovery and discovery requests are proportional if:

(b)(2)(A) the discovery is reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues;

(b)(2)(B) the likely benefits of the proposed discovery outweigh the burden or expense;

(b)(2)(C) the discovery is consistent with the overall case management and will further the just, speedy and inexpensive determination of the case;

(b)(2)(D) the discovery is not unreasonably cumulative or duplicative;

(b)(2)(E) the information cannot be obtained from another source that is more convenient, less burdensome or less expensive; and

(b)(2)(F) the party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties’ relative access to the information.

(b)(3) Burden. The party seeking discovery always has the burden of showing proportionality and relevance. To ensure proportionality, the court may enter orders under Rule 37.

(b)(4) Electronically stored information. A party claiming that electronically stored information is not reasonably accessible because of undue burden or cost shall describe the source of the electronically stored information, the nature and extent of the burden, the nature of the information not provided, and any other information that will enable other parties to evaluate the claim.

(b)(5) Trial preparation materials. A party may obtain otherwise discoverable documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain substantially equivalent materials by other means. In ordering discovery of such materials, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

(b)(6) Statement previously made about the action. A party may obtain without the showing required in paragraph (b)(5) a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement about the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order under Rule 37. A statement previously made is (A) a written statement signed or approved by the person making it, or (B) a stenographic, mechanical, electronic, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(b)(7) Trial preparation; experts.

(b)(7)(A) Trial-preparation protection for draft reports or disclosures. Paragraph (b)(5) protects drafts of any report or disclosure required under paragraph (a)(3), regardless of the form in which the draft is recorded.

(b)(7)(B) Trial-preparation protection for communications between a party's attorney and expert witnesses. Paragraph (b)(5) protects communications between the party's attorney and any witness required to provide disclosures under paragraph (a)(3), regardless of the form of the communications, except to the extent that the communications:

(b)(7)(B)(i) relate to compensation for the expert's study or testimony;

(b)(7)(B)(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(b)(7)(B)(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(b)(7)(C) Expert employed only for trial preparation. Ordinarily, a party may not, by interrogatories or otherwise, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. A party may do so only:

(b)(7)(C)(i) as provided in Rule 35(b); or

(b)(7)(C)(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(b)(8) Claims of privilege or protection of trial preparation materials.

(b)(8)(A) Information withheld. If a party withholds discoverable information by claiming that it is privileged or prepared in anticipation of litigation or for trial, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced in a manner that, without revealing the information itself, will enable other parties to evaluate the claim.

(b)(8)(B) Information produced. If a party produces information that the party claims is privileged or prepared in anticipation of litigation or for trial, the producing party may notify any receiving party of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being

notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(c) Sequence and timing of discovery; tiers; limits on standard discovery; extraordinary discovery.

(c)(1) Methods of discovery; sequence and timing of discovery.

(c)(1) Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; requests for admission; and subpoenas other than for a court hearing or trial.

(c)(2) Methods of discovery may be used in any sequence, and the fact that a party is conducting discovery shall not delay any other party's discovery. Except for cases exempt under paragraph (a)(2), a party may not seek discovery from any source before that party’s initial disclosure obligations are satisfied.

(c)(3) Definition of tiers for standard discovery. Actions claiming $50,000 or less in damages are permitted standard discovery as described for Tier 1. Actions claiming more than $50,000 and less than $300,000 in damages are permitted standard discovery as described for Tier 2. Actions claiming $300,000 or more in damages are permitted standard discovery as described for Tier 3. Absent an accompanying damage claim for more than $300,000, actions claiming non-monetary relief are permitted standard discovery as described for Tier 2.

(c)(4) Definition of damages. For purposes of determining standard discovery, the amount of damages includes the total of all monetary damages sought (without duplication for alternative theories) by all parties in all claims for relief in the original pleadings, but not including punitive damages.

(c)(5) Limits on standard fact discovery. Standard fact discovery per side (plaintiffs collectively, defendants collectively, and third-party defendants collectively) in each tier is as follows. The days to complete standard fact discovery are calculated from the date the first defendant’s first disclosure is due and do not include expert discovery under Rule 26(a)(3)(C) and (D).

Tier	Amount of Damages	Total Fact Deposition Hours	Rule 33 Interrogatories including all discrete subparts	Rule 34 Requests for Production	Rule 36 Requests for Admission	Days to Complete Standard Fact Discovery
1	$50,000 or less	3	0	5	5	120
2	More than $50,000 and less than $300,000 or non-monetary relief	15	10	10	10	180
3	$300,000 or more	30	20	20	20	210

(c)(6) Extraordinary discovery. To obtain discovery beyond the limits established in Paragraph (c)(5), a party shall file:

(c)(6)(A) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a stipulated statement that extraordinary discovery is necessary and proportional under paragraph (b)(2) and that each party has reviewed and approved a discovery budget; or

(c)(6)(B) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a motion for extraordinary discovery setting forth the reasons why the extraordinary discovery is necessary and proportional under paragraph (b)(2) and certifying that the party has reviewed and approved a discovery budget and certifying that the party has in good faith conferred or attempted to confer with the other party in an effort to achieve a stipulation.

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

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

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

(d)(3) A party is not excused from making disclosures or responses because the party has not completed investigating the case or because the party challenges the

sufficiency of another party's disclosures or responses or because another party has not made disclosures or responses.

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

(d)(5) If a party learns that a disclosure or response is incomplete or incorrect in some important way, the party must timely provide the additional or correct information if it has not been made known to the other parties. The supplemental disclosure or response must state why the additional or correct information was not previously provided.

(e) Signing discovery requests, responses, and objections. Every disclosure, request for discovery, response to a request for discovery and objection to a request for discovery shall be in writing and signed by at least one attorney of record or by the party if the party is not represented. The signature of the attorney or party is a certification under Rule 11. If a request or response is not signed, the receiving party does not need to take any action with respect to it. If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, may take any action authorized by Rule 11 or Rule 37(e).

(f) Filing. Except as required by these rules or ordered by the court, a party shall not file with the court a disclosure, a request for discovery or a response to a request for discovery, but shall file only the certificate of service stating that the disclosure, request for discovery or response has been served on the other parties and the date of service.

Advisory Committee Notes

Disclosure Requirements and Timing. Rule 26(a)(1). The 2011 amendments seek to reduce discovery costs by requiring each party to produce, at an early stage in the case, and without a discovery request, all of the documents and physical evidence the party may offer in its case-in-chief and the names of witnesses the party may call in its case-in-chief, with a description of their expected testimony. In this respect, the amendments build on the initial disclosure requirements of the prior rules. In addition to the disclosures required by the prior version of Rule 26(a)(1), a party must disclose each

fact witness the party may call in its case-in-chief and a summary of the witness's expected testimony, a copy of all documents the party may offer in its case-in-chief, and all documents to which a party refers in its pleadings.

Not all information will be known at the outset of a case. If discovery is serving its proper purpose, additional witnesses, documents, and other information will be obtained. The scope and the level of detail required in the initial Rule 26(a)(1) disclosures should be viewed in light of this reality. A party, for example, is not required to interview every witness it ultimately may call at trial in order to provide a summary of the witness's expected testimony. For witnesses outside a party's control, it is expected that less information would be known at the beginning of a case and therefore any summary of their expected testimony would necessarily be limited to what the witness is reasonably expected to testify about. Additionally, the summary of the witness's expected testimony should be just that – a summary. The rule does not require prefiled testimony or detailed descriptions of everything a witness might say at trial. On the other hand, it requires more than the the broad, conclusory statements that often were made under the prior version of Rule 26(a)(1) (e.g., "The witness will testify about the events in question" or "The witness will testify on causation."). The intent of this requirement is to give the other side basic information that can be used to determine the subjects about which the witness is expected to testify at trial, to determine the witness's relative importance to disputed issues in the case, and to enable the opposing party to determine if the witness is someone who should be interviewed (if not a party) or deposed, or from whom additional information otherwise should be obtained. This information is important because of the other discovery limits contained in the 2011 amendments, particularly the limits on depositions. Likewise, the documents that should be provided as part of the Rule 26(a)(1) disclosures are those that a party reasonably believes it may use at trial, understanding that not all documents will be available at the outset of a case. In this regard, it is important to remember that the duty to provide documents and witness information is a continuing one, and disclosures must be promptly supplemented as new evidence and witnesses become known as the case progresses.

The amendments also require parties to provide more information about damages early in the case. Too often, the subject of damages is deferred until late in the case. Early disclosure of damages information is important. Among other things, it is a critical factor in determining proportionality. The committee recognizes that damages often require additional discovery, and typically are the subject of expert testimony. The Rule is not intended to require expert disclosures at the outset of a case. At the same time, the subject of damages should not simply be deferred until expert discovery. Parties should make a good faith attempt to compute damages to the extent it is possible to do so and must in any event provide all discoverable information on the subject, including materials related to the nature and extent of the damages.

The penalty for failing to make timely disclosures is that the evidence may not be used in the party's case-in-chief. To make the disclosure requirement meaningful, and to discourage sandbagging, parties must know that if they fail to disclose important information that is helpful to their case, they will not be able to use that information at trial. The courts will be expected to enforce them unless the failure is harmless or the party shows good cause for the failure.

The 2011 amendments also change the time for making these required disclosures. Because the plaintiff controls when it brings the action, plaintiffs must make their disclosures within 14 days after service of the first answer. A defendant is required to make its disclosures within 28 days after the plaintiff's first disclosure or after that defendant's appearance, whichever is later. The purpose of early disclosure is to have all parties present the evidence they expect to use to prove their claims or defenses, thereby giving the opposing party the ability to better evaluate the case and determine what additional discovery is necessary and proportional.

The time periods for making Rule 26(a)(1) disclosures, and the presumptive deadlines for completing fact discovery, are keyed to the filing of an answer. If a defendant files a motion to dismiss or other Rule 12(b) motion in lieu of an answer, these time periods normally would be not begin to run until that motion is resolved.

Finally, the 2011 amendments eliminate two categories of actions that previously were exempt from the mandatory disclosure requirements. Specifically, the amendments eliminate the prior exemption for contract actions in which the amount

claimed is $20,000 or less, and actions in which any party is proceeding pro se. In the committee's view, these types of actions will benefit from the early disclosure requirements and the overall reduced cost of discovery.

Expert Disclosures and Timing. Rule 26(a)(3). Expert discovery has become an ever-increasing component of discovery cost. The prior rules sought to eliminate some of these costs by requiring the written disclosure of the expert's opinions and other background information. However, because the expert was not required to sign these disclosures, and because experts often were allowed to deviate from the opinions disclosed, attorneys typically would take the expert's deposition to ensure the expert would not offer "surprise" testimony at trial, thereby increasing rather than decreasing the overall cost. The amendments seek to remedy this and other costs associated with expert discovery by, among other things, allowing the opponent to choose either a deposition of the expert or a written report, but not both; in the case of written reports, requiring more comprehensive disclosures, signed by the expert, and making clear that experts will not be allowed to testify beyond what is fairly disclosed in a report, all with the goal of making reports a reliable substitute for depositions; and incorporating a rule that protects from discovery most communications between an attorney and retained expert. Discovery of expert opinions and testimony is automatic under Rule 26(a)(3) and parties are not required to serve interrogatories or use other discovery devices to obtain this information.

The amendments also address the issue of the "non-retained" expert. Their expected testimony must be disclosed and they are subject to depositions similar to a fact witness.

Disclosures of expert testimony are made in sequence, with the party who bears the burden of proof on the issue for which expert testimony will be offered going first. Within seven days after the close of fact discovery, that party must disclose: (i) the expert's curriculum vitae identifying the expert's qualifications, publications, and prior testimony; (ii) compensation information; (iii) a brief summary of the opinions the expert will offer; and (iv) a complete copy of the expert's file for the case. The file should include all of the facts and data that the expert has relied upon in forming the expert's opinions. If the expert has prepared summaries of data, spreadsheets, charts, tables, or similar

materials, they should be included. If the expert has used software programs to make calculations or otherwise summarize or organize data, that information and underlying formulas should be provided in native form so it can be analyzed and understood. To the extent the expert is relying on depositions or materials produced in discovery, then a list of the specific materials relied upon is sufficient. The committee recognizes that experts frequently will prepare demonstrative exhibits or other aids to illustrate the expert's testimony at trial, and the costs for preparing these materials can be substantial. For that reason, these types of demonstrative aids may be prepared and disclosed later, as part of the Rule 26(a)(4) pretrial disclosures when trial is imminent.

Within seven days after this disclosure, the party opposing the retained expert may elect either a deposition or a written report from the expert. A deposition is limited to four hours, which is not included in the deposition hours under Rule 26(c)(5), and the party taking it must pay the expert's hourly fee for attending the deposition. If a party elects a written report, the expert must provide a signed report containing a complete statement of all opinions the expert will express and the basis and reasons for them. The intent is not to require a verbatim transcript of exactly what the expert will say at trial; instead the expert must fairly disclose the substance of and basis for each opinion the expert will offer. The expert may not testify in a party's case in chief concerning any matter that is not fairly disclosed in the report. To achieve the goal of making reports a reliable substitute for depositions, courts are expected to enforce this requirement. If a party elects a deposition, rather than a report, it is up to the party to ask the necessary questions to "lock in" the expert's testimony. But the expert is expected to be fully prepared on all aspects of his/her trial testimony at the time of the deposition and may not leave the door open for additional testimony by qualifying answers to deposition questions.

The report or deposition must be completed within 28 days after the election is made. After this, the party who does not bear the burden of proof on the issue for which expert testimony is offered must make its corresponding disclosures and the opposing party may then elect either a deposition or a written report. Under the deadlines contained in the rules, expert discovery should take less than three months to complete.

However, as with the other discovery rules, these deadlines can be altered by stipulation of the parties or order of the court.

The amendments also address the issue of testimony from experts other than those who are retained or specially employed to provide expert testimony, or whose duties as an employee regularly involve giving expert testimony, such as treating physicians, police officers, or accident investigators. This issue was addressed by the Supreme Court in Drew v. Lee, 2011 UT 15, wherein the court held that reports under the prior version of Rule 26(a)(3) are not required for treating physicians.

There are a number of difficulties inherent in disclosing expert testimony that may be offered from fact witnesses. First, there is often not a clear line between fact and expert testimony. Many fact witnesses have scientific, technical or other specialized knowledge, and their testimony about the events in question often will cross into the area of expert testimony. The rules are not intended to erect artificial barriers to the admissibility of such testimony. Second, many of these fact witnesses will not be within the control of the party who plans to call them at trial. These witnesses may not be cooperative, and may not be willing to discuss opinions they have with counsel. Where this is the case, disclosures will necessarily be more limited. On the other hand, consistent with the overall purpose of the 2011 amendments, a party should receive advance notice if their opponent will solicit expert opinions from a particular witness so they can plan their case accordingly. In an effort to strike an appropriate balance, the rules require that such witnesses be identified and the information about their anticipated testimony should include that which is required under Rule 26(a)(1)(A)(ii) which should include any opinion testimony that a party expects to elicit from them at trial. If a party has disclosed possible opinion testimony in its Rule 26(a)(1)(A)(ii) disclosures, that party is not required to prepare a separate Rule 26(a)(3)(D) disclosure for the witness. And if that disclosure is made in advance of the witness's deposition, those opinions should be explored in the deposition and not in a separate expert deposition. Rule 26(a)(3)(D) and 26(a)(1)(A)(ii) are not intended to elevate form over substance – all they require is that a party fairly inform its opponent that opinion testimony may be offered from a particular witness. And because a party who expects

to offer this testimony normally cannot compel such a witness to prepare a written report, further discovery must be done by interview or by deposition.

Finally, the amendments include a new Rule 26(b)(7) that protects from discovery draft expert reports and, with limited exception, communications between an attorney and an expert. These changes are modeled after the recent changes to the Federal Rules of Civil Procedure and are intended to address the unnecessary and costly procedures that often were employed in order to protect such information from discovery, and to reduce "satellite litigation" over such issues.

Scope of Discovery—Proportionality. Rule 26(b). Proportionality is the principle governing the scope of discovery. Simply stated, it means that the cost of discovery should be proportional to what is at stake in the litigation.

In the past, the scope of discovery was governed by "relevance" or the "likelihood to lead to discovery of admissible evidence." These broad standards may have secured just results by allowing a party to discover all facts relevant to the litigation. However, they did little to advance two equally important objectives of the rules of civil procedure—the speedy and inexpensive resolution of every action. Accordingly, the former standards governing the scope of discovery have been replaced with the proportionality standards in subpart (b)(1).

The concept of proportionality is not new. The prior rule permitted the Court to limit discovery methods if it determined that "the discovery was unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." The Federal Rules of Civil Procedure contains a similar provision. See Fed. R. Civ. P. 26(b)(2)(C). This method of limiting discovery, however, was rarely invoked either under the Utah rules or federal rules.

Under the prior rule, the party objecting to the discovery request had the burden of proving that a discovery request was not proportional. The new rule changes the burden of proof. Today, the party seeking discovery beyond the scope of "standard" discovery has the burden of showing that the request is "relevant to the claim or defense of any party" and that the request satisfies the standards of proportionality

The 2011 amendments establish three tiers of standard discovery in Rule 26(c). Ideally, rules of procedure should be crafted to promote predictability for litigants. Rules should limit the need to resort to judicial oversight. Tiered standard discovery seeks to achieve these ends. The "one-size-fits-all" system is rejected. Tiered discovery signals to judges, attorneys, and parties the amount of discovery which by rule is deemed proportional for cases with different amounts in controversy.

Any system of rules which permits the facts and circumstances of each case to inform procedure cannot eliminate uncertainty. Ultimately, the trial court has broad discretion in deciding whether a discovery request is proportional. The proportionality standards in subpart (b)(2) and the discovery tiers in subpart (c) mitigate uncertainty by guiding that discretion. The proper application of the proportionality standards will be defined over time by trial and appellate courts.

Standard and Extraordinary Discovery. Rule 26(c). As a counterpart to requiring more detailed disclosures under Rule 26(a), the 2011 amendments place new limitations on additional discovery the parties may conduct. Because the committee expects the enhanced disclosure requirements will automatically permit each party to learn the witnesses and evidence the opposing side will offer in its case-in-chief, additional discovery should serve the more limited function of permitting parties to find witnesses, documents, and other evidentiary materials that are harmful, rather than helpful, to the opponent's case.

Rule 26(c) provides for three separate "tiers" of limited, "standard" discovery that are presumed to be proportional to the amount and issues in controversy in the action, and that the parties may conduct as a matter of right. An aggregation of all damages sought by all parties in an action dictates the applicable tier of standard discovery, whether such damages are sought by way of a complaint, counterclaim, or otherwise. The tiers of standard discovery are set forth in a chart that is embedded in the body of the rule itself. "Tier 1" describes a minimal amount of standard discovery that is presumed proportional for cases involving damages of $50,000 or less. "Tier 2" sets forth larger limits on standard discovery that are applicable in cases involving damages above $50,000 but less than $300,000. Finally, "Tier 3" prescribes still greater standard discovery for actions involving damages in excess of $300,000. The tiers also provide

presumptive limitations on the time within which standard discovery should be completed, which limitations similarly increase with the amount of damages at issue. After the expiration of the applicable time limitation, a case is presumed to be ready for trial. Actions for non-monetary relief, such as injunctive relief, are subject to the standard discovery limitations of Tier 2, absent an accompanying monetary claim of $300,000 or more, in which case Tier 3 applies. The committee determined these standard discovery limitations based on the expectation that for the majority of cases filed in the Utah State Courts, the magnitude of available discovery and applicable time parameters available under the three-tiered system should be sufficient for cases involving the respective amounts of damages.

Despite the expectation that standard discovery according to the applicable tier should be adequate in the typical case, the 2011 amendments contemplate there will be some cases for which standard discovery is not sufficient or appropriate. In such cases, parties may conduct additional discovery that is shown to be consistent with the principle of proportionality. There are two ways to obtain such additional discovery. The first is by stipulation. If the parties can agree additional discovery is necessary, they may stipulate to as much additional discovery as they desire, provided they stipulate the additional discovery is proportional to what is at stake in the litigation and counsel for each party certifies that the party has reviewed and approved a budget for additional discovery. Such a stipulation should be filed before the close of the standard discovery time limit, but only after the completion of standard discovery available under the rule. If these conditions are met, the Court will not second-guess the parties and their counsel and must approve the stipulation.

The second method to obtain additional discovery is by motion. The committee recognizes there will be some cases in which additional discovery is appropriate, but the parties cannot agree to the scope of such additional discovery. These may include, among other categories, large and factually complex cases and cases in which there is a significant disparity in the parties' access to information, such that one party legitimately has a greater need than the other party for additional discovery in order to prepare properly for trial. To prevent a party from taking advantage of this situation, the 2011 amendments allow any party to move the Court for additional discovery. As with

stipulations for extraordinary discovery, a party filing a motion for extraordinary discovery should do so before the close of the standard discovery time limit, but only after the moving party has completed the standard discovery available to it under the rule. By taking advantage of this discovery, counsel should be better equipped to articulate for the court what additional discovery is needed and why. The party making such a motion must demonstrate that the additional discovery is proportional and certify that the party has reviewed and approved a discovery budget. The burden to show the need for additional discovery, and to demonstrate relevance and proportionality, always falls on the party seeking additional discovery. However, cases in which such additional discovery is appropriate do exist, and it is important for courts to recognize they can and should permit additional discovery in appropriate cases, commensurate with the complexity and magnitude of the dispute.

Protective Order Language Moved to Rule 37. The 2011 amendments delete in its entirety the prior language of Rule 26(c) governing motions for protective orders. The substance of that language is now found in Rule 37. The committee determined it was preferable to cover motions to compel, motions for protective orders, and motions for discovery sanctions in a single rule, rather than two separate rules. Accordingly, Rule 37 now governs these motions and orders.

Consequences of Failure to Disclose. Rule 26(d). If a party fails to disclose or to supplement timely its discovery responses, that party cannot use the undisclosed witness, document, or material at any hearing or trial, absent proof that non-disclosure was harmless or justified by good cause. More complete disclosures increase the likelihood that the case will be resolved justly, speedily, and inexpensively. Not being able to use evidence that a party fails properly to disclose provides a powerful incentive to make complete disclosures. This is true only if trial courts hold parties to this standard. Accordingly, although a trial court retains discretion to determine how properly to address this issue in a given case, the usual and expected result should be exclusion of the evidence.

Rule 26A. Disclosure and discovery in domestic relations actions.

(a) Scope. This rule applies to the following domestic relations actions: divorce; temporary separation; separate maintenance; parentage; custody; child support; and modification. This rule does not apply to adoptions, enforcement of prior orders, cohabitant abuse protective orders, child protective orders, civil stalking injunctions, or grandparent visitation.

(b) Time for disclosure. In addition to the disclosures required in Rule 26, in all domestic relations actions, the documents required in this rule shall be disclosed by the petitioner within 14 days after service of the first answer to the complaint and by the respondent within 28 days after the petitioner's first disclosure or 28 days after that respondent's appearance, whichever is later.

(c) Financial Declaration. Each party shall disclose to all other parties a fully completed court-approved Financial Declaration and attachments. Each party shall attach to the Financial Declaration the following:

(c)(1) For every item and amount listed in the Financial Declaration, excluding monthly expenses, the producing party shall attach copies of statements verifying the amounts listed on the Financial Declaration that are reasonably available to the party.

(c)(2) For the two tax years before the petition was filed, complete federal and state income tax returns, including Form W-2 and supporting tax schedules and attachments, filed by or on behalf of that party or by or on behalf of any entity in which the party has a majority or controlling interest, including, but not limited to, Form 1099 and Form K-1 with respect to that party.

(c)(3) Pay stubs and other evidence of all earned and un-earned income for the 12 months before the petition was filed.

(c)(4) All loan applications and financial statements prepared or used by the party within the 12 months before the petition was filed.

(c)(5) Documents verifying the value of all real estate in which the party has an interest, including, but not limited to, the most recent appraisal, tax valuation and refinance documents.

(c)(6) All statements for the 3 months before the petition was filed for all financial accounts, including, but not limited to checking, savings, money market funds,

certificates of deposit, brokerage, investment, retirement, regardless of whether the account has been closed including those held in that party's name, jointly with another person or entity, or as a trustee or guardian, or in someone else's name on that party's behalf.

(c)(7) If the foregoing documents are not reasonably available or are in the possession of the other party, the party disclosing the Financial Declaration shall estimate the amounts entered on the Financial Declaration, the basis for the estimation and an explanation why the documents are not available.

(d) Certificate of Service. Each party shall file a Certificate of Service with the court certifying that he or she has provided the Financial Declaration and attachments to the other party in compliance with this rule.

(e) Exempted agencies. Agencies of the State of Utah are not subject to these disclosure requirements.

(f) Sanctions. Failure to fully disclose all assets and income in the Financial Declaration and attachments may subject the non-disclosing party to sanctions under Rule 37 including an award of non-disclosed assets to the other party, attorney's fees or other sanctions deemed appropriate by the court.

(g) Failure of a party to comply with this rule does not preclude any other party from obtaining a default judgment, proceeding with the case, or seeking other relief from the court.

(h) Notice of the requirements of this rule shall be served on the Respondent and all joined parties with the initial petition.

Advisory Committee Note

Proposed Rule 26A was developed by the Family Law Section of the Utah State Bar. It represents the type of discovery or disclosure rule that the advisory committee anticipated when drafting proposed Rule 26(a).

Rule 29. Stipulations regarding disclosure and discovery procedure.

The parties may modify the limits and procedures for disclosure and discovery by filing, before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a stipulated statement that the extraordinary discovery is necessary and proportional under Rule 26(b)(2) and that each party has reviewed and approved a discovery budget. Stipulations extending the time for or limits of disclosure or discovery require court approval if the extension would interfere with a court order for completion of discovery or with the date of a hearing or trial.

Rule 30. Depositions upon oral questions.

(a) When depositions may be taken; when leave required. A party may depose a party or witness by oral questions. A witness may not be deposed more than once in standard discovery. An expert who has prepared a report disclosed under Rule 26(a)(3)(B) may not be deposed.

(b) Notice of deposition; general requirements; special notice; non-stenographic recording; production of documents and things; deposition of organization; deposition by telephone.

(b)(1) The party deposing a witness shall give reasonable notice in writing to every other party. The notice shall state the date, time and place for the deposition and the name and address of each witness. If the name of a witness is not known, the notice shall describe the witness sufficiently to identify the person or state the class or group to which the person belongs. The notice shall designate any documents and tangible things to be produced by a witness. The notice shall designate the officer who will conduct the deposition.

(b)(2) The notice shall designate the method by which the deposition will be recorded. With prior notice to the officer, witness and other parties, any party may designate a recording method in addition to the method designated in the notice. Depositions may be recorded by sound, sound-and-visual, or stenographic means, and the party designating the recording method shall bear the cost of the recording. The appearance or demeanor of witnesses or attorneys shall not be distorted through recording techniques.

(b)(3) A deposition shall be conducted before an officer appointed or designated under Rule 28 and shall begin with a statement on the record by the officer that includes (A) the officer's name and business address; (B) the date, time and place of the deposition; (C) the name of the witness; (D) the administration of the oath or affirmation to the witness; and (E) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (A) through (C) at the beginning of each unit of the recording medium. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall state any stipulations.

(b)(4) The notice to a party witness may be accompanied by a request under Rule 34 for the production of documents and tangible things at the deposition. The procedure of Rule 34 shall apply to the request. The attendance of a nonparty witness may be compelled by subpoena under Rule 45. Documents and tangible things to be produced shall be stated in the subpoena.

(b)(5) A deposition may be taken by remote electronic means. A deposition taken by remote electronic means is considered to be taken at the place where the witness answers questions.

(b)(6) A party may name as the witness a corporation, a partnership, an association, or a governmental agency, describe with reasonable particularity the matters on which questioning is requested, and direct the organization to designate one or more officers, directors, managing agents, or other persons to testify on its behalf. The organization shall state, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation.

(c) Examination and cross-examination; objections.

(c)(1) Questioning of witnesses may proceed as permitted at the trial under the Utah Rules of Evidence, except Rules 103 and 615.

(c)(2) All objections shall be recorded, but the questioning shall proceed, and the testimony taken subject to the objections. Any objection shall be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a witness not to answer only to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion for a protective order under Rule 37. Upon demand of the objecting party or witness, the deposition shall be suspended for the time necessary to make a motion. The party taking the deposition may complete or adjourn the deposition before moving for an order to compel discovery under Rule 37.

(d) Limits. During standard discovery, oral questioning of a nonparty shall not exceed four hours, and oral questioning of a party shall not exceed seven hours.

(e) Submission to witness; changes; signing. Within 28 days after being notified by the officer that the transcript or recording is available, a witness may sign a statement of changes to the form or substance of the transcript or recording and the reasons for the changes. The officer shall append any changes timely made by the witness.

(f) Record of deposition; certification and delivery by officer; exhibits; copies.

(f)(1) The officer shall record the deposition or direct another person present to record the deposition. The officer shall sign a certificate, to accompany the record, that the witness was under oath or affirmation and that the record is a true record of the deposition. The officer shall keep a copy of the record. The officer shall securely seal the record endorsed with the title of the action and marked "Deposition of (name). Do not open." and shall promptly send the sealed record to the attorney or the party who designated the recording method. An attorney or party receiving the record shall store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(f)(2) Every party may inspect and copy documents and things produced for inspection and must have a fair opportunity to compare copies and originals. Upon the request of a party, documents and things produced for inspection shall be marked for identification and added to the record. If the witness wants to retain the originals, that person shall offer the originals to be copied, marked for identification and added to the record.

(f)(3) Upon payment of reasonable charges, the officer shall furnish a copy of the record to any party or to the witness. An official transcript of a recording made by non-stenographic means shall be prepared under Utah Rule of Appellate Procedure 11(e).

(g) Failure to attend or to serve subpoena; expenses. If the party giving the notice of a deposition fails to attend or fails to serve a subpoena upon a witness who fails to attend, and another party attends in person or by attorney, the court may order the party giving the notice to pay to the other party the reasonable costs, expenses and attorney fees incurred.

(h) Deposition in action pending in another state. Any party to an action in another state may take the deposition of any person within this state in the same manner and subject to the same conditions and limitations as if such action were pending in this state. Notice of the deposition shall be filed with the clerk of the court of the county in which the person whose deposition is to be taken resides or is to be served. Matters required to be submitted to the court shall be submitted to the court in the county where the deposition is being taken.

(i) Stipulations regarding deposition procedures. The parties may by written stipulation provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions.

Rule 31. Depositions upon written questions.

(a) A party may depose a party or witness by written questions. Rules 30 and 45 apply to depositions upon written questions, except insofar as by their nature they are clearly inapplicable.

(b) A party taking a deposition using written questions shall serve on the parties a notice which includes the name or description and address of the deponent, the name or descriptive title of the officer before whom the deposition will be taken, and the questions to be asked.

(c) Within 14 days after the questions are served, a party may serve cross questions. Within 7 days after being served with cross questions, a party may serve redirect questions. Within 7 days after being served with redirect questions, a party may serve re-cross questions.

(d) A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the designated officer who shall proceed promptly to ask the questions and prepare a record of the responses.

(e) During standard discovery, a deposition by written questioning shall not cumulatively exceed 15 questions, including discrete subparts, by the plaintiffs collectively, by the defendants collectively or by third-party defendants collectively.

Rule 33. Interrogatories to parties.

(a) Availability; procedures for use. During standard discovery, any party may serve written interrogatories upon any other party, subject to the limits of Rule 26(c)(5). Each interrogatory shall be separately stated and numbered.

(b) Answers and objections. The responding party shall serve a written response within 28 days after service of the interrogatories. The responding party shall restate each interrogatory before responding to it. Each interrogatory shall be answered separately and fully in writing under oath or affirmation, unless it is objected to. If an interrogatory is objected to, the party shall state the reasons for the objection. Any reason not stated is waived unless excused by the court for good cause. An interrogatory is not objectionable merely because an answer involves an opinion or argument that relates to fact or the application of law to fact. The party shall answer any part of an interrogatory that is not objectionable.

(c) Scope; use at trial. Interrogatories may relate to any discoverable matter. Answers may be used as permitted by the Rules of Evidence.

(d) Option to produce business records. If the answer to an interrogatory may be found by inspecting the answering party's business records, including electronically stored information, and the burden of finding the answer is substantially the same for both parties, the answering party may identify the records from which the answer may be found. The answering party must give the asking party reasonable opportunity to inspect the records and to make copies, compilations, or summaries. The answering party must identify the records in sufficient detail to permit the asking party to locate and to identify them as readily as the answering party.

Rule 34. Production of documents and things and entry upon land for inspection and other purposes.

(a) Scope.

(a)(1) Any party may serve on any other party a request to produce and permit the requesting party to inspect, copy, test or sample any designated discoverable documents, electronically stored information or tangible things (including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent into reasonably usable form) in the possession or control of the responding party.

(a)(2) Any party may serve on any other party a request to permit entry upon designated property in the possession or control of the responding party for the purpose of inspecting, measuring, surveying, photographing, testing, or sampling the property or any designated discoverable object or operation on the property.

(b) Procedure and limitations.

(b)(1) The request shall identify the items to be inspected by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable date, time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced.

(b)(2) The responding party shall serve a written response within 28 days after service of the request. The responding party shall restate each request before responding to it. The response shall state, with respect to each item or category, that inspection and related acts will be permitted as requested, or that the request is objected to. If the party objects to a request, the party must state the reasons for the objection. Any reason not stated is waived unless excused by the court for good cause. The party shall identify and permit inspection of any part of a request that is not objectionable. If the party objects to the requested form or forms for producing electronically stored information -- or if no form was specified in the request -- the responding party must state the form or forms it intends to use.

(c) Form of documents and electronically stored information.

(c)(1) A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c)(2) If a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable.

(c)(3) A party need not produce the same electronically stored information in more than one form.

Rule 35. Physical and mental examination of persons.

(a) Order for examination. When the mental or physical condition or attribute of a party or of a person in the custody or control of a party is in controversy, the court may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or control. The order may be made only on motion for good cause shown. All papers related to the motion and notice of any hearing shall be served on a nonparty to be examined. The order shall specify the time, place, manner, conditions, and scope of the examination and the person by whom the examination is to be made. The person being examined may record the examination by audio or video means unless the party requesting the examination shows that the recording would unduly interfere with the examination.

(b) Report. The party requesting the examination shall disclose a detailed written report of the examiner, setting out the examiner's findings, including results of all tests made, diagnoses and conclusions. If the party requesting the examination wishes to call the examiner as a witness, the party shall disclose the examiner as an expert as required by Rule 26(a)(3).

(c) Sanctions. If a party or a person in the custody or under the legal control of a party fails to obey an order entered under paragraph (a), the court on motion may take any action authorized by Rule 37(e), except that the failure cannot be treated as contempt of court.

Advisory Committee Notes

Rule 35 has been substantially revised. Few rules have generated such an extensive motion practice and disputes as the previous version of Rule 35. The battles typically raged over the production of reports of prior examinations by the examining physician, and whether the examination could be recorded or witnessed by a third party.

It is also doubtful that any rule under consideration for change has been as thoroughly studied as Rule 35. A subcommittee of the advisory committee has spent several years collecting information from both sides of the personal-injury bar and from the trial courts. While no rule amendment will please everyone, the committee is of the opinion that making recording the default for medical examinations, and removing the

requirement for automatic production of prior reports, will best resolve the issues that have bedeviled the trial courts and counsel.

The Committee re-emphasizes that a medical examination is not a matter of right, but should only be permitted by the trial court upon a showing of good cause. Rule 35 has always provided, and still provides, that the proponent of an examination must demonstrate good cause for the examination. And, as before, the motion and order should detail the specifics of the proposed examination.

