Agenda
Advisory Committee on Rules of Civil Procedure

February 22, 2012
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
Rule 26.3. Disclosure in employment cases.	Tab 2	Bob Wilde
HB 235, Offer of judgment in civil cases.	Tab 3	Tim Shea
FAQs	Tab 4	Judge Derek Pullan Frank Carney
Issues identified during statewide workshops.	Tab 5	Tim Shea
Rule 58A(d). How does notice of judgment affect the appeal?		Fran Wikstrom

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

Meeting Schedule: Matheson Courthouse, Judicial Council Room, 4:00 to 6:00 unless otherwise stated.

March 28, 2012
April 25, 2012
May 23, 2012
September 26, 2012
October 24, 2012
November 28, 2012

Tab 1

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE OF THE RULES OF CIVIL PROCEDURE

January 25, 2012

PRESENT: Francis M. Wikstrom, Chair, Lincoln L. Davies, Honorable John Baxter, Barbara L. Townsend, Terrie T. McIntosh, W. Cullen Battle, Leslie W. Slaugh, Francis J. Carney, Honorable David O. Nuffer, Honorable Lyle Anderson, Robert J. Shelby, James T. Blanch, Honorable Kate Toomey, David Moore, Honorable Derek P. Pullan, Jonathan O. Hafen

PHONE: Lori Woffinden, David W. Scofield

EXCUSED: Janet H. Smith, Trystan B. Smith

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

I. INTRODUCTION OF COMMITTEE MEMBERS.

Committee members introduced themselves to the committee as required by the rules of the Utah Supreme Court.

II. APPROVAL OF MINUTES.

Mr. Wikstrom entertained comments from the committee concerning the November 30, 2011 minutes. The committee unanimously approved the minutes.

III. RULE 83. VEXATIOUS LITIGANTS.

Judge Toomey presented Rule 83 as proposed by the Board of District Court Judges. The Board's desire is that the Rule be approved. Prior to the committee meeting, Mr. Shea circulated a memo addressing the comments and responses to the Rule posted by members of the Bar. Messrs. Slaugh and Battle discussed the concern that the rule as written may inadvertently capture some institutional litigants, *e.g.*, collections agencies. Messrs. Slaugh and Battle expressed the concern that these parties could fall within the definition of having lost a certain number of cases, even though the party had also won many cases in the same time frame, just by virtue of the party having a large number of actions in the legal system in any time frame. The committee discussed ensuring that the court has discretion to address any such situation. Motion to include the words "The Court may find a person to be a vexatious litigant if the person…." in paragraph a(1). The committee approved the motion unanimously. Judge Pullan questioned what is driving the rule and why we cannot simply trust judges to enforce Rule 11. Judge Toomey noted

that the Board's originating concern was repeated lawsuits against trial judges, but opined that the rule could apply to other situations as well. Judge Pullan inquired as to whether we really need the rule. Judge Nuffer discussed facing similar problems at the federal level. The federal courts have no applicable rule but there is a very developed body of case law, which does not exist at the state level. Mr. Shea noted his opinion that the district court judges are simply seeking guidance because they are empowered through other means to act. A motion was made to approve the Rule as amended. The committee passed the motion with two dissenting votes.

IV. RULE 58A(d).

The Supreme Court requested that the committee review the potential due process implications of the interplay between 58A(d) "[a] copy of the signed judgment shall be promptly served by the party preparing it in the manner provided in Rule 5. The time for filing a notice of appeal is not affected by this requirement" and Rule 4 of the Rules of Appellate Procedure, which provides a fixed time to appeal a judgment triggered by the date judgment is entered. The Court also asked the committee to consider whether Rule 60(b) or any other provisions of the civil rules vindicate due process where notice of entry of judgment is not provided. The concern appears to be that the losing party, who bears the burden to timely appeal, in some ways is at the mercy of the prevailing party, who is responsible to provide notice of the entry of the judgment, and entry of the judgment triggers the time running for the appeal. Mr. Shea led a discussion concerning the history of amendments and proposed amendments to this rule and others addressing this issue. Mr. Wikstrom suggested removing the above-cited clause from Rule 5 and tinkering with Rule 60(b) to identify failure to serve a copy of the judgment as grounds for an excusable neglect extension under Rule 60(b). The committee discussed whether the appropriate change should really go to Appellate Rule 4, which governs the deadline for filing an appeal. The committee discussed the nature of the Court's request as being one for the committee's reasoned consideration, not necessarily a change to the Rules of Civil Procedure. Judge Pullan queried whether the committee is looking for a solution where it doesn't fully understand the problem. Mr. Wikstrom tabled the issue until next month's meeting for further discussion and consideration.