The committee is concerned about the rise of the so-called "professional witness" in the area of medical examinations. This phenomenon is not limited to Utah. See, A World of Hurt: Exams of Injured Workers Fuel Mutual Mistrust, By N. R. Kleinfield, New York Times, April 4, 2009. The committee recognizes that there is often nothing "independent" about a Rule 35 examiner. Therefore, the trial court should refrain from the use of the phrase "independent medical examiner," using instead the neutral appellation "medical examiner," "Rule 35 examiner," or the like.

As noted, a major source of controversy has been requests by plaintiffs' counsel to audio- or video-record examinations. The Committee has determined that the benefits of recording generally outweigh the downsides in a typical case. The new rule therefore provides that recording shall be permitted as a matter of course unless the person moving for the examination demonstrates the recording would unduly interfere with the examination. See, Boswell v. Schultz, 173 P.3d 390, 394 (OK 2007) ("A video recording would be a superior method of providing an impartial record of the physical examination.")

Nothing in the rule requires that the recording be conducted by a professional, and it is not the intent of the committee that this extra cost should be necessary. The committee also recognizes that recording may require the presence of a third party to manage the recording equipment, but this must be done without interference and as unobtrusively as possible.

The former requirement of Rule 35(c) providing for the production of prior reports on other examinees by the examiner was a source of great confusion and controversy. This provision does not exist in the federal version of the rule, nor is the Committee aware of any other similar state court rule. After much deliberation and discussion, it is

the Committee's view that this provision is better eliminated, and in the new rule there is no longer an automatic requirement for the production of prior reports of other examinations. Medical examiners will be treated as other expert witnesses are treated, with the required disclosure under Rule 26 and the option of a report or a deposition.

Rule 36. Request for admission.

(a) Request for admission. A party may serve upon any other party a written request to admit the truth of any discoverable matter set forth in the request, including the genuineness of any document. The matter must relate to statements or opinions of fact or of the application of law to fact. Each matter shall be separately stated and numbered. A copy of the document shall be served with the request unless it has already been furnished or made available for inspection and copying. The request shall notify the responding party that the matters will be deemed admitted unless the party responds within 28 days after service of the request.

(b) Answer or objection.

(b)(1) The matter is admitted unless, within 28 days after service of the request, the responding party serves upon the requesting party a written response.

(b)(2) The answering party shall restate each request before responding to it. Unless the answering party objects to a matter, the party must admit or deny the matter or state in detail the reasons why the party cannot truthfully admit or deny. A party may identify the part of a matter which is true and deny the rest. A denial shall fairly meet the substance of the request. Lack of information is not a reason for failure to admit or deny unless the information known or reasonably available is insufficient to form an admission or denial. If the truth of a matter is a genuine issue for trial, the answering party may deny the matter or state the reasons for the failure to admit or deny.

(b)(3) If the party objects to a matter, the party shall state the reasons for the objection. Any reason not stated is waived unless excused by the court for good cause. The party shall admit or deny any part of a matter that is not objectionable. It is not grounds for objection that the truth of a matter is a genuine issue for trial.

(c) Effect of admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. The court may permit withdrawal or amendment if the presentation of the merits of the action will be promoted and withdrawal or amendment will not prejudice the requesting party. Any admission under this rule is for the purpose of the pending action only. It is not an admission for any other purpose, nor may it be used in any other action.

32

Rule 37. Discovery and disclosure motions; Sanctions.

(a) Motion for order compelling disclosure or discovery.

(a)(1) A party may move to compel disclosure or discovery and for appropriate sanctions if another party:

(a)(1)(A) fails to disclose, fails to respond to a discovery request, or makes an evasive or incomplete disclosure or response to a request for discovery;

(a)(1)(B) fails to disclose, fails to respond to a discovery request, fails to supplement a disclosure or response or makes a supplemental disclosure or response without an adequate explanation of why the additional or correct information was not previously provided;

(a)(1)(C) objects to a discovery request ;

(a)(1)(D) impedes, delays, or frustrates the fair examination of a witness; or

(a)(1)(E) otherwise fails to make full and complete disclosure or discovery.

(a)(2) A motion may be made to the court in which the action is pending, or, on matters relating to a deposition or a document subpoena, to the court in the district where the deposition is being taken or where the subpoena was served. A motion for an order to a nonparty witness shall be made to the court in the district where the deposition is being taken or where the subpoena was served.

(a)(3) The moving party must attach a copy of the request for discovery, the disclosure, or the response at issue. The moving party must also attach a certification that the moving party has in good faith conferred or attempted to confer with the other affected parties in an effort to secure the disclosure or discovery without court action and that the discovery being sought is proportional under Rule 26(b)(2).

(b) Motion for protective order.

(b)(1) A party or the person from whom discovery is sought may move for an order of protection from discovery. The moving party shall attach to the motion a copy of the request for discovery or the response at issue. The moving party shall also attach a certification that the moving party has in good faith conferred or attempted to confer with other affected parties to resolve the dispute without court action.

(b)(2) If the motion raises issues of proportionality under Rule 26(b)(2), the party seeking the discovery has the burden of demonstrating that the information being sought is proportional.

(c) Orders. The court may make any order to require disclosure or discovery or to protect a party or person from discovery being conducted in bad faith or from annoyance, embarrassment, oppression, or undue burden or expense, or to achieve proportionality under Rule 26(b)(2), including one or more of the following:

(c)(1) that the discovery not be had;

(c)(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(c)(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(c)(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(c)(5) that discovery be conducted with no one present except persons designated by the court;

(c)(6) that a deposition after being sealed be opened only by order of the court;

(c)(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(c)(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court;

(c)(9) that a question about a statement or opinion of fact or the application of law to fact not be answered until after designated discovery has been completed or until a pretrial conference or other later time; or

(c)(10) that the costs, expenses and attorney fees of discovery be allocated among the parties as justice requires.

(c)(11) If a protective order terminates a deposition, it shall be resumed only upon the order of the court in which the action is pending.

(d) Expenses and sanctions for motions. If the motion to compel or for a protective order is granted, or if a party provides disclosure or discovery or withdraws a disclosure or discovery request after a motion is filed, the court may order the party, witness or

attorney to pay the reasonable expenses and attorney fees incurred on account of the motion if the court finds that the party, witness, or attorney did not act in good faith or asserted a position that was not substantially justified. A motion to compel or for a protective order does not suspend or toll the time to complete standard discovery.

(e) Failure to comply with order.

(e)(1) Sanctions by court in district where deposition is taken. Failure to follow an order of the court in the district in which the deposition is being taken or where the document subpoena was served is contempt of that court.

(e)(2) Sanctions by court in which action is pending. Unless the court finds that the failure was substantially justified, the court in which the action is pending may impose appropriate sanctions for the failure to follow its orders, including the following:

(e)(2)(A) deem the matter or any other designated facts to be established in accordance with the claim or defense of the party obtaining the order;

(e)(2)(B) prohibit the disobedient party from supporting or opposing designated claims or defenses or from introducing designated matters into evidence;

(e)(2)(C) stay further proceedings until the order is obeyed;

(e)(2)(D) dismiss all or part of the action, strike all or part of the pleadings, or render judgment by default on all or part of the action;

(e)(2)(E) order the party or the attorney to pay the reasonable expenses, including attorney fees, caused by the failure;

(e)(2)(F) treat the failure to obey an order, other than an order to submit to a physical or mental examination, as contempt of court; and

(e)(2)(G) instruct the jury regarding an adverse inference.

(f) Expenses on failure to admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions proves the genuineness of the document or the truth of the matter, the party requesting the admissions may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that:

(f)(1) the request was held objectionable pursuant to Rule 36(a);

(f)(2) the admission sought was of no substantial importance;

(f)(3) there were reasonable grounds to believe that the party failing to admit might prevail on the matter;

(f)(4) that the request is not proportional under Rule 26(b)(2); or

(f)(5) there were other good reasons for the failure to admit.

(g) Failure of party to attend at own deposition. The court on motion may take any action authorized by paragraph (e)(2) if a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to appear before the officer taking the deposition, after proper service of the notice. The failure to act described in this paragraph may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order under paragraph (b).

(h) Failure to disclose. If a party fails to disclose a witness, document or other material as required by Rule 26(a) or Rule 26(d)(1), or to amend a prior response to discovery as required by Rule 26(d)(4), that party shall not be permitted to use the witness, document or other material at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose. In addition to or in lieu of this sanction, the court on motion may take any action authorized by paragraph (e)(2).

(i) Failure to preserve evidence. Nothing in this rule limits the inherent power of the court to take any action authorized by paragraph (e)(2) if a party destroys, conceals, alters, tampers with or fails to preserve a document, tangible item, electronic data or other evidence in violation of a duty. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Advisory Committee Notes

The 2011 amendments to Rule 37 make two principal changes. First, the amended Rule 37 consolidates provisions for motions for a protective order (formerly set forth in Rule 26(c)) with provisions for motions to compel. By consolidating the standards for these two motions in a single rule, the Advisory Committee sought to highlight some of

the parallels and distinctions between the two types of motions and to present them in a single rule.

Second, the amended Rule 37 incorporates the new Rule 26 standard of "proportionality" as a principal criterion on which motions to compel or for a protective order should be evaluated. As to motions to compel, Rule 37(a)(3) requires that a party moving to compel discovery certify to the court "that the discovery being sought is proportional under Rule 26(b)(2)." Rule 37(b) makes clear that a lack of proportionality may be raised as ground for seeking a protective order, indicating that "the party seeking the discovery has the burden of demonstrating that the information being sought is proportional."

Tab 3

Comments: Rules of Civil Procedure

(1) Emails

Fran:

I greatly appreciated your presentation at the Bar Convention in San Diego. I went up to speak with you after your presentation but you mentioned that you had to head out, and you asked me to email you with my comments or questions.

First, I had a question regarding the tier system. If a plaintiff elects for Tier 1 (the under $50,000 category), are his damages capped at $50,000? Would he be prevented from requesting more than $50,000 from a jury? It seems prejudicial if you go through the entire discovery process, with all of the limitations of an under-$50,000 case, only to have the plaintiff ask for more than $50,000 at trial, or even for the jury to award more than $50,000.

Second, I have a comment regarding interrogatories in cases of less than $50,000. You indicated that at least some on the committee believed that interrogatories are not useful. It looks like from your profile that you practice in complex civil litigation cases. For my practice, I am primarily involved in personal injury litigation. In personal injury cases, interrogatories are exceptionally valuable, providing useful information regarding past injuries, a list of past and current health care providers, Social Security Disability, and Medicare liens (which we are required to deal with under federal law). All of that information will likely not be known off-hand by a plaintiff at his or her deposition. I hope you will consider allowing at least 5 interrogatories for the less than $50,000 cases.

Thanks for your time, and thanks again for your presentation at the Bar Convention.

From Tyler Snow

Fran, thanks for taking the time to present the new discovery rules at the Bar Convention. As I mentioned when we spoke after your presentation, I have a concern that a plaintiff may claim damages of 50k or less and then ask for more than that at trial. If the goal is proportionality, than it would seem to me that the rule should be clear that no more than 50k can be awarded at trial. It does not seen fair or meet the goal of proportionality to allow a plaintiff to claim damages of 50k or less to limit a defendants ability to pursue discovery and then allow a plaintiff to recover more than 50k at trial.

From Robert L. Janicki, Esq.

The Utah Defense Lawyers Association sent out via its list serve the attached email summarizing the rule changes and inviting members to make comments. The summary is actually pretty good (although it doesn't really discuss proportionality, for some reason). The summary mentions one thing, however, that I think might have been a mistake on our part. It points out that the following language has been deleted from Rule 30(b)(6): "The person so designated shall testify as to matters known or reasonably available to the organization." We also deleted the next sentence, which

reads: "This Subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules." It may be that we intentionally deleted this language, or perhaps moved it somewhere else, but I don't remember having done so. I'm not exactly sure what the second sentence is intended to address, but the first is pretty important. It ensures that the organization actually prepare and put up a witness who can speak to the issues in the notice (or in the response to the notice) and not simply show up and say "I don't know" in response to questions.

Tim, can you put this on the list of things we need to look into when we revisit this rule after the comment period? If we intentionally deleted this, a quick explanation of why would be helpful. If not, we should consider adding it back in.

From Todd Shaughnessy

> The change was made in September 2009. There is nothing in the paragraph to suggest that depositions cannot be taken by other authorized means, so the second sentence is pointless.
>
> The substance of the first sentence was moved to Rule 26(d) so that it applies to all disclosure and discovery, not just depositions. If the concern is that a person designated by a party could play dumb when a party could not, see the further suggested change to Rule 26(d)(2).

PROPOSED AMENDMENT TO NEW RULES OF DISCOVERY

GRAMA APPLICATION TO CIVIL DISCOVERY

Add the following subsection to the proposed new rule 37, Discovery and Disclosure Motions; Sanctions, at line 116:

(j)(1) If a party to litigation is a government entity subject to the Government Records Access and Management Act, 63G-1-101, et seq. (GRAMA), GRAMA shall not be used as a substitute for discovery in or related to the litigation.

(2) If any party has a reasonable belief that another party is improperly using GRAMA for litigation discovery, it may apply to the court for an order limiting or prohibiting the use of GRAMA.

(3) In determining whether to issue an order limiting the use of GRAMA, the court shall consider admissibility, relevance, proportionality, expense, the burden imposed on the government entity, and whether a GRAMA request has some legitimate basis unrelated to the litigation.

From the Attorney General's Office

> The Supreme Court may not have the authority to limit the application of GRAMA on a governmental party since that obligation is imposed by the legislature.

First, on the tiered approach, the amount of claimed damages dictates the amount of discovery. However, I can think of many circumstances where no monetary relief is sought but where the matter in controversy is very important and probably deserves significant discovery, i.e. actions to quiet title, specific performance, injunctions, etc. I would suggest importing the approach for diversity jurisdiction, i.e. the amount in controversy rather than the amount of damages claimed.

Second, I really like the approach for a limit on the number of hours for deposition. However, I can easily see an opportunity for mischief with the rule as currently written. What if a plaintiff notices a deposition and takes 1 hour but the defendant examines the witness for 5. Do the 6 hours count against the plaintiff? Is it split? I think that the rule is ambiguous in this respect.

Third, while I think the exhaustion of discovery before asking the court for more will result in delay for complex cases, I am concerned about another ambiguity in the requirement. As written, the party needs first to exhaust the allowed discovery. Does this mean that a party needs to use, for example, all interrogatories before seeking leave to depose another witness? I think, as written, the rule could be so interpreted.

Jefferson W. Gross

Burbidge Mitchell & Gross

> Would changing "damages" to "amount in controversy" have the desired effect? Is there caselaw in diversity jurisdiction that might be helpful? Confusing? If there are no damages claimed, the case would be placed in the second tier. Is that sufficient standard discovery for the types of cases mentioned?
>
> Should the rule specify that deposition time is charged to the examining party?
>
> Should the rule specify that a party must exhaust standard discovery in order to request extraordinary discovery of the same type?

(2) Posted online

Dear Members of the Civil Rules Committee:

First, I would like to thank you for your service on this committee and for undertaking this unenviable task. I know that you have received a number of comments and concerns with regard to the proposed amendments and I would like to echo a number of these sentiments. Also, I am writing this comment individually, but I have compiled a number of these concerns from the other attorneys at Clyde Snow. Thus, while this is not an official comment from the firm, it does reflect a number of opinions.

Initially, I would like to address the efforts to increase disclosure and strengthen the pleading requirements. This is a laudable goal, however, the standards are too restrictive and likely hold parties to unrealistic standards. This comment refers specifically to the requirement that parties summarize witness testimony and provide an

accurate accounting of damages. These amendments require parties to disclose information that is often unknown, or unknowable, at this stage in the proceedings. For example, damages are often calculated following the completion of expert reports. Accordingly, it is unrealistic to expect parties to be able to disclose this information, or the basis for an estimate, at the initial disclosure phase. Therefore, the prudence of this amendment is called into question.

Secondly, the proportionality standard espoused by the Committee is similarly unworkable. Specifically, the restrictions imposed by the tiered discovery are overly restrictive and generally lacking in support. The amount in controversy rarely dictates the complexity of the case. Cases that have less than $50,000 at issue are frequently just as complicated, if not more so, than cases for larger amounts. The seemingly arbitrary lines drawn by the committee are not accurately justified with regard to the limitations imposed by the tiered approach. Thus, it is difficult to support these amendments without some supporting evidence that justifies the lines that have been drawn.

Further the proportionality standard, while admirable, will likely lead to a busy motion practice of challenging the proportionality of requested discovery. For example, every time a motion is filed to expand “standard discovery,” which I expect to happen quite often, a motion questioning the proportionality of the request will summarily oppose it. As this will ultimately be a fact intensive inquiry, it must surely be resolved at a hearing.

The amendments note that the “standard discovery” period will not be tolled while a motion to compel or a motion for expanded discovery is resolved. However, the practical result is that following the affirmative resolution of such a motion, the discovery period will be necessarily be extended to allow the party to complete discovery. Accordingly, the anticipated motion practice will likely defeat the ambitious timeline established by the tiered approach.

Similarly the attempt made by the Committee to deal with the costs of expert discovery fall short of the desired effect. I cannot foresee any situation in which a party would elect to depose an expert in lieu of receiving an expert report. Therefore, experts will be expected to produce substantive written reports within 28 days of the opposing parties election. Frequently, this will not allow sufficient time for a responding party’s expert to conduct the necessary research (if needed) or collect the necessary data to accurately respond in its own written report.

These critiques highlight the major concerns I have identified with the proposed amendments. However, there are a number of minor changes and alterations that have been made which also appear problematic. Further, these changes were not well publicized and our firm received late notice of the nature and extent of these changes. Accordingly, we were unable to coordinate a more thorough response and critique of these amendments.

With the foregoing in mind, I am unable to support these proposed changes and would encourage the committee to consider another round of revisions.

Sincerely,

Jon Clyde, Clyde Snow & Sessions, P.C.

Posted by Jon Clyde June 21, 2011 10:54 PM

The amendments to Rule 8, requiring that a pleader state the facts and legal theory supporting a claim, are guaranteed to cause an explosion in motions to dismiss and a significant additional burden on trial judges. The Advisory Committee note sows confusion, because it states that the Twombly/Iqbal standard isn't applicable, but doesn't say what standard is applicable, and it's hard to see how requiring the pleading of facts isn't some sort of "heightened pleading standard," notwithstanding the comments in the note to the contrary. The Canfield decision, which the note supplies for guidance, involved a pleading so deficient in facts that a motion for a more definite statement was ordered. It's tough to reconcile that holding with the new proposed requirement that facts plus legal theory be alleged.

No amendments have been proposed to Rule 9, save for one amendment concerning timing, yet the proposed revisions to Rule 8 seem to conflict with Rule 9, the latter of which has a whole host of special pleading rules directed to certain issues. In each place where Rule 9 says that something may be averred "generally," is Rule 8 now intended to preempt Rule 9? Is the new Rule 8 standard equivalent to the Rule 9(b) demand that fraud and mistake be stated with particularity, for example?

The Advisory Committee note on Rule 8 also says that pleaders are no longer required to plead "claims." But the rest of the rules, such as Rules 12 and 56, speak in terms of "claims."

On a wholly separate issue, I concur with the opinion expressed by many that moving away from the federal rules is in general a bad idea, and will create needless complications.

Posted by Mark Dykes June 21, 2011 05:45 PM

To the Committee:

The following comments are submitted on behalf of several members of my firm (including Roger P. Christensen, Dale J. Lambert, L. Rich Humpherys, William J. Hansen, Phillip S. Ferguson, Karra J. Porter, Rebecca L. Hill, Nathan D. Alder, Scott T. Evans, George W. Burbidge, Scot A. Boyd, Sarah E. Spencer, Alain C. Balmanno, and Tyler V. Snow).

Like others, we recognize that the Committee has devoted substantial efforts to a worthy goal, i.e., reducing the length and cost of litigation. In that regard, some changes are welcome. For example, it makes sense to eliminate disputes by recognizing (some)

attorney-expert communications as privileged. Other proposals, however, seem likely to increase cost and delay, increase motion practice, reduce civility, and/or create unfairness to one or both sides:

Rule 1 retroactive application: Application to pending cases seems unworkable and prejudicial. Trial courts will be deluged with motions for exemption, as most of us have handled our existing cases based upon the existing rules.

Rule 8 statement of legal theory: The level of specificity in pleading legal theories is unclear. For example, may a party plead negligence generally, or does she have to specify a Restatement provision?

Rules 8 and 26 tiers: As others have remarked, the proposed tiers are problematic. Is the tier a cap? The parties are limited in preparing a defense (to a claim or counterclaim) based upon the tier selected, which raises due process concerns if the claimant is free to seek more at trial. If it is a cap, some claimants will automatically choose tier 3 to avoid that limitation. And is a jury prohibited from awarding more, even if the claimant does not request it?

The lack of interrogatories in tier 1 cases is potentially unfair to both parties. It may force the taking of otherwise unneeded depositions, and deponents often cannot meaningfully recall medical information. In other states, court-approved interrogatories are authorized in specific types of cases (e.g., auto accidents). Or initial disclosures could include all medical providers, not just those supportive of the party's claim. Or perhaps allow 10 interrogatories.

Limiting discovery by side is (1) problematic in cases in which co-parties have conflicts, or claims against each other; (2) prejudicial to parties added to the case after some of the discovery limitations have been eaten up.

Rule 26(a)(1) summary of testimony: The requirement that initial disclosures include a summary of expected testimony (1) is unfair to defendants, who do not have the same time to put their case together as plaintiffs, (2) is unfair to plaintiffs who may not have access to some witnesses (e.g., treating doctors who won't meet with patients' attorneys, defendant's employee-witnesses); (3) increases cost by forcing early and potentially unnecessary interviews of all persons with potential knowledge, and (4) infringes upon attorney work product. Are witness statements now presumptively subject to production, whether in a dispute about adequacy of the summary or otherwise?

Rule 26(a)(3) experts: The proposed changes regarding expert reports/depositions will increase cost. If an expert is limited to a report, (1) counsel and expert will have to expend more effort on the report because it cannot be fleshed out through a deposition; (2) parties will be hindered in evaluating a case because the strength of the expert's opinions cannot be tested until trial or a possible Rimmasch-type hearing. If the expert is deposed with no report, (1) the attorney will be taking a blind deposition, and (2) may be forced to pay his own expert to attend the deposition for assistance.

We agree that expert cost is a growing problem, but perhaps it might be better addressed through greater enforcement of existing rules. Some trial courts do not strenuously examine the need for or qualifications/methodology of experts, i.e., to truly act as a gatekeeper. Also, although existing rules contemplate “reasonable” expert fees, expert rates are skyrocketing, and often comprise (by far) a client’s biggest expense in a case.

Posted by Karra Porter June 21, 2011 05:21 PM

I also echo the prior comments that the time periods for expert disclosures (including rebuttal) are far too short and are not realistic. Most people with meaningful experience retaining and working with experts on complicated matters will recognize that to locate and retain and expert, work into his/her schedule, get him/her up to speed, and prepare a report (or prepare for a deposition) will almost always take longer than the time periods alloted in the rules. 30 days should be the bare minimum.

Posted by Keith Call June 21, 2011 04:41 PM

Dear Committee:

The discovery rules of the Federal Rules of Civil Procedure, upon which Utah’s current rules are modeled, were specifically designed to foster settlement. According to recent studies demonstrating how few federal cases actually go to trial, it appears the rules have achieved that purpose. There is no reason to believe the rules have not had the same effect in the Utah state courts.

The proposed rules are designed to reverse this trend. There is, however, no evidence that more jury trials are a salutary development for an already overstretched judicial system. A decrease in the number of cases that settle and concomitant increase in the number of cases that go to trial will put additional strain on a state judicial system that is chronically underfunded and understaffed. It could in fact be more costly to clients in the long run, which begs the question, who are the new rules designed to benefit the most?

If the amendments to expert discovery are enacted, Rule 702 of the Utah Rules of Evidence, will be effectively abandoned. Rule 702 requires that proposed expert testimony satisfy certain requirements of reliability. Trial courts, to whom Rule 702 “assigns . . . a ‘gatekeeper’ responsibility to screen out unreliable expert testimony,” cannot be expected to make the necessary inquiry without the assistance of the adversary process. Utah R. Evid. 702 (advisory committee notes).

The parties, however, cannot assist the trial judge discharge its “gatekeeper” obligations under Rule 702 without the proper methods for discovering whether the “principles or methods underlying the testimony meet a threshold showing that they (i) are reliable, (ii) are based upon sufficient facts or data, and (iii) have been reliably applied to the facts of the case.” Utah R. Evid. 702(b).

The proposed amendments permit discovery only through an expert report or a four-hour (4-hour) deposition, but not both (as currently allowed). Rarely, if ever, do expert reports alone provide all of the information necessary to assess proposed expert testimony under Rule 702. Moreover, the proposed rule does not even require an expert report contain the information that Rule 702 requires: (1) the methods and principles upon which the witness's testimony is based, (2) the facts and data upon which the witness has relied, and (3) the application of the methods and principles to the facts and data in the particular case.

Neither will a four-hour (4-hour) deposition provide a sufficient basis for the parties to explore for the trial court whether a witness's testimony satisfies all of the reliability requirements imposed by Rule 702. A large portion of that time will be consumed merely attempting to identify the actual opinions the witness intends to offer at trial. If the witness intends to offer more than one opinion or if the opinion involves multiple parts, it is doubtful that the parties could properly explore each of the Rule 702 elements (methods and principles; facts and data; application to the case) in just four hours.

If Rule 702 is to have meaning and effect, the discovery necessary to properly apply the rule should not be so restrained as to render the required analysis impossible.

Furthermore, it appears that those with smaller cases believe the current rules are not adequate when smaller amounts are at stake. But, it should not be assumed that all state court cases are for small amounts. There are also cases that are for very large amounts for which diversity or subject matter does not put the matter into federal court. The proposed rules are completely inadequate to handle these types of cases (i.e., numerous parties, numerous issues, complicated issues, large dollars).

Because there is already a trend in the proposed rules to recognize a need to "tier" the rules' applicability to certain sizes of cases, it would be preferable if the current rules of civil procedure remained in place for cases in which the dollar size is over $500,000.00, which could be referred to as Tier 4. Therefore, Tier 3 would only refer to cases of $300,000.00 to $500,000.00.

Posted by Vicki M. Baldwin June 21, 2011 04:21 PM

The attorneys at Smith Hartvigsen, PLLC, recognize that litigation costs in many actions can be enormous and that the costs and expenses overall have been rising during recent years. However, the mere fact that litigation is expensive or time consuming does not mean that the cost or time involved is always unjustified or unnecessary. We feel that the proposed changes to the Utah Rules of Civil Procedure, while apparently driven by admirable motives, often go too far and may in actuality sacrifice fairness upon the altar of cost savings.

The proposed changes to Rule 26 represent a radical departure from the current rules governing discovery and disclosures. Modern rules of civil procedure are founded on the idea that discovery and disclosures should bring to light all relevant facts involved,

allow all parties to present their best arguments, and enable the court to make a decision on the merits of the case. Discovery under the current rules is still often a difficult process. Requiring more voluntary disclosures up front, entailing significantly higher initial costs and time commitments, while at the same time reducing the amount of discovery allowed during the course of litigation will only complicate the process and present additional enforcement problems.

The move from a relevance standard to a proportionality standard in Rule 26(b) is presumably intended to reduce or eliminate unnecessary discovery requests. However, the ambiguous standards set forth to determine proportionality in the discovery process may invite other problems. Determining the proportionality of each request will inundate the court with motions challenging the proportionality of discovery requests. The likelihood that two opposing sides will agree on the “proportionality” of particular discovery requests is very small based on our litigation experience.

Additionally, we feel that the discovery tiers established by Rule 26(c)(3) are arbitrary limits that fail to account for the extensive variety of issues litigated in Utah courts. Although the proposed rules allow for modification of discovery limits by either stipulation or motion, we feel that the additional layer of regulation would be an unnecessary burden on courts, counsel, and parties. The tiers based on pled monetary damages fail to account for cases in which significant non-monetary relief is sought (these cases would, by default, be permitted discovery according to tier 2 rules). Also, the tiers are based on the amount of damages initially claimed and may leave open the possibility of a plaintiff initially claiming a low damage amount—based only on facts then-known—when significantly higher damages may exist based on facts established through discovery. In such a case, potential additional claims for damages would never be realized because of the meager discovery allowed under tier 1 rules. The discovery limits placed on depositions and interrogatories for all tiers are overly restrictive and unrealistic because factors governing the extent of discovery, but unrelated to the amount in controversy, vary greatly from case to case. Litigants will also have the incentive to fail to make complete or accurate disclosure, particularly in small monetary cases, knowing that the opponent has limited resources and tools available to ever discover the undisclosed information. While discovery can be costly and time consuming, such extensive discovery is often necessary to effectively litigate a case.

We also feel that the proposed changes to Rule 26 regarding expert witnesses are unnecessary and unrealistic. While we support the free and voluntary disclosure of experts expected to testify and the basic topics of their testimony, the limits placed on the length and scheduling of depositions are problematic. According to proposed Rule 26(a)(3)(B), an expert deposition may not exceed four hours. An expert discussing an extremely complicated subject or an expert whose testimony is expected to be “key” to a case may require a much lengthier deposition, requiring additional motions, responses, court hearings, and expense. The proposed rules also set forth 28-day time periods in which depositions must occur. We believe that these time restrictions are unrealistic, particularly in multi-party cases, based on the schedules of experts and

attorneys. On the other hand, under Rule 26(a)(3)(B) parties may choose to receive a detailed expert report containing a complete statement of all opinions an expert will offer at trial, but the substance of the expert's testimony need only be "fairly disclosed in the report." Without an opportunity to depose the expert, the true nature or meaning of an expert's testimony may be disguised, intentionally or not, in the detail, or lack thereof, in the expert report. Likewise, deposing an expert without first knowing the substance of an expert's opinion (through the previous disclosure of the expert's report) makes it nearly impossible to adequately prepare for the expert's deposition.

We are also concerned that the changes made to Rule 8 regarding initial pleadings will have the effect of preventing some meritorious cases from being properly heard and will be, for practical purposes, a move toward "code" pleading despite the drafters' statements to the contrary. While the proposed requirement to plead facts contained in Rule 8(a)(1) is consistent with the expectations of increased voluntary disclosures in proposed Rule 26, the effect of the proposed rule may be to limit the ability of plaintiffs to bring certain causes of action where many of the supporting facts may only be obtainable through discovery. The same is true for defendants who must now specifically plead the facts and supporting legal theories for all affirmative defenses. We feel that the current pleading standards are sufficient and well-known and we discourage significant changes.

Most cases effectively regulate discovery issues under the current rules. Small cases require few depositions and only limited written discovery. Cases where discovery is most likely to be costly and time consuming will not become less costly or less time consuming because of these changes. Rather, the process will instead be more ponderous, complex, costly, and lengthy because large or complicated cases will inherently turn to the provisions for extraordinary discovery in Rule 26(c)(6). We do encourage measured and incremental actions by courts and the Rules Committee to contain the cost of litigation while still achieving a high degree of fairness to all parties. We believe, however, that these proposed changes will measurably increase the cost of cases while negatively impacting the degree of fairness in many.

SMITH HARTVIGSEN, PLLC

J. Craig Smith

David B. Hartvigsen

Clark R. Nielsen

Daniel J. McDonald

Mathew E. Jensen

Kathryn J. Steffey

R. Christopher Preston

Bryan C. Bryner

Jeffry R. Gittins

Kyle C. Fielding

Posted by Chris Preston June 21, 2011 04:19 PM

I thank the committee for its work. Although in strong agreement with other comments regarding the difficulties resulting from proposed changes, may I take this opportunity to list some of my concerns?

1. Most of the proposed discovery changes are remedies in search of nonexistent problems. I have practiced almost exclusively civil tort litigation for 26 years. I, like most attorneys, have a very, very short list of attorneys with whom I have not readily and informally worked out discovery disagreements. For example, in 26 years I have needed to move the court for a Rule 16 scheduling order less than a dozen times. I have filed a motion objecting to discovery less than 10 times. I have filed a motion to dismiss for failure to prosecute less than 10 times. I have received such objections just as infrequently. I can not remember but a few times receiving a formal objection to discovery which required a hearing.

2. The cost of a standard set of interrogatories are not unreasonable or burdensome in any case. Even in cases where the claim is for less than $50,000, a paralegal can almost always meet with the client and compile answers within a relatively short period of time. These responses go a long way to reduce the need and/or time for depositions.

3. The tier system based on amount claimed lacks rational basis. These cases are important to the litigants. These cases belong to the litigants. A $50,000 tier case is more important to the average citizen as a $301,000 tier case is to a major corporation. This is particularly so in cases where reasonable insurance limits are less than the amount claimed. Additionally, claims for punitive damages, which by statute may not be covered by insurance, are important claims. Whether frivolous or not, these claims carry significant risks to defendants. Defense of these claims, therefore, require complete preparation. These claims cost nothing to allege but require significant discovery to defend.

4. It is unreasonable and unjust to strip a defendant from conducting all desired and relevant discovery which the trial court does not deem burdensome. The court already has the authority to limit unreasonable discovery on motion. In 26 years I can not remember a single time when a plaintiff’s attorney has made a motion to limit discovery as being unreasonable or over burdensome under the present rules.

4. The new rules require the trial court to direct mediation or other ADR process. Courts presently do not and should not have the power to direct arbitrations, etc. The parties have a constitutional right to jury trial.

5. It is unreasonable to require an attorney to provide a summary of expected fact witness testimony. The potential or prospective witness may not be cooperative with or available to the defendant. At the beginning of cases defendants usually do not know the identity or knowledge of these witnesses. It may be impossible to know the expected testimony even from cooperative witnesses well into the case. This requirement will dramatically increase the cost of litigation as counsel strives to locate and sufficiently interview all such witnesses.

6. In well over 95% of cases, plaintiffs' attorneys are satisfied to receive the coverage limits rather than a copy of the insurance policy. The costs incurred in obtaining a copy of such a policy are not necessary in almost all cases.

7. A defendant, in a significant amount of cases, does not know (1) whether or not an expert is needed; (2) the type of expert which is needed; (3) the identity of the exact expert selected, or (4) the availability of an expert within seven days of completion of fact discovery. Nor does the defendant have a realistic opportunity to consult with an informed expert until after plaintiff provides their expert information. Plaintiffs, on the other hand, have two to four years to prepare their case and screen, select and consult with their experts before the case is filed. To require defendants to designate experts and provide expert disclosures within seven days of completion of fact discovery will require a defendant to select, retain, and put to work experts, which may never become necessary. This will require significant and needless expense in many cases.

8. In like fashion, seven days is far too short a time to evaluate the need to depose or obtain a report of an expert. It should also be remembered that presently a party, after receiving a report, is the party who pays for the deposition of the opposing expert. The deposing party pays the court reporter and the expert fees. Why disallow a party from conducting what it believes to be a needed deposition if that party is paying the costs?

9. 28 days to provide a report or take a deposition is a needless burden. Rarely does an active litigator have available dates within 28 days notice to consult with his own expert, prepare for the deposition and schedule the opposing expert's deposition.

10. When an attorney opts for taking a deposition rather than receiving a report, the attorney is prevented from adequately preparing for that deposition. The time needed to meet with clients, retained experts and basic area of knowledge are all increased for a lawyer who has been forbidden a report prior to deposition. A standard disclosure is inadequate to remedy this. This will result in lower quality and longer depositions. The net savings here and elsewhere in the proposed changes are illusory.

Present discovery promotes realistic evaluation by plaintiffs and defendants. In summary, the proposed changes will increase litigation costs and lead to more cases going to trial. In short, these proposed changes open the door to foster ambush and enable meritless claims and defenses at trial. Thank you for your consideration.

Posted by Harold L. Petersen June 21, 2011 04:13 PM

I join with the many others who have expressed concerns about the proposed rule changes. I have yet to speak with an attorney, both plaintiff and defense, who is not worried that the shortened response periods and limitations on written discovery will make it more difficult to obtain complete and accurate information and test the legal position forwarded by the opposing party.