V. RULE 37. SANCTION FOR DENIAL OF MOTIONS.

Mr. Carney led a discussion regarding earlier changes/consolidation to Rule 37 and a potential omission. In subparagraph (d), line 61, it appears the committee has left out the word "denied" and, in doing so unintentionally removed the power of a court to award attorney's fees as a sanction where a motion to compel is denied. Mr. Carney moved to insert the words "or denied" to correct the inadvertent omission. The committee unanimously approved the motion.

VI. RULE 26(a)(4)(a).

Rule 26(a)(4)(a) references a witness who will testify under Rules of Evidence 702 or 703. It should also say Rule 705 (as it did originally) but does not due to a typographical error during the earlier revisions to the rules. There was a motion to correct the error by adding "705" to the third line of sub-paragraph (a)(4)(A). The motion was unanimously approved.

VII. CONFLICT BETWEEN RULE 11(d) and RULE 26(e).

Rule 11(d) states that it does not apply to disclosures and discovery requests, responses, objections and motions that are the subject to the provisions of Rules 26 through 37. However, Rule 26(e) states that an attorney's signature is a certification under Rule 11, which subjects the attorney to the provisions of Rule 11. Ms. McIntosh moved to strike the language in 11(d) as inconsistent. This gives a practitioner the ability to seek relief under Rule 11 or Rule 37. The committee unanimously approved the motion.

VIII. RULE 5.

Judge Shaughnessy proposed adding language to Rule 5 requiring that each pleading filed with a court have an attached Certificate of Service. Judge Toomey led the discussion on the proposed changes. The Board of District Judges has recommended that the attached Certificate of Service also identify the name of the document, the date and manner in which it was served and the parties upon whom it was served in that manner. This is proposed because litigants have apparently been filing unattached, stand-alone Certificates of Service that refer to a host of different pleadings filed/served, and litigants sometimes do not name the specific pleading in the Certificate of Service. This creates problems if the Certificate of Service gets separated in the court's file. It is then difficult to decipher what pleading was filed and served on what date and in what fashion. Judge Toomey and Mr. Battle proposed adding a subsection 5(f) entitled "Certificate of Service," requiring the name of the pleading served, the manner in which it was served and the party upon whom it was served. The motion was unanimously approved.

IX. LOCAL SUPPLEMENTAL RULE 10-1-306.

Judge Toomey advised the committee that the Fourth District has adopted the Rule on an interim basis. Half of the Second District has also adopted the Rule. The Board of District Judges has recommended that the Rule be ratified by the Council and considered for statewide adoption.

X. RULE 26.2.

The Committee discussed its consensus that specialty rule 26.2 is applicable as of November 1, 2011, as part of the new rules. The committee will include this in an advisory note to the Rule.

XI. ADJOURNMENT.

The meeting adjourned at 5:45 p.m. The next meeting will be held on February 22, 2012 at 4:00 p.m. at the Administrative Office of the Courts.

Tab 2

Rule 26.3. Initial disclosure in employment actions.

(a) **Scope.** This rule applies to all employment cases alleging adverse employment action except class actions and cases alleging only the following:

(a)(1) discrimination in hiring;

(a)(2) harassment/hostile work environment where wrongful termination is not alleged;

(a)(3) violations of the Fair Labor Standards Act where wrongful termination is not alleged;

(a)(4) Failure to provide accommodations under the Americans with Disabilities Act (ADA) where wrongful termination is not alleged;

(a)(5) violations of the Family Medical Leave Act (FMLA) where wrongful termination is not alleged; and

(a)(6) violations of the Employee Retirement Income Security Act (ERISA) where wrongful termination is not alleged.

The provisions of this rule are not intended to preclude or to modify the rights of any party for discovery as provided by the Utah Rules of Civil Procedure and other applicable rules, but they are intended to supersede the parties' obligations to make initial disclosures pursuant to Rule 26(a)(1). The rule is intended to require parties and attorneys to exchange the most relevant information and documents early in the case, to assist in framing the issues and to plan for more efficient and targeted discovery.

(b) **Definitions.**

(b)(1) "Concerning" means referring to, describing, evidencing, or constituting.

(b)(2) "Document" is synonymous in meaning and equal in scope to the terms "documents" and "electronically stored information" as used in Rule 34(a).

(b)(3) "Identify persons" means to disclose the person's:

(b)(3)(A) full name;

(b)(3)(B) present or last known address and telephone number;

(b)(3)(C) present or last known place of employment;

(b)(3)(D) present or last known job title; and

(b)(3)(E) relationship, if any, to the plaintiff or defendant.

After a person has been identified in accordance with this paragraph, only the name of that person need be listed in response to discovery requesting identification of that person.

(c) **Instructions.**

(c)(1) The relevant time period for initial disclosures begins three years before the date of the adverse action, unless otherwise specified.

(c)(2) 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. Otherwise, initial disclosures are not subject to objection.

(c)(3) If a partial or incomplete disclosure is provided, the disclosing party shall state the reason that the disclosure is partial or incomplete.

(c)(4) Initial disclosures are subject to Rule 34(c) regarding form of production.

(c)(5) Initial disclosures shall be made within the time allowed in Rule 26(a)(2).

(d) **Documents that plaintiff must produce to defendant.** The plaintiff shall, without a discovery request, produce to the defendant:

(d)(1) All communications concerning the factual allegations or claims at issue in the action between the plaintiff and the defendant.

(d)(2) Claims, actions, administrative charges, and complaints by the plaintiff that rely upon any of the same factual allegations or claims as those at issue in the action.

(d)(3) Documents concerning the formation and termination, if any, of the employment relationship at issue in the action, irrespective of the relevant time period.

(d)(4) Documents concerning the terms and conditions of the employment relationship at issue in the action.

(d)(5) Diary, journal, and calendar entries maintained by the plaintiff concerning the factual allegations or claims at issue in the action.

(d)(6) The plaintiff's current resumes.

(d)(7) Documents in the possession of the plaintiff concerning claims for unemployment benefits, unless production is prohibited by law.

(d)(8) Documents concerning:

(d)(8)(A) communications with potential employers;

(d)(8)(B) job search efforts; and

(d)(8)(C) offers of employment, job descriptions, and income and benefits of subsequent employment. The defendant shall not contact or subpoena plaintiff's prospective or current employer to discover information about the plaintiff's claims without first providing the plaintiff 28 days notice. If the plaintiff files a motion for a protective order or a motion to quash a subpoena within that time, the defendant shall not contact or subpoena plaintiff's prospective or current employer until the motion is ruled upon.

(d)(9) Documents concerning the termination of any subsequent employment.

(d)(10) Documents concerning an application for disability benefits and/or social security disability benefits after the adverse action.

(d)(11) Any other documents upon which the plaintiff relies to support the plaintiff's factual allegations or claims at issue in the action.

(e) **Information that plaintiff must disclose to defendant.** The plaintiff shall, without a discovery request:

(e)(1) Identify persons having knowledge of the facts concerning the claims or defenses at issue in the action, and a brief description of that knowledge.

(e)(2) Describe the categories of damages the plaintiff claims.

(e)(3) State whether the plaintiff has applied for disability benefits and/or social security disability benefits after the adverse action, whether any application has been granted, and the nature of the award, if any.