I would urge the committee to make some changes that will promote the goal of proportionality while not sacrificing the goals of obtaining accurate and complete information about a case.

That being said, I urge the committee to amend the proposed changes as follows. First, I urge the committee to increase the number of interrogatories and requests for production available in all three tiers. The proposed Rule 26 disclosure requirement does not appear to be a true "full-disclosure" requirement. It only requires a party to disclose items that he or she "may" use in their case-in-chief. Items solely used for impeachment need not even be disclosed. By depriving opposing counsel of a meaningful opportunity to conduct written discovery to ferret out documents and facts that are adverse to the disclosing party, the rules essentially leave the fox to guard the hen house.

Interrogatories and requests for production are relatively inexpensive and, in my experience, are not the reason litigation is expensive. Without written discovery, the parties will be left to take depositions, and depositions are significantly more expensive than interrogatories.

I also urge the committee to extend the time for discovery by 60 days in each tier. In theory, shorter discovery deadlines seem like a good idea, but in reality scheduling conflicts will frequently necessitate motions to enlarge the discovery period. We are already facing a similar situation in arbitrations under section 31A-22-321 which only provides 150 days of discovery in cases worth $50,000 or less.

The committee should also enlarge the time in which a party can elect to obtain an expert report or deposition. Seven days will often be too short a time period to communicate with clients and allow them to reach an informed decision as to whether their money would be well-spent in deposing the expert. In reality, a 30 day time period would be much more practical. And given the practical difficulty of coordinating attorneys' and experts' calendars, the committee should give the parties 90 days to conduct the deposition after the election is made.

Thank you for your consideration of these issues and for your continuing efforts to establish a framework for litigation that will provide litigants a fair opportunity to conduct reasonable discovery.

Posted by Ryan Schriever June 21, 2011 03:59 PM

The proposed changes which drastically reduce the use of depositions, interrogatories, request for admissions and request for production of documents are in my opinion a

giant step backwards, and an abandonment of years of the development of discovery and a bad idea.

Proposed Rule 26(a)(3)(B) limits on expert discovery make a legitimate challenges to unfounded or unsupported expert opinions much more difficult. The purpose of discovery is to learn the strengths and weaknesses of your case and the oppositions case. These rule changes don't further these objectives.

I strongly oppose making a report or a deposition an "either or" situation. A retained expert should have to write out his opinions and also defend those opinions in a deposition. A report without a deposition allows for no testing of the opinions. A deposition without a report means that the deposition will be a blind fishing exposition. A thorough deposition of an expert witness is the most effective way of getting at the truth.

The advisory committee notes regarding expert disclosures and timing appear to presume that the only purpose for a deposition of an expert witness is to prevent deviation of the opinions of the expert at trial from the opinions that the expert might express in the deposition. I submit that there are numerous other reasons for the taking of the deposition of an expert witness. These include evaluation of the credibility of the expert witness, challenging the experts opinions, determining whether or not there are other opinions held or previously expressed that are inconsistent with the written opinion, getting accurate information on how to check out an expert witness. You need to know more than just what they are going to say.

Depositions do have value! Putting a witness under oath, (and producing the witness to be put under oath) does have a positive effect on an honest or even a marginally honest witness. The evasive expert (and there are many of them) sometimes requires a long deposition to pin down. If a four hour rule is adopted there were be more evasive expert witnesses.

(I would also like to note that I have found numerous violations of the provision of Rule 26(a)(3)(A)(A) regarding a list of all other cases in which the expert has testified as an expert at trial or deposition in the preceding four years. These lists are regularly so unspecific as to be totally unhelpful. "Plaintiffs case, Dallas, Texas, 2008," tells you nothing of value that you can check out. Retained expert witnesses should be required to identify the case name, the court and the civil number at minimum. It would also be helpful to know the party for whom the witness testified and the attorneys on both sides of the case.)

Proposed Rule 26(c)(5) dramatically changes discovery in Utah and I oppose those changes.

The amount of discovery allowed in tier 1, tier 2 and tier 3 for depositions, interrogatories, request for production and request for admissions are shockingly small. For example, zero interrogatories in any case seems to be unreasonable. Ten and twenty interrogatories are also amazingly small. A multi million dollar case would be limited to twenty interrogatories. Request for admissions are a tool, which ought to be

used for the purpose of narrowing the issues; are restricted to an amount as small as twenty in any case. Indeed all of the discovery procedures are tools. These proposed rules inhibit the lawyers inability to do their jobs.

The adoption of these limitations on depositions will, in my opinion, cause more cases to be forced in the direction of going to trial. Those trials will also be more like the old trials where inadequate information was obtained before trial. If the outcome is unpredictable, trial is more likely.

Witnesses are not always cooperative. Some witnesses will refuse to talk to a party or the party attorney. Depositions are often necessary in order to get the information from the reluctant witness. In addition, rules of confidentiality in doctor patient relationships require the deposition of treating physicians.

Rule 26(a)(3)(c)(i) provides for a very very short response time to designations of expert witnesses and I oppose them.

Practioner would be best advised not to ever go on vacation or go out of town for a week of discovery and or investigation. There are lawyers who will send notice or pleadings when they know you are out of town and on a Friday afternoon at 4:55 p.m. This 7 day response time and the 28 day deposition deadline do not recognize the realities of the practice of law. These timeframes do not allow sufficient time to consult with, retain, and educate legitimate experts.

Also, requiring the designation of an expert witness within 7 days of the closing of fact discovery fails to allow the expert witness to review discovery obtained at the end of the fact discovery period. Should it not be the case that a proposed expert examine the relevant materials obtained during discovery before arriving at his opinion?

It is notable and highly regrettable that the standards of "relevance" and "likelihood to lead to discovery of admissible evidence" are being abandoned by the advisory committee note in favor of speedy resolution. The Supreme Courts prior position always has been to advocate justice over speed. The judicial review of important legal and factual matters should not be superficial.

The currently existing Utah Rules of Civil Procedure have been developed over many many years by many Supreme Court Advisory Committees. Conformity with the Federal Rules of Procedure is often been a strong consideration. These proposed rules totally break from the Federal rules. In my experience, a sharp departure from the federal rules, such is now proposed, is unwarranted and ill-advised. Proposed amendments would tie the hands of effective litigators capable of using discovery to find facts that are not likely to be voluntary disclosed by the opposition.

Posted by Tim Dunn June 21, 2011 03:47 PM

Here are my comments to the proposed new rules of civil procedure.

Rule 26(a)(3)(c)(i)(line 86 ff): Seven days after the close of fact discovery to submit a summary of an expert's opinion is too short a time. Even preparation of a summary will likely require more time than seven days; at least 21 days should be provided.

Rule 26(b)(3)(line 163 ff): It is likely the provisions regarding proportionality will result in more satellite disputes and litigation than result from the current rule.

Rule 26: Eliminating the requirement of a scheduling conference under current subdivision f will result in the court having to order it or the parties having to request it under Rule 16. The requirement of a scheduling conference should be retained.

Thank you.

Posted by Clark Fetzer June 21, 2011 03:46 PM

Dear Committee:

The purpose of this letter is to express both our support for certain proposed amendments to the rules governing civil discovery, and also to share with the Utah Supreme Court Advisory Committee (“Committee”) our concerns with certain areas of the proposed rules. First of all, the attorneys of Holland & Hart LLP (“H&H”) appreciate the great effort and amount of time that must have been spent by the Committee in studying problems related to the current discovery rules and in drafting the detailed drafts of the proposed discovery rules. Further, H&H appreciates the opportunity to respond to the proposed rules, and we hope that our remarks are given due consideration by the Committee in making its final decisions.

As stated in the background commentary for the proposed rules, the Committee has come to question the premise upon which Utah adopted the federal discovery rules. As recognized by the Committee, the federal rules were “designed for complex cases with large amounts in controversy.” H&H believes that the proposed rules, as currently written, are a great improvement for relatively simple cases involving amounts in controversy that are less than $300,000.00, and in cases involving one plaintiff and one defendant. H&H recognizes the burdensome expense of traditional discovery in these small disputes. However, the typical cases managed by H&H and other large firms in the Utah market do not fit within the scheme contemplated by the proposed rules. H&H often represents clients that are involved in multi-party litigation with millions and tens of millions of dollars in dispute. In most of these cases, the simplified and expedited discovery process contemplated in the proposed rules subjects our clients to unreasonable risk in the litigation process, whether the dispute is at the settlement stage, summary judgment stage, or trial stage. For the most part, the current discovery rules, based largely on the federal rules, are more practical for these “complex cases with large amounts in controversy.”

The following is a list of areas in which we support the proposed rules, and of areas in which we have concerns that arise either directly, or indirectly, from the proposed rules.

1. With respect to heightened initial disclosure requirements, H&H fully supports the Committee's proposal. H&H agrees that a more comprehensive initial disclosure will support more focused and efficient initial discovery.

2. With respect to Proposed Rule 26(a)(3)(B)'s limits on expert discovery, H&H has serious concerns with the Committee's proposal. The proposed rule requires that any expert discovery, beyond the initial summary report, be limited to either four hours of deposition or a written report. First of all, the proposed rule fails to expressly state who decides between the two options. This may be implied in the proposed rule, but the proposed rule should expressly state that the party seeking further discovery of the expert's opinions be allowed to decide between a deposition or a written report.

Second, and more importantly, a written report containing a statement of the opinions the expert will offer at trial does not in all cases obviate the need for a subsequent deposition. Simply being offered a written report denies the party the opportunity to question and fully analyze the bases of an expert's opinion prior to trial. In many cases, the ability to take an expert's deposition after having received a complete written report furthers the goal of Utah R. Evid. 702 in keeping junk science out of the courtroom. Furthermore, our experience suggests that expert witnesses will be permitted to expand upon the opinions set forth in reports as "elaboration," "clarification," or "explanation." A deposition is the best available means to discover and prepare for such expansions.

3. Another concern of H&H relates to the two categories of discovery – standard discovery through the tiered system and extraordinary discovery. H&H recognizes that the Committee has sought to provide an avenue for more in-depth discovery for complex, commercial litigation disputes through the extraordinary discovery procedures. However, H&H has serious concerns.

One concern is with the limits to document requests. Document requests differ from other types of written discovery in that the burden to the responding party is not as onerous. The responding party need only produce the relevant, non-privileged documents that the party already has. Nothing needs to be created, as in the case of interrogatories or requests for admission. Thus, the burden posed by document request is comparatively slight. The benefit of document requests, however, is great. Records and other documents frequently have the greatest impact in a case because they are generally prepared outside the litigation context, making them a more reliable source of evidence. Thus, H&H believes that document requests should be subject only to the limits currently in place.

Another concern is that going through the mandatory "standard" discovery process before being allowed to seek additional discovery beyond that contemplated in the standard process will result in delay and unnecessary expense to our clients. In the vast majority of our matters, the tiered-limits proposed for standard discovery will not be nearly sufficient. Thus, we would need to proceed through standard discovery in every matter only to then seek, by either motion or stipulation, additional discovery. H&H proposes that the provision requiring a party to reach "the limits of standard discovery"

prior to seeking a stipulation or moving for extraordinary discovery be omitted from the final rules.

Further, perhaps the greater concern is the uncertainty of whether a motion for additional discovery would even be granted. In many cases it will be in the best interests of an opposing party to refuse to stipulate to additional discovery, so the option of additional discovery would be left in the hands of the judge. Although, in theory, H&H supports the proposed proportionality analysis, H&H is concerned that a judge will still have the discretion to simply deny a motion for additional discovery. The idea of bringing, or defending, a multi-party case with a large amount in dispute and only being allotted 30 hours of deposition testimony would be unjustly beneficial to the party opposing additional discovery. Further, it presents a potential issue of forum shopping. In nearly every action that presents a large dollar amount in dispute, one of the parties will likely be benefitted by additional discovery. Thus, plaintiffs will seek to bring their action in federal court, or defendants will seek to remand the action to federal court. Thus, H&H proposes that a case claiming damages that fall within Tier 3 (i.e., $300,000 or more) be presumptively allowed the “extraordinary” discovery contemplated under the proposed rules.

If, under H&H’s proposal, the amount in dispute is greater than $300,000, or the parties have stipulated to extraordinary discovery procedures, then it is proposed that the parties be required to jointly create a discovery plan. The parties would have a duty to stipulate to a discovery plan that specifically identifies the scope of discovery to be sought. For example, with respect to electronically-stored information, search terms could be restricted to target specific individuals, issues, etc., and a customized search of a custodian’s database could be carried out based on the specific scope of the discovery plan as stipulated.

4. Although only indirectly related to the Committee’s proposed rules governing civil discovery, H&H also proposes that a complex, commercial litigation division be created in the state courts. Similar to the tax court structure currently in place, a complex, commercial litigation division would allow parties to file a case in a court specifically managed to accommodate the additional discovery needs for this type of litigation.

H&H appreciates the opportunity to respond to the Committee’s proposed rules, and welcomes any questions or requests seeking further elaboration of H&H’s concerns and proposals.

Sincerely,

Attorneys of Holland & Hart LLP

Posted by Holland & Hart LLP June 21, 2011 03:44 PM

Mr. Wikstrom and Ladies and Gentlemen of the Committee:

I am writing this letter on behalf of The Board of the Utah Defense Lawyers Association (“UDLA”). As you are likely aware, our organization is comprised of over 200 lawyers in the State of Utah who litigate wide ranging matters and claims including, among other types of claims, medical malpractice claims, personal injury claims, premises liability claims, and construction defect claims. We also work closely with a very large number of plaintiffs counsel in this State. The UDLA is concerned with the scope and breadth of many of the changes to the Rules. This letter is being sent as a comment on the web site provided by the Committee. A hard copy will also be hand-delivered to Francis M. Wikstrom, Chair of the Supreme Court's Advisory Committee on the Rules of Civil Procedure.

Before addressing concerns that the UDLA has with particular rules, some general comments need to be made. First, the changes to the rules are sweepingly broad and create major changes not only to how a particular attorney may procedurally handle his or her case, but will alter how attorneys and legal offices conduct their business, from how and when they should investigate and/or speak with witnesses, bring motions before the court, and interact with opposing counsel. Second, the tone of the comments and some of the rules suggests that not only that less discovery should be had, but the amount in controversy, and the facts of the particular case should be driving force in discovery determination. Third, the Committee cites a few surveys and one, apparently opinion piece, from the New York Times in support of these new rules. No empirical evidence supporting the broad changes is identified, including any study as to Utah in particular or in litigation costs in general.

The formulation of the proposed rules is also problematic. The new rules contradict or conflict with unmodified rules and, in some cases, existing case law. The new rules also appear or some have already argued that these rules conflict amongst themselves. As is noted below, most disconcerting is that the new rules either due to ambiguity or the harshness of the new requirements will result in the filing of multiple motions and more expense, not less, which appeared to be the impetus of the rules. Finally, the rules may run afoul of existing federal and state law, including due process and equal protection concerns.

The following is not a complete list of concerns, and for the sake of brevity, the Board has not commented on all of the positive changes in the proposed rules. Specific concerns with the proposed rules will be taken in turn. At the end of this letter, we have tried to address some concerns relating to the impact of the proposed rules.

Rule 1 states that the proposed rules will take effect immediately unless the Court sitting in that matter determines that the enforcing the new rules would be infeasible or result in injustice. There are three problems with the timing. First, as a matter of practical reality, all cases in Tier 1, and a large portion of Tier 2 and 3 cases, will have to have to be evaluated by the attorney immediately or shortly after the new rules go into effect. Several personal injury attorneys, both plaintiff and defense, handle a large percentage of Tier 1 cases. With fact discovery being closed 120 days after the receipt of initial

disclosures, most scheduling orders would have lapsed or would lapse without discovery being completed. Interrogatory or requests may be outstanding at the time of approval of the Rule and some attorneys may refuse to provide responses in the lower tier cases. With expert designations to be made by day 127, most cases in Tier 1 would have passed that date, or it would be infeasible to complete discovery. Therefore, most cases, in our experience, will run into the two factors.

Second, whether a particular case will run into this concern requires that the handling attorney, on both sides, review his or her cases upon passage of the rule, to determine if the case can be completed under the new rules or not. This is time wasted on both sides of the matter, in some cases costing the clients money, to review a scheduling order that has likely been reviewed by both attorneys and the Court.

That leads to the third concern, which is the Court will be involved in a matter for which it has no time or need to be involved. If the parties agree that the case would not be feasible under the new rules, they would still, on our reading, have to present the Court with an order finding that the new rules would not be feasible. If one of the parties disagrees, then a motion and hearing will need to be requested.

Another concern with the new rule is that it states that a specific rule overrules a general rule as does a statute. This may create some conflicts and a potential due process issue. For example, as the committees is aware, Utah Code Ann. § 31A-22-321, as it is presently written, allows slightly longer discovery than the proposed Rule 26 and allows both parties to conduct additional 90 days of discovery if the arbitration is appealed for a trial de novo. As the committee is aware, the language of this statute allows only plaintiffs to elect arbitration and thus a longer discovery time to present its claims, but there is no mechanism for defendants to elect a longer discovery period. Therefore, in a lower value automobile accident case, a plaintiff’s counsel can choose his discovery time period, but the defendant’s counsel cannot.

The UDLA feels that Rule 8 is improved as it requires some more specificity in the claimed amount of damages. The rule suggests that all damages are included and punitive damages are not. This raises three concerns. First, many plaintiffs suggest, and may be correct, general damages are within the purview of the jury and should not be disclosed. However, if a plaintiff argues at trial that he or she is entitled to more general damages and exceeds the high end of a particular tier, a competent defense counsel will likely argue for a mistrial as they could not take more time to address the claim.

Second, in some cases, it is the punitive damage claim which causes the need to investigate more carefully and conduct more discovery. Many cases, like drunk driving cases, dog bite cases, and wrongful evictions, involve minimal or modest special and general damage claims, but a plaintiff may allege tens or even hundreds of thousands of dollars in punitive damages. As the committee is aware, a different standard of evidence applies and extensive discovery may be required on both sides to determine if the claim will stand.

Third, this rule coupled with Rule 26 may be constitutionally infirm. Under both Federal equal protection requirements and Utah's open court provision, a personal or corporate defendant should be allowed equal due process to conduct discovery and confront claims whether these claims arise for special, general or punitive damages.

Although not a large concern, but as a matter of practical application, there is also no statement in the rule for calculation of contractual interest, pre-judgment interest in personal injury actions, costs or fees that may be included, and attorneys fees. Interest increases with the time of the case and attorneys fees are a moving target, admittedly difficult for both sides to calculate at the beginning of a case and then may vary as it is the Court at the end of a case, which likely then determines the amount of the award.

Rule 16 raises a few concerns. First, the Rule requires the Court to direct the parties to mediation or other ADR process. While mediation is often a useful tool, it is not appropriate in all cases and a blanket requirement that it be done or an order obtained from the Court indicated it is not feasible may add undue expense. For example when parties are only a few thousand dollars apart, mediation may cost more than it might save in compromise. It should be noted that case law precludes forcing a party to contribute a specific amount or additional amount mediation (or forcing a party to accept less) and a right to jury trial precludes forcing parties into binding arbitration.

Additional, "ADR" is not defined. It is unclear what the Committee is suggesting. If the Committee is suggesting a non-binding panel review or arbitration, which, while potentially could bring issues to light, would not be cost effective. Simply stated, it is unclear what the process would entailed and what mechanism exists for enforcing this rule. Additionally, we would note that mediation is most effective when the parties and a third party have access to all facts and have had the opportunity to review them prior to mediation. Without discovery such as interrogatories and fewer requests for production in the lower tier cases, mediation would only be fruitful at the end of the discovery process. With the tightened deadlines set forth in Rule 26, the parties will likely have done all discovery, including designation of experts (with the incumbent costs) to have the information. At that stage, the only cost would be the cost (and potential risks) that would be incurred at trial. However, at present, parties may and often elect mediation prior to expert discovery, or upon resolution of certain facts. The new rules would require Court intervention to obtain such a change in the plan. Further, under the present rules, the parties can plan ahead for such mediation at a future date and often work that date into a case management order.

Rule 26 raises several concerns and represents the bulk of our comments. First, as this committee is aware, plaintiffs counsel can prepare and access information for months and in some cases years prior to filing suit. The new rules exacerbate this problem, which is apparent in the new initial disclosure requirement. First, at most, a defendant will have 28 days after receiving plaintiff's initial disclosures (in any case no more than 42 days after answering the complaint) to compile and produce all documents that he has or has access to to defend the action including witness summaries and all persons

he intends to call in his case in chief. It is impracticable, unrealistic, and certainly not cost effective, to expect, even in a simple but disputed liability case, for a defendant (or for that matter a plaintiff) to locate, interview, and summarize the expected testimony of one or two fact witnesses and the investigating officer within this time period. Further, the present case law prohibits defendant, but not plaintiff from speaking to a treating physician unless done by subpoena or in a deposition. A defendant cannot address what someone might say at trial or what exhibits he might present within the initial disclosure timeframe.

As noted by others, a summary of a witness interview done by an attorney or his office can also be protected work product. More to the point, with the exception of one's own client and a client's employees, an attorney at the initial stages of case, may not, with any meaningful accuracy, be able to say what a witness might say at trial. Memories fade, previous statements are changed when oaths are administered, and views change when a speaker is presented with new or unknown facts.

Both parties producing documents, rather than a description, is also not cost effective. Again, in even simple car accident cases, both parties have copies of several documents, included, but not limited to, police reports, treating physician notes and billing records, car estimates, photographs and similar items. A description may save costs in both the short and long run.

A related issue arises from the requirement to provide an insurance policy. In the personal injury and medical malpractice case the insurance policy is almost never sought, requested, or provided. A declaration page provides the levels of coverage. A policy holder may receive endorsements and amendments from time to time. When a policy is requested, the insurance company often locates the applicable policy and endorsement, which is a computer aided search. The applicable provisions are then printed, compiled and mailed with a certification under oath that the policy is accurate. This represents a true and unnecessary cost. One local in-house office for a major insurer receives approximately 350 personal complaints a year. The estimated cost and charged cost to those requesting a new copy is $35 per policy. That firm alone and its insurance company could spend $12,250 a year (plus mailing and delivery costs for each) unnecessarily. Experience indicates that a declarations page is usually sufficient to demonstrate applicable policy limits and to identify the insuring entity and types of coverage provided and if the Committee would like to require an item to be produced, it should be limited to this page.

The expert disclosure requirements are also troubling. First, the rule indicates that an expert can be deposed for no more than four hours. In some cases, like construction defect cases involving several alleged problems, a knowledgeable expert (construction, engineer, or economists) could easily be deposed for more than that time. Also, the rule has guidelines for total fact deposition time. Therefore, experts are not included, presumably. It seems that this would allow for some cases with experts that the only limit on expert depositions is four hours per expert.

The disclosure time for experts, especially in Tier 1 cases, is not realistic. Again, in a simple automobile case with minor injuries and contested causation, a defendant would have 127 days from the date of plaintiff's initial disclosures to have a medical examination done. Since no interrogatories are allowed, the deposition of the plaintiff is the sole mechanism to learn the names of any prior treating physicians or similar injuries. Once deposed, the defendant can then compile records, which takes at least one month with HIPPA and Rule 45 compliance. Assuming that the Plaintiff can be deposed within 30 days of the initial disclosures and all records sought are received within 30 days, defendant has 67 days to decide if the examination is necessary, schedule the examination, and have the report's conclusions and a summary prepared to disclose to plaintiff's counsel. It would also be possible to just schedule the medical examination and cancel for a lesser fee from the beginning of the case. Neither solution is practicable or cost efficient. It also invites what the Committee apparently believes is the norm; that is the professional examiner. Experts in the small cases would be needed quickly and ready to perform on short notice and work on rushed schedules. The result would be a rise in a few "at the ready" examiners. The 28 day requirement for depositions is also impracticable if not impossible. Most physicians, treating or expert, have their schedules set several weeks in advance. The undersigned have, at times, working well with opposing counsel and doctors, spent two to three months setting up a deposition.

As suggested by others, seven days, in most cases, is not sufficient time to receive, analyze and decide if seeking a report or deposition is the best course of action. This is more often true in cases with multiple parties who must make this determination together. A new rule with such a deadline requirement should allow the other party or parties 30 days to make their election. If the Committee is going to place a deadline on the timing of expert depositions, we suggest allowing at least 90 days to conduct those depositions.

A report versus a deposition is also, as stated by others, a classis Hobson's choice. An attorney summary of an expert's testimony may not fully encompass the expert's opinion and a deposition question, may go unasked, that would have been asked of an expert who provided a report. On the other hand, Courts, juries, and the parties may disagree on a reasonable inference taken from a report, or a fatal flaw in a test or basis for an opinion may only arise in cross-examination at trial leading to the exclusion of an expert. Further, the Court as a gate-keeper of Rule 702 experts may need both a deposition and report to rule on a motion in limine. In some cases, Courts now order an evidentiary hearing, which one party may argue under the new rule amounts to a free deposition.

The proposed tiered discovery potentially violates Federal due process and equal protection right and the Open Courts provision of the Utah Constitution. A $40,000 claim, while being a small matter to a large corporation, would likely bankrupt many Utah families. Each party should have the right to conduct the discovery and is entitled to the same due process and protections regardless of the amounts claimed. Some

cases are expensive and some are not and the dollar value may make little or no difference in the discovery. A simple, yet common, example illustrates this point. Let us take two nearly identical cases. In both cases the plaintiff alleges that the defendant rear-ended him at a speed of 20 miles per hour. In both cases, the defendant alleges that the plaintiff merged into his lane improperly at a slow rate of speed failing to allow him enough room to brake and causing the accident. In both cases two witnesses are identified as well as an investigating officer. In both cases, the plaintiff alleges minor soft-tissue injuries with one hospital visit to the emergency room, one treating physician visit, and chiropractic care for four months with medical expenses of $15,000 and two weeks off of work. However, the first plaintiff claims lost wages of $9.00 an hour for his full-time job and his lost wage claim is $720. The second plaintiff is an executive account manager who claims direct lost wages of $10,000 and lost commissions of another $10,000. In both cases, the plaintiff supplies information fully supporting the wage loss claims, but the need for the extensive chiropractic care is questioned in both cases. Both claim $20,000 in general damages. The first matter is a Tier 1 case where $35,720 is claimed. The second is a Tier 2 case where $55,000 is at issue. Liability is the primary issue and both defendants may choose, if they wish, to also attack the medical treatment. Both defendants pay nothing if they prevail on liability. However, the first defendant has 3 hours to depose the two witnesses and the police officer, and if he has any time remaining, the treating physician and the chiropractor. The second defendant has 15 hours to do the same tasks. In addition to the equal protection implications, this example also illustrates the inherent problems of Tiers based on the monetary value claimed, where is a line to be drawn changing allowable discovery?

Regardless of the tier, if the Committee desires to make the changes, the time period for all three tiers should be extended. At the lowest tier, 180 days would be a more realistic and attainable goal for fact discovery. Additionally, some fact witnesses, like treating physicians, employees of the other party or those who assert some type of privilege, can only be contacted through the opposing party or through subpoena, and the examining attorney can only speak to, what is often a key witness, in the deposition setting. Therefore, we request that the Committee extend the deposition time for these type of third-party witnesses.

As alluded to above, three hours of fact discovery is insufficient in many small cases. First, the undersigned believe that since the rules allow for seven hours of deposition for a party, the three hours does not include the parties. Again, in a small automobile case, causation and/or liability may be disputed. A party may wish to depose the police officer, one fact witness, a past treating physician and a present medical provider such as a chiropractor who is not a designated expert. This will exceed his available time. Rule 26 and 29 would allow the parties to move or stipulate for more time, but a trip to the Court after exhausting the deposition time is not efficient.

Interrogatories and requests for production and for admissions save time, resources and money. A standard set of discovery requests in a personal injury case can be generated in a relative short time. Necessary, and often undisputed, information can be

obtained and a respondent has a month to compile and thoughtfully answer the questions including a clear, non-rushed response how the accident occurred, the amount of medical bills, the names of employers with telephone numbers and addresses, the names of past medical providers, ongoing medical concerns and present medical treatment. Depositions can then be shorter and more useful as the examiner can shorten the questioning or refine the deposition to address specific issues or clarify concerns. Plaintiff's counsel can often avoid deposing defendants altogether with responses regarding medical conditions or medicines, cellular phone or texting issues, or mechanical issues that might have contributed to the subject accident. These are also all tools for summary judgment, which often serve to resolve or partially resolve legal issue, which in turn may resolve the case. The limitation on interrogatories serves no purpose to reduce costs. In fact, in personal injury cases the limitation will result in more motion practice and increased costs. First, as a practical matter, the examiner will ask every question that would have been an interrogatory. That will add time to the deposition. The deponent will also have to answer these questions, with no time to prepare or to refer to documents. That will lead to increase in time as deponents try to reconstruct lists of past medical concerns and treating physicians, when they could have reviewed medical records at home in response to an interrogatory. Also, the deponent may simply not recall as she sits in deposition. Under the new Rule 37, the examiner may make a motion or recess until a later date. The result is more time and costs in Court, more time in the deposition, and more disputes between counsel regarding a party's ability to recall relevant information. While we disagree with a limit of written discovery, this Committee should allow a higher number of interrogatories and requests for production at all three levels. Additionally, a party should be allowed to use requests for admission after the close of fact discovery to limit disputed issues prior to trial or other alternative dispute resolution process.

The Committee has also introduced the concept of proportionality. This standard is presently, to our knowledge, used only in the Federal mass tort ligation cases. The present Rules of Civil Procedure already provide remedies if discovery is not relevant, is unduly burdensome, or otherwise objectionable; which raises the issue as to why proportionality is even needed. More importantly, this concept is also subject to possible due process concerns. Relevance is defined in the Rules of Evidence and is the subject of volumes of case law. Proportionality is, by the reading of the rule, a standard that varies from case to case. The suggested factors do not aid in any analysis. If the defendant is bearing the cost of the discovery, is it a factor or not? A plaintiff in a small case may claim that a small fender bender denting her bumper, which was not repaired, caused her to incur 40 chiropractic visits resulting in $5000 in medical expenses. She may only claim another $5000 in general damages, but with interest cannot proceed in small claims court. Defendant, not believing that she was injured, on his own or through his insurance provider, retains at the cost of $6000 a biomechanical engineer and a doctor who opine that the accident could not result in injury. The Plaintiff may argue that his client should not be subjected to the medical examination because of the burden

placed on her and that the accident reconstructionsist report should be disallowed as it would require his client who is only claiming $10,000 to spend $3000 on her own expert. Defendant's expert could result in a no cause of action, but he may not be able to get the examination and may lose the $3000 he already spent on the other expert because a court may determine that the proportionality standard has been violated. However, the discovery was clearly relevant and necessary to his defense, and well within his State and Federal rights to pursue.

The other issue is how an attorney or the Court may be judged later. A defense attorney may advise his client that the discovery would help, but that he thinks the Court would find it disproportional. He chooses not to engage in the discovery and loses the case. Will he be able to raise his good faith belief that his discovery was disproportionate when he is sued for malpractice? The reverse scenario is equally troubling. A court may find a certain discovery to be disproportionate and cases are appealed to the Supreme Court. What is the standard of review to be applied on appeal, which will happen often, is it trial court discretion, interpretation of law, or mixed question of fact and law? Because facts vary in every case, each and every ruling on proportionality may present a potential appealable issue.

Finally, the deposition restriction under Rule 26 is problematic as to treating physicians. Again, three hours in insufficient in small cases where medical causation is at issue. Defense counsel can only speak with physicians in deposition settings. In most small personal injury cases (under $50,000), Plaintiff's counsel usually identify two to three present treating medical professional and often and equal number of past treating physicians. Usually, most are identified as non-retained experts with a summary that may or may not comport to the treating physician's notes. If causation is really at issue, and one or more fact non-medical witnesses are identified, three hours will not suffice.

Rule 29 would require the parties to address the above-referenced proportionality issue and agree. First, in essence this should be done under the present Rule 26, which presently requires the attorneys, who know the case first-hand, to have the attorney planning meeting including what discovery can be had. If they need assistance or disagree, Rule 16, as presently written, allows the parties to have the Court enter a scheduling order. Although anecdotal, our experience is that subpoenas turn over helpful, relevant information, for or against, a plaintiff in at least 20 to 25% our cases and in most cases the information verifies known relevant information. Some Plaintiff's counsel would argue that a 20% return on discovery is not proportional in an individual case. We believe that this is well used discovery and at minimum provides relevant information.

In sum, the parties will agree and submit the stipulation to the Court for order or one party will make the motion. The other concern is that Rule 29 suggests that some discovery has to be exhausted. We do not believe that the parties who agree that four short deposition will take more than three hours, should have to take three of the four and then present a motion to the court.

The other concern with this rule is the disclosure of the approved budget. Budgets with clients are almost always intermixed and dependent on attorney work product and attorney client communications. My budget may include activities that relate to impeachment investigation, surveillance (until the same becomes discoverable), retained, but consulting experts, and other activities. In sum, the disclosure of a budget interferes with relationship between counsel and client and the independence of an attorney and this requirement should be eliminated from any proposed rule.

The undersigned agree that independent medical examination may not be the correct nomenclature. However, that does not correlate with the drastic change and commentary on the new Rule 35. First, the Committee cites a New York Times article that opines that defense medical examiners are paid hired guns. By placing this note with this tone and foundation, the Committee appears to demonstrate a bias against the defense bar generally, and if the Rules are passed, would have published its apparent bias for public consumption. Further, the committee cited an Oklahoma case for the proposition that audio and video recordings should be allowed. The case was researched and read. The case cited the controlling Oklahoma statute, which 1) allowed a party to have someone present already and 2) placed the onus on the examinee, not the party requesting the examination, to show good cause why the examination should not take place. As the Committee notes, in Utah, the requesting party bears the burden. In sum, the Committee cited as its basis for the new rule selected law from another state, which unlike Utah places the examinee in the position to show the exam is improper.

More disconcerting; however, is the lack of direction supplied by the rule. The rule says the examinee can record an examination, but does so, without any direction or controls. Can a party show up with a Dictaphone over which they exercise complete control or a video camera held by another who due to lack of experience or bias only films portions of the exam? Is the person who films or tapes subject to examination or must they be a third party? The rules gives the requesting party the right to object the recording if it would unduly interfere. This suggests that the party to be examined must notify of the other of his intent to record and the method in a timely manner, but no direction is given. Again, this will result in motion practice and appeals that could be prevented with clear rules. If the exam is to be audio recorded, for example, one could argue that it must be done with a stationary recorder with some type of oath by the recorder that is it unaltered and original, and the recording party must timely provide a true and correct copy of the original unaltered recording. However, without guidelines, the Committee is inviting extensive motion practice and unnecessary costs.

We would suggest that if the final rule allows a recording, specific requirements be met. First, the manner of recording the examination be set forth in a notice within 5 business days of the notice of the medical examination. Second, the recording be made by a third-party. Third, the recording be at the examinee’s cost. And finally, a copy, certified as true and correct by the third-party, be provided to the party that requested the examination.

Rule 36 would allow a party to deny a fact that is a “genuine issue for trial.” This is unclear and confusing. There is no comment explaining this change. Most facts in liability and causation cases are genuine issues for trial. Damages are genuine issues for trial. Light colors in intersections are genuine issues for trial. If a party knows a fact to be true or false, it should answer the request, not evade and protract litigation arguing that the otherwise proper request is a “genuine issue for trial and is therefore denied.” Also, this rule would seem to conflict with the controlling standards of a deposition. Certainly, whether a matter is a genuine issue for trial would not be the basis for counsel to instruct his or her client not to answer a direct fact question.