(f) **Documents that defendant must produce to plaintiff.** The defendant shall, without a discovery request, produce to the plaintiff:

(f)(1) All communications concerning the factual allegations or claims at issue in the action among or between:

(f)(1)(A) the plaintiff and the defendant;

(f)(1)(A) the plaintiff's managers, and/or supervisors, and/or the defendant's human resources representatives.

(f)(2) Responses to claims, actions, administrative charges, and complaints by the plaintiff that rely upon any of the same factual allegations or claims as those at issue in the action.

(f)(3) Documents concerning the formation and termination, if any, of the employment relationship at issue in the action, irrespective of the relevant time period.

(f)(4) The plaintiff's personnel file, in any form, maintained by the defendant, including files concerning the plaintiff maintained by the plaintiff's supervisors, managers, or the defendant's human resources representatives, irrespective of the relevant time period.

(f)(5) The plaintiff's performance evaluations and formal discipline.

(f)(6) Documents relied upon to make the employment decisions at issue in the action.

(f)(7) Workplace policies or guidelines relevant to the adverse action in effect at the time of the adverse action including, if relevant, policies or guidelines that address:

(f)(7)(A) discipline;

(f)(7)(B) termination of employment;

(f)(7)(C) promotion;

(f)(7)(D) discrimination;

(f)(7)(E) performance reviews or evaluations;

(f)(7)(F) misconduct;

(f)(7)(G) retaliation; and

(f)(7)(H) nature of the employment relationship.

(f)(8) The table of contents and index of any employee handbook, code of conduct, or policies and procedures manual in effect at the time of the adverse action.

(f)(9) Job descriptions for the positions that the plaintiff held.

(f)(10) Documents showing the plaintiff's compensation and benefits. Those normally include retirement plan benefits, fringe benefits, employee benefit summary plan descriptions, and summaries of compensation.

(f)(11) Agreements between the plaintiff and the defendant to waive jury trial rights or to arbitrate disputes.

(f)(12) Documents concerning investigations of any complaints about the plaintiff or made by the plaintiff, if relevant to the plaintiff's factual allegations or claims at issue in this action and not otherwise privileged.

(f)(13) Documents in the possession of the defendant and/or the defendant's agents concerning claims for unemployment benefits unless production is prohibited by applicable law.

(f)(14) Documents concerning an application for disability benefits and/or social security disability benefits after the adverse action.

(f)(15) Any other document upon which the defendant relies to support the defenses, affirmative defenses, and counterclaims, including any other documents describing the reasons for the adverse action.

(g) **Information that defendant must disclose to plaintiff.** The defendant shall, without a discovery request:

(g)(1) Identify the plaintiff's supervisors and/or managers.

(g)(2) Identify persons who were involved in making the decision to take the adverse action.

(g)(3) Identify persons having knowledge of the facts concerning the claims or defenses at issue in this action, and a brief description of that knowledge.

(g)(4) State whether the plaintiff has applied for disability benefits and/or social security disability benefits after the adverse action. State whether the defendant has provided information to a third party concerning an application and identify any information concerning an application provided to a third party.

Advisory Committee Notes

This rule is intended to track the Initial Discovery Protocols for Employment Cases Alleging Adverse Action prepared by the Federal Judicial Center and described in its statement of November, 2011.

PILOT PROJECT REGARDING
INITIAL DISCOVERY PROTOCOLS
FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION

November 2011

The Federal Judicial Center is making this document available at the request of the Advisory Committee on Civil Rules, in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. While the Center regards the contents as responsible and valuable, it does not reflect policy or recommendations of the Board of the Federal Judicial Center.

TABLE OF CONTENTS

Page

INTRODUCTION

The Initial Discovery Protocols for Employment Cases Alleging Adverse Action provide a new pretrial procedure for certain types of federal employment cases. As described in the Protocols, their intent is to "encourage parties and their counsel to exchange the most relevant information and documents early in the case, to assist in framing the issues to be resolved and to plan for more efficient and targeted discovery." Individual judges throughout the United States District Courts will pilot test the Protocols and the Federal Judicial Center will evaluate their effects.