In addition to the concerns set forth above, there are interpretational and situational issues with the rules. For example, the limits of the rules seem to be per party, but some may argue that the limitations are per side. If there are co-defendants, does each get three hours of fact depositions? Are the limits per party and claim, or are they combined? For example, one plaintiff sues two parties for $45,000 each believing in a personal injury case that each is 50% liable. Does each defendant have its own set of Tier 1 discovery, Tier 2 discovery, or does each share Tier 2 discovery? What about cross-claims and third-party claims?

Rule 15 allows a party to amend, but the new rules provide no time-line as to when that is timely and should it vary based on the discovery tier. Amendments are to be liberally allowed, but how does that change the controlling deadlines? Similarly, there is little guidance as to cross-claims, counter-claims and third-party complaints.

Rule 9 removed the deadline for allocation of fault, but no meaningful deadline or guidance is set forth as how that may affect a case.

Another concern arises from the initial disclosures requirement. Can a party indicate that information will be supplemented as to their claims? If a party fails to provide a computation of their damages in the Complaint and specify a tier, one could argue that it is subject a 12(b)(6) motion or a Rule 37 motion. This raises another issue, which is what happens to discovery while a Rule 37 motion is pending. Are parties required to file another motion to stay discovery?

Finally, we are concerned with the impact of these new rules on the Supreme Court’s Rules of Civility. We are committed to the civility standards. However, if a case has 120 days of fact discovery, or 210, extensions to deadlines cannot be given absent Court order. As noted above, dates cannot be changed without budgets and proportionality statements. Both sides of the bar may be wary to give anything then more than very short extensions for discovery responses. However, at present, Parties on both sides of the aisle give 30 day extensions for discovery concerns or set a date back to discuss mediation. Medical examinations are postponed to accommodate schedules. However, the mechanism to alter the deadlines under the proposed rule is onerous, time consuming and potentially costly. Some counsel will likely refuse to grant extensions due the burdens involved and point to new deadlines as the basis for any lack of civility.

In summary, we believe that the Committee should review and address these concerns before forwarding the proposed rules to the Supreme Court. Again, we believe that there is a lack of empirical evidence demonstrating a need for the suggested changes, especially to the degree involved. Many of the deadlines are impracticable if not impossible in many cases to meet. Many of the cost saving discovery tools, such as interrogatories and requests for production of documents, have been eliminated or drastically reduced. True requests for admission may have been rendered useless. The new proportionality standard is untested and is open to various interpretations inviting motion and appellate practice and raises serious due process and equal protection concerns. Similarly, tiered discovery is subject to those same concerns. Finally, the proposed rules reduce discovery to a one size fits all matrix based on an amount of a claim or in some special cases a type of claim, without regard to the wide potential array of liability or causation issues; issues best left to the members of the bar to address as each evaluates his or her cases under the existing rules and established case law, with recourse to a responsive judiciary for guidance as needed.

Lloyd R. Jones, President, Utah Defense Lawyers Association

UDLA Board Members

Anne Armstrong

Ryan Schriever

Joseph Minnock

Robert Thompson

Peter Christensen

Kristy Larsen

Bruce Burt

Pete Petersen

Chris Purcell

Scott Dubois

Posted by Lloyd Jones June 21, 2011 03:43 PM

I appreciate the stated goals of these proposed changes to our civil discovery rules and the many hours of volunteer work contributed by the committee's members. I have significant concerns, however, about their application in medical malpractice cases. My practice is exclusively in medical malpractice defense, and almost all of my firm's cases are well above the $300,000 tier. But I do not think that even that tier adequately takes into account the realities of med mal work—for either side of the bar, but in particular for the defense of these cases.

The comments that have already been posted are thoughtful and detailed, and I share many of the concerns already expressed. I have several concerns that are specific to medical malpractice cases.

Health care providers cannot investigate or defend a malpractice claim without obtaining medical records. The defense must follow HIPAA-compliant procedures that are fundamentally inconsistent with the very short time allowed for fact discovery, even under the expanded third tier. The defense must first notify the plaintiff of its intent to subpoena records and allow ten days to object. After ten days, we send a subpoena for records that allows 14 days to respond. In reality, though, it takes an average of four to six weeks to receive medical records by subpoena. Often, medical records show that other (previously-undisclosed) key treating physicians have been involved in the plaintiff's care, which necessitates another round of subpoenas.

There is no way around these procedures, at least not without putting the burden on plaintiff to obtain all the records, which most are reluctant to do. Some plaintiffs' attorneys are unwilling to provide signed records releases, which would also be an efficient way to gather records.

In addition, medical malpractice defendants cannot talk informally with a plaintiff's treating physicians. Deposing a provider is the only way to obtain information beyond what is contained in medical records, and medical records alone are often not enough to understand complex issues of medical causation. These two concerns—HIPAA requirements, combined with Sorensen v. Barbuto's bar against conducting any informal discovery of a treating provider—combine to create in every med mal case a situation (described by the advisory committee's comments to rule 26) where "there is a significant disparity in the parties' access to information, such that one party legitimately has a greater need than the other party for additional discovery in order to properly prepare for trial." Being able to investigate a claim within the new rules' time limits will be impossible in all but the most straightforward of cases (I'm thinking here of the extremely rare res ipsa case—a sponge left in a belly, amputating the wrong limb, that type of thing).

Other comments have raised the question of how the time allotted to each "side" (defined as "plaintiffs collectively, defendants collectively") will be split. Most med mal cases involve more than one defendant, and it is not uncommon for there to be half a dozen and sometimes more. I have a case right now with eight defendants. In cases like that, allowing only 20 interrogatories or requests for production—divided among eight defendants—would be crippling to each defendant's ability to defend itself. Even if there were only two defendants, each defendant would then be limited to no more than 10 of each type of written discovery request.

In med mal cases, experts are an absolute necessity. Ideally, these experts are ones who practice in their field, rather than professional witnesses who no longer treat patients. Because these experts typically have heavy patient loads, and because treating patients takes priority over medico-legal work, expert consulting is something

that is fit in as the doctor or nurse is able, often on evenings and weekends. Scheduling medical experts for deposition typically takes several weeks' lead time, and quite frequently takes several months. The requirement that experts' depositions be taken within 35 days of their disclosure (seven days to elect deposition or report, and 28 days following the election) will be impossible to satisfy in all but very rare cases. Aside from being impossible, these requirements will dissuade many medical experts from doing this type of work at all.

The motion practice that will be spawned by these proposed changes is fundamentally inconsistent with their stated goal of making litigation faster and less expensive.

I see that there is a proposed rule specific to family law cases. Perhaps a similarly segregated rule that would apply only to med mal cases would make sense? I'm not sure what the specific cure is, but I do know that as applied to medical malpractice cases these proposed changes will severely harm health care providers' ability to defend themselves and will create a whole new area of motion practice that will greatly increase the time and money that both plaintiffs and defendants will have to expend before a case is resolved.

Posted by Tawni Anderson June 21, 2011 03:31 PM

Regarding Rule 26(a)(3), in order for this rule to be effective, experts must be strictly restricted to offering only opinions which they have identified in their disclosures or expert reports. I often get expert reports that ramble or are vague as to their opinions or the basis for their opinions. I have spent hours deposing experts trying to pin down exactly what opinions they will offer and how they reached those opinions. I have also seen experts greatly expand their opinions when they get to trial. If an expert only produces an expert report, the rules must allow the expert to be excluded from testifying if the report does not sufficiently describe all opinions, or does not adequately identify the facts and bases upon which each opinion is based. Experts should be prohibited from offering opinions at trial other than those identified in the report. Experts should not be allowed to give pithy opinions in a report, then elaborate upon them at trial.

Posted by George W. Burbidge II June 21, 2011 03:28 PM

Thank you for your work in attempting to revise the Utah Rules of Civil Procedure. While I am certain your efforts have not been easy, I offer the following comments on the items that seem the most worthy:

1. Rejecting the Corresponding Federal Rule as a Model is a Mistake.

There are already relatively few reported decisions from the Utah appellate courts concerning Rules 26 through 37. Thus, the corresponding federal rules currently serve a very important role in providing practitioners and courts with authoritative constructions of Utah's procedural rules. Without the guidance of available federal court decisions, practitioners, judges, and litigants will struggle to understand and predict how the rules

will apply in practice. Additionally, because future decisions construing and applying the proposed rules will largely occur in the trial courts, those decisions will never be available for reference. As a result, motion practice relating to the interpretation and application of the proposed rules will, at least initially, consume a great deal of resources, as the bar and bench attempt to ascertain the proper application of the new rules in various factual circumstances. Similarly, conflicting and contradictory interpretations and applications of the rules by different trial courts are not only likely but inevitable.

2. Every Evidentiary Objection Will Become a Discovery Objection.

The proposed changes to Rule 26 of the Utah Rules of Civil Procedure deletes a very important provision from the corresponding federal rule: that the scope of discoverable information is not limited to admissible information but extends to any information that is "reasonably calculated to lead to the discovery of admissible evidence." Utah R. Civ. P. 26(b)(1). The language was added to the corresponding federal rule for a very good reason -- to avoid objections to discovery requests based on the ultimate admissibility of the requested information. Instead of courts having to make a threshold determination about the admissibility of the requested information, the unrevised rule currently presumes the information is discoverable and saves questions about its admissibility under the rules of evidence for later proceedings.

This proposed change will likely not result in less expensive, less protracted discovery but will have precisely the opposite effect -- parties will resist discovery based on questions concerning the ultimate inadmissibility of the requested information, and trial courts will be called upon to make premature admissibility determinations as part of the discovery process. Every possible argument for why a document is not admissible under the rules of evidence will become an objection to its discoverability.

3. The Proportionality Assessment Required Before Any Discovery Is Permitted Will Make the Discovery Process More Expensive.

The proposed rule sets forth various factors trial courts are required to consider when a party requests any discovery through any method. Because trial courts must determine that all discovery "satisfies the standards of proportionality" before permitting it, this mandatory rule will become yet another place where motion practice will proliferate. Pursuant to the plain language of the rule, a party served with discovery requests can require the trial court to apply the proportionality factors to each and every discovery request before permitting the discovery.

4. The Proportionality Factors Are Ambiguous and Ill Defined.

The proportionality factors that trial courts must now apply to every request for discovery are ambiguous and ill defined. For example, one factor a trial court must consider before allowing any discovery is "the parties' resources." The rule does not specify how trial courts are supposed to apply that standard. The factor raises as many questions as it answers: for example, should the trial court take into consideration that

an attorney has taken a party's case on a contingency fee basis? In a multi-party case, are all of the parties' resources aggregated or considered separately? Are parties required to disclose their financial resources to the trial court, even if that information is confidential, proprietary, and otherwise irrelevant? Does "resources" include non-liquid assets, like real estate holdings, or does it include only the parties' liquid assets, which is readily available to pay for litigation expenses?

Another factor trial courts must apply before allowing any discovery is "the importance of the issues." Although not defined or explicated in the proposed rule, presumably the factor refers to the issues in the underlying litigation. Again, however, the proposed rule is silent as to identifying to whom such importance attaches -- importance to the parties? to the judicial system? to society at large? Without some further clarification, it would appear the factor is so broad and vague that disparate decisions among trial judges is inevitable.

5. Proposed Rule 30(b)(6) No Longer Requires the Designated Witness to Prepare to Testify on the Deposition Topics.

This proposal eliminates a critical, and logical, requirement: that the designated witness "testify as to matters known or reasonably available to the organization." By omitting this requirement, the proposed rule expressly permits a person designated to testify on a particular topic to respond merely that he or she has no personal knowledge of the matter, the infamous and unhelpful "I don't know" response. Thus, Rule 30(b)(6) will quickly become useless, and parties attempting to obtain information from a corporation or other organization will expend their "standard discovery" attempting to identify the person in the corporation or organization who has personal knowledge of the pertinent information.

Thank you for considering these comments.

Posted by John Delaney June 21, 2011 03:05 PM

I applaud your efforts to make the courts more accessible to the general public. It will be interesting to see how this experiment works. I am hopeful it will have positive effects.

I strongly recommend that Rule 1 be amended to make the new rules effective to new cases filed after the effective date. Imposing the new rules on pending cases midstream will likely result in mayhem. Most cases will already have scheduling orders in place that have been planned out, worked around and relied upon. To impose the new restrictions on these cases would be extremely unfair, prejudicial, confusing and unworkable. Moreover, many pleadings will not be compliant with the revised rules, making it unclear which discovery tier applies and to what extent. It may also require mass amendments of pleadings to comply with the new rules, such as the amendments requiring more detailed answers.

Applying the new rules to pending cases would be unworkable.

Posted by Keith Call June 21, 2011 02:53 PM

Some general comments:

The proposed rule changes represent a drastic revision of the rules of civil procedure. I realize that the advisory committee on the civil rules has given the proposed changes a lot of thought, but such drastic changes should be based on empirical evidence and not merely anecdotal evidence or some attorneys' wish lists.

The current rules presuppose that the attorneys know their case and rely on the attorneys to come up with a discovery plan suitable for the case. I'm not aware of any evidence that the current rules are not working as intended. The proposed rules impose limits on discovery that are not related to anything other than the amount in controversy. While that may be a relevant factor, it is not the only factor or even the most important factor in many cases.

The committee note says that the proposed changes are meant to further rule 1's goal of achieving "the just, speedy, and inexpensive determination of every action." But the proposed changes focus more on speed and expense than they do on reaching a just result. Deciding every case by a coin flip would be speedy and inexpensive, but it would hardly be just.

Many of the proposed changes presuppose more extensive disclosures, without any discovery requests, but the parties are still only required to disclose what supports their cases, something they are already required to do. If there is no greater disclosure obligation than currently exists, the rationale for further limiting discovery disappears.

The committee says it is rejecting a "one-size-fits-all" approach, but in fact the current system allows the attorneys to adopt a discovery plan that meets the requirements of each case. Instead, the proposed amendments impose a "three sizes fit all" approach, and the three sizes are completely arbitrary.

By setting hard limits, the proposed rules invite extended motion practice, yet they make no provision for the effect that motions will have on the draconian discovery schedules imposed. If the idea is to avoid unnecessary and expensive discovery, it seems to me that a motion that may affect such things as who will be parties to the case, whether the case will be thrown out at the pleading stage should be resolved before much discovery is (perhaps needlessly) taken.

As the committee says in its note to rule 26, "Rules should limit the need to resort to judicial oversight." The current rules do that by allowing the parties to work out a discovery plan among themselves. The proposed rules raise numerous issues (some of which are identified below) that will require more satellite litigation over such things as "proportionality."

I believe that the proposed rule changes will also result in more civil cases being tried. Parties will have less information on which to make an informed decision whether to

settle or try the case. And the money that insurance companies are now spending on discovery will simply be shifted to trials; the proposed rules will not lower anyone's insurance premiums.

Finally, my chief concern is that the severe limitations on discovery imposed by the proposed rules favor the party that wants to be obstructionist or hide evidence. For example, in one recent case we had, the other side would not stipulate to the authenticity of its own documents that it produced in discovery, necessitating the service of some 500 requests for admissions to establish the foundation for the documents. That would likely have been impossible under the proposed rules.

In another case we had, the other side repeatedly denied making a particular phone call as well as denying the existence of the telephone records that would have shown whether or not the call was made in response to repeated discovery requests asking for the information. It was only after the party's own expert testified that it would have been a breach of the standard of care not to have made the call that the records miraculously appeared. The expert's testimony would never have come out before trial if the expert had submitted a report under the proposed rules because the expert could not have been deposed, nor would we have had sufficient other means of discovery to uncover the truth.

Under the proposed rules, a party can withhold even relevant information simply on the grounds that the request is not "proportional," and without being able to see the information, it may be hard for the other side (who has the burden of proof on the issue) to prove "proportionality."

Some comments on specific rules:

Rule 1: It is unclear how the rules are to be applied to "all further proceedings in actions then pending." For example, if a pending action is governed by a case management order that allows interrogatories in a case where the plaintiff is only claiming $50,000 in damages, if the proposed rules take effect, will the parties be deprived of their right to serve any interrogatories? Or if the parties have previously agreed to provide expert reports and take expert depositions, must the parties now elect between one or the other?

Rule 8: While the note purports to reject the heightened federal pleading standard under Iqbal and Twombly, by replacing the requirement that a pleading state a "claim" with a requirement that it state "facts" and "legal theory," the rule does impose a heightened pleading standard, which will lead to many more motions at the pleading stage, before the parties have had an opportunity to discover the facts of the case. Although the note purports to reject the federal "plausibility" standard, if a defendant thinks that the "facts" pleaded do not state a plausible claim for relief, you can be assured that the party will file a motion for judgment on the pleadings.

Moreover, the proposed changes requiring “fact” pleading will not necessarily lessen the need for discovery, since neither party is going to accept the other’s statement of facts without probing them through discovery.

The requirement that the plaintiff who does not plead a specific amount of damages plead that his or her damages “qualify for a specified tier” under rule 26(c)(3) in effect requires a party to plead an amount of damages and may run afoul of statutes that prohibit pleading an amount of damages (such as Utah Code Ann. § 78B-3-409).

By pleading that his claim “qualif[ies] for a specified tier,” is a plaintiff limiting the amount of damages that may be awarded at trial, even if the evidence supports a higher award? Often, a plaintiff cannot know the full amount of his or her damages before fact discovery is complete. Ultimately, it is up to the jury to say how much the plaintiff’s claim is worth. If a jury awards more than the limit for the specified tier, the plaintiff may be facing a new trial on the grounds that the defense was improperly limited in the discovery it could have.

Rule 8(c)(3)’s requirement that an affirmative defense contain “a demand for relief” seems unnecessary. Why can’t the defendant merely ask at the end of the answer that the complaint be dismissed with prejudice and that the plaintiff take nothing thereby?

By eliminating the phrase “if justice so requires” from rule 8(c), the rules appear to give courts unlimited discretion to decide when to treat a defense as a counterclaim or vice versa. Was this intentional?

By deleting the sentence “No technical forms of pleading or motions are required” from rule 8(e)(1), do the proposed amendments in effect reinstate form pleading?

By deleting from rule 8(e)(2) the phrase that allows a party to state as many claims or defenses as he has, does the proposed amendment limit the number of claims or defenses a party may plead?

Rule 9: The deletion in rule 9(l)(2) of the phrase “but no later than the deadline specified in the discovery plan under Rule 26(f)” is problematic. The problem the phrase was meant to address was that of a defendant not identifying a third party alleged to have been at fault until after the statute of limitations had run and thus until it was too late for the plaintiff to join the person as a party. Allowing the parties to address the timing of such disclosures in their discovery plan allowed them to weigh the need for discovery to identify third parties at fault with the plaintiff’s need to bring in additional parties before the statute of limitations ran. The proposed rule change will encourage defendants to delay identifying third parties until 90 days before trial.

Rule 26:

By limiting expert discovery to either a report or a deposition, rule 26(a)(3)(B) is unduly restrictive. A deposition is often necessary to understand the expert’s opinions stated in his report and the bases for them. The requirement that the party taking the expert’s

deposition pay the expert's reasonable hourly fees for attending the deposition seems an adequate limitation on the willy-nilly deposing of experts.

The requirement that, in the case of multiple plaintiffs or defendants, all agree on either a report or a deposition may force one plaintiff (or defendant) to give up his rights and submit to the will of another.

As others have noted, the time limitations for expert discovery are unrealistic. Seven days after the close of fact discovery is not enough time to designate experts, 7 days thereafter to elect between a report or a deposition may not be enough time, and 28 days after a party elects either a report or a deposition is not enough time to complete expert discovery. An expert often needs to review fact discovery before he can finalize his or her opinions. If a key fact witness is not deposed until the end of fact discovery, the expert may not have even received the deposition transcript within 7 days after the close of fact discovery. With out-of-state and medical experts especially, it may be difficult to arrange for and complete a deposition within 28 days. Most doctors have their schedules set weeks in advance. These timing difficulties are magnified if the case involves multiple experts, with possibly conflicting schedules. The time limits of rule 26(a)(3)(C) seem to presuppose that an attorney is working on only one case at a time, which is almost never the case. To complete all expert discovery in perhaps multiple cases within 28 days, part of which time counsel for one or more of the parties may be in trial in other cases, is simply unrealistic. Please, please allow more time to for expert discovery.

As others have also pointed out, in the case of non-retained experts, such as treating physicians, it may be difficult to discover the witness's facts and opinions sufficiently to provide a written summary of the facts and opinions the witness is expected to testify about. The defendant is precluded from talking to the treating physician ex parte under Sorensen v. Barbuto, 2008 UT 8, and treating physicians often will not talk to the plaintiff's counsel, at least not without the doctor's own counsel present.

Does the change to rule 26(a)(4)(B), adding "transcript" before "deposition," preclude the use of video depositions at trial?

Rule 26(b)(1): By limiting the scope of discovery to matters relevant to the "claim or defense" (as opposed to "the subject matter involved"), the proposed rules can be used to preclude the discovery of additional claims and defenses arising out of the same subject matter.

I also believe that it is a mistake to replace the relevancy standard of discovery with a "proportionality" standard. It is hard to know "the likely benefits of the proposed discovery" and "the burden or expense" before undertaking the discovery. Moreover, it is unclear under the proposed amendments whether a party must meet the "burden of showing proportionality and relevance" before he or she can obtain any discovery, or whether the standard just applies when a party seeks additional discovery beyond what is allowed under the tiered approach. In other words, if a party is allowed 10

interrogatories, must it show that each interrogatory is “proportional,” or must it show proportionality only if it wants to propound an 11th interrogatory or only if the other side objects to the discovery request? (The committee note suggests the latter, but the rule itself is not clear.) It seems to me that the parties should be allowed some leeway to conduct discovery that they deem appropriate without having to meet what may be an impossible burden of showing relevance and proportionality at the outset, before any discovery has taken place.

Rule 26(b)(5): Do all of the limitations on discovery make discovery of attorney work product more available, because the other party cannot now obtain the materials “by other means,” for example, because it cannot propound interrogatories or has used up its 3 hours of depositions in a tier 1 case?

Rule 26(b)(7) and (8): Must expert trial preparation materials protected from discovery under rule 26(b)(7) be listed on a privilege log under rule 26(b)(8), or can they be omitted because they are not “discoverable”?

Rule 26(c)(5): By making the limits on standard fact discovery apply “per side” rather than “per party,” the rules create a possible division among multiple plaintiffs or multiple defendants, whose interests may not be aligned.

I agree with others who have asked for interrogatories in tier 1 cases. Interrogatories are the least expensive form of discovery and can do much to narrow the issues. Without interrogatories, how are the parties to know who to depose? They will be limited to deposing only the witnesses who support the other side’s case, since those are the only witnesses who are required to be disclosed. I think 10 interrogatories, 10 requests for production, and 10 requests for admission would do much to further the goals of rule 1 in even the smallest case.

The proposed rules severely restrict the number of requests for production but do not limit the number of subpoenas a party can issue, so a party can ask for unlimited documents from third parties but not from an opposing party. I am not advocating limits on the number of subpoenas a party can issue. I just point this out to suggest that perhaps the rules cannot foresee or deal appropriately with all contingencies but perhaps should leave it up to the parties to decide what discovery is appropriate in a particular case.

The requirement that a party certify that the party has reviewed and approved a discovery budget before it can obtain additional discovery impinges too much on the attorney-client relationship. In contingent fee cases, attorneys seldom have a “discovery budget.” The attorney fronts the costs of discovery and is therefore naturally leery of incurring unnecessary discovery costs. And the propounding party’s “discovery budget” may not reflect the true costs of the discovery. It is very easy to promulgate discovery requests. So the party propounding the request may certify that it is within his or her discovery budget, when in fact it imposes an undue or disproportionate burden on the other side.

The rule also seems excessive where the parties have simply not been able to complete the allowed discovery within the time allowed and are seeking an extension of time to complete discovery but no increase in the other limits on discovery. It seems in those cases, a simple stipulation by the parties to extend the deadlines should be sufficient, without having to show “proportionality” or a “discovery budget.”

Rule 30: I’m not sure why depositions of nonparties are limited to 4 hours, but depositions of parties are limited to 7 hours. A nonparty may know more about what happened than the party. For example, a treating surgeon may know much more than the plaintiff, who was under anesthesia the whole time, about the events surrounding the plaintiff’s surgery. I believe the 4-hour limit is subject to more abuse. A skilled attorney can easily use most of the 4 hours questioning a witness, leaving little time for the other side to ask questions.

Rule 36: The provision in rule 36(b)(2) that allows a party to deny a request for admission on the grounds that “the truth of [the] matter is a genuine issue for trial” is problematic. Rule 36 is meant to narrow the issues for trial. If a party can simply deny a request because it thinks it presents “a genuine issue for trial,” rule 36 will not have served its purpose. I believe that the current rule, which says that a party may not deny a request on that ground alone, is preferable.

Posted by Paul Simmons June 21, 2011 12:55 PM

Dear Committee:

I acknowledge the difficult task you have undertaken. The bar is a diverse amoeba-like group with varying priorities, agendas, and capabilities. You have introduced these proposed changes in a normal manner spending many hours of your own time, without compensation, to explain the proposal to the bench and bar. However, given the major changes proposed, more time, more input and more consideration is needed.

I support the effort to reduce litigation costs and to reduce the load on the judiciary—but in my practice the proposed changes will do the opposite.

Rather than get into specific changes to the rules item-by-item which others have already done, I wanted to comment more broadly. If I step back and evaluate on a big-picture basis how these rules will affect my clients and my practice, a few major issues come to mind.

LESS DISCOVERY TRANSLATES TO MORE EXPENSE, MORE TIME, AND MORE TRIALS

Limited discovery hampers one’s ability to fully evaluate a case. With limited information in the early stages of a case, a case cannot be resolved through settlement or moved quickly to mediation or some other form of ADR. Written discovery is the quickest and least expensive way to discover facts. Take written discovery away and limit depositions as proposed and a party will not have facts necessary to make an informed decision on

settlement—one that will survive the light of 20/20 hindsight applied by auditors and corporate managers on the defense and by malpractice experts reviewing plaintiff's counsel. Without correct information, cases go to trial. They may be settled during trial because the discovery has not taken place until trial—but to trial they will go.

So big picture, less discovery… more trials. If the goal of the proposed rules is to give attorneys more trials, then fine. If the goal of the proposed rules is to give lawyers the tools they need to evaluate and resolve cases early, then these rules do not do this.

NO EVIDENCE SUPPORTING THE NEED FOR CHANGE

I understand the committee is concerned with the rising cost of litigation but I have not seen any evidence to support this conclusion. Is the cost of litigation going up for Utah litigants? Is the cost of litigation going up materially faster than the cost of other goods and services? What portion of the increase in fees is simply attributable to lawyers wanting to charge more for their time? Are there not alternatives available to litigants to keep the cost down (small claims, § 321 arbitration, voluntary arbitration, etc.)? How can we justify such a wholesale change in the Rules without evidence to support this change? Is there a less restrictive way to test these new Rules short of wholesale application? Can these rules be voluntary like they are in Colorado?

TO WHOM DOES THE LAWSUIT BELONG?

Traditionally the lawsuit belongs to the litigants. A litigant has a right, sometimes a constitutional right, to bring a case for redress of grievances and to defend allegations of grievance. How much could or should the Rules interfere with those rights? How much should the State be allowed to regulate the exercise of those rights?

The courtroom has been historically equated to the marketplace. To operate most efficiently those participating in the marketplace must have correct information. Lack of correct information leads to inequity and inequity leads to lack of confidence—in this case lack of confidence in the court system.

Again, despite my dissent I respect your willingness to take this on and your efforts to publish your efforts to the bench and bar. Unfortunately, given the current economic client, the attorneys I know are extremely busy and have not even heard of these proposals. My suggestion for the Rules is to take some more time or perhaps try these changes out voluntarily or in a more limited fashion before wholesale adoption.

Thank you for your consideration of these comments.

Posted by Kent R. Holmberg June 20, 2011 07:04 PM

In the case Ellis v. Gilbert, 429 P.2d 39 (Utah 1967), the Supreme Court stated that the discovery rules "were intended to make procedure as simple and efficient as possible by eliminating any useless ritual, undue rigidities or technicalities, and to remove elements of surprise or trickery..." It would seem to me that the proposed changes would be opening up the courts to the old rigidities, and "tricks" that the rules were designed to

prevent. I second many of the issues and points brought out in previous comments opposing the proposed changes by J. Bogart, mas, Grace Acosta, JHR and Katherine Smith and I will not repeat their comments. However, I must add my voice in opposition to the tiered discovery provision of the changes.

In my defense practice I have many plaintiff attorneys elect to have their cases submitted to arbitration pursuant to Utah Code 31A-22-321. These arbitrations are limited to damages less than $50,000. It just so happens that that is the amount in the "Tier I" of cases that would now have "0" interrogatories under the new rules. Interrogatorries are the cheapest and most efficient way to find out about any previous injuries or treatment a plainitff may have. To do away with interrogatories in this setting would require the attorney to ask the entire medical history during a deposition. Most people have trouble remembering their medical history even when they are presented with their own medical records, but to now ask an entire medical history during a deposition is not practical. A person just does not remember all of their treatment off the top of their head at a deposition. With interrogatories, the person has the time to go back and look at their records and write out their previous medical providers. There is a place for interrogatories in discovery, and this is one example. If these proposed changes are enacted, in every 321 arbitration, I will not have the ability to effectivly find out about a person's past medical history or previous injuries. I will have to rely on the faulty memory of every person and then spend an inordinate amount of the 3 hours I am alloted to find out that history. With the interrogatories I can ask my questions and be done, but without the prior discovery, the deposition will definitly be longer and more expensive. The committiee would be substititing a rule that would be more expensive and less effective for the one that does presently work well. This does not seem to be consistent with the intention of the rules set out in the Ellis case.

There is also an issue of equal protection that the committee must consider. The tiered approach allows for interrogatories in a case above $50,000 and even more above $300,000. Why is the defendant who finds himself or herself in the "Tier one" not allowed to conduct effective discovery using a discovery tool that other defendants are allowed to use in other Tiers? Are their cases no less important to them? A small businessman or woman who is sued on a contract for less then $50,000 will now be severely limited in conducting any discovery for their defense. Interrogatories are the most cost effective discovery tool we have, and limiting them as we do now to 25 is justified, but not allowing them in "Tier one" cases at all, I beleive, may violate the equal protection of the laws provisions of the Constitution.

Posted by Paul J. Simonson June 20, 2011 05:56 PM

The new version of the rules is somewhat different than those previously proposed. Among other changes, this version allows the deposition of experts, albeit in an unrealistically short time frame, but I find the limitations on time and discovery draconian and in my view an apparent attempt to fix a problem that does not exist. I can see some

wisdom in limiting time and reducing expense for smaller cases, but with that exception, I strongly oppose the proposed changes. There have not been many comments, I suspect that that is in part due to the fact that now that everything is online a number of attorneys are not aware of these changes, unlike earlier times when proposed changes were sent by mail to members of the bar.

Be that as it may, generally I see the rules as favoring the plaintiffs' bar since a plaintiff can take all the time allowed by the pertinent statue of limitations, prepare the case and find experts and then file the case leaving defense counsel under these proposed rules with very limited time to scramble to be able to comply with the detailed initial disclosure required by proposed Rule 26 and conduct limited discovery in the short time provided. It will be very difficult for a defendant to try to make the detailed disclosures required in Rule 26 in the time allowed and will actually increase costs.

Rule 26 also requires disclosure of experts 7 days after the end of discovery and simultaneous disclosure of experts is required. This will increase costs because instead of simply responding to plaintiff's expert designation defendants will now have to anticipate what the plaintiff may designate and retain more experts than may be necessary. Disclosure of experts should be staggered by at least 30 days.

The requirement that experts must be deposed within 28 days after designation ignores reality. I view this as an impossible requirement. This aspect of discovery is important to allow insurers to evaluate whether they will settle and to try to truncate this period to 28 days with multiple counsel and out of state experts is unrealistic as is the requirement to complete fact discovery in a $300K case in 180 days and above that amount in 210 days. That might work if an attorney had only one case.

The requirement of submitting a budget and a statement that the discovery is proportional and getting court approval to extend fact discovery is unreasonable. Why can't the parties stipulate? This seems to be a solution looking for a problem which will only create more problems when at present there is not a problem.

To restate my general objections, these rules seem to have some helpful application to the cases in the $50K range, but for larger cases they require increased court involvement, increase costs and unduly favor plaintiffs, by limiting time and discovery.

I have other specific objections, but it is too tedious to type in the tiny comment box provided.

Posted by Larry White June 18, 2011 11:30 AM

In addition to the issues previously noted, I would add that Rule 26 does not adequately address those areas of law where in which it is well-established that one party bears the burden of establishing the prima facie elements of a claim through expert testimony. While the on its face the rule states that the party who bears the affirmative duty must first designate experts, it does not reflect the reality that often a defendant cannot even begin to assess the real merits of the plaintiff's case until the plaintiff's experts have

been deposed or meaningful expert reports have been provided. Unlike the plaintiff, who has years to consult with various experts and develop his or her case before even filing the claim, the proposed rules unfairly impose on the defendant an extremely abbreviated time frame in which to evaluate the plaintiff's expert testimony while also finding, scheduling and conferring with and designating appropriate rebuttal witnesses. While a seven-day time period theoretically seems to speed things along to help ease court congestion, I expect that the unreasonableness of this short time frame will lead to further court intervention. In essence, it seems rule 26 will be utilized by some to force the parties to sprint along until they necessarily must seek court intervention, at which time the parties will then have to wait for some action by the court.

Posted by P. Van Komen June 17, 2011 09:57 AM

I oppose the changes. Such a massive re-writing of the rules will do nothing more than further complicate litigation. The rules are reasonably clear already, and are reasonably understood by the attorneys. The attorneys know the procedures, have accepted them, and litigate according to the well established practices. Please don't interfere with that.

Like many of the other comments, the requirement to designate experts within 7 days of the close of fact discovery is unreasonable. Further, what's the great benefit in rushing such a designation? Perhaps you save a few weeks. That benefit is not so great that it outweighs a party's right to the time necessary to reasonably prepare its case.

Like the other comments, I oppose the requirement to decide between an expert report and a deposition. A party should be permitted to pursue its claim or defense without having its hands tied. Leave the reports as a requirement, and allow parties to depose experts as they see fit. If they don't want to depose, they don't have to.

CMOs routinely contain deadlines for the submission of expert reports, and the depositions of experts. Those deadlines are agreed to by the parties. If the parties are fine with the dates, why interfere with that? The 28 day rule is needless interference.

The proportional standard should not become the new standard. The rules already contain safeguards against overburdening. Leave it as is.

Tiered discovery should not be implemented. The amount being sought does not necessarily dictate the complexity of the case. Furthermore, to limit a party's ability to pursue or defend its case simply because that party is not seeking $300,000 or more seems odd. It seems to me to be offensive to the concept of an open and impartial justice system. I don't believe a person should be prevented from issuing interrogatories in an effort to defend himself merely because he might only have a judgment of $50,000 entered against him.

If you want to tweak parts of Rule 26 to address a material issue, fine. But such extensive changes are unnecessary and will only complicate litigation further.

Posted by JHR June 14, 2011 10:49 AM

Several items re: proposed Rule 26

The new deadlines imposed by the proposed Rule 26 are unrealistic. The new deadlines would likely result in a motion being filed for every case I'm involved in on the basis of injustice or lack of feasibility.

Experts, particularly practicing physicians, have busy schedules and it is highly unlikely that an attorney can obtain the information needed from their expert within seven days after the close of fact discovery. It can take seven days to speak to an expert. If a family emergency or a vacation comes up, those seven days will be completely insufficient. If new information is disclosed near the close of fact discovery, seven days will not be enough time to properly evaluate the information.

The rules do not seem to contemplate courteous extensions commonly granted to opposing counsel due to circumstances such as illnesses, vacations and family emergencies. Such reasonable extensions of time are encouraged by the Utah Supreme Court's Standards of Professionalism and Civility. The proposed Rule 26 seems to require any stipulations to extend the deadlines to be approved by the court, which is unnecessary and a waste of time.