This project grew out of the 2010 Conference on Civil Litigation at Duke University, sponsored by the Judicial Conference Advisory Committee on Civil Rules for the purpose of re-examining civil procedures and collecting recommendations for their improvement. During the conference, a wide range of attendees expressed support for the idea of case-type-specific "pattern discovery" as a possible solution to the problems of unnecessary cost and delay in the litigation process. They also arrived at a consensus that employment cases, "regularly litigated and [presenting] recurring issues,"[1] would be a good area for experimentation with the concept.

Following the conference, Judge Lee Rosenthal convened a nationwide committee of attorneys, highly experienced in employment matters, to develop a pilot project in this area. Judge John Koeltl volunteered to lead this committee. By design, the committee had a balance of plaintiff and defense attorneys. Joseph Garrison[2] (New Haven, Connecticut) chaired a plaintiff subcommittee, and Chris Kitchel[3] (Portland, Oregon) chaired a defense subcommittee. The committee invited the Institute for the Advancement of the American Legal System at the University of Denver (IAALS) to facilitate the process.

---

[1] Civil Rules Advisory Committee, *Report to the Standing Committee*, 10 (May 17, 2010).

[2] Mr. Garrison was a panelist at the Duke Conference. He also wrote and submitted a conference paper, entitled *A Proposal to Implement a Cost-Effective and Efficient Procedural Tool Into Federal Litigation Practice*, which advocated for the adoption of model or pattern discovery tools for "categories of cases which routinely appear in the federal courts" and suggested the appointment of a task force to bring the idea to fruition.

[3] Ms. Kitchel serves on the American College of Trial Lawyers Task Force on Discovery and Civil Justice, which produced the *Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System*, 268 F.R.D. 407 (2009). As a result of her role on the ACTL Task Force, Ms. Kitchel had already begun discussing possibilities for improving employment litigation with Judge Rosenthal when she attended the Duke Conference.

The group worked diligently over the course of one year. Committee members met at IAALS for valuable in-person discussions in March and July of 2011. Judge Koeltl was in attendance as well, to oversee the process and assist in achieving workable consensus. In addition, committee members exchanged hundreds of emails, held frequent telephone conferences, and prepared numerous drafts. The committee's final product is the result of rigorous debate and compromise on both sides, undertaken in the spirit of making constructive and even-handed improvements to the pretrial process.

The Protocols create a new category of information exchange, replacing initial disclosures with initial discovery specific to employment cases alleging adverse action. This discovery is provided automatically by both sides within 30 days of the defendant's responsive pleading or motion. While the parties' subsequent right to discovery under the F.R.C.P. is not affected, the amount and type of information initially exchanged ought to focus the disputed issues, streamline the discovery process, and minimize opportunities for gamesmanship. The Protocols are accompanied by a standing order for their implementation by individual judges in the pilot project, as well as a model protective order that the attorneys and the judge can use a basis for discussion.

The Federal Judicial Center will establish a framework for effectively measuring the results of this pilot project.[4] If the new process ultimately benefits litigants, it is a model that can be used to develop protocols for other types of cases. **Please note:** Judges adopting the protocols for use in cases before them should inform FJC senior researcher Emery Lee, elee@fjc.gov, so that their cases may be included in the evaluation.

[4] Civil Rules Advisory Committee, *Draft Minutes of April 2011 Meeting*, 43 (June 8, 2011).