I agree with Ms. Hutton, who stated: Going away from the relevance standard to a proportionality standard is too subjective and invites the filing of motions to determine whether the value of a certain discovery request is proportional to the value of the damages requested. Each decision will be confined to the facts of the case and it will be impossible to even define such an esoteric standard.

I oppose the elimination of interrogatories for tier 1 cases. Attorneys will be required to take the deposition of a party without information that could have been easily obtained through interrogatories. The party being deposed often cannot remember all of the information requested when put on the spot in a deposition. It is much more cost and time-effective to allow the party to think about their response and respond in writing via answers to interrogatories.

Posted by Kathryn Tunacik Smith June 13, 2011 01:28 PM

Requiring plaintiffs to provide HIPAA compliant releases potentially runs afoul of the HIPAA law itself and also allows defense to engage in a fishing expedition with no check on that expedition through notice to plaintiffs. Current practice allows the attorneys to work out the details of medical releases and provides adequate opportunity for defendants to get medical records while still providing notice to plaintiffs of the records being sought.

The division of case into small, medium and large categories and the consequent division of discovery rules by eah category seems to me to be shooting oneself in the foot. It is a return to the days of formalism, allowing lawyers to play games with categories in order to frustrate and impede justice. I cannot think of a more harmful

approach to the courts than to create this overly technical Rule 26, which as it stands is already too long and too complex.

The drafters of the Rule on expert reports seem sepcifically to have targeted for circumvention the Supreme Court's recent ruling on non-retained experts. I strongly object to the increased formalism and expense necessary to obtain opinion summaries from physicians who are treating a person and already busy enough to be unlikely to cooperate. This seems like an attempt to keep neutral medical evidence out of the courtroom. Such an attempt should be discarded forthwith. The recent ruling made perfect sense in enabling medical testimony that comes from the most knowledgeable person, the patient's treating physician.

I understand that the intent of the Committee is to reduce the cost of discovery, but creating a more complex Rule 26 that can be finely parsed into tiny increments of compliance with formal requirement is only the path to more and more burdensome discovery motions. This Rule 26 is clearly a creature of committee and has the potential to become monstrously difficult to comply with and tremendously expensive, leading to motion after motion on whether experts' reports are or are not compliant, on whether or not deadlines are met, and on whether or not testimony is within the intent of the report. Please, please scarp this proposed rule and give the existing Rule 26 some more time to get worked out. We don't need a new set of complicated discovery rules every few years or even every decade.

Posted by Hipaa REleases June 13, 2011 12:23 PM

As to Rule 1: if new rules apply retroactively, won't the court be flooded with motions from all litigants asking to modify existing CMO's? Wouldn't it make more sense to have new rules apply only to cases filed after a certain date.

As to Rule 8: need to correlate this rule with Rule 15 (which will allow a party to amend the pleadings to conform with the evidence) so as to avoid a plaintiff alleging lower amount to get into the shorter timelines only to allege higher amount at trial.

Rule 26: Having no interrogatories makes no sense. One of the key things in a personal injury matter is to identify past treating providers and get medical records. We need the plaintiffs to identify these people for us and we need signed release (HIPPA compliant) so that we can start collecting records. Let us send interrogatories! Please require a listing of all medical providers for last 10 years and require submission of a HIPPA compliant medical release with initial disclosures!

Designation of experts 7 days post close of fact discovery is impossible. I need all the facts to give to my expert so that he/she can render an opinion. Can't do this this close in time to getting all the facts. Also impossible to schedule depositions of experts in 28 days time. My schedule and the schedule of others can't accomodate. Also, not clear how this interplays with rules of civility which requires me to give extensions etc...

Why are we addopting a proportional standard? Isn't the standard relevance? Seems like a drastic change in the law that have significant affect on how we practice.

It appears as if the committee was most concerned with addressing the speediness and cost-effective components of the justice system but forgot fairness. Not all litigation is simple. Also--since you exclude punitive damages in your valuation of a claim--you put commercial cases at a disadvantage. I may have a bank who is charged with violations of federal law which only have per violation charges of $1000 but which expose my client to punitive damages in the hundreds of thousands of dollars. It seems that the court should let the lawyers regulate themselves rather than try such a drastic over-haul. I would not support these changes.

Posted by Grace Acosta June 10, 2011 02:26 PM

I am writing at the request of the Executive Committee of the Family Law Section which has been involved in drafting and editing this section which applies to the practice of family law. The EC requested the addition of allowing depositions of custody evaluators and financial experts in a letter to the Rules Committee on October 13, 2010. I am writing to renew that request to the Judicial Council on behalf of the Executive Committee of the Family Law Section.

Requested Addition:

j) Depositions. In addition to depositions as provided in Rule 30, and subject to the provisions of Rule 30, a party in a domestic relations action may depose custody evaluators and financial experts. A deposition of a custody evaluator or financial expert shall not exceed four hours and shall not be included in the 16-hour limit on depositions in Rule 30(d).

While we understand that the underlying goals to limit unnecessary and costly discovery tools, in family law cases, depositions of custody evaluators and financial experts such as property valuators, can facilitate the aquisition of follow up information that enables the parties to reach final agreements in negotiation, mediation or at pre-trial conferences and avoid the most expensive part of litigation -- trial. For example, finding out the methodology of valuing a certain piece of property or finding who a custody evaluator interviewed or which tests were conducted on the parents, is essential in understanding all the facts necessary to either settle a case or litigate at trial. The absence of in-depth follow-up information form these expert witnesses actually serves an unintended consequence of forcing the parties to go to trial to obtain needed information on cross examination.

The obvious response to our request would be, "Well, if you need a deposition of the custody evaluator or financial expert, you can either submit a stipulation or file a motion for extraordinary discovery." The problem with such an answer is that those methods only increase the costs of discovery through additional pleadings and court hearings, not reduce it, which is the overall objective of the new rules.

While we would acknowledge that the depositions of custody evaluators and financial experts are not needed in all family law cases, it is common enough to warrant an exception that allows the discovery without having to do an additional stipulation or motion with the court. We understand the need to balance the costs and benefits of variations from the general rules, but this is one form of discovery that is common enough in our area of practice to warrant an exception.

Sincerely,

Stewart P. Ralphs

Chair, Family Law Section, Legislation and Rules Committee

Posted by Stewart P Ralphs June 10, 2011 12:01 PM

I have several concerns from the personal injury arena. I have practiced law for 11 years, 9 of them in the area of insurance defense arena, both for the "outside" firms and the "in-house" counsel firms. These rules may work well for some areas of law, but will create motion practice and increase trial frequency in my area of practice, not cheaper and more efficient resolution of matters. I will take each rule one at a time. Most of my concerns are with the potential conflict the rules create or, maybe better said, the potential issues on how each side may interpret a rule.

Before addressing the rules individually, I agree with some comments expressing concerns for the reason for the changes. I will give one example, Rule 26, at present, requires the attorneys to meet to address the claims and defenses raised in the individual case and then prepare an order. This is part of the practice of law and the best opportunity to address discovery issues early in a case. Now, two competent, duly licensed attorneys, with direct access to their clients (with whom each should have adressed costs and risks), will set down on paper what they think at the beginning of the case that which each believes is the best means (including the use of interrogatories, admissions, etc.) within the law, to move a matter forward. If they do not agree, there is a mechanism to request that the Court intervene at any stage of the process. The new rule removes this ability from the attorneys unless each moves the Court to change the rules, after disclosigng its budget (which is likely work product) a device that fails to save time or resoures. That Cout, which is already overworked, should not have to spend its resources deciding if the parties, who do know the case and are being compensated to run it, have shown that they really do know it well enough to change the rules. My experience has been that if the two attorneys agree on how to proceed the Court will send them off to do so. The result is an overworked Court being inundated with de facto attorney planning reports stipulating that the new rules should be amended in their cases, which, I imagine the Courts will be inclined to grant (as it should have little reason to doubt the word of two sworn officers of the Court who are in agreement) unless mandated by the higher Court with some set of requirements not yet written controlling when the lower Courts ought to deny these requests.

Turning to the first rule, Rule 1 allows a Court to decide if the new rules will apply if a party suggests that the imposition of the rule would be unfeasible or result in injustice. The plain language of the rule is that all Court ordered or approved discovery plans are supplanted by the new rule which sets fact discovery from the date of Plaintiff's initial discloure and based on an amount in controversy that may never have disclosed.) If the case is already pending, then more than likely the parties have agreed on an order and have worked their cases in a way to meet or hopefuly meet the guidelines that have set, which likely have already been approved of by the Court, but, have more than likley already run under the new rules. So the attorneys are clear on the deadlines, the Court had presumably or at least tacitly approved of the way the case is progressing, and presumably the parties are informed. Now one or both parties will have to go to the Court, billing a client along the way, to indicate the new dates or some application of the new rules will not work in their case. This will flood trial judges with motions. Second, even if the new dates are acceptable, every case on every attorney's desk, in my case (60 plus files) will need to be evaluated to see if the new rule will result in injustice or lack of feasability. As many of my cases fall into the Tier 1 category where depositions often occur in month three or four discovery and no determination as to an IME has been made yet, I will be filing that motion often. Plaintiffs who do not wish to receive motions for having unintentionally missed a new expert deadline will be fling their fair share as well to prevent motions for summary judgment. Third, discovery is set by tier based on the amount in dispute. Under the present rules, a party can ask for any amount of general damages at trial, so how will a party know which tier his or her case will fall into? That raises an issue for a later Rule, but general damages are a category of damages by my reading under the new rules (which some counsel disagree with me about), and although I am a defense attorney, I as a Plaintiff may want some flexibility at trial to ask for more than I originally thought the case was worth if the facts change or my client presents very well and I read the jury as amenable to a higher prayer for reef in my closing, but do not want to risk a mis-trial when the defense raises the issue at trial that my combined number exceeds $50,000 and the defense was preculded from doing second tier disocvery. Finally, Rule 1 now allows a more specific rule or statute to trump the more general rules. Fact discovery in arbitration raised under Utah Code Ann. Section 31A-22-321 (motor vehcile accident cases) is longer with its own set of default dates, including 90 additional days of disovery if a de novo trial is sought. The result is a potential equal protection argument in that a defendant in standard litigation cases involving an insured automobile, cannot have a longer discovery period, but a Plaintiff can elect arbitration under the statute and obtain it.

Again, this is my general comment for the rules and just Rule 1.

Posted by Kevin Tanner June 3, 2011 05:23 PM

The limits for Tier 1 discovery, contained in 26(c)(5) go too far. A better rule would allow 10 interrogatories, 10 request for production and 10 requests for admissions even in tier 1 cases.

For example, even in low end auto accident cases I send out an interrogatory asking if they were using a cell phone, if they claim mechanical issues with the vehicle caused the crash and if they had consumed any drugs or alcohol within 24 hours of the crash. That's three interrogatories.

Admittedly, I could ask this information in a deposition, but sometimes a deposition of the defendant isn't necessary. Further, defendants frequently have terrible memories in depositions. Interrogatories serve a purpose.

Posted by Nelson Abbott June 3, 2011 04:44 PM

The proposed change to Rule 26(a)(3)(D) ignores reality and is not workable in the real world.

The Supreme Court issued Sorensen v. Barbuto several years ago. Shortly thereafter, UMIA, the largest medical malpractice insurer in the State, sent out a letter to the doctors they insure, telling them not to speak with Plaintiff's attorneys unless the doctor obtained independent counsel. In my experience, some doctors have followed that advice. As a result, a plaintiff may want to call a treating physician but will not be able to speak with that treating physician to prepare the summary.

This leaves the plaintiff with two options: 1) depose the doctor, or 2) create the summary based upon the medical records.

Taking a deposition is expensive, and may not be allowed in small cases. Creating a summary based upon the medical records is simply shifting the cost of trial preparation onto the plaintiff and creating a hot spot for discovery disputes. If both parties have access to the medical records, the plaintiff is in no better position to create the summary than the defendant.

In essence, this rule requires one party to do legal work for the other party, even when the other party is equally capable of doing so.

Posted by Nelson Abbott June 3, 2011 04:33 PM

I oppose the requirement in Rule 26 that a party offering a witness must summarize that witnesses testimony.

That reqirement will inevitably lead to discovery disputes and thereby increase the cost of litigation.

First, the opposing party will argue that the summary was not sufficient. Is the general nature of the testimony required, is a summary required, is a detailed outline of the testimony required, is a video of the mock trial testimony required? Anything short of a full list of all questions and expected answers will result in motions to strike. This seems like a mess.

The second problem with this proposal is that it violates the work product privilege. If a party spends the effort to interview prospective witnesses, this rule presumably requires that party to give the results of that interview to the opposing party. Take an automobile accident case as an example. Witnesses are commonly listed in the police report and are equally available to each party. If a plaintiff interviews a witness and determines what that witness will say, this amendment requires the plaintiff to summarize the result of that work for the defendant. A better solution is for the defendant to call the witness and conduct their own interview.

The third problem with this rule is that it requires a party to actually go out and interview all witnesses before trial. While this may happen in larger cases, it doesn't always happen in smaller cases. This rule would mandate full witness interviews in all cases.

The fourth problem with the proposed rule change is that in real life it may be impossible to comply with the rule without deposing a witness. For example, a party may wish to call an employee of an adverse party. It is common for such witnesses to be uncooperative before trial. Depending on the position held by the witness in the company, it may be unethical to conduct an informal interview with such a witness. In many cases it will be impossible to prepare a summary of the testimony. It can also be disadvantagious. Summarizing the expected testimony of a hostile witness simply gives the oppposition an opportunity to coach that witness and avoid the damage that would be done if that witness were simply to testify cold. A common practice under the current rules is to depose such a witness to "lock in" the testimony before trial. With the restrictions on the amount of depositions allowed under the proposed changes, it may not be practical to depose all of the witnesses a party wants to "lock in."

A solution is rather simple. The rule should be changed to require only disclosure of the general nature of the testimony to be offered. If any summaries are required, they should only be required of witnesses who are parties or otherwise closely associated with a party.

Posted by Nelson Abbott May 27, 2011 03:40 PM

The legislature, as you know, changed the statute with regard to Renewal of a Judgment by allowing the Renewal to be made by filing a Motion for Renewal (78B-6-1802)rather than filing a Complaint for Renewal of Judgment.

The language under the Utah Rules of Civil Procedures, Rule 9(k), Pleading special matters requires a revision, as it still reads: "Renew judgment. A complaint alleging failure to pay a judgment shall describe the judgment with particularity or attach a copy of the judgment to the Complaint." Since you no longer are required to file a Complaint for Renewal, this language is no longer correct.

Posted by Sandy Tiller, Terry Jessop & Bitner May 27, 2011 09:31 AM

As a plaintiff's personal injury lawyer with over 20 years of experience, I like most of the changes to the new Rule 26, with the exception that taking expert depositions within 28 days of giving the election to do so is not practical in light of schedules of attorneys and experts. More time will be necessary to schedule the depositions.

I strongly disagree with eliminating interrogatories in Tier 1 cases and feel that all cases should be allowed at least 25 interrogatories. They are the cheapest way to conduct discovery, and sometimes the only way to discover the basis of the other sides's defense. For example, in a personal injury case, the other side may not hire an expert, but may still dispute causation or extent of injuries. In most cases, taking the defendant's or witness deposition is not going to allow plaintiff's counsel to find out the defense theories or positions, because it is the defendant's attorney who knows about the defenses, not the defendant. Without interrogatories, the plaintiffs will not be able to find out about the defense case and it will be trial by surprise and ambush. Full disclosure allows the parties to consider settlement and is judicially efficient, whereas a "hide the ball" type of trial preparation does not allow the plaintiff all the information he or she needs in order to consider whether settlement is wise. Interrogatories do not require the parties to pay for a court reporter while depositions cost about $100-500 per hour, depending on if they are video depositions and depending on the rates of the court reporter. So it is a hardship to require Plaintiffs to do all discovery by depositions in Tier 1 cases and increases the expense for the parties.

Posted by Tamara Hauge May 23, 2011 01:51 PM

The massive revision of civil procedure proposed by the Advisory Committee is remarkable in a number of ways. Start with Rule 1 and the explanation for the plan of revisions. The Introductory Notes assert that discovery processes have ignored Rule 1’s call for “speedy” and “inexpensive” justice. That observation is, the Committee says, supported by empirical evidence, citing a 2008 survey the College of Trial Lawyers. It may be that the Committee is right, but what it offers as justification is not much more than ipse dixit. The 2008 survey is, after all, just an opinion poll. It is not a study of the actual costs for any phase of discovery or litigation. One cannot make any reasonable inferences from the 2008 survey to costs of discovery and, consequently, to whether ‘speedy and inexpensive’ justice has been sacrificed. The Committee’s citation to ABA studies is no better. Those studies too are just opinion polls. None of the studies actually looks at the costs of discovery. There is nothing in the studies which suggests that small dollar value cases in fact involve too much discovery, or that too much money is spent on expert discovery, because they contain no information about how much expert discovery costs. The division of cases proposed in the new Rule 26, therefore, appears to be arbitrary. This is not just a problem in the Advisory Notes. Review of the Committee’s minutes for the last year are equally bereft of any empirical foundation for any of the proposed changes. The Committee could have, but did not, investigate how much is actually spent on various sorts of cases (contracts, personal injury, other torts, etc.) and on cases valued at various levels. It could have made a study of the actual

costs of expert discovery under the current rules. It is therefore rather difficult to tell whether the Committee's pronouncements about discovery are correct.

A second point before turning to the substance of the proposed changes: Many of the revisions seem to contemplate fairly dramatic changes in the conduct and practices of both lawyers and judges, but for reasons that are not explained. Judges, who have to date not strictly enforced disclosure requirements, discovery limits, or deadlines, will do so under the new Rules. Lawyers who currently cannot cooperate for efficient discovery plans and routinely flout disclosure requirements and discovery limits, under the new Rules will do otherwise. (It is clear that the Committee believes that lawyers routinely fail to make proper disclosures, impose unreasonable discovery requests, and adopt tactical stances for the purpose of raising litigation costs – they say as much in the Notes to Rules 1 and 26.) One wonders why there will be such a change in culture.

The centerpiece of the proposed revisions is Rule 26. The presumption at work throughout the changes in Rule 26 (and the related discovery rules) is that discovery is to be discouraged. A party seeking anything beyond what the adverse party wants to disclose will have the burden of proving that the requested discovery is proportional to the burden of production, and that the information is not available from some other source. The idea is that fuller initial disclosures will obviate the need for any but minimal discovery. This seems doubtful. A plaintiff would not normally rely on, and hence disclose, evidence that undermines or disproves its case. How is that information to be collected? A defendant won't be able to ask for categories of information in an effort to test the plaintiff's story. Any request, whether a request for documents or an interrogatory, can be met with an objection that it is burdensome or disproportional, and the defendant then will have to prove that the discovery request will result in some material evidence. (How does a party moving to compel show that the discovery request is not burdensome?) The presumption against discovery does look like an invitation to a more active motion practice, and so does not look like it will advance speedy and inexpensive resolution of cases. (In this regard, the Committee might have considered the history of discovery under the Federal Rules – there was a time when the burden was on the requesting party to show the discovery request justified. The Committee might have explained why the Federal Rules abandoned that approach and why those reasons won't apply here.) Matters on not really any better for a plaintiff who requires discovery to make its case.

The Committee lays great emphasis on the new disclosure requirements obviating need for significant additional discovery. This is surprising because the scope of initial disclosures is hardly altered from the current requirements. The changes come to (1) a requirement that the parties produce documents (not merely identify), (2) a requirement that every document "a party refers" to be produced, and (3) and a list of each fact witness (with summary of testimony) a party may call for its case. (The requirement that a party disclose each individual who is a discoverable witness is unchanged, so it is not obvious what the new requirement adds other than a summary of testimony.) If initial disclosures significantly limited the need for discovery, then that effect would long ago

have been realized. The Committee thinks it hasn't, so how the new disclosures, which do not materially add to the content of disclosures, changes the need for discovery is unclear. What is clear is that the promise that disclosures will limit the need for discovery is dubious. Yet it is the justification for eviscerating discovery.

The proposal changes the content of expert disclosures. On the good side, the disclosure will include a brief statement of the expert's expected opinions and production of all of the information relied on in forming the opinion. (The proposal is unclear about whether the information relied on is to be included in or identified in the disclosure, a significant difference.) The adverse side then must decide whether to take the deposition of the expert or accept a report in lieu of deposition. The expert is confined to testifying on matters "fairly disclosed in the report" in the party's case in chief. Does the Committee intend that there be no limit on the scope of rebuttal testimony from an expert? And what does "fairly disclose" mean in this context? If an expert discusses a topic, is he or she entitled to testify about opinions on any subject under the topic? The standard is in the current rule, but one at least has the opportunity to depose the expert using the report to determine the true limits of the expert's opinions, and the basis for the opinions. Given the minimal Utah case law on expert discovery and testimony, these standards seem awfully vague, and to invite a good deal of mid-trial on the question of whether an opinion has been fairly disclosed. Remarkably, there is no limit on testimony of an expert who is deposed. The substantive requirements for expert reports will change from a requirement that the report include "the substance of the facts and opinions" to a requirement that the report include a "complete statement of all opinions." The latter is intended as more comprehensive, according to the Notes, and intended as a remedy to the problem that experts "often were allowed to deviate from the opinions disclosed." So the proposal assumes that judges who permitted experts to deviate from their reports before will not do so in the future. A problem is that the language of the proposal is taken directly from the disclosure requirements of the Federal Rules. If that disclosure did suffice to reduce expert depositions, then it would be easy to track a decline in such depositions, and there should be a higher rate for expert depositions under state than federal rules. But the Committee thinks the Federal Rules allow too much discovery.

The Committee proposes that the standard for discovery be changed to require a party seeking discovery to show that the burden of responding to the discovery is proportional, i.e., that "the likely benefits of the proposed discovery outweigh the burden or expense." The apparent aim is to discourage discovery, in large part because the new disclosure requirements obviate need for significant discovery. The disclosure requirements cannot bear such weight. They require disclosure only of what supports the party's case, and largely track current disclosure requirements, and so do very little to obviate the need for discovery. The burden shift also imposes the burden on the party least likely to be able to make its case. How is a requesting party to know what the burden is on the responding party? There is no requirement under the proposed Rule 37 which requires a conferral to include that level of detailed information. In fact, the

Committee never really identifies what the proportionality requirement applies to: the discovery request or to the discovery response. They yield rather different outcomes in many cases. As there is no case law at all in Utah on this standard, and the Committee does not suggest any other jurisdiction to look to, one can expect a significant period of litigation over discovery just to get the standards sorted out.

The proposed limitations on discovery methods and “tiering” of cases is one place the absence of empirical research stands out starkly. The categories are conjured. No explanation or evidence is offered supporting that cases should be categorized in these ways, or that the limits of discovery have any rational connection to the dollar values. There is an underlying problem, however. Throughout the presumption of excessive discovery implies an assumption that parties (or their counsel) are largely unable or unwilling to cooperatively manage discovery under the current rules. If they did, then to that extent voluntary limits on discovery – whether or not embodied in case management orders – would effectively confine actual discovery to levels appropriate to the case. Imposing formal limits by rule supposes that such cooperation is rare. The Committee has no evidence that is true. The proposals and Notes repeatedly presuppose the opposite – that counsel can and will regularly cooperate on discovery plans. Under the proposals, multi-party cases require high levels of cooperation as discovery is allocated to sides, and not parties. Whatever the facts on that issue, the proposals clearly disfavor discovery. The Committee’s explanation is that expanded disclosure limits the need for discovery. That looks to be a confusion. Disclosure is limited to evidence supporting the disclosing party’s case, something already required – if not often enforced. How is contrary evidence to be found? On what basis does the Committee believe that all or almost all small dollar value cases require just 6 total hours of deposition, 10 total document requests, 10 total requests for admission? Or, in a case involving $300,000 or more in damages, why 30 hours per side will be adequate in almost all cases? There are opt-out provisions, but they sit uneasily with the body of the proposals.

The Committee has proposed that discovery be allocated to sides, not parties. The first instance, as noted above, involves expert discovery. All parties on a side must agree on the method of discovery; if they do not, then adverse experts are subject only to one four hour deposition. The supposition is that four hours is ample time for an expert deposition, no matter the number of issues or parties involved. There is no provision for motions for relief from those limitations. It is plausible that such a motion constitutes a motion for permission to take extraordinary discovery, in which case it must be brought before the expert disclosures and choices are practically possible: they seem to occur after the close of standard fact discovery. The allocation of discovery to sides and not parties is also basic to the fact discovery processes. Each of the tiers allots depositions, etc., to each side. (The proposals do recognize three sides: plaintiffs, defendants, and third-party defendants. How counterclaims and cross-claims play is not explained.) There are no provisions for, and no mention in the Notes of, cases where a party is added to a case after the added party’s ‘side’ as exhausted it discovery methods.

Presumably the new party may request leave to take some discovery. But a party has a right to discovery, not merely to the possibility of requesting permission. For the Committee, due process rights attach to sides not, as they used to, to parties. The proposals contemplate that a party could be denied any opportunity to take discovery before trial as ordinary course application of the rules.

Opt-out through stipulation is possible, and, remarkably, the Committee suggests will be the most frequent opt-out method. Remarkable because the Committee here supposes cooperation among counsel of exactly the sort it generally believes does not occur. Why parties may not opt-out of the discovery tiers at the outset of a case is not explained, and it is hard to come up with a plausible explanation for the constraint. Although the Notes say courts must grant a stipulation of this kind, the proposed Rule does not and the former is hardly binding. The proposal also includes a requirement that the parties themselves approve a discovery budget. How budgets became a proper subject for rules of civil procedure, is unclear. What purpose the requirement serves that might be appropriate for a committee on civil procedure to consider is equally unclear. Opt-out is also possible by motion from a party. Such a motion must come after exhaustion of regular discovery. The difficulties that poses for discovery planning and efficiency are obvious.

The proposed changes to Rule 37 are consistent with the reconceived Rule 26, and further illustrate difficulties in the revision. There are no schedules or deadlines for motions. Given the short schedules permitted to discovery, this is a surprising omission. Motions do not stay the discovery schedule. Hence, a motion to compel a cure of an inadequate disclosure is likely to be resolved half-way or more through the available discovery period. Or a motion to compel (or for protective order) in response to a document request is unlikely to be resolved in time to have any effect on the remaining discovery. In fact, given the time frames, discovery motions coming even mid-way through the period will not be resolved in time to be of use. Rule 37 does not provide for changes in the discovery schedule, and Rule 26 does not indicate that resolution of motions is a proper basis for altering the calendar. Such a motion would have to come before the close of fact discovery and after exhaustion of discovery methods. In other words, obstruction of discovery is strategically enhanced by the proposed Rules. On the other hand, asserting an objection alone is grounds for a motion to compel. The objection need not be unfounded or defective in any way. A proper objection is grounds for a motion to compel. Equally interesting, the proposed Rule 37 adds to the disclosure requirements of Rule 26. Rule 26 requires parties to timely supplement their disclosures. Rule 37 requires that every supplementation be accompanied by “an adequate explanation of why the additional or correct information was not previously provided.” Which proposed Rule governs? The conferral requirement has been expanded. Currently, one needs to confer with the party one seeks to compel discovery from. Under the proposed Rule, one will need to confer with “the other affected parties.” “Affected parties” is an unfortunate choice because so ambiguous. Normally, one would expect all parties to be affected by discovery or disclosure, as the material affects the

case. But it is also possible that something else is meant – confer with the parties with a direct interest in the discovery? Or is it a round about way of including conferral with third parties subject to subpoena?

There are issues in the revisions to the proposed Rules intervening between 26 and 37, some of which are carried over from Rule 26. Rule 29 repeats the requirement that counsel certify budget discussions with their respective clients. It is at least odd for the Rules to intervene in the attorney client relationship. How it could be the business of the courts to monitor discussions between client and lawyer regarding costs is mysterious. What such a discussion entails where the representation is based on something other than hourly compensation is hard to make out. The certification serves no real purpose, and presupposes a level of attorney misconduct that should have some empirical foundation.

The proposed Rule 30 does nothing to cure the problem of remote depositions, sure to become more common. The Committee has retained phrasing which is hopelessly unclear: “A deposition taken by remote electronic means is considered to be taken at the place where the witness answers questions.” Where is that? If they mean the place where the witness is located, say that.

Rule 33 alters the business records option by relieving the responding party of any duty to provide the records. Instead, they will have to identify the records and make them available for inspection and copying. This cannot but delay a full response, which seems odd given the shortened discovery deadlines.

In Rule 34 the scope of document discovery is narrowed. Under the old rule, the scope of response was documents in the possession, custody or control of the responding party. No more. The revisions limit the response to documents in the possession or control of the party. Why the change?

Under the proposed Rule 36, a party will be permitted to deny the truth of a matter “if the truth of a matter is a genuine issue for trial.” There are no Notes explaining what that means. Because it is an addition, one assumes it means something different from a denial because the party believes the matter false.

For discovery requests, parties will have to state the reasons for objections. The failure to state an objection waives the objection unless the Court excuses the failure. There is nothing particularly objectionable about this except that it is not consistent with the aim of rapid discovery and trial. Permitting parties to resurrect objections whenever there is good cause is little constraint. Good cause is not hard to show, and, absent a sea-change in the attitudes of the trial courts, will mean that the normal course will allow objections to be raised late, admissions withdrawn, etc.

That illustrates one of the key defects in the proposals. They limit discovery and impose short timelines but do nothing to limit motion practice and little to make motion practice consistent with the aim of quick resolution. The revisions appear to aim at driving more cases to trial, not quicker just resolution.

The proposed revisions include a number of positive changes, and it would be unfair not to note at least some of them. The revisions to Rule 26 would improve final pretrial disclosures. The greater specificity of the disclosures should allow better trial preparation, and therefore more efficient trial presentation. The more detailed requirements concerning expert reports will also be beneficial. It may be that fuller reports would, independently of the other proposed changes, result in fewer depositions. More importantly, it would make trial preparation more efficient. Similarly, adoption of an order for expert disclosure and discovery removes an area of conflict, and is reasonable. Requiring meaningful disclosure and deposition of witnesses offering expert testimony but not specially retained, etc., is a significant improvement, clarifying a murky and disputatious area of practice.

Posted by J. Bogart May 23, 2011 12:31 PM

If the committee is going to push the expert deposition issue, why not at least implement a tiered approach? Many state court cases are small, but not all. If a plaintiff is asking for more than $300,000 (often based on an expert damage report), is it really unreasonable for the defendant to ask for both an expert report and a deposition?

Posted by W May 20, 2011 09:36 AM

The proposed rules leave a lot of room to game the system. A few examples:

Rule 8(a)(3) requires a plaintiff seeking unspecified damages to plead that their damages are within a specified tier. However, there does not appear to be anything that limits the plaintiff's recovery to that tier. What prevents a plaintiff from saying its complaint are "tier 1 damages" but then asking the jury for $500,000 at trial? Frankly, why wouldn't plaintiffs do this? They save a ton of costs, get an early trial, and most importantly, the defending party is blindsided because it has only had 3 hours of depositions and 5 requests for production.

PJ's comment addressed the games that can be played with having to choose between an expert report or an expert deposition.

There are other examples, although these seem the most blatant.

Posted by mas May 20, 2011 09:26 AM

Just my two cents:

1. Rule 26A should be styled Rule 26.1 so as not to be confused with Rule 26(a).

2. While I recognize it was an attempt at compromise, the proposed rule on expert witness disclosures should not force litigants to choose between eliminating the report or the deposition.

The report alone will not effectively limit trial testimony because there will be uncertainty over what was "fairly disclosed", and judges may be reluctant to enforce it for fear of reversal.

The deposition alone will not effectively limit trial testimony because even if the lawyer asks if the expert has disclosed all opinions, the expert may say "as of right now", etc. but may try to reserve the right expound at trial.

You need both the report and deposition in tandem to elicit a reasonably full expert disclosure. If cost is the concern, set a limited default length of both (10 page single spaced and 6 hours, etc.) but don't force a Hobson's choice.

Posted by PJ May 19, 2011 09:04 PM

The changes to Rule 8 appear otiose. If the pleading standard is not changed -- and that is what the rejection of Twombly appears to state -- then what is the value of requiring that facts and theory be pled? With the rejection of Twombly, the facts and theory need not be even plausible, so there does not appear to be any legitimate purpose in changing the Rule; it can only introduce uncertainty and encourage motion practice.

Posted by J. Bogart May 16, 2011 03:52 PM

I agree with Mr. Milliner as to many of his comments for proposed Rule 26A. In that spirit, I suggest Rule 26A require parties to attach their Financial Declarations as attachments to their initial pleadings, not 14-28 days after pleadings are filed/served.

26A(c)(2) is poorly drafted because many divorcing parties do not have their complete federal and state income tax returns for the the two tax years before the petition was filed. The rule, to be clearer, should require that the parties file their last two most recently filed tax returns.

26A(c)(3) as currently drafted suggests that the drafters are a little out of touch with the public. Requiring the filing of "Pay stubs and other evidence of all earned and un-earned income for the 12 months before the petition was filed" presupposes that all divorcing parties have jobs (many parents are stay-at-home care providers with no outside employment or documentation of same) and are currently employed at the time the divorce action is filed.

26A(c)(6), requiring disclosure of a mere 3 three months of financial accounts statements is way too short a period.

Posted by Eric K. Johnson May 11, 2011 11:19 AM

If the judiciary wants to bring litigation to a just result more quickly, it seems that the first place to start is where the issues are initially framed, i.e., the pleadings -- especially answers. That is where defendant stonewalling always begins. The proposed revision to

Rule 8 completely removes any requirement that a defendant must deny and defend only in good faith (i.e., that denials must fairly meet the substance of the matter denied). Granted that Rule 11 remains, but it has become expensive to enforce and is often overlooked or ignored -- especially by pro se litigants. I suggest that a "good faith" pleading requirment be inserted either at the beginning of Rule 8 (applicable to all parties) or at least as a preamble Rule 8(b) making it clear that any denial or defense must be made or brought in good faith and made or stated so as to make clear the good-faith basis for the denial or defense.

Proposed Rule 16(a)(11), (12) & (13) lack an appropriate initial present participle such as "setting," "establishing" and "enforcing" to make them clearer and uniform with the prior subparagraphs. 16(a)(11) could also use a comma after the word "conferences" to add clarity.

The preamble to proposed Rule 26(a) should be changed so that instead of recognizing other discovery rules that apply "in a practice area," it recognizes other discovery rules that apply "to specific types of cases." A "practic area" is too broad a reference and only applies to attorneys and not to pro se litigants.

Proposed Rule 26 is also too draconian when it comes to discovery for lower tier cases. Parties should be allowed to propound some interrogatories and take some depositions -- even in cases where the amount at issue is less than $50k. And, if injunctive or declaritory relief is requested, litigants may need more than what is permitted in tier 2. Again, requiring that the pleadings appropriately narrow the issues will do more to decrease discovery than trying to fit cases into tiers with discovery caps.

Proposed new Rule 26A ignors the current practice of requiring the parties to file Financial Declarations in connection with a Motion for Temporary Orders, which usually comes hot on the heels of, if not concurrently with, the filing of the initial Petition. This rule, as drafted, would give a respondent an excuse to delay filing his Financial Declaration and/or postpone the entry of a Temporary Order because the 28 days after he filed his answer had not yet run.

Proposed Rule 26A also presumes that there is a court-approved Financial Declaration. In my experience, if there is a court-approved form in a particular district, it is rather ad hoc and does not conform to conventional rules for income statements (i.e., statements of income and expenses) or balance sheets (i.e., statements of assets and liabilities). If this rule is going to incorporate such a form by reference, the judiciary should create a good form to be used uniformly in all districts.

Proposed Rule 36, line 6, isn't clear as to what document(s) it's referring to.

Posted by David Milliner May 6, 2011 04:55 PM

The rules are unclear on how to apply the limits on, for example, interrogatories. If there is a limit of 20 interrogatories, and there are two plaintiffs and three defendants, how many interrogatories does each party actually get?

The proposed rule says "The limits on standard fact discovery are “per side” (plaintiffs collectively, defendants collectively, and third-party defendants collectively)." Does that mean that all three defendants "split" the 20 interrogatories?

Similarly, does that mean that 20 interrogatories can be directed to Plaintiff #1 and 20 interrogatories can be directed to Plaintiff #2? Or does it mean that 20 interrogatories total can directed to both Plaintiffs?

Posted by Blake Hill May 6, 2011 02:30 PM

I’m in favor of some limitations on discovery, but the limitations currently set forth in the proposed Rule 26 "tiers" places too great a hardship on the defendant; particularly in the tier 1 discovery, which allows “0” interrogatories. This means there is no way to ascertain whether a plaintiff had a prior injury, accident or condition, because the defendant cannot ask for the names of providers, etc. Regardless of the value of the claimed injury, the defendant should be able to discover whether it arose from the relevant accident. Should the answers be sought through deposition, the 3 hours allotted could be used quickly where both parties consume the time by including questions. How is this time to be divided?

Similarly, the deadlines for expert discovery require a defendant to retain a medical expert within 7 days of receiving a summary of a treating physicians opinion, and then 28 days to have him review the material and produce a report as a retained expert. It is rarely (if ever) possible to get a physician to agree to such a time line. This will actually force the defendant to retain doctors who are professional experts and will certainly increase the cost due to the tightened timeline.

Finally, going away from the relevance standard to a proportionality standard is too subjective and invites the filing of motions to determine whether the value of a certain discovery request is proportional to the value of the damages requested. Each decision will be confined to the facts of the case and it will be impossible to even define such an esoteric standard.

Posted by Linette Hutton May 6, 2011 10:31 AM

Rule 16(a)(5) and (b) refer to "other ADR processes" without defining "ADR." Wouldn't it be better to state "or other dispute resolution processes"?

Posted by Steven G. Johnson May 6, 2011 09:29 AM

The Utah Court of Appeals, in the recent case of Rahofy v. Steadman, 2010 UT App 350, struck down (or severely limited) the use of informal releases as a method to obtaining out of state records of an opposing party. This method of discovery allows for a quicker, less expensive method of gathering significant amounts of relevant materials. The Rahofy court directed parties to instead initiate ancillary proceedings in other states to obtain records outside of Utah, even though the court “readily acknowledge[d] that to

obtain all of the information Defendants seek they may have to undertake a time-consuming and expensive process."

This holding is at odds with this Committee's desire to simplify the discovery process. Unfortunately, the situs of relevant records is not determined by the value of the claims being made. A relatively minor $20,000 personal injury claim is just as likely to have relevant records stored in California as a $500,000 contract claim. However, under the proposed scheme, the $20,000 claim only allows for 120 to conduct discovery and an extremely limited number of requests for production of documents – a scheme at odds with the Rahofy holding. The 120 days will easily be consumed by the simple task of obtaining copies of the most basic records.

The committee needs to amend the proposed changes to acknowledge the restrictions imposed by Rahofy.

Posted by Blake Hill May 5, 2011 09:28 AM

I am very much opposed to this proportionality standard. It will be used as another excuse not to provide discovery in cases and will beget more law and motion practice (and extraordinary delay) as parties litigate over whether certain discovery is "proportional" based on a rather esoteric, but certainly subjective standard. Even if this proportionality standard is adopted, there are three additional issues which I think the committee should address.

First, the tiers are based on the amount of damages claimed. I think a better approach would be to borrow from federal law and apply an amount in controversy standard so that, when a plaintiff seeks non-monetary damages such as an injunction or to quiet title (which relief may be worth quite a bit more than $300k), the case may be subject to more appropriate discovery limits.

Second, the limitations on deposition hours seems to be a reasonable idea. However, against which party do the hours count? If the plaintiff notices a deposition and consumes 30 minutes on the record and then the defendant examines the witness for 5 hours, against which party, or in what proportion, do the hours count?

Third, under the proposed rule, parties can only obtain additional discovery "after reaching the limits of standard discovery." Does this mean that, in order to take an additional deposition beyond that permitted by the tier, the party must exhaust the allocated requests for admission and interrogatories, etc.? I doubt the committee meant to impose such a requirement but the rule can certainly be read in such a way.

Posted by Jefferson Gross May 4, 2011 08:35 AM

(3) Letters attached

Memorandum Regarding Changes to Discovery Rules

This memorandum is written on behalf of the Litigation Division of the Attorney General's Office. We practice extensively in State Court and will be significantly affected by the proposed discovery rules. As an initial matter, we note that we do not believe that the current system is broken; it has been our collective experience that the current system is working well and that most attorneys against whom we litigate are cooperative and mindful of the need to balance the cost of discovery and the need for information. Nonetheless, we recognize that there are some abuses in the system that need to be addressed. (Although, we believe mechanisms are in place to prevent such abuses, but are simply not enforced by state trial judges.)

We believe that this second round of rules changes is an improvement over the last version and we appreciate the Committee's consideration of our prior comments. We still, however, remain concerned that this new version will impair our ability to properly defend our clients (primarily state agencies, state colleges and universities, school districts, and their employees) and we urge the Committee to address a few concerns that we have. They are as follows:

A TIER SYSTEM IS A GOOD IDEA; BUT THE CURRENTLY PROPOSED LIMITATIONS ARE UNWORKABLE, UNFAIR, AND UNJUST.

We understand the Committee's concern that exorbitant discovery costs might prevent some citizens from having access to justice. However, the Committee has failed to recognize that access to justice is a two-way street. A party against whom a lawsuit is filed needs access to justice as well. The limitations on discovery proposed by the Committee ignores defendants' right to justice and their right to defend themselves.

1. Proposed Modification to the Tier System

Limiting discovery based **solely** on the amount at issue fails to recognize that for many cases, the amount at issue is not the only indicator of the need for discovery. Just because a case is valued at less than $50,000, doesn't mean that discovery is not necessary. Often times, those cases are the types of cases where there **are** significant disputes. For example, we handle quite a few motor vehicle accident claims. Lower level claims often involve disputed soft-tissue injuries that are not readily verifiable. And, frequently, plaintiffs have pre-existing medical issues complicating the understanding of their condition and damages. At a minimum, defendants need to be able to inquire of the plaintiff's medical history and conduct some (albeit minimal) medical discovery. Yet, the current tier system allows no interrogatories (which would unearth the names of prior providers with discoverable information) and only 3 hours of depositions (barely enough for the plaintiff, let alone eyewitnesses and damages witnesses.)

This is especially problematic because defendants are not able to contact a plaintiff's treating physician, and so a deposition is the only way to obtain access to that witness and his or

her testimony. Yet, the proposed limits essentially prohibit that procedure. In sum, these limitations are unfair and prevent defendants from adequately defending themselves.

Accordingly, we believe that the following limits would better balance the plaintiff's desire to keep discovery to a minimum, and allow a defendant to defend itself:

Tier	**Amt. Of Damages**	**Fact Depo. Hours**	**Interrogatories**	**Doc Reqs**	**Req for Adm.**	**Days to Complete**
1	Up to $50,000	15	10*	10#	10	180
2	$50,000 - $300,000	25	15*	15#	15	210
3	$300,000 or more	35	25	25	25	210

The increases are mainly in Tier 1. I would assume that under Tier 3, the parties will almost always need to seek additional time at the conclusion of the prescribed fact discovery period. It allows for some modest written discovery (which is important to gain basic information) and modest deposition time, yet enough to gain the necessary information.

[*We would also invite the Committee to limit meaningless and burdensome contention interrogatories, at least in Tiers 1 and 2.]

[#As government lawyers, we also need to point out that plaintiffs currently have an alternative mechanism to obtain records – GRAMA – not available to the defense. We would ask for either an express provision preventing plaintiffs from using GRAMA once litigation has been filed, or a provision allowing a government defendant to have an equal number of document requests.]

We think some additional time should be given for Tier 1 and 2. Even in a smaller damage case, there needs to be enough time for a defendant to send interrogatories, get medical providers' names, subpoena records and then depose the plaintiff. 120 days cuts that too close. 180 days would provide enough time that the parties would likely not have to petition the court for additional time or discovery. This proposal would, in our estimation, be far more efficient and fair to all parties.

NOTE: the Committee's limits are "per side" and appear to assume that a case involves one plaintiff and one defendant. These limits need to be increased for cases involving multiple plaintiffs or defendants. Otherwise, if there are multiple plaintiffs, a defendant could not conduct discovery as to all of them. Conversely, if there are multiple defendants, not all will have an opportunity to conduct discovery.

2. Establishing The Amount of Damages.

We believe the Tier system will only work if a plaintiff is required to adhere to its claimed damage amount. We would ask that the plaintiff be required, in its complaint, to firmly assert an amount of damages, thus placing the case in one of the three tiers. If the plaintiff wants to take advantage of a limited discovery, it needs to stand by its claimed amount and should be limited to damages in that amount. We are concerned that some plaintiffs might want to conduct discovery as a Tier 1 case, but later seek additional damages. If a plaintiff wants to seek more damages, it should have to make a showing of good cause (i.e., that the plaintiff could not have known the elevated value of the case when it filed) and agree to allow the defendant to do additional discovery, if necessary.

3. Timing Issues

Under the proposed rules, parties cannot stipulate to certain discovery at the beginning of a case. Instead, they must complete the prescribed fact discovery and then request additional time and discovery. We think that is problematic for two reasons. First, if two parties and their counsel believe that a certain amount of discovery is necessary and appropriate in a given case, they should be allowed to do so; it makes little sense to have a rigid rule that prevents parties from working together and agreeing on a discovery plan. Second, the process is inefficient, especially if the Tier 1 proposed discovery limits are kept. If a party needs additional time and discovery, it will not be able to even ask for it for 120+ days. That could, in some cases, prolong discovery and bring about unnecessary legal fees in the process. It could actually result in a system that is more time-consuming and more costly than the present one.

Finally, there is a new arbitration statute (the "Tortious Act Arbitration," Utah Code Ann. § 78B-10a-101) that allows parties to stipulate to a binding streamlined arbitration process for cases worth less than $50,000. That provides yet another mechanism for plaintiffs who want to reduce litigation costs. (Perhaps with that option already available to plaintiffs, there is less of a need for Tier 1.)

OTHER CONCERNS ABOUT THE NEW RULES

There are two other concerns that we have with the proposed rules:

1. Expert Discovery Timing: Under the rules, after a party takes an expert deposition, the party has only 7 days to make its expert disclosure, which is to be detailed and contain numerous items. It is unfair and unrealistic to require a party – in a week – to complete the deposition, hire an expert, get the expert up to speed, and make the required disclosure. We believe that thirty days at a minimum should be allowed (and even that is pushing it.) Granted, in some instances, an expert will already be on board. However, there will be instances where a party might not determine to hire an expert until the party hears what the other side's expert has to say. In that case, seven days is not workable.

2. Rule 35 Examinations: On this point, too, the Committee seems to have simply adopted the plaintiff's bar's requests without regard to a defendant's right to defend itself. (We do not object to deleting the term "independent;" however, although there may be a perception that these exams are not independent, there are many providers who are unbiased and independent and a broad brush statement that they are not does them a disservice.) The real concern we have is mandatory recording of the examination. There is no reason for such a requirement – except to put undue pressure on the examiner. (Such pressure will discourage all but the professional expert witness from examining a plaintiff. A plaintiff's medical visits to its own treater – obviously not independent – are not recorded.) It doesn't seem necessary to mandate recording IME exams. We believe that a party should be required to make some showing of good cause to be able to record any medical examination.

CONCLUSION

While the recent draft is an improvement, we remain concerned that the limits on discovery – particularly the limitations placed in the lower Tiers, and the time constraints regarding expert designation – will significantly impair a defendant's ability to fairly defend itself from suit. Principles of justice, equality and fairness need to be applied evenly to both sides involved in litigation.

Parsons Behle & Latimer®

A Professional Law Corporation

201 South Main Street
Suite 1800
Salt Lake City, Utah 84111
Telephone 801.532.1234
Facsimile 801.536.6111
pbl@parsonsbehle.com

Raymond J. Etcheverry

Direct Dial
(801) 536-6608
E-Mail
REtcheverry@parsonsbehle.com

June 21, 2011

VIA E-MAIL AND U.S. MAIL

Francis M. Wikstrom
Parsons Behle & Latimer
201 South Main Street, Suite 1800
Salt Lake City, UT 84111
fwikstrom@parsonsbehle.com

Timothy M. Shea
450 South State Street, Suite N31
P.O. Box 140241
Salt Lake City, UT 84114-0241
tims@email.utcourts.gov

Re: Proposed Amendments to the Utah Rules of Civil Procedure

Gentlemen:

The following comments are submitted in response to the Utah Supreme Court's Civil Rules Advisory Committee's notice of proposed amendments to the Utah Rules of Civil Procedure.[1]

I. PROPOSED ALTERNATIVE: APPLY THE PROPOSED RULES TO CASES INVOLVING SMALLER DAMAGES CLAIMS BUT LEAVE THE CURRENT RULES IN PLACE FOR CASES INVOLVING LARGER DAMAGES CLAIMS

For the reasons discussed below, we would suggest that the proposed amendments to the Utah Rules of Civil Procedure be applied to those cases the amendments are designed for. If the purpose behind the amendments is to "limit[] parties to discovery that is proportional to the stakes of the litigation," that goal can be accomplished by applying the proposed amendments to the class of cases that perceived discovery abuses most affect—those in which relatively small amounts of damages are claimed. Proposed Rule 1

[1] These comments were prepared in collaboration with Brandon Mark.

(advisory committee note). For example, the proposed rules could be employed in all cases in which $500,000 or less is at issue.

As the amount of damages sought in a particular matter increases, the likelihood discovery will become excessive substantially decreases. Plaintiffs suing for large damage awards can typically secure well-funded representation on a contingency-fee basis. Their lawyers can ensure, under the existing rules, that discovery is not excessive or abusive. Similarly, defendants sued for large damage awards typically have the resources to resist abusive discovery tactics.

If the amendments are truly necessary for cases in which less monetary damages are claimed, applying the proposed rules to that class of cases would be a good way for determining how the proposed rules will actually operate in practice and would permit the Supreme Court and its advisory committee to receive feedback from the bench and bar concerning the rules, and, to the extent necessary, modify the rules based on that feedback. If the rules successfully mitigate the perceived problems, then the rules could be extended to all cases in the future.

Although we have not been able to access the data provided to the advisory committee relating to the number of state-court cases that fall below the $500,000 threshold, it is anticipated this proposal would apply the proposed amendments to a significant majority of the cases filed in the state-court system.

II. COMMENTS REGARDING PARTICULAR PROPOSED RULES

A. Expert Discovery Under the Proposed Rules Is Inadequate.

The advisory committee notes to the proposed amendments explain that the amendments are necessary to "curb[] excessive expert discovery." Proposed Rule 1 (advisory committee note). However, the notes fail to provide any empirical support for that proposition. For example, the notes do not reference any studies or polling suggesting that a significant proportion of judges, litigants, or practitioners believe that "excessive expert discovery" currently occurs.[2]

---

[2] The advisory committee notes state, without any empirical evidence or support, that "[e]xpert discovery has become an ever-increasing component of discovery cost." Proposed Rule 26 (advisory committee note). The complaint that expert discovery has become unnecessarily protracted, assuming that it is true, misses the point. Complex cases cost more to litigate. That is not a sign of injustice or a fundamental problem with the judicial system; it is reality. If a case is complex enough to require expert testimony, the case should be important enough to ensure that the expert testimony presented to the jury—testimony that "has the potential to overawe and confuse,

If the amendments to expert discovery are enacted, Rule 702, which was amended only a few years ago, will become ineffectual.[3] Rule 702 requires that proposed expert testimony satisfy certain requirements of reliability. As the Utah Supreme Court has recognized, the only way to determine whether expert testimony satisfies the requirements of Rule 702 is by "explor[ing] each logical link in the chain that leads to the expert testimony . . . and determine its reliability." *State v. Rimmasch*, 775 P. 2d 388, 403 (Utah 1989). Trial courts, to whom Rule 702 "assigns . . . a 'gatekeeper' responsibility to screen out unreliable expert testimony," cannot be expected to make the necessary inquiry without the assistance of the adversary process. Utah R. Evid. 702 (advisory committee notes).

The parties cannot assist the trial judge discharge its "gatekeeper" obligations under Rule 702 without the proper methods at their disposal for discovering whether the "principles or methods underlying the testimony meet a threshold showing that they (i) are reliable, (ii) are based upon sufficient facts or data, and (iii) have been reliably applied to the facts of the case." Utah R. Evid. 702(b).

As currently formed, the proposed rules permit discovery only through an expert report *or* a four-hour (4-hour) deposition, but not both. Proposed Rule 26(a)(3)(B).[4] Neither of these mutually exclusive options will permit trial courts to determine whether the proposed testimony satisfies the requirements of Rule 702.

Rarely, if ever, do expert reports alone "explore each logical link in the chain that leads to the expert testimony." *Rimmasch*, 775 P. 2d at 403. Moreover, the proposed rule does not require an expert report contain the information that Rule 702 requires: (1) the methods and principles upon which the witness's testimony is based, (2) the facts and data upon which the witness has relied, and (3) the application of the methods and principles to the facts and data in the particular case. *Compare* Utah R. Evid. 702(b) *with* Proposed Rule

---

and even to be misused for that purpose," *Alder v. Bayer Corp.*, 61 P.3d 1068, 1083 (Utah 2002)—is sufficiently reliable.

[3] The advisory committee notes fail to mention or discuss the impact of the changes on Rule 702 of the Utah Rules of Evidence or explain how a trial court is expected to discharge its duties under Rule 702 given the proposed changes to Rule 26.

[4] Previously, a party proffering expert testimony from a retained expert had to both provide a detailed expert report and make the proposed expert available for a deposition of at least seven (7) hours.

26(a)(3)(B) (requiring merely that the report "contain a complete statement of all opinions the expert will offer at trial and the basis and reasons for them.").[5]

A four-hour (4-hour) deposition will likewise not provide a sufficient basis for the parties to explore for the trial court whether a witness's testimony satisfies all of the reliability requirements imposed by Rule 702.[6] A large portion of that time will be consumed merely attempting to identify the actual opinions the witness intends to offer at trial. If the witness intends to offer more than one opinion or if the opinion involves multiple parts, it is doubtful that the parties could properly explore each of the Rule 702 elements (methods and principles; facts and data; application to the case) in just four hours.

Without the benefit of complete discovery of expert opinions, partial and incomplete information about an expert's opinions will result in trial courts allowing witnesses who cannot, and who do not, satisfy the requirements of Rule 702 to testify. If Rule 702 is to have meaning and effect, the discovery necessary to properly apply the rule should not be so restrained as to render that analysis impossible.

B. The General Discovery Provisions of Rule 26.

Proposed Rule 26 contains new standards that practitioners and trial judges will have to apply in various factual contexts. Because several of the new standards are ambiguous, it can be expected that both the bar and bench will struggle to interpret and apply the rules. Additionally, several of the proposed standards appear to contradict the stated purpose of the rules—to require early disclosure of all relevant information. *See* Proposed Rule 26 (advisory committee note).

1. Every Evidentiary Objection Will Become a Discovery Objection.

The proposed rule omits arguably the most important provision from the corresponding federal rule: that the scope of discoverable information is not limited to admissible information but extends to any information that is "reasonably calculated to lead to the discovery of admissible evidence." Utah R. Civ. P. 26(b)(1). The language was

---

[5] Because the proposed rule addressing expert reports fails to track the requirements of Rule 702, such reports can never be a "reliable substitute for depositions," as the advisory committee currently hopes.

[6] The notes state, without any evidence or support, that parties "typically take the expert's deposition to ensure the expert would not offer 'surprise' testimony at trial." Proposed Rule 26 (advisory committee notes). The advisory committee apparently failed to appreciate there are many reasons for taking an expert's deposition that have nothing to do with avoiding "surprise" testimony, such as testing the reliability of the expert's opinions.

added to the corresponding federal rule to avoid objections to discovery requests based on the ultimate admissibility of the requested information. Fed. R. Civ. P. 26 (advisory committee notes to 1946 amendments) (explaining the purpose of the language is to "make clear" that discovery includes "not only evidence for use at trial but also inquiry into matter in themselves inadmissible as evidence but which lead to the discovery of such evidence"). Prior to this language, courts "limited discovery on the basis of admissibility," for example, courts suggested "inquiry might not be made into statements or other matters which, when disclosed, amount only to hearsay." *Id.*

Instead of courts having to make a threshold determination about the admissibility of the requested information, the rule currently presumes the information is discoverable and saves questions about its admissibility under the rules of evidence for later proceedings.

This change will likely not result in less expensive, less protracted discovery but will have precisely the opposite effect. Instead, parties will resist discovery based on the ultimate inadmissibility of the requested information, and trial courts will be called upon to make premature admissibility determinations as part of the discovery process. Every possible argument for why a document is not admissible under the rules of evidence will become an objection to its discoverability.

2. The "Standard Discovery" Tiers Fail to Include Accommodations for Cases Involving Large Damages Claims or Multiple Parties.

The "standard discovery" tiers are skewed towards cases with relatively smaller damages claims. The largest "standard discovery" tier in the proposed rule is for cases in which damages of $300,000 or more are claimed. However, there are cases currently pending in state court that involve damage claims exceeding $300,000,***000***. Nevertheless, under the proposed rule, $300 million cases are allowed the same amount of "standard discovery" as cases claiming a small fraction of those damages.

Moreover, the standard discovery tiers fail to accommodate for cases in which large numbers of parties are involved. For example, in a case involving a large number of plaintiffs or a large number of defendants, the allowed "standard discovery" will be quickly exhausted. If forty (40) plaintiffs join their claims in a single suit, as they are entitled to do under the rules, the defendants will be allowed less than one hour of deposition per plaintiff.

3. The Proposed Rule Does Not Permit Parties to Adequately Plan Their Discovery at the Outset.

Although the proposed rule provides a mechanism for parties to request more discovery, that provision requires the party seeking additional discovery to first exhaust the allowed "standard discovery." Proposed Rule 26(c)(6)(B) (permitting parties to obtain

"extraordinary discovery" only "after reaching the limits of standard discovery"). Thus, parties must first use all of the available "standard discovery" without knowing whether the trial court will ultimately allow further discovery or to what extent such "extraordinary discovery" will be permitted.

To properly plan the discovery strategy in a professional, systematic, and efficient fashion, parties must know *at the beginning* of the process how much discovery they will be allowed. If parties are forced to first utilize the allowed standard discovery before learning whether they will be allowed more discovery, the discovery process will become less efficient, not more so.

4. The Proportionality Assessment Required Before Any Discovery Is Permitted Will Slow the Discovery Process.

The proposed rule sets forth various factors trial courts are required to consider when a party requests *any* discovery through *any* method. Although the proposed rule later makes reference to "standard discovery" tiers, the rule specifically requires trial courts to affirmatively determine that *all* proposed discovery, including discovery falling within the "standard discovery" tiers, "satisfies the standards of proportionality." Proposed Rule 26(b)(1).

Because trial courts must determine that all discovery "satisfies the standards of proportionality" before permitting it, this mandatory rule will become yet another place where motion practice will proliferate. Pursuant to the plain language of the rule, a party served with discovery requests can require the trial court to apply the proportionality factors to each and every discovery request before permitting the discovery.

Moreover, the proportionality factors themselves are ambiguous. For example, one factor a trial court must consider before allowing any discovery is "the parties' resources." The rule does not specify how trial courts are supposed to apply that standard. The factor raises as many questions as it answers: for example, should the trial court take into consideration that an attorney has taken a party's case on a contingency fee basis? In a multi-party case, are all of the parties' resources aggregated or considered separately? Are parties required to disclose their financial resources to the trial court, even if that information is confidential? Does "resources" include non-liquid assets, like real estate holdings, or does it include only the parties' liquid assets, which is readily available to pay for litigation expenses?

Another factor trial courts must apply before allowing any discovery is "the importance of the issues." Although not defined or explicated in the proposed rule, presumably the factor refers to the issues in the underlying litigation. Again, however, the proposed rule fails to "operationalize" the factor. Importance to whom? The parties? The

judicial system? Society at large? Without some further clarification, it would appear the factor is so broad and vague that disparate decisions among trial judges is inevitable.[7]

C. Proposed Rule 30(b)(6) Has Been Stripped of Its Most Important Provision.

Proposed Rule 30 eliminates one of the most important advancements of the Federal Rules of Civil Procedure: Rule 30(b)(6). Although a shell of Rule 30(b)(6) survives in the proposed rule, it has been stripped of the critical requirement that the designee "testify as to matters known or reasonably available to the organization." Utah R. Civ. P. 30(b)(6). As courts and commentators have long realized, that particular provision was added to "curb the 'bandying' by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and therefore to it." Fed. R. Civ. P. 30 (advisory committee notes to 1970 amendments).

As one oft-cited case on this topic well explained, the language that proposed Rule 30(b)(6) omits "was added [to the federal rules] in 1970 in order to avoid the difficulties encountered by both sides when the examining party is unable to determine who within the corporation would be best able to provide the information sought, to avoid the 'bandying' by corporations where individual officers disclaim knowledge of facts clearly known to the corporation, and to assist corporations which found an unnecessarily large number of their officers and agents were being deposed." *United States v. Taylor*, 166 F.R.D. 356, 360 (M.D.N.C. 1996); *id.* at 361 ("If the persons designated by the corporation do not possess personal knowledge of the matters set out in the deposition notice, the corporation is obligated to prepare the designees so that they may give knowledgeable and binding answers for the corporation.").

By omitting the requirement that the Rule 30(b)(6) designee testify about matters known to or reasonably available to the organization he or she is representing, the proposed rule expressly permits a person designated to testify on a particular topic to respond merely that

---

[7] The proposed rule requires that counsel (or an unrepresented party) sign discovery requests pursuant to Rule 11. However, Rule 11 imposes requirements that are not appropriate for, and indeed contradictory to the purpose of, discovery requests. In particular, Rule 11(b)(3) includes a certification that "factual contentions have evidentiary support." Implicit factual contentions in discovery requests often lack such evidentiary support—that is whole point of discovery: to determine whether evidentiary support exists. A discovery request as simple as "Produce all written communications between Party X and Party Y" would technically violate Rule 11(b)(3) unless the propounding attorney had some evidence that written communications were actually exchanged between Party X and Party Y before signing the discovery request. Generally speaking, the more complex a discovery request, the more factual contentions are implied in the request, and the more such a request would run afoul of Rule 11 absent the required evidentiary basis.

he or she has no personal knowledge of the matter. Rule 30(b)(6) will quickly become feckless, and parties attempting to obtain information from a corporation or other organization will expend their "standard discovery" attempting to identify the person in the corporation or organization who has personal knowledge of the pertinent information.

Sincerely,

Parsons Behle & Latimer

Raymond J. Etcheverry

Ronald L. Rencher

Vicki M. Baldwin

RJE/sa

Parsons
Behle &
Latimer®

A PROFESSIONAL
LAW CORPORATION

Salt Lake City • Reno • Las Vegas

201 South Main Street
Suite 1800
Salt Lake City, UT 84111
Telephone 801.532.1234
Facsimile 801.536.6111

Brandon J. Mark

Direct Dial
(801) 536-6958
E-Mail
BMark@parsonsbehle.com

June 21, 2011

Francis M. Wikstrom
Parsons Behle & Latimer
201 South Main Street, Suite 1800
Salt Lake City, UT 84111
fwikstrom@parsonsbehle.com

Timothy M. Shea
450 South State Street Suite N31
P.O. Box 140241
Salt Lake City, UT 84114-0241
tims@email.utcourts.gov

Re: Proposed Amendments to the Utah Rules of Civil Procedure

Gentlemen:

We are submitting the following comments in response to the Utah Supreme Court's Civil Rules Advisory Committee's Notice of Proposed Amendments to the Utah Rules of Civil Procedure.[1]

I. GENERAL COMMENTS

A. The Proposed Rules Abandon the Authoritative Guidance Available under the Current Rules.

A significant problem with the proposed amendments to the Utah Rules of Civil Procedure is the explicit rejection of the corresponding federal rules as a model. Because reported decisions from the Utah appellate courts concerning procedural rules—particularly the discovery-related rules (Rules 26 through 37)—are scant,[2] the federal rules currently

[1] The comments were prepared in collaboration with Ron Rencher and others.

[2] A recent search of Utah appellate court decisions citing (not necessarily construing) *all* of the procedural discovery rules (Rules 26 through 37) *since 1950* yielded only 288 decisions, or, an average of less than five (5) decisions per year since the current rules were adopted in 1950. By contrast, there are more than 8,500 available federal decisions citing just Rule 26 of the Federal Rules of Civil Procedure.

serve a very important role—providing practitioners and courts with authoritative constructions of Utah's procedural rules. *Gold Standard, Inc. v. Am. Barrick Res. Corp.*, 805 P.2d 164, 168 (Utah 1990) (Where a state procedural rule is "nearly identical to the federal rule," the state courts "freely refer to authorities which have interpreted the federal rule.").

Without the guidance of available federal court decisions, practitioners, judges, and litigants will struggle to understand and predict how the rules will apply in practice. Although the rules may be unambiguous in the abstract, difficulty is encountered when attempting to apply them to specific factual circumstances. There are tens of thousands of available federal court decisions applying the federal rules to specific situations. Conversely, the proposed rules are completely unique and thus there are no decisions construing or applying them.

Furthermore, because future decisions construing and applying the proposed rules will largely occur in the trial courts of the state, those decisions will never be available for reference by practitioners, judges, and litigants. This has two consequences.

First, motion practice relating to the interpretation and application of the proposed rules will, at least initially, consume a great deal of resources, both of the parties and the courts, as the bar and bench attempt to ascertain the proper application of the new rules in various factual circumstances.[3]

Second, conflicting and contradictory interpretations of the rules by different trial courts are not only likely but inevitable. Without a body of authoritative decisional law to draw upon, as they have now, trial courts will be forced to interpret the proposed procedural rules anew each time. The new rules, therefore, will likely increase motion practice over the interpretation and application of the new procedures, which the already over-burdened trial courts will have to adjudicate.

B. The Proposed Rules Will Result in More Jury Trials.

The discovery rules of the Federal Rules of Civil Procedure, upon which Utah's current rules are modeled, were specifically designed to foster settlement. Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 Vand. L. Rev. 1295, 1301-03 (Nov. 1978) ("Perhaps the most important of the[] goals [of

[3] This motion practice, which will be entirely collateral to the merits of the case, could very well consume any cost savings the new rules were intended to generate. Likewise, cases bogged down by extensive motion practice relating to the interpretation and application of the proposed rules will not be litigated more promptly—in fact, the opposite result can be expected.

the modern discovery rules] was the realization of just settlements without the necessity of protracted litigation." (internal quotation marks omitted)); Dane S. Ciolino & Gary R. Roberts, *The Missing Direct-Tender Option in Federal Third-Party Practice: A Procedural and Jurisdictional Analysis*, 68 N.C.L. Rev. 423, 439 (1990) ("[A]n important purpose of the Federal Rules is to encourage settlement; by providing for liberal joinder and discovery, the Rules enable the sides to agree on the facts and issues, settle more cases, and reduce the number of issues and length of trials." (internal quotation marks and alterations omitted)).

It appears the rules have achieved that purpose. According to recent surveys, only seven percent (7%) of cases now go to trial. Marc Glanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 Stanford L. Rev. 1339, 1340 (1993-94); Theodore Eisenberg, *What is the Settlement Rate and Why Should We Care?*, Research Symposium on Empirical Studies of Civil Liability, Northwestern Law Searle Center (Oct. 2008) (reporting a 71.6% settlement rate for cases filed in the Eastern District of Pennsylvania, for example).

The proposed rules, by design, will reverse this trend. At a recent symposium, a representative of the American Board of Trial Advocates, a national association of trial lawyers, explained that the proposed rules are intended to make Utah the first state in the nation to modify its procedural rules with the objective of increasing the number of the jury trials. (Comments of Donald J. Winder, National Board Representative, May 20, 2011, American Board of Trial Advocates CLE.)

The question, unanswered by the advisory committee, is whether more jury trials is a salutary development for an already overstretched judicial system. As Chief Justice Christine Durham explained in her 2010 State of the Judiciary Address to the Utah Legislature, "[d]ecreases in court services necessitated by [budget] shortfalls must inevitably increase backlogs in civil, criminal, juvenile and family cases." A decrease in the number cases that settle and concomitant increase in the number of cases that go trial will put additional strain on a state judicial system that is chronically underfunded and understaffed.

II. COMMENTS REGARDING PARTICULAR PROPOSED RULES

A. Expert Discovery Under the Proposed Rules Is Inadequate.

The advisory committee notes to the proposed amendments explain that the amendments are necessary to "curb[] excessive expert discovery." Proposed Rule 1 (advisory committee note). However, the notes fail to provide any empirical support for that proposition. For example, the notes do not reference any studies or polling suggesting

that a significant proportion of judges, litigants, or practitioners believe that "excessive expert discovery" currently occurs.[4]

1. Effect on Rule 702 of the Utah Rules of Evidence.

If the amendments to expert discovery are enacted, Rule 702, which was amended only a few years ago, will become ineffectual.[5] Rule 702 requires that proposed expert testimony satisfy certain requirements of reliability. As the Utah Supreme Court has recognized, the only way to determine whether expert testimony satisfies the requirements of Rule 702 is by "explor[ing] each logical link in the chain that leads to the expert testimony . . . and determine its reliability." *State v. Rimmasch*, 775 P. 2d 388, 403 (Utah 1989). Trial courts, to whom Rule 702 "assigns . . . a 'gatekeeper' responsibility to screen out unreliable expert testimony," cannot be expected to make the necessary inquiry without the assistance of the adversary process. Utah R. Evid. 702 (advisory committee notes).

The parties cannot assist the trial court to discharge its "gatekeeper" obligations under Rule 702 without the proper methods at their disposal for discovering whether the "principles or methods underlying the testimony meet a threshold showing that they (i) are reliable, (ii) are based upon sufficient facts or data, and (iii) have been reliably applied to the facts of the case." Utah R. Evid. 702(b).

As currently formed, however, the proposed rules permit discovery only through an expert report *or* a four-hour (4-hour) deposition, but not both. Proposed Rule 26(a)(3)(B).[6] Neither of these mutually exclusive options will permit trial courts to determine whether the proposed testimony satisfies the requirements of Rule 702.

---

[4] The advisory committee notes state, without any empirical evidence or support, that "[e]xpert discovery has become an ever-increasing component of discovery cost." Proposed Rule 26 (advisory committee note). The complaint that expert discovery has become unnecessarily protracted, assuming that it is true, misses the point. Complex cases cost more to litigate. That is not a sign of injustice or a fundamental problem with the judicial system; it is reality. If a case is complex enough to require expert testimony, the case should be important enough to ensure that the expert testimony presented to the jury—testimony that "has the potential to overawe and confuse, and even to be misused for that purpose," *Alder v. Bayer Corp.*, 61 P.3d 1068, 1083 (Utah 2002)—is sufficiently reliable.

[5] The advisory committee notes fail to mention or discuss the impact of the changes on Rule 702 of the Utah Rules of Evidence or explain how a trial court is expected to discharge its duties under Rule 702 given the proposed changes to Rule 26.

[6] Currently, a party proffering expert testimony from a retained expert had to both provide a detailed expert report and make the proposed expert available for a deposition of at least seven (7) hours.