EMPLOYMENT PROTOCOLS COMMITTEE ROSTER

Fred Alvarez
Wilson Sonsini Goodrich & Rosati
Palo Alto, CA

Kathryn Burkett Dickson
Dickson Levy Vinick Burrell Hyams LLP
Oakland, CA

Herbert Eisenberg
Eisenberg & Schnell LLP
New York, NY

Joseph Garrison
Garrison, Levin-Epstein, Chimes, Richardson & Fitzgerald, PC
New Haven, CT

Margaret Harris
Butler & Harris
Houston, TX

John Jansonius
Akin Gump Strauss Hauer & Feld LLP
Dallas, TX

Chris Kitchel
Stoel Rives LLP
Portland, OR

Jonathan Margolis
Rodgers, Powers & Schwartz, LLP
Boston, MA

Ellen Messing
Messing, Rudavsky & Weliky, PC
Boston, MA

Bettina (Betsy) Plevan
Proskauer Rose LLP
New York, NY

Felix Springer
Day Pitney LLP
Hartford, CT

INITIAL DISCOVERY PROTOCOLS
FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION

PART 1: INTRODUCTION AND DEFINITIONS.

(1) Statement of purpose.

a. The Initial Discovery Protocols for Employment Cases Alleging Adverse Action is a proposal designed to be implemented as a pilot project by individual judges throughout the United States District Courts. The project and the product are endorsed by the Civil Rules Advisory Committee.

b. In participating courts, the Initial Discovery Protocols will be implemented by standing order and will apply to all employment cases that challenge one or more actions alleged to be adverse, except:
   i. Class actions;
   ii. Cases in which the allegations involve only the following:
      1. Discrimination in hiring;
      2. Harassment/hostile work environment;
      3. Violations of wage and hour laws under the Fair Labor Standards Act (FLSA);
      4. Failure to provide reasonable accommodations under the Americans with Disabilities Act (ADA);
      5. Violations of the Family Medical Leave Act (FMLA);
      6. Violations of the Employee Retirement Income Security Act (ERISA).

   If any party believes that there is good cause why a particular case should be exempted, in whole or in part, from this pilot program, that party may raise such reason with the Court.

c. The Initial Discovery Protocols are not intended to preclude or to modify the rights of any party for discovery as provided by the Federal Rules of Civil Procedure (F.R.C.P.) and other applicable local rules, but they are intended to supersede the parties' obligations to make initial disclosures pursuant to F.R.C.P. 26(a)(1). The purpose of the pilot project is to encourage parties and their counsel to exchange the most relevant information and documents early in the case, to assist in framing the issues to be resolved and to plan for more efficient and targeted discovery.

d. The Initial Discovery Protocols were prepared by a group of highly experienced attorneys from across the country who regularly represent plaintiffs and/or defendants in employment matters. The information and documents identified are those most likely to be requested automatically by experienced counsel in any similar case. They are unlike initial disclosures pursuant to F.R.C.P. 26(a)(1) because they focus on the type of information most likely to be useful in narrowing the issues for employment discrimination cases.

(2) Definitions. The following definitions apply to cases proceeding under the Initial Discovery Protocols.

a. ***Concerning*.** The term "concerning" means referring to, describing, evidencing, or constituting.

b. ***Document.*** The terms "document" and "documents" are defined to be synonymous in meaning and equal in scope to the terms "documents" and "electronically stored information" as used in F.R.C.P. 34(a).

c. ***Identify (Documents).*** When referring to documents, to "identify" means to give, to the extent known: (i) the type of document; (ii) the general subject matter of the document; (iii) the date of the document; (iv) the author(s), according to the document; and (v) the person(s) to whom, according to the document, the document (or a copy) was to have been sent; or, alternatively, to produce the document.

d. ***Identify (Persons).*** When referring to natural persons, to "identify" means to give the person's: (i) full name; (ii) present or last known address and telephone number; (iii) present or last known place of employment; (iv) present or last known job title; and (v) relationship, if any, to the plaintiff or defendant. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

(3) Instructions.

a. For this Initial Discovery, the relevant time period begins three years before the date of the adverse action, unless otherwise specified.

b. This Initial Discovery is not subject to objections except upon the grounds set

forth in F.R.C.P. 26(b)(2)(B).

c. If a partial or incomplete answer or production is provided, the responding party shall state the reason that the answer or production is partial or incomplete.

d. This Initial Discovery is subject to F.R.C.P. 26(e) regarding supplementation and F.R.C.P. 26(g) regarding certification of responses.

e. This Initial Discovery is subject to F.R.C.P. 34(b)(2)(E) regarding form of production.

PART 2: PRODUCTION BY PLAINTIFF.

(1) Timing.

a. The plaintiff's Initial Discovery shall be provided within 30 days after the defendant has submitted a responsive pleading or motion, unless the court rules otherwise.

(2) Documents that Plaintiff must produce to Defendant.

a. All communications concerning the factual allegations or claims at issue in this lawsuit between the plaintiff and the defendant.

b. Claims, lawsuits, administrative charges, and complaints by the plaintiff that rely upon any of the same factual allegations or claims as those at issue in this lawsuit.

c. Documents concerning the formation and termination, if any, of the employment relationship at issue in this lawsuit, irrespective of the relevant time period.

d. Documents concerning the terms and conditions of the employment relationship at issue in this lawsuit.

e. Diary, journal, and calendar entries maintained by the plaintiff concerning the factual allegations or claims at issue in this lawsuit.

f. The plaintiff's current resume(s).

g. Documents in the possession of the plaintiff concerning claims for unemployment benefits, unless production is prohibited by applicable law.

h. Documents concerning: (i) communications with potential employers; (ii) job search efforts; and (iii) offer(s) of employment, job description(s), and income

and benefits of subsequent employment. The defendant shall not contact or subpoena a prospective or current employer to discover information about the plaintiff's claims without first providing the plaintiff 30 days notice and an opportunity to file a motion for a protective order or a motion to quash such subpoena. If such a motion is filed, contact will not be initiated or the subpoena will not be served until the motion is ruled upon.

i. Documents concerning the termination of any subsequent employment.

j. Any other document(s) upon which the plaintiff relies to support the plaintiff's claims.

(3) Information that Plaintiff must produce to Defendant.

a. Identify persons the plaintiff believes to have knowledge of the facts concerning the claims or defenses at issue in this lawsuit, and a brief description of that knowledge.

b. Describe the categories of damages the plaintiff claims.

c. State whether the plaintiff has applied for disability benefits and/or social security disability benefits after the adverse action, whether any application has been granted, and the nature of the award, if any. Identify any document concerning any such application.

PART 3: PRODUCTION BY DEFENDANT.

(1) Timing.

a. The defendant's Initial Discovery shall be provided within 30 days after the defendant has submitted a responsive pleading or motion, unless the court rules otherwise.

(2) Documents that Defendant must produce to Plaintiff.

a. All communications concerning the factual allegations or claims at issue in this lawsuit among or between:
   i. The plaintiff and the defendant;
   ii. The plaintiff's manager(s), and/or supervisor(s), and/or the defendant's human resources representative(s).

b. Responses to claims, lawsuits, administrative charges, and complaints by the plaintiff that rely upon any of the same factual allegations or claims as those at issue in this lawsuit.

c. Documents concerning the formation and termination, if any, of the employment relationship at issue in this lawsuit, irrespective of the relevant time period.

d. The plaintiff's personnel file, in any form, maintained by the defendant, including files concerning the plaintiff maintained by the plaintiff's supervisor(s), manager(s), or the defendant's human resources representative(s), irrespective of the relevant time period.

e. The plaintiff's performance evaluations and formal discipline.

f. Documents relied upon to make the employment decision(s) at issue in this lawsuit.

g. Workplace policies or guidelines relevant to the adverse action in effect at the time of the adverse action. Depending upon the case, those may include policies or guidelines that address:
    i. Discipline;
    ii. Termination of employment;
    iii. Promotion;
    iv. Discrimination;
    v. Performance reviews or evaluations;
    vi. Misconduct;
    vii. Retaliation; and
    viii. Nature of the employment relationship.

h. The table of contents and index of any employee handbook, code of conduct, or policies and procedures manual in effect at the time of the adverse action.

i. Job description(s) for the position(s) that the plaintiff held.