Rarely, if ever, do expert reports alone "explore each logical link in the chain that leads to the expert testimony." *Rimmasch*, 775 P. 2d at 403. Moreover, the proposed rule does not require an expert report contain the information that Rule 702 requires: (1) the methods and principles upon which the witness's testimony is based, (2) the facts and data upon which the witness has relied, and (3) the application of the methods and principles to the facts and data in the particular case. *Compare* Utah R. Evid. 702(b) *with* Proposed Rule 26(a)(3)(B) (requiring merely that the report "contain a complete statement of all opinions the expert will offer at trial and the basis and reasons for them.").[7]

A four-hour (4-hour) deposition will likewise not provide a sufficient basis for the parties to explore for the trial court whether a witness's testimony satisfies all of the reliability requirements imposed by Rule 702.[8] A large portion of that time will be consumed merely attempting to identify the actual opinions the witness intends to offer at trial. If the witness intends to offer more than one opinion or if the opinion involves multiple parts, it is doubtful that the parties could properly explore each of the Rule 702 elements (methods and principles; facts and data; application to the case) in just four hours.

Without the benefit of complete discovery of expert opinions, partial and incomplete information about an expert's opinions will result in trial courts allowing witnesses who cannot, and who do not, satisfy the requirements of Rule 702 to testify. If Rule 702 is to have meaning and effect, the discovery necessary to properly apply the rule should not be so restrained as to render that analysis impossible.

2. Inconsistency with Utah Supreme Court Precedent.

The proposed expert discovery rules also conflict with the Utah Supreme Court's most recent decision distinguishing expert testimony from other types of testimony.

The proposed rule and the corresponding advisory committee notes use the terms "fact witness" and "expert witness." Although these terms are frequently used colloquially and informally, the Utah Supreme Court has recognized that the rules of evidence do not

---

[7] Because the proposed rule addressing expert reports fails to track the requirements of Rule 702, such reports can never be a "reliable substitute for depositions," as the advisory committee currently hopes.

[8] The notes state, without any evidence or support, that parties "typically take the expert's deposition to ensure the expert would not offer 'surprise' testimony at trial." Proposed Rule 26 (advisory committee notes). The advisory committee apparently failed to appreciate there are many reasons for taking an expert's deposition that have nothing to do with avoiding "surprise" testimony, such as testing the reliability of the expert's opinions.

recognize a distinction between "expert witnesses" and "fact witnesses."[9] Indeed, expert testimony frequently encompasses testimony about facts: "Expert testimony, which is treated under rule 702, is opinion *or fact* testimony based on scientific, technical, or other specialized knowledge." *State v. Rothlisberger*, 147 P.3d 1176, 1180 (Utah 2006) (emphasis added).[10]

As the Utah Supreme Court explained in *Rothlisberger*, its most recent pronouncement on the difference between expert and lay testimony, the applicable rules of evidence distinguish between types of *testimony*, not types of *witnesses*. 147 P.3d at 1179. Under the rules of evidence, there is "lay fact testimony, lay opinion testimony, and expert testimony." 147 P. 3d at 1179. Using the terms "expert witness" and 'fact witness" in a procedural rule would not only serve as a source of confusion, it would make the procedural rules inconsistent with the rules of evidence.

The advisory committee notes attempt to justify the limitations on expert discovery by asserting that "there is often not a clear line between fact and expert testimony." Proposed Rule 26. Indeed, there is *no* distinction between fact and expert testimony. Again, the distinction drawn under the rules of evidence, as the Utah Supreme Court has explained, is between "opinion" and "fact" testimony and between "lay" and "expert" witnesses. The Utah Supreme Court, drawing on well-established principles, has set forth workable rules for distinguishing "opinion" testimony from "fact" testimony and "lay" witnesses from "expert" witnesses. *See generally State v. Rothlisberger*, 147 P.3d 1176 (Utah 2006). Proposed Rule 26 abandons these distinctions and replaces them with categories that expressly contradict the applicable rules of evidence, as interpreted by the Utah Supreme Court.

B. The General Discovery Provisions of Rule 26.

Proposed Rule 26 contains new standards that practitioners and trial judges will have to apply in various factual contexts. Because several of the new standards are ambiguous, it can be expected that both the bar and bench will struggle to interpret and apply the rules. Additionally, several of the proposed standards appear to contradict the stated purpose of the rules—to require early disclosure of all relevant information. *See* Proposed Rule 26 (advisory committee note).

---

[9] The Utah Supreme Court has not used the term "fact witness" in an opinion in more than a decade. *See Boice v. Marble*, 982 P. 2d 565 (Utah 1999).

[10] Indeed, even the proposed rule acknowledges the focus is on testimony, not witnesses. Proposed Rule 26(a)(3)(A) (requiring disclosure of information about any "person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Utah Rules of Evidence").

1. Every Evidentiary Objection Will Become a Discovery Objection.

The proposed rule omits arguably the most important provision from the corresponding federal rule: that the scope of discoverable information is not limited to admissible information but extends to any information that is "reasonably calculated to lead to the discovery of admissible evidence." Utah R. Civ. P. 26(b)(1). The language was added to the corresponding federal rule to avoid objections to discovery requests based on the ultimate admissibility of the requested information. Fed. R. Civ. P. 26 (advisory committee notes to 1946 amendments) (explaining the purpose of the language is to "make clear" that discovery includes "not only evidence for use at trial but also inquiry into matter in themselves inadmissible as evidence but which lead to the discovery of such evidence"). Prior to the addition of this language, courts "limited discovery on the basis of admissibility," for example, courts suggested "inquiry might not be made into statements or other matters which, when disclosed, amount only to hearsay." *Id.*

Instead of courts having to make a threshold determination about the admissibility of the requested information, the rule currently presumes the information is discoverable and saves questions about its admissibility under the rules of evidence for later proceedings.

This change will likely not result in less expensive, less protracted discovery but will have precisely the opposite effect. Instead, parties will resist discovery based on the ultimate inadmissibility of the requested information, and trial courts will be called upon to make premature admissibility determinations as part of the discovery process. Every possible argument for why a document is not admissible under the rules of evidence will become an objection to its discoverability.

2. The "Standard Discovery" Tiers Fail to Include Accommodations for Complex or Large Cases.

The "standard discovery" tiers are skewed towards cases with relatively smaller damages claims. The largest "standard discovery" tier in the proposed rule is for cases in which damages of $300,000 or more are claimed. However, there are cases currently pending in state court that involve damage claims exceeding $300,000,***000***. Nevertheless, under the proposed rule, $300 million cases are allowed the same amount of "standard discovery" as cases claiming a small fraction of those damages.

Moreover, the standard discovery tiers fail to accommodate for cases in which large numbers of parties are involved. For example, in a case involving a large number of plaintiffs or a large number of defendants, the allowed "standard discovery" will be quickly exhausted. If forty (40) plaintiffs join their claims in a single suit, as they are entitled to do under the rules, the defendants will be allowed less than one hour of deposition per plaintiff.

3. The Proposed Rule Does Not Permit Parties to Adequately Plan Their Discovery at the Outset.

Although the proposed rule provides a mechanism for parties to request more discovery, that provision requires the party seeking additional discovery to first exhaust the allowed "standard discovery." Proposed Rule 26(c)(6)(B) (permitting parties to obtain "extraordinary discovery" only "after reaching the limits of standard discovery"). Thus, parties must first use all of the available "standard discovery" without knowing whether the trial court will ultimately allow further discovery or to what extent such "extraordinary discovery" will be permitted.

To properly plan the discovery strategy in a professional, systematic, and efficient fashion, parties must know *at the beginning* of the process how much discovery they will be allowed. If parties are forced to first utilize the allowed standard discovery before learning whether they will be allowed more discovery, the discovery process will become less efficient, not more so.

4. The "Case-in-Chief" Standard Is More Narrow Than the Current Standard.

The proposed rule requires parties to initially disclose documents and witnesses they may offer as part of their "case-in-chief." The proposed rule, however, does not define "case-in-chief." Black's Law Dictionary (abridged 5th ed.) defines "Case in chief" as "[t]hat part of a trial in which the party with the initial burden of proof presents his evidence after which he rests." This change thus works at cross-purposes to the stated objective of fostering early disclosure of relevant information. The "case-in-chief" standard is narrower than the current standard, which requires a party to initially disclose documents and witnesses that "support[] its claims or defenses," regardless of whether those documents and witnesses will be presented in the case in chief and regardless of which party bears the burden of proof on the particular issue. *See* Utah R. Civ. P. 26(a)(1) As such, the proposed standard may lead to *less* information being initially disclosed than under the current standard, not more.

5. The Proportionality Assessment Required Before Any Discovery Is Permitted Will Make the Discovery Process More Expensive, Not Less So.

The proposed rule sets forth various factors trial courts are required to consider when a party requests *any* discovery through *any* method. Although the proposed rule later makes reference to "standard discovery" tiers, the rule specifically requires trial courts to affirmatively determine that *all* proposed discovery, including discovery falling within the

"standard discovery" tiers, "satisfies the standards of proportionality." Proposed Rule 26(b)(1).

Because trial courts must determine that all discovery "satisfies the standards of proportionality" before permitting it, this mandatory rule will become yet another place where motion practice will proliferate. Pursuant to the plain language of the rule, a party served with discovery requests can require the trial court to apply the proportionality factors to each and every discovery request before permitting the discovery.

Moreover, the proportionality factors themselves are ambiguous. For example, one factor a trial court must consider before allowing any discovery is "the parties' resources." The rule does not specify how trial courts are supposed to apply that standard. The factor raises as many questions as it answers: for example, should the trial court take into consideration that an attorney has taken a party's case on a contingency fee basis? In a multi-party case, are all of the parties' resources aggregated or considered separately? Are parties required to disclose their financial resources to the trial court, even if that information is confidential? Does "resources" include non-liquid assets, like real estate holdings, or does it include only the parties' liquid assets, which is readily available to pay for litigation expenses?

Another factor trial courts must apply before allowing any discovery is "the importance of the issues." Although not defined or explicated in the proposed rule, presumably the factor refers to the issues in the underlying litigation. Again, however, the proposed rule fails to "operationalize" the factor. Importance to whom? The parties? The judicial system? Society at large? Without some further clarification, it would appear the factor is so broad and vague that disparate decisions among trial judges is inevitable.

6. The Rule 11 Standards Should Not Apply to Discovery Requests.

The proposed rule requires that counsel (or an unrepresented party) sign discovery requests pursuant to Rule 11. However, Rule 11 imposes requirements that are not appropriate for, and indeed contradictory to the purpose of, discovery. In particular, Rule 11(b)(3) includes a certification that "factual contentions have evidentiary support." Implicit factual contentions in discovery requests often lack such evidentiary support—that is whole point of discovery: to determine whether evidentiary support exists.

A discovery request as simple as "Produce all written communications between Party X and Party Y" would technically violate Rule 11(b)(3) unless the propounding attorney had some evidence that written communications were actually exchanged between Party X and Party Y before signing the discovery request. Generally speaking, the more complex a discovery request, the more factual contentions are implied in the request, and the more such a request would run afoul of Rule 11 absent the required evidentiary basis.

This problem is not hypothetical. The undersigned has actual experience with this problem. Even though Rule 11 does not currently apply to discovery requests, he has experienced opposing counsel threatening "Rule 11 sanctions" for asking deposition questions that opposing counsel believed implicitly assumed facts that were contrary to the evidence, as opposing counsel saw it. Applying Rule 11 to discovery requests, including deposition questions, will only invite lawyers to make similar baseless objections and threats.

C. Proposed Rule 30(b)(6) Has Been Stripped of Its Most Important Provision.

Proposed Rule 30 eliminates one of the most important advancements of the Federal Rules of Civil Procedure: Rule 30(b)(6). Although a shell of Rule 30(b)(6) survives in the proposed rule, it has been stripped of the critical requirement that the designee "testify as to matters known or reasonably available to the organization." Utah R. Civ. P. 30(b)(6). As courts and commentators have long realized, that particular provision was added to "curb the 'bandying' by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and therefore to it." Fed. R. Civ. P. 30 (advisory committee notes to 1970 amendments).

As one oft-cited case on this topic well explained, the language that proposed Rule 30(b)(6) omits "was added [to the federal rules] in 1970 in order to avoid the difficulties encountered by both sides when the examining party is unable to determine who within the corporation would be best able to provide the information sought, to avoid the 'bandying' by corporations where individual officers disclaim knowledge of facts clearly known to the corporation, and to assist corporations which found an unnecessarily large number of their officers and agents were being deposed." *United States v. Taylor*, 166 F.R.D. 356, 360 (M.D.N.C. 1996); *id.* at 361 ("If the persons designated by the corporation do not possess personal knowledge of the matters set out in the deposition notice, the corporation is obligated to prepare the designees so that they may give knowledgeable and binding answers for the corporation.").

By omitting the requirement that the Rule 30(b)(6) designee testify about matters known to or reasonably available to the organization he or she is representing, the proposed rule expressly permits a person designated to testify on a particular topic to respond merely that he or she has no personal knowledge of the matter. Rule 30(b)(6) will quickly become feckless, and parties attempting to obtain information from a corporation or other organization will expend their "standard discovery" attempting to identify the person in the corporation or organization who has personal knowledge of the pertinent information.

D. The Pleading Standards of Rule 8 Are Unbalanced.

Proposed Rule 8 fundamentally changes the current pleading standards to require the pleading of "facts showing that the party is entitled to relief." Proposed Rule 8.[11]

The proposed rule imposes identical pleading requirements on parties defending against such claims, which, in practice, actually makes the pleading burdens asymmetrical. The proposed rule requires that to plead an affirmative defense, a party must not only state the "legal theory on which the defense rests," it must also state "facts establishing the affirmative defense." Proposed Rule 8(c). Even though the responding party is generally provided only twenty (20) days to investigate all aspects of the claims, Utah R. Civ. P. 12, whereas the party asserting the claims generally has much more time to develop the case and facts, the same pleading standard is applied to all parties.[12]

III. APPLY THE PROPOSED RULES TO CASES IN WHICH LESS DAMAGES ARE CLAIMED

If the purpose behind the amendments is to "limit[] parties to discovery that is proportional to the stakes of the litigation," that goal can be accomplished by applying the proposed amendments to the class of cases that perceived discovery abuses most affect—those in which relatively small amounts of damages are claimed. Proposed Rule 1 (advisory committee note). For example, the proposed rules could be employed in all cases in which $500,000 or less is at issue.

---

[11] The accompanying advisory committee note offers a contradictory explanation of the standard. Although the proposed rule apparently requires parties to "plead facts," the note expressly states that the rule is not intended to adopt the pleading standard recently established by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*, 79 550 U.S. 544 (2007), and *Iqbal v. Ashcroft*, 129 S. Ct. 1937 (2009). Nevertheless, pleading facts is precisely what *Twombly* and *Iqbal* require. *See Iqbal*, 129 S. Ct. at 1949 (holding that under Rule 8, "a complaint must contain sufficient factual matter").

The advisory committee note's reference to *Twombly* and *Iqbal* erecting a "heightened pleading requirement" is unhelpful since the United States Supreme Court explained the standard announced in *Twombly* does not "require heightened fact pleading." *Twombly*, 550 U.S. at 570; *id.* at 569 n.14 (explaining that its ruling does "not apply any 'heightened' pleading standard"). As a result, to distinguish the standard set forth under the proposed rule on this basis sheds little light on the question and only serves to confuse.

[12] Notably, federal courts are deeply split on the question of whether the *Twombly/Iqbal* standard applies to affirmative defenses. *Lucas v. Jerusalem Café, LLC*, No. 4:10-cv-00582 (W.D. Mo. April 11, 2011) ("There is currently a split of authority in the district courts regarding the applicability of the *Iqbal* pleading standard to affirmative defenses.").

As the amount of damages sought in a particular matter increases, the likelihood discovery will become excessive substantially decreases. Plaintiffs suing for large damage awards can typically secure well-funded representation on a contingency-fee basis. Their lawyers can ensure, under the existing rules, that discovery is not excessive or abusive. Similarly, defendants sued for large damage awards typically have the resources to resist abusive discovery tactics.

If the need for the amendments is as pressing as the advisory committee notes suggest, applying the proposed rules to the class of cases most affected by the perceived problems would be an excellent method for determining how the proposed rules will actually operate in practice and would permit the Supreme Court and its advisory committee to receive feedback from the bench and bar concerning the rules, and, to the extent necessary, modify the rules based on that feedback. If the rules successfully mitigate the perceived problems, then expanding the rules to all cases could be considered in the future.

Sincerely,

Brandon J. Mark

Vicki M. Baldwin

BJM/aw

ROGER W. GRIFFIN

Attorney at Law
556 West 990 North
American Fork, Utah 84003

Telephone: (801) 842-9218
Facsimile: (801) 984-5262

E-mail:rogergriffin@gmail.com

June 21, 2011

SENT VIA FACSIMILE TO: (801) 578-3843
Tim Shea
Administrative Office of the Courts
450 South State Street, Office N31
Salt Lake City, Utah 8411

Re: Utah Supreme Court Advisory Committee On the Rules of Civil Practice – Comment

Dear Mr. Shea:

I appreciate the opportunity to provide input regarding the recently published changes to the Utah Rules of Civil Procedure. As a preface, I wish to acknowledge the hard work and commitment of the committee. I also note that I agree, in principle, with the proportionality requirements under the new rules. With the preceding in mind, I wish to provide a perhaps somewhat unique perspective towards some of the changes to Rule 26. You may be aware that I was the successful appellate counsel in the Utah Supreme Court's recent decision in *Drew v. Lee*, 2011 UT 15, 250 P.3d 48, wherein the court finally resolved a long-standing dispute between the trial court and members of the bar as to the intent of Rule 26(a)(3)(A) and 26(a)(3)(B) of the Utah Rules of Civil Procedure. Unfortunately, as explained below, I believe aspects of the proposed changes to Rule 26 will not only gut the court's ruling in *Drew* and move away from the court's bright-line distinction but will unintentionally lead to needless costs in the litigation process.

My first concern is based upon the "summary" required of treating physicians. The *Drew* decision provided a bright-line test regarding the permissible use and method for treating physicians and clearly held that reports are not needed for the same. I fear, however, that a "summary," despite the committee's efforts to define what a summary is and is not, will still lead to numerous challenges as to the reasonable scope of the summary. Please note that *Drew* was based upon numerous conflicting decisions by the trial bench as to the scope and intent of Rule 26(a)(3)(A), 26(a)(3)(B) and the Utah Court of Appeal's decision in *Pete v. Youngblood*, 2006 UT App. 303, 141 P.3d 629. In short, I am confident that the "summary" requirement is a step backwards and will once again require an appeal to Utah Supreme Court for clarification as to what a "summary" really means, especially as this term is even more vague than the previous iteration of Rule 26.

Additionally, I believe that the summary requirement will lead to needless expense. First and foremost, plaintiffs do not have control over their treating physicians (unlike specially retained experts) as they have not voluntarily agreed to be subject to the litigation process. As such, it is very difficult to obtain a confirmed summary from treating providers as to what the actual scope of their testimony will encompass. Consequently, plaintiffs will now be forced to retain a specially retained expert with the additional and needless costs associated with such an action. Yet, such a retention will not alleviate the need to call the treating provider as a fact witness at trial. As such, a plaintiff – the victim of another individual's negligence – is victimized twice, so to speak, as he or she will now be forced to incur non-

recoverable costs for an additional expert that under *Drew* and the current rule is not necessary. Moreover, such a requirement ignores the simple fact that causation, prognosis and effect are issues routinely observed in the ordinary care of a patient. See e.g., *Shapardon v. West Beach Estates*, 172 F.R.D. 415, 416-17 (D. Hawaii 1997, *McCloughan v. City of Springfield*, 208 F.R.D. 236, 240-43 (C.D. Ill 2002). As such, a "summary" is simply a legal requirement that ignores the training and practice of the medical community and the actual intent and effect of their medical records and treatment. I note that a treating provider's medical records contain the same information contained in a specially retained expert's report. The real difference is the manner in which it is presented. As such, a "summary" is simply nothing more than a lay person's attempts to summarize a treating provider's records. Inevitably, this will lead to endless debate and motions concerning the same which will only increase the costs of litigation and tax scarce judicial resources. To this end, I respectfully suggest we drop the summary requirement and simply rely on the tests and requirements outlined in *Drew* which I believe already provide an adequate guideline within the proportionality limits sought by the committee.

My final concern deals with the practical effect the rule has on civility and professionalism. As the committee is aware, the Utah Supreme Court has long strived to improve professionalism and civility within the bar. Unfortunately, the proposed rules favor inflexibility based upon the tight deadlines and the difficulty in obtaining additional time to complete proportional discovery. As such, I foresee needless conflict where counsel will not be able to grant courtesy extensions or accommodate busy schedules of all involved. For instance, I currently have a treating surgeon whose next available date for a defense deposition is 6 September 2011. As a courtesy to counsel, we have scheduled the deposition and will, in essence, wait for this deposition to conclude before any meaningful and additional litigation is continued. While there is undeniable delay in this case, the delay is beneficial to both the defendant and the plaintiff in this matter. Unfortunately, under the proposed rules, there are so many hurdles regarding time-lines that extensions for proportional discovery are not possible. This is detrimental to the public as a trial is something neither a plaintiff or a defendant generally wish to undergo. However, preventing a deposition of a plaintiff's treating physician, a reality under the tight time-lines for the proposed rule, is in essence a barrier that will lead to needless trials. The basis for this comment is that insurance adjusters and not defense counsel are almost always the ultimate authority in making decisions as to valuation and offers in a case. Moreover, all are required to follow company guidelines and policies. As such, if the adjuster does not receive the information required under their company's policies, they will not give the defense attorney authority sufficient to settle a case thus requiring a trial. While trials may not be a major consideration for a billion dollar insurance company, the expense and time constraints of a trial are real concerns for both plaintiffs and defendants. I submit that a trial should only occur when there are legitimate issue of material fact that cannot be reasonably resolved. Unfortunately, I fear that the new rule will lead to needless trials that would never have occurred if counsel had the tools to easily accommodate the schedules of all involved.

On a similar note, the Utah Legislature has clearly expressed a desire to expedite the litigation process while limiting costs for smaller cases. To this end, they have legislated the so-called "321" arbitration which allows for timely and cost effective resolutions – proportionality for cases under $50,000. Without the ability to easily accommodate schedules, I am concerned that insurance companies will use the arbitration to call witness and delve into issues, allowed under the proportionality of the discovery rule, to resolve outstanding factual issues. In essence, the arbitration will become the discovery process and the arbitration will be nothing more than a facade designed to facilitate the *de novo* appeal. Consequently, the rule will negate legislative intent surrounding "321" arbitrations which has the real possibility of the legislature attempting to become involved in the rule process.

With the preceding in mind, I respectfully suggest that the committee amend Rule 26 to allow counsel to stipulate to additional time to conduct the proportional discovery limits detailed under the new rules without needless hurdles. As a fail safe, I would include in the rule a default clause. That being, if the parties cannot agree to a discovery deadline, the trial court will have the authority to implement an

order in line with the proportionality requirements of the rule absent exigent circumstances and a hearing on the same.

Very truly yours,

Roger W. Griffin

Parsons
Behle &
Latimer®

A PROFESSIONAL
LAW CORPORATION

201 South Main Street
Suite 1800
Salt Lake City, Utah 84111
Telephone 801.532.1234
Facsimile 801.536.6111
pbl@parsonsbehle.com

Raymond J. Etcheverry

Direct Dial
(801) 536-6608
E-Mail
REtcheverry@parsonsbehle.com

June 21, 2011

VIA E-MAIL AND U.S. MAIL

Francis M. Wikstrom
Parsons Behle & Latimer
201 South Main Street, Suite 1800
Salt Lake City, UT 84111
fwikstrom@parsonsbehle.com

Timothy M. Shea
450 South State Street, Suite N31
P.O. Box 140241
Salt Lake City, UT 84114-0241
tims@email.utcourts.gov

Re: Proposed Amendments to the Utah Rules of Civil Procedure

Gentlemen:

The following comments are submitted in response to the Utah Supreme Court's Civil Rules Advisory Committee's notice of proposed amendments to the Utah Rules of Civil Procedure.[1]

I. PROPOSED ALTERNATIVE: APPLY THE PROPOSED RULES TO CASES INVOLVING SMALLER DAMAGES CLAIMS BUT LEAVE THE CURRENT RULES IN PLACE FOR CASES INVOLVING LARGER DAMAGES CLAIMS

For the reasons discussed below, we would suggest that the proposed amendments to the Utah Rules of Civil Procedure be applied to those cases the amendments are designed for. If the purpose behind the amendments is to "limit[] parties to discovery that is proportional to the stakes of the litigation," that goal can be accomplished by applying the proposed amendments to the class of cases that perceived discovery abuses most affect—those in which relatively small amounts of damages are claimed. Proposed Rule 1

[1] These comments were prepared in collaboration with Brandon Mark.

(advisory committee note). For example, the proposed rules could be employed in all cases in which $500,000 or less is at issue.

As the amount of damages sought in a particular matter increases, the likelihood discovery will become excessive substantially decreases. Plaintiffs suing for large damage awards can typically secure well-funded representation on a contingency-fee basis. Their lawyers can ensure, under the existing rules, that discovery is not excessive or abusive. Similarly, defendants sued for large damage awards typically have the resources to resist abusive discovery tactics.

If the amendments are truly necessary for cases in which less monetary damages are claimed, applying the proposed rules to that class of cases would be a good way for determining how the proposed rules will actually operate in practice and would permit the Supreme Court and its advisory committee to receive feedback from the bench and bar concerning the rules, and, to the extent necessary, modify the rules based on that feedback. If the rules successfully mitigate the perceived problems, then the rules could be extended to all cases in the future.

Although we have not been able to access the data provided to the advisory committee relating to the number of state-court cases that fall below the $500,000 threshold, it is anticipated this proposal would apply the proposed amendments to a significant majority of the cases filed in the state-court system.

II. COMMENTS REGARDING PARTICULAR PROPOSED RULES

A. Expert Discovery Under the Proposed Rules Is Inadequate.

The advisory committee notes to the proposed amendments explain that the amendments are necessary to "curb[] excessive expert discovery." Proposed Rule 1 (advisory committee note). However, the notes fail to provide any empirical support for that proposition. For example, the notes do not reference any studies or polling suggesting that a significant proportion of judges, litigants, or practitioners believe that "excessive expert discovery" currently occurs.[2]

---

[2] The advisory committee notes state, without any empirical evidence or support, that "[e]xpert discovery has become an ever-increasing component of discovery cost." Proposed Rule 26 (advisory committee note). The complaint that expert discovery has become unnecessarily protracted, assuming that it is true, misses the point. Complex cases cost more to litigate. That is not a sign of injustice or a fundamental problem with the judicial system; it is reality. If a case is complex enough to require expert testimony, the case should be important enough to ensure that the expert testimony presented to the jury—testimony that "has the potential to overawe and confuse,

If the amendments to expert discovery are enacted, Rule 702, which was amended only a few years ago, will become ineffectual.[3] Rule 702 requires that proposed expert testimony satisfy certain requirements of reliability. As the Utah Supreme Court has recognized, the only way to determine whether expert testimony satisfies the requirements of Rule 702 is by "explor[ing] each logical link in the chain that leads to the expert testimony . . . and determine its reliability." *State v. Rimmasch*, 775 P. 2d 388, 403 (Utah 1989). Trial courts, to whom Rule 702 "assigns . . . a 'gatekeeper' responsibility to screen out unreliable expert testimony," cannot be expected to make the necessary inquiry without the assistance of the adversary process. Utah R. Evid. 702 (advisory committee notes).

The parties cannot assist the trial judge discharge its "gatekeeper" obligations under Rule 702 without the proper methods at their disposal for discovering whether the "principles or methods underlying the testimony meet a threshold showing that they (i) are reliable, (ii) are based upon sufficient facts or data, and (iii) have been reliably applied to the facts of the case." Utah R. Evid. 702(b).

As currently formed, the proposed rules permit discovery only through an expert report *or* a four-hour (4-hour) deposition, but not both. Proposed Rule 26(a)(3)(B).[4] Neither of these mutually exclusive options will permit trial courts to determine whether the proposed testimony satisfies the requirements of Rule 702.

Rarely, if ever, do expert reports alone "explore each logical link in the chain that leads to the expert testimony." *Rimmasch*, 775 P. 2d at 403. Moreover, the proposed rule does not require an expert report contain the information that Rule 702 requires: (1) the methods and principles upon which the witness's testimony is based, (2) the facts and data upon which the witness has relied, and (3) the application of the methods and principles to the facts and data in the particular case. *Compare* Utah R. Evid. 702(b) *with* Proposed Rule

---

and even to be misused for that purpose," *Alder v. Bayer Corp.*, 61 P.3d 1068, 1083 (Utah 2002)—is sufficiently reliable.

[3] The advisory committee notes fail to mention or discuss the impact of the changes on Rule 702 of the Utah Rules of Evidence or explain how a trial court is expected to discharge its duties under Rule 702 given the proposed changes to Rule 26.

[4] Previously, a party proffering expert testimony from a retained expert had to both provide a detailed expert report and make the proposed expert available for a deposition of at least seven (7) hours.

26(a)(3)(B) (requiring merely that the report "contain a complete statement of all opinions the expert will offer at trial and the basis and reasons for them.").[5]

A four-hour (4-hour) deposition will likewise not provide a sufficient basis for the parties to explore for the trial court whether a witness's testimony satisfies all of the reliability requirements imposed by Rule 702.[6] A large portion of that time will be consumed merely attempting to identify the actual opinions the witness intends to offer at trial. If the witness intends to offer more than one opinion or if the opinion involves multiple parts, it is doubtful that the parties could properly explore each of the Rule 702 elements (methods and principles; facts and data; application to the case) in just four hours.

Without the benefit of complete discovery of expert opinions, partial and incomplete information about an expert's opinions will result in trial courts allowing witnesses who cannot, and who do not, satisfy the requirements of Rule 702 to testify. If Rule 702 is to have meaning and effect, the discovery necessary to properly apply the rule should not be so restrained as to render that analysis impossible.

B. The General Discovery Provisions of Rule 26.

Proposed Rule 26 contains new standards that practitioners and trial judges will have to apply in various factual contexts. Because several of the new standards are ambiguous, it can be expected that both the bar and bench will struggle to interpret and apply the rules. Additionally, several of the proposed standards appear to contradict the stated purpose of the rules—to require early disclosure of all relevant information. *See* Proposed Rule 26 (advisory committee note).

1. Every Evidentiary Objection Will Become a Discovery Objection.

The proposed rule omits arguably the most important provision from the corresponding federal rule: that the scope of discoverable information is not limited to admissible information but extends to any information that is "reasonably calculated to lead to the discovery of admissible evidence." Utah R. Civ. P. 26(b)(1). The language was

---

[5] Because the proposed rule addressing expert reports fails to track the requirements of Rule 702, such reports can never be a "reliable substitute for depositions," as the advisory committee currently hopes.

[6] The notes state, without any evidence or support, that parties "typically take the expert's deposition to ensure the expert would not offer 'surprise' testimony at trial." Proposed Rule 26 (advisory committee notes). The advisory committee apparently failed to appreciate there are many reasons for taking an expert's deposition that have nothing to do with avoiding "surprise" testimony, such as testing the reliability of the expert's opinions.

added to the corresponding federal rule to avoid objections to discovery requests based on the ultimate admissibility of the requested information. Fed. R. Civ. P. 26 (advisory committee notes to 1946 amendments) (explaining the purpose of the language is to "make clear" that discovery includes "not only evidence for use at trial but also inquiry into matter in themselves inadmissible as evidence but which lead to the discovery of such evidence"). Prior to this language, courts "limited discovery on the basis of admissibility," for example, courts suggested "inquiry might not be made into statements or other matters which, when disclosed, amount only to hearsay." *Id.*

Instead of courts having to make a threshold determination about the admissibility of the requested information, the rule currently presumes the information is discoverable and saves questions about its admissibility under the rules of evidence for later proceedings.

This change will likely not result in less expensive, less protracted discovery but will have precisely the opposite effect. Instead, parties will resist discovery based on the ultimate inadmissibility of the requested information, and trial courts will be called upon to make premature admissibility determinations as part of the discovery process. Every possible argument for why a document is not admissible under the rules of evidence will become an objection to its discoverability.

2. The "Standard Discovery" Tiers Fail to Include Accommodations for Cases Involving Large Damages Claims or Multiple Parties.

The "standard discovery" tiers are skewed towards cases with relatively smaller damages claims. The largest "standard discovery" tier in the proposed rule is for cases in which damages of $300,000 or more are claimed. However, there are cases currently pending in state court that involve damage claims exceeding $300,000,***000***. Nevertheless, under the proposed rule, $300 million cases are allowed the same amount of "standard discovery" as cases claiming a small fraction of those damages.

Moreover, the standard discovery tiers fail to accommodate for cases in which large numbers of parties are involved. For example, in a case involving a large number of plaintiffs or a large number of defendants, the allowed "standard discovery" will be quickly exhausted. If forty (40) plaintiffs join their claims in a single suit, as they are entitled to do under the rules, the defendants will be allowed less than one hour of deposition per plaintiff.

3. The Proposed Rule Does Not Permit Parties to Adequately Plan Their Discovery at the Outset.

Although the proposed rule provides a mechanism for parties to request more discovery, that provision requires the party seeking additional discovery to first exhaust the allowed "standard discovery." Proposed Rule 26(c)(6)(B) (permitting parties to obtain

"extraordinary discovery" only "after reaching the limits of standard discovery"). Thus, parties must first use all of the available "standard discovery" without knowing whether the trial court will ultimately allow further discovery or to what extent such "extraordinary discovery" will be permitted.

To properly plan the discovery strategy in a professional, systematic, and efficient fashion, parties must know *at the beginning* of the process how much discovery they will be allowed. If parties are forced to first utilize the allowed standard discovery before learning whether they will be allowed more discovery, the discovery process will become less efficient, not more so.

4. The Proportionality Assessment Required Before Any Discovery Is Permitted Will Slow the Discovery Process.

The proposed rule sets forth various factors trial courts are required to consider when a party requests *any* discovery through *any* method. Although the proposed rule later makes reference to "standard discovery" tiers, the rule specifically requires trial courts to affirmatively determine that *all* proposed discovery, including discovery falling within the "standard discovery" tiers, "satisfies the standards of proportionality." Proposed Rule 26(b)(1).

Because trial courts must determine that all discovery "satisfies the standards of proportionality" before permitting it, this mandatory rule will become yet another place where motion practice will proliferate. Pursuant to the plain language of the rule, a party served with discovery requests can require the trial court to apply the proportionality factors to each and every discovery request before permitting the discovery.

Moreover, the proportionality factors themselves are ambiguous. For example, one factor a trial court must consider before allowing any discovery is "the parties' resources." The rule does not specify how trial courts are supposed to apply that standard. The factor raises as many questions as it answers: for example, should the trial court take into consideration that an attorney has taken a party's case on a contingency fee basis? In a multi-party case, are all of the parties' resources aggregated or considered separately? Are parties required to disclose their financial resources to the trial court, even if that information is confidential? Does "resources" include non-liquid assets, like real estate holdings, or does it include only the parties' liquid assets, which is readily available to pay for litigation expenses?

Another factor trial courts must apply before allowing any discovery is "the importance of the issues." Although not defined or explicated in the proposed rule, presumably the factor refers to the issues in the underlying litigation. Again, however, the proposed rule fails to "operationalize" the factor. Importance to whom? The parties? The

judicial system? Society at large? Without some further clarification, it would appear the factor is so broad and vague that disparate decisions among trial judges is inevitable.[7]

C. Proposed Rule 30(b)(6) Has Been Stripped of Its Most Important Provision.

Proposed Rule 30 eliminates one of the most important advancements of the Federal Rules of Civil Procedure: Rule 30(b)(6). Although a shell of Rule 30(b)(6) survives in the proposed rule, it has been stripped of the critical requirement that the designee "testify as to matters known or reasonably available to the organization." Utah R. Civ. P. 30(b)(6). As courts and commentators have long realized, that particular provision was added to "curb the 'bandying' by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and therefore to it." Fed. R. Civ. P. 30 (advisory committee notes to 1970 amendments).

As one oft-cited case on this topic well explained, the language that proposed Rule 30(b)(6) omits "was added [to the federal rules] in 1970 in order to avoid the difficulties encountered by both sides when the examining party is unable to determine who within the corporation would be best able to provide the information sought, to avoid the 'bandying' by corporations where individual officers disclaim knowledge of facts clearly known to the corporation, and to assist corporations which found an unnecessarily large number of their officers and agents were being deposed." *United States v. Taylor*, 166 F.R.D. 356, 360 (M.D.N.C. 1996); *id.* at 361 ("If the persons designated by the corporation do not possess personal knowledge of the matters set out in the deposition notice, the corporation is obligated to prepare the designees so that they may give knowledgeable and binding answers for the corporation.").

By omitting the requirement that the Rule 30(b)(6) designee testify about matters known to or reasonably available to the organization he or she is representing, the proposed rule expressly permits a person designated to testify on a particular topic to respond merely that

---

[7] The proposed rule requires that counsel (or an unrepresented party) sign discovery requests pursuant to Rule 11. However, Rule 11 imposes requirements that are not appropriate for, and indeed contradictory to the purpose of, discovery requests. In particular, Rule 11(b)(3) includes a certification that "factual contentions have evidentiary support." Implicit factual contentions in discovery requests often lack such evidentiary support—that is whole point of discovery: to determine whether evidentiary support exists. A discovery request as simple as "Produce all written communications between Party X and Party Y" would technically violate Rule 11(b)(3) unless the propounding attorney had some evidence that written communications were actually exchanged between Party X and Party Y before signing the discovery request. Generally speaking, the more complex a discovery request, the more factual contentions are implied in the request, and the more such a request would run afoul of Rule 11 absent the required evidentiary basis.

he or she has no personal knowledge of the matter. Rule 30(b)(6) will quickly become feckless, and parties attempting to obtain information from a corporation or other organization will expend their "standard discovery" attempting to identify the person in the corporation or organization who has personal knowledge of the pertinent information.

Sincerely,

Parsons Behle & Latimer

Raymond J. Etcheverry

Ronald L. Rencher

Vicki M. Baldwin

RJE/sa

Parsons Behle & Latimer®

A PROFESSIONAL LAW CORPORATION

Salt Lake City • Reno • Las Vegas

201 South Main Street
Suite 1800
Salt Lake City, UT 84111
Telephone 801.532.1234
Facsimile 801.536.6111

Brandon J. Mark

Direct Dial
(801) 536-6958
E-Mail
BMark@parsonsbehle.com

June 21, 2011

Francis M. Wikstrom
Parsons Behle & Latimer
201 South Main Street, Suite 1800
Salt Lake City, UT 84111
fwikstrom@parsonsbehle.com

Timothy M. Shea
450 South State Street Suite N31
P.O. Box 140241
Salt Lake City, UT 84114-0241
tims@email.utcourts.gov

Re: Proposed Amendments to the Utah Rules of Civil Procedure

Gentlemen:

We are submitting the following comments in response to the Utah Supreme Court's Civil Rules Advisory Committee's Notice of Proposed Amendments to the Utah Rules of Civil Procedure.[1]

I. GENERAL COMMENTS

A. The Proposed Rules Abandon the Authoritative Guidance Available under the Current Rules.

A significant problem with the proposed amendments to the Utah Rules of Civil Procedure is the explicit rejection of the corresponding federal rules as a model. Because reported decisions from the Utah appellate courts concerning procedural rules—particularly the discovery-related rules (Rules 26 through 37)—are scant,[2] the federal rules currently

[1] The comments were prepared in collaboration with Ron Rencher and others.

[2] A recent search of Utah appellate court decisions citing (not necessarily construing) *all* of the procedural discovery rules (Rules 26 through 37) *since 1950* yielded only 288 decisions, or, an average of less than five (5) decisions per year since the current rules were adopted in 1950. By contrast, there are more than 8,500 available federal decisions citing just Rule 26 of the Federal Rules of Civil Procedure.

serve a very important role—providing practitioners and courts with authoritative constructions of Utah's procedural rules. *Gold Standard, Inc. v. Am. Barrick Res. Corp.*, 805 P.2d 164, 168 (Utah 1990) (Where a state procedural rule is "nearly identical to the federal rule," the state courts "freely refer to authorities which have interpreted the federal rule.").

Without the guidance of available federal court decisions, practitioners, judges, and litigants will struggle to understand and predict how the rules will apply in practice. Although the rules may be unambiguous in the abstract, difficulty is encountered when attempting to apply them to specific factual circumstances. There are tens of thousands of available federal court decisions applying the federal rules to specific situations. Conversely, the proposed rules are completely unique and thus there are no decisions construing or applying them.

Furthermore, because future decisions construing and applying the proposed rules will largely occur in the trial courts of the state, those decisions will never be available for reference by practitioners, judges, and litigants. This has two consequences.

First, motion practice relating to the interpretation and application of the proposed rules will, at least initially, consume a great deal of resources, both of the parties and the courts, as the bar and bench attempt to ascertain the proper application of the new rules in various factual circumstances.[3]

Second, conflicting and contradictory interpretations of the rules by different trial courts are not only likely but inevitable. Without a body of authoritative decisional law to draw upon, as they have now, trial courts will be forced to interpret the proposed procedural rules anew each time. The new rules, therefore, will likely increase motion practice over the interpretation and application of the new procedures, which the already over-burdened trial courts will have to adjudicate.

B. The Proposed Rules Will Result in More Jury Trials.

The discovery rules of the Federal Rules of Civil Procedure, upon which Utah's current rules are modeled, were specifically designed to foster settlement. Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 Vand. L. Rev. 1295, 1301-03 (Nov. 1978) ("Perhaps the most important of the[] goals [of

[3] This motion practice, which will be entirely collateral to the merits of the case, could very well consume any cost savings the new rules were intended to generate. Likewise, cases bogged down by extensive motion practice relating to the interpretation and application of the proposed rules will not be litigated more promptly—in fact, the opposite result can be expected.

the modern discovery rules] was the realization of just settlements without the necessity of protracted litigation." (internal quotation marks omitted)); Dane S. Ciolino & Gary R. Roberts, *The Missing Direct-Tender Option in Federal Third-Party Practice: A Procedural and Jurisdictional Analysis*, 68 N.C.L. Rev. 423, 439 (1990) ("[A]n important purpose of the Federal Rules is to encourage settlement; by providing for liberal joinder and discovery, the Rules enable the sides to agree on the facts and issues, settle more cases, and reduce the number of issues and length of trials." (internal quotation marks and alterations omitted)).

It appears the rules have achieved that purpose. According to recent surveys, only seven percent (7%) of cases now go to trial. Marc Glanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 Stanford L. Rev. 1339, 1340 (1993-94); Theodore Eisenberg, *What is the Settlement Rate and Why Should We Care?*, Research Symposium on Empirical Studies of Civil Liability, Northwestern Law Searle Center (Oct. 2008) (reporting a 71.6% settlement rate for cases filed in the Eastern District of Pennsylvania, for example).

The proposed rules, by design, will reverse this trend. At a recent symposium, a representative of the American Board of Trial Advocates, a national association of trial lawyers, explained that the proposed rules are intended to make Utah the first state in the nation to modify its procedural rules with the objective of increasing the number of the jury trials. (Comments of Donald J. Winder, National Board Representative, May 20, 2011, American Board of Trial Advocates CLE.)

The question, unanswered by the advisory committee, is whether more jury trials is a salutary development for an already overstretched judicial system. As Chief Justice Christine Durham explained in her 2010 State of the Judiciary Address to the Utah Legislature, "[d]ecreases in court services necessitated by [budget] shortfalls must inevitably increase backlogs in civil, criminal, juvenile and family cases." A decrease in the number cases that settle and concomitant increase in the number of cases that go trial will put additional strain on a state judicial system that is chronically underfunded and understaffed.

II. COMMENTS REGARDING PARTICULAR PROPOSED RULES

A. Expert Discovery Under the Proposed Rules Is Inadequate.

The advisory committee notes to the proposed amendments explain that the amendments are necessary to "curb[] excessive expert discovery." Proposed Rule 1 (advisory committee note). However, the notes fail to provide any empirical support for that proposition. For example, the notes do not reference any studies or polling suggesting

that a significant proportion of judges, litigants, or practitioners believe that "excessive expert discovery" currently occurs.[4]

1. Effect on Rule 702 of the Utah Rules of Evidence.

If the amendments to expert discovery are enacted, Rule 702, which was amended only a few years ago, will become ineffectual.[5] Rule 702 requires that proposed expert testimony satisfy certain requirements of reliability. As the Utah Supreme Court has recognized, the only way to determine whether expert testimony satisfies the requirements of Rule 702 is by "explor[ing] each logical link in the chain that leads to the expert testimony . . . and determine its reliability." *State v. Rimmasch*, 775 P. 2d 388, 403 (Utah 1989). Trial courts, to whom Rule 702 "assigns . . . a 'gatekeeper' responsibility to screen out unreliable expert testimony," cannot be expected to make the necessary inquiry without the assistance of the adversary process. Utah R. Evid. 702 (advisory committee notes).

The parties cannot assist the trial court to discharge its "gatekeeper" obligations under Rule 702 without the proper methods at their disposal for discovering whether the "principles or methods underlying the testimony meet a threshold showing that they (i) are reliable, (ii) are based upon sufficient facts or data, and (iii) have been reliably applied to the facts of the case." Utah R. Evid. 702(b).

As currently formed, however, the proposed rules permit discovery only through an expert report *or* a four-hour (4-hour) deposition, but not both. Proposed Rule 26(a)(3)(B).[6] Neither of these mutually exclusive options will permit trial courts to determine whether the proposed testimony satisfies the requirements of Rule 702.

---

[4] The advisory committee notes state, without any empirical evidence or support, that "[e]xpert discovery has become an ever-increasing component of discovery cost." Proposed Rule 26 (advisory committee note). The complaint that expert discovery has become unnecessarily protracted, assuming that it is true, misses the point. Complex cases cost more to litigate. That is not a sign of injustice or a fundamental problem with the judicial system; it is reality. If a case is complex enough to require expert testimony, the case should be important enough to ensure that the expert testimony presented to the jury—testimony that "has the potential to overawe and confuse, and even to be misused for that purpose," *Alder v. Bayer Corp.*, 61 P.3d 1068, 1083 (Utah 2002)—is sufficiently reliable.

[5] The advisory committee notes fail to mention or discuss the impact of the changes on Rule 702 of the Utah Rules of Evidence or explain how a trial court is expected to discharge its duties under Rule 702 given the proposed changes to Rule 26.

[6] Currently, a party proffering expert testimony from a retained expert had to both provide a detailed expert report and make the proposed expert available for a deposition of at least seven (7) hours.

Rarely, if ever, do expert reports alone "explore each logical link in the chain that leads to the expert testimony." *Rimmasch*, 775 P. 2d at 403. Moreover, the proposed rule does not require an expert report contain the information that Rule 702 requires: (1) the methods and principles upon which the witness's testimony is based, (2) the facts and data upon which the witness has relied, and (3) the application of the methods and principles to the facts and data in the particular case. *Compare* Utah R. Evid. 702(b) *with* Proposed Rule 26(a)(3)(B) (requiring merely that the report "contain a complete statement of all opinions the expert will offer at trial and the basis and reasons for them.").[7]

A four-hour (4-hour) deposition will likewise not provide a sufficient basis for the parties to explore for the trial court whether a witness's testimony satisfies all of the reliability requirements imposed by Rule 702.[8] A large portion of that time will be consumed merely attempting to identify the actual opinions the witness intends to offer at trial. If the witness intends to offer more than one opinion or if the opinion involves multiple parts, it is doubtful that the parties could properly explore each of the Rule 702 elements (methods and principles; facts and data; application to the case) in just four hours.

Without the benefit of complete discovery of expert opinions, partial and incomplete information about an expert's opinions will result in trial courts allowing witnesses who cannot, and who do not, satisfy the requirements of Rule 702 to testify. If Rule 702 is to have meaning and effect, the discovery necessary to properly apply the rule should not be so restrained as to render that analysis impossible.

2. Inconsistency with Utah Supreme Court Precedent.

The proposed expert discovery rules also conflict with the Utah Supreme Court's most recent decision distinguishing expert testimony from other types of testimony.

The proposed rule and the corresponding advisory committee notes use the terms "fact witness" and "expert witness." Although these terms are frequently used colloquially and informally, the Utah Supreme Court has recognized that the rules of evidence do not

---

[7] Because the proposed rule addressing expert reports fails to track the requirements of Rule 702, such reports can never be a "reliable substitute for depositions," as the advisory committee currently hopes.

[8] The notes state, without any evidence or support, that parties "typically take the expert's deposition to ensure the expert would not offer 'surprise' testimony at trial." Proposed Rule 26 (advisory committee notes). The advisory committee apparently failed to appreciate there are many reasons for taking an expert's deposition that have nothing to do with avoiding "surprise" testimony, such as testing the reliability of the expert's opinions.

recognize a distinction between "expert witnesses" and "fact witnesses."[9] Indeed, expert testimony frequently encompasses testimony about facts: "Expert testimony, which is treated under rule 702, is opinion *or fact* testimony based on scientific, technical, or other specialized knowledge." *State v. Rothlisberger*, 147 P.3d 1176, 1180 (Utah 2006) (emphasis added).[10]

As the Utah Supreme Court explained in *Rothlisberger*, its most recent pronouncement on the difference between expert and lay testimony, the applicable rules of evidence distinguish between types of *testimony*, not types of *witnesses*. 147 P.3d at 1179. Under the rules of evidence, there is "lay fact testimony, lay opinion testimony, and expert testimony." 147 P. 3d at 1179. Using the terms "expert witness" and 'fact witness" in a procedural rule would not only serve as a source of confusion, it would make the procedural rules inconsistent with the rules of evidence.

The advisory committee notes attempt to justify the limitations on expert discovery by asserting that "there is often not a clear line between fact and expert testimony." Proposed Rule 26. Indeed, there is *no* distinction between fact and expert testimony. Again, the distinction drawn under the rules of evidence, as the Utah Supreme Court has explained, is between "opinion" and "fact" testimony and between "lay" and "expert" witnesses. The Utah Supreme Court, drawing on well-established principles, has set forth workable rules for distinguishing "opinion" testimony from "fact" testimony and "lay" witnesses from "expert" witnesses. *See generally State v. Rothlisberger*, 147 P.3d 1176 (Utah 2006). Proposed Rule 26 abandons these distinctions and replaces them with categories that expressly contradict the applicable rules of evidence, as interpreted by the Utah Supreme Court.

B. The General Discovery Provisions of Rule 26.

Proposed Rule 26 contains new standards that practitioners and trial judges will have to apply in various factual contexts. Because several of the new standards are ambiguous, it can be expected that both the bar and bench will struggle to interpret and apply the rules. Additionally, several of the proposed standards appear to contradict the stated purpose of the rules—to require early disclosure of all relevant information. *See* Proposed Rule 26 (advisory committee note).

---

[9] The Utah Supreme Court has not used the term "fact witness" in an opinion in more than a decade. *See Boice v. Marble*, 982 P. 2d 565 (Utah 1999).

[10] Indeed, even the proposed rule acknowledges the focus is on testimony, not witnesses. Proposed Rule 26(a)(3)(A) (requiring disclosure of information about any "person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Utah Rules of Evidence").

1. Every Evidentiary Objection Will Become a Discovery Objection.

The proposed rule omits arguably the most important provision from the corresponding federal rule: that the scope of discoverable information is not limited to admissible information but extends to any information that is "reasonably calculated to lead to the discovery of admissible evidence." Utah R. Civ. P. 26(b)(1). The language was added to the corresponding federal rule to avoid objections to discovery requests based on the ultimate admissibility of the requested information. Fed. R. Civ. P. 26 (advisory committee notes to 1946 amendments) (explaining the purpose of the language is to "make clear" that discovery includes "not only evidence for use at trial but also inquiry into matter in themselves inadmissible as evidence but which lead to the discovery of such evidence"). Prior to the addition of this language, courts "limited discovery on the basis of admissibility," for example, courts suggested "inquiry might not be made into statements or other matters which, when disclosed, amount only to hearsay." *Id.*

Instead of courts having to make a threshold determination about the admissibility of the requested information, the rule currently presumes the information is discoverable and saves questions about its admissibility under the rules of evidence for later proceedings.

This change will likely not result in less expensive, less protracted discovery but will have precisely the opposite effect. Instead, parties will resist discovery based on the ultimate inadmissibility of the requested information, and trial courts will be called upon to make premature admissibility determinations as part of the discovery process. Every possible argument for why a document is not admissible under the rules of evidence will become an objection to its discoverability.

2. The "Standard Discovery" Tiers Fail to Include Accommodations for Complex or Large Cases.

The "standard discovery" tiers are skewed towards cases with relatively smaller damages claims. The largest "standard discovery" tier in the proposed rule is for cases in which damages of $300,000 or more are claimed. However, there are cases currently pending in state court that involve damage claims exceeding $300,000,***000***. Nevertheless, under the proposed rule, $300 million cases are allowed the same amount of "standard discovery" as cases claiming a small fraction of those damages.

Moreover, the standard discovery tiers fail to accommodate for cases in which large numbers of parties are involved. For example, in a case involving a large number of plaintiffs or a large number of defendants, the allowed "standard discovery" will be quickly exhausted. If forty (40) plaintiffs join their claims in a single suit, as they are entitled to do under the rules, the defendants will be allowed less than one hour of deposition per plaintiff.

3. The Proposed Rule Does Not Permit Parties to Adequately Plan Their Discovery at the Outset.

Although the proposed rule provides a mechanism for parties to request more discovery, that provision requires the party seeking additional discovery to first exhaust the allowed "standard discovery." Proposed Rule 26(c)(6)(B) (permitting parties to obtain "extraordinary discovery" only "after reaching the limits of standard discovery"). Thus, parties must first use all of the available "standard discovery" without knowing whether the trial court will ultimately allow further discovery or to what extent such "extraordinary discovery" will be permitted.

To properly plan the discovery strategy in a professional, systematic, and efficient fashion, parties must know *at the beginning* of the process how much discovery they will be allowed. If parties are forced to first utilize the allowed standard discovery before learning whether they will be allowed more discovery, the discovery process will become less efficient, not more so.

4. The "Case-in-Chief" Standard Is More Narrow Than the Current Standard.

The proposed rule requires parties to initially disclose documents and witnesses they may offer as part of their "case-in-chief." The proposed rule, however, does not define "case-in-chief." Black's Law Dictionary (abridged 5th ed.) defines "Case in chief" as "[t]hat part of a trial in which the party with the initial burden of proof presents his evidence after which he rests." This change thus works at cross-purposes to the stated objective of fostering early disclosure of relevant information. The "case-in-chief" standard is narrower than the current standard, which requires a party to initially disclose documents and witnesses that "support[] its claims or defenses," regardless of whether those documents and witnesses will be presented in the case in chief and regardless of which party bears the burden of proof on the particular issue. *See* Utah R. Civ. P. 26(a)(1) As such, the proposed standard may lead to *less* information being initially disclosed than under the current standard, not more.

5. The Proportionality Assessment Required Before Any Discovery Is Permitted Will Make the Discovery Process More Expensive, Not Less So.

The proposed rule sets forth various factors trial courts are required to consider when a party requests *any* discovery through *any* method. Although the proposed rule later makes reference to "standard discovery" tiers, the rule specifically requires trial courts to affirmatively determine that *all* proposed discovery, including discovery falling within the

"standard discovery" tiers, "satisfies the standards of proportionality." Proposed Rule 26(b)(1).

Because trial courts must determine that all discovery "satisfies the standards of proportionality" before permitting it, this mandatory rule will become yet another place where motion practice will proliferate. Pursuant to the plain language of the rule, a party served with discovery requests can require the trial court to apply the proportionality factors to each and every discovery request before permitting the discovery.

Moreover, the proportionality factors themselves are ambiguous. For example, one factor a trial court must consider before allowing any discovery is "the parties' resources." The rule does not specify how trial courts are supposed to apply that standard. The factor raises as many questions as it answers: for example, should the trial court take into consideration that an attorney has taken a party's case on a contingency fee basis? In a multi-party case, are all of the parties' resources aggregated or considered separately? Are parties required to disclose their financial resources to the trial court, even if that information is confidential? Does "resources" include non-liquid assets, like real estate holdings, or does it include only the parties' liquid assets, which is readily available to pay for litigation expenses?

Another factor trial courts must apply before allowing any discovery is "the importance of the issues." Although not defined or explicated in the proposed rule, presumably the factor refers to the issues in the underlying litigation. Again, however, the proposed rule fails to "operationalize" the factor. Importance to whom? The parties? The judicial system? Society at large? Without some further clarification, it would appear the factor is so broad and vague that disparate decisions among trial judges is inevitable.

6. The Rule 11 Standards Should Not Apply to Discovery Requests.

The proposed rule requires that counsel (or an unrepresented party) sign discovery requests pursuant to Rule 11. However, Rule 11 imposes requirements that are not appropriate for, and indeed contradictory to the purpose of, discovery. In particular, Rule 11(b)(3) includes a certification that "factual contentions have evidentiary support." Implicit factual contentions in discovery requests often lack such evidentiary support—that is whole point of discovery: to determine whether evidentiary support exists.

A discovery request as simple as "Produce all written communications between Party X and Party Y" would technically violate Rule 11(b)(3) unless the propounding attorney had some evidence that written communications were actually exchanged between Party X and Party Y before signing the discovery request. Generally speaking, the more complex a discovery request, the more factual contentions are implied in the request, and the more such a request would run afoul of Rule 11 absent the required evidentiary basis.

This problem is not hypothetical. The undersigned has actual experience with this problem. Even though Rule 11 does not currently apply to discovery requests, he has experienced opposing counsel threatening "Rule 11 sanctions" for asking deposition questions that opposing counsel believed implicitly assumed facts that were contrary to the evidence, as opposing counsel saw it. Applying Rule 11 to discovery requests, including deposition questions, will only invite lawyers to make similar baseless objections and threats.

C. Proposed Rule 30(b)(6) Has Been Stripped of Its Most Important Provision.

Proposed Rule 30 eliminates one of the most important advancements of the Federal Rules of Civil Procedure: Rule 30(b)(6). Although a shell of Rule 30(b)(6) survives in the proposed rule, it has been stripped of the critical requirement that the designee "testify as to matters known or reasonably available to the organization." Utah R. Civ. P. 30(b)(6). As courts and commentators have long realized, that particular provision was added to "curb the 'bandying' by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and therefore to it." Fed. R. Civ. P. 30 (advisory committee notes to 1970 amendments).

As one oft-cited case on this topic well explained, the language that proposed Rule 30(b)(6) omits "was added [to the federal rules] in 1970 in order to avoid the difficulties encountered by both sides when the examining party is unable to determine who within the corporation would be best able to provide the information sought, to avoid the 'bandying' by corporations where individual officers disclaim knowledge of facts clearly known to the corporation, and to assist corporations which found an unnecessarily large number of their officers and agents were being deposed." *United States v. Taylor*, 166 F.R.D. 356, 360 (M.D.N.C. 1996); *id.* at 361 ("If the persons designated by the corporation do not possess personal knowledge of the matters set out in the deposition notice, the corporation is obligated to prepare the designees so that they may give knowledgeable and binding answers for the corporation.").

By omitting the requirement that the Rule 30(b)(6) designee testify about matters known to or reasonably available to the organization he or she is representing, the proposed rule expressly permits a person designated to testify on a particular topic to respond merely that he or she has no personal knowledge of the matter. Rule 30(b)(6) will quickly become feckless, and parties attempting to obtain information from a corporation or other organization will expend their "standard discovery" attempting to identify the person in the corporation or organization who has personal knowledge of the pertinent information.

D. The Pleading Standards of Rule 8 Are Unbalanced.

Proposed Rule 8 fundamentally changes the current pleading standards to require the pleading of "facts showing that the party is entitled to relief." Proposed Rule 8.[11]

The proposed rule imposes identical pleading requirements on parties defending against such claims, which, in practice, actually makes the pleading burdens asymmetrical. The proposed rule requires that to plead an affirmative defense, a party must not only state the "legal theory on which the defense rests," it must also state "facts establishing the affirmative defense." Proposed Rule 8(c). Even though the responding party is generally provided only twenty (20) days to investigate all aspects of the claims, Utah R. Civ. P. 12, whereas the party asserting the claims generally has much more time to develop the case and facts, the same pleading standard is applied to all parties.[12]

III. APPLY THE PROPOSED RULES TO CASES IN WHICH LESS DAMAGES ARE CLAIMED

If the purpose behind the amendments is to "limit[] parties to discovery that is proportional to the stakes of the litigation," that goal can be accomplished by applying the proposed amendments to the class of cases that perceived discovery abuses most affect—those in which relatively small amounts of damages are claimed. Proposed Rule 1 (advisory committee note). For example, the proposed rules could be employed in all cases in which $500,000 or less is at issue.

---

[11] The accompanying advisory committee note offers a contradictory explanation of the standard. Although the proposed rule apparently requires parties to "plead facts," the note expressly states that the rule is not intended to adopt the pleading standard recently established by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*, 79 550 U.S. 544 (2007), and *Iqbal v. Ashcroft*, 129 S. Ct. 1937 (2009). Nevertheless, pleading facts is precisely what *Twombly* and *Iqbal* require. *See Iqbal*, 129 S. Ct. at 1949 (holding that under Rule 8, "a complaint must contain sufficient factual matter").

The advisory committee note's reference to *Twombly* and *Iqbal* erecting a "heightened pleading requirement" is unhelpful since the United States Supreme Court explained the standard announced in *Twombly* does not "require heightened fact pleading." *Twombly*, 550 U.S. at 570; *id.* at 569 n.14 (explaining that its ruling does "not apply any 'heightened' pleading standard"). As a result, to distinguish the standard set forth under the proposed rule on this basis sheds little light on the question and only serves to confuse.

[12] Notably, federal courts are deeply split on the question of whether the *Twombly/Iqbal* standard applies to affirmative defenses. *Lucas v. Jerusalem Café, LLC*, No. 4:10-cv-00582 (W.D. Mo. April 11, 2011) ("There is currently a split of authority in the district courts regarding the applicability of the *Iqbal* pleading standard to affirmative defenses.").

As the amount of damages sought in a particular matter increases, the likelihood discovery will become excessive substantially decreases. Plaintiffs suing for large damage awards can typically secure well-funded representation on a contingency-fee basis. Their lawyers can ensure, under the existing rules, that discovery is not excessive or abusive. Similarly, defendants sued for large damage awards typically have the resources to resist abusive discovery tactics.

If the need for the amendments is as pressing as the advisory committee notes suggest, applying the proposed rules to the class of cases most affected by the perceived problems would be an excellent method for determining how the proposed rules will actually operate in practice and would permit the Supreme Court and its advisory committee to receive feedback from the bench and bar concerning the rules, and, to the extent necessary, modify the rules based on that feedback. If the rules successfully mitigate the perceived problems, then expanding the rules to all cases could be considered in the future.

Sincerely,

Brandon J. Mark

Vicki M. Baldwin

BJM/aw

June 21, 2011

Tim Shea
Administrative Office of the Courts
450 So. State Street, Office #N31
Salt Lake City, UT. 84111

Re: Utah Supreme Court Advisory Committee on the Rule of Civil Procedures

Dear Mr. Shea:

Thank you for seeking out comment from those that will be impacted by the proposed civil rule changes. We are always interested in ways to avoid costly litigation or at the very least minimize the cost and streamline the efficiency. Of course the most effective way is for honest dialogue and sharing of information between parties. In most cases, we find this is accomplished and litigation is not required. However, litigation or the threat of such can be and is sometimes used as a tool to force parties into a resolution that is neither worthy nor fair minded. Again, we believe this is not the standard but the exception.

Setting limitations for discovery on even a smaller dollar valued case can have long reaching outcomes because the case may set precedence for an industry. The proper time and investment should be allowed in these cases.

There are already alternatives such as small claims or arbitration. As you know, the Legislature in recent years has enacted a number of bills dealing with alternative resolution of cases including expedited litigation, mandatory arbitration in certain automobile and non-automobile (tort) cases. Both sides of the issue have worked together to help draft language and support the need. If the idea is to get smaller cases into a legal setting, we believe there are now many remedies to accomplish this. If the argument is that smaller cases are not being filed due to costs, we have not seen support for that proposition.

The means of getting more cases into litigation should not be at the expense of justice. A defendant should be able to defend its case as it deems reasonable. We believe that the artificial limitation on discovery requests, depositions, requests for production of documents and requests for admission is short-sighted. We believe that a party and its counsel ought to be able to fashion a discovery plan suitable to the case. Clearly some attorneys may go too far but that would be subject to judicial intervention. Shouldn't the parties sit down (i.e., Case Management Conference), outline the discovery plan, and

Utah's Oldest Mutual P & C Insurance Company
778 East Winchester (6600 South), P.O. Box 571310, Murray, UT 84157-1310
Phone: (801) 267-5000 or (800) 925-5177 Fax: (801) 267-5033

get both sides to agree? If the parties cannot agree, a court could intervene, but to artificially limit the number of depositions, limiting the number of interrogatories and requests for production of documents without even knowing what the case is about is very concerning. We also have concerns about limited expert testimony. Again, any given case may have long standing outcomes.

The time a Plaintiff has to prepare for litigation (in personal injury cases) is 4 years. The time a defendant has to prepare is 30 days (to respond to the Summons and Complaint) and then a small amount of time is allowed for discovery. This limited time is more abusive when the defendant can't even begin to ask the questions which are needed to discover the facts supporting or refuting the claims.

All parties choosing to litigate a claim should do so wisely, with the right motives. All parties choosing to litigate should have equal opportunity to explore, present or defend their positions. This can and should be done with the help of the court but each case is unique and may require more or less discovery. Placing an arbitrary number to discovery will not necessarily create the justice that the parties are seeking.

In conclusion, we believe that we have in place remedies to help expedite less complex cases and rules in place for the more complex. We are uncertain that these rule changes will help to expedite cases or create opportunities for those that were or are not utilizing the court system.

Thank you again for the opportunity to provide feedback.

Sincerely,

Kathy Jensen

Kathy Jensen
Claim V.P.
Bear River Mutual Insurance Company
(801) 267-5032 or (800) 925-5177 ext. 5032
Direct Fax (801) 685-5632

June 20, 2011

Tim Shea
Administrative Office of the Courts
450 So. State Street, Office N31
Salt Lake City, UT 84111

RE: Utah Supreme Court Advisory Committee
On the Rules of Civil Procedure

Dear Mr. Shea:

We sincerely appreciate the opportunity to provide input on the recently published proposed changes to the Utah Rules of Civil Procedure.

We appreciate the committee's hard work and commitment in drafting the many changes and modifications to the present Rules of Civil Procedure.

We have reviewed the proposed changes in detail. We believe the concept of "proportionality" is furthered by the Tier system the committee has recommended.

We understand the committee is suggesting the Tier 1 rules would apply to cases with an estimated value of $50,000 or less. In the Tier 1 concept, we would request the committee consider allowing 10 interrogatories per party. We would request thought be given to 10 requests for production of documents, rather than 5 requests. We would request consideration be given to 10 requests for admissions, rather than 5 requests for admissions, and 180 days to complete standard discovery.

There are good reasons for these suggested modifications. Deposition testimony is expensive in this class of case. Oftentimes, we can get away without taking depositions through the use of appropriately drafted interrogatories and other written discovery. In fact, in auto arbitration, as described at U.C.A. §31A-22-321, the costs of multiple depositions may well outweigh the value of the case. This may also be true in arbitrations called for by insurance policies in uninsured and underinsured motorist cases. Thus, written discovery is especially important in this lowest class of case.

If depositions are needed, it may be difficult for all parties to get together and complete needed written discovery, deposition discovery, and obtain subpoenaed records within 120 days. Oftentimes, getting lawyers' calendars together, as well as the witness calendars' together, is difficult. It is almost always the case that medical providers do not provide timely response to subpoenas and other more informal requests for medical records. Thus, 120

days is unworkable, even though the size of the case is relatively small. It is highly likely that counsel for the parties will need to extend the deadlines in most, if not all, cases. Therefore, we would request that deadline be extended to 180 days.

We understand Tier 2 cases would apply to cases have an estimated value of $50,000 to $299,000. In that category of cases, we would request consideration be given to 15 interrogatories per party, 15 requests for production of documents per party, 20 requests for admissions per party, and an additional 10 requests for admissions per party within 60 days after fact discovery cutoff. We would request 210 days be allowed to complete standard discovery.

The big issue raised above is the use of requests for admissions after discovery cutoff. We have found that, once fact discovery is completed, the issues in the case can be substantially narrowed through the use of admissions after the completion of discovery. Unfortunately, the use of requests for admissions during the discovery process itself is somewhat ineffective. Many times, a responding party will indicate that discovery is continuing and they cannot practically and accurately respond to the request at that point in time. Thus, the use of requests for admissions following discovery cutoff is more effective.

As you know, the purpose for admission requests is not to obtain information, but to narrow the issues for trial. Thus, it is not really a part of discovery, but rather, a tool to streamline the issues before the court. This is commonly done in practice before the Federal courts.

The obvious reason for our request for additional written discovery limits is as noted above. Many times, written discovery can take the place of, or at least minimize, the need for expensive deposition testimony.

The reason for the 210 day deadline is, again, because of the difficulties in calendaring discovery dates and obtaining needed factual discovery within a relatively short period of time.

We understand the Tier 3 category is for civil cases with a value of $300,000 and more. In that category, we would request the committee consider the use of 20 interrogatories per party, 20 requests for production of documents per party, 20 requests for admissions before the discovery cutoff date per party, and 20 requests for admissions within 60 days after fact discovery deadline. The rationale for this request is identical to the Tier 2. These large cases will more

often involve multiple lawyers. Many times, there are multiple factual and legal issues which must be investigated. Due to the value of the case, counsel for the different parties are interested in running to ground all types of different issues. This complex discovery simply requires additional discovery tools and time to complete the same.

The committee has recommended changes in the times in which expert designation must be made. We understand the committee is suggesting that disclosure of expert witnesses must be made within 7 days after the close of fact discovery. We understand the opposing counsel has an additional 7 days in which to serve a notice electing either a written report or a deposition. If neither is requested, the responding party does not have the right to any discovery of the expert.

We are concerned about this recommended rule change. For purposes of keeping the costs of litigation down, once fact discovery is completed, we must talk with our clients and consider the issues which discovery has identified. Seven days is simply too short a time frame for a party to consider the complex issues in a case and determine whether money will be spent on expert witnesses. This is true, both in the smaller-value cases as well as in the complex cases.

Similarly, we believe 7 days is an inappropriately short time for the opposing party to meet with their clients and determine whether a report or deposition should be required. Preventing any discovery if the request is not made within 7 days is too big a trap.

We would request that the 7-day election time frame discussed above be changed to a 30-day time line.

We understand the recommended rules include that the expert depositions or the report would be provided within 28 days after the election is made. We understand that, fortunately, the parties can stipulate around this requirement. However, because such a time line is terribly impractical, it would force such a stipulation in every case. The rule, therefore, has no purpose if a stipulation is generated in every single dispute. We would request a deadline of 90 days with the same stipulation approach.

Again, we do sincerely appreciate all of the work, debate and discussion these proposed changes have generated. We fully support the court's overall policy of proportionality and keeping the costs of civil litigation at a rational level, depending on the ultimate value of the case. We fully support the committee's recommendations. We do request the committee consider the changes set forth above.

Very truly yours,

ROBERT J. DeBRY & ASSOCIATES

G. Steven Sullivan

SIEGFRIED & JENSEN

Mitchell R. Jensen

CRAIG SWAPP & ASSOCIATES

J. Craig Swapp

GSS:le
061411.gss