j. Documents showing the plaintiff's compensation and benefits. Those normally include retirement plan benefits, fringe benefits, employee benefit summary plan descriptions, and summaries of compensation.

k. Agreements between the plaintiff and the defendant to waive jury trial rights or to arbitrate disputes.

l. Documents concerning investigation(s) of any complaint(s) about the plaintiff or made by the plaintiff, if relevant to the plaintiff's factual allegations or claims at issue in this lawsuit and not otherwise privileged.

m. Documents in the possession of the defendant and/or the defendant's agent(s) concerning claims for unemployment benefits unless production is prohibited by applicable law.

n. Any other document(s) upon which the defendant relies to support the defenses, affirmative defenses, and counterclaims, including any other document(s) describing the reasons for the adverse action.

(3) Information that Defendant must produce to Plaintiff.

a. Identify the plaintiff's supervisor(s) and/or manager(s).

b. Identify person(s) presently known to the defendant who were involved in making the decision to take the adverse action.

c. Identify persons the defendant believes to have knowledge of the facts concerning the claims or defenses at issue in this lawsuit, and a brief description of that knowledge.

d. State whether the plaintiff has applied for disability benefits and/or social security disability benefits after the adverse action. State whether the defendant has provided information to any third party concerning the application(s). Identify any documents concerning any such application or any such information provided to a third party.

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____
_____ DIVISION

_____,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. _____
	)	
_____,	)	Judge _____
	)	
Defendant.	)	

STANDING ORDER FOR CERTAIN EMPLOYMENT CASES

This Court is participating in a Pilot Program for **INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION,** initiated by the Advisory Committee on Federal Rules of Civil Procedure (see "Discovery protocol for employment cases," under "Educational programs and materials," at www.fjc.gov).

The Initial Discovery Protocols will apply to all employment cases pending in this court that challenge one or more actions alleged to be adverse, except:

i. Class actions;
ii. Cases in which the allegations involve only the following:
    1. Discrimination in hiring;
    2. Harassment/hostile work environment;
    3. Violations of wage and hour laws under the Fair Labor Standards Act (FLSA);
    4. Failure to provide reasonable accommodations under the Americans with Disabilities Act (ADA);
    5. Violations of the Family Medical Leave Act (FMLA);

6. Violations of the Employee Retirement Income Security Act (ERISA).

Parties and counsel in the Pilot Program shall comply with the Initial Discovery Protocols, attached to this Order. If any party believes that there is good cause why a particular case should be exempted from the Initial Discovery Protocols, in whole or in part, that party may raise the issue with the Court.

Within 30 days following the defendant's submission of a responsive pleading or motion, the parties shall provide to one another the documents and information described in the Initial Discovery Protocols for the relevant time period. This obligation supersedes the parties' obligations to provide initial disclosures pursuant to F.R.C.P. 26(a)(1). The parties shall use the documents and information exchanged in accordance with the Initial Discovery Protocols to prepare the F.R.C.P. 26(f) discovery plan.

The parties' responses to the Initial Discovery Protocols shall comply with the F.R.C.P. obligations to certify and supplement discovery responses, as well as the form of production standards for documents and electronically stored information. As set forth in the Protocols, this Initial Discovery is not subject to objections, except upon the grounds set forth in F.R.C.P. 26(b)(2)(B).

ENTER:

Dated:_____ _____

[Name]

United States [District/Magistrate] Judge

The Initial Discovery Protocols for Employment Cases Alleging Adverse Action are designed to achieve the goal of more efficient and targeted discovery. If a protective order will be entered in a case to which the Initial Discovery Protocols applies, immediate entry of the order will allow the parties to commence discovery without delay. In furtherance of that goal, the Employment Protocols Committee offers the following Model Protective Order. Recognizing that the decision to enter a protective order, as well as the parameters of any such order, rests within the Court's sound discretion and is subject to local practice, the following provisions are options from which the Court might select.

MODEL PROTECTIVE ORDER

It is hereby ordered by the Court that the following restrictions and procedures shall apply to certain information, documents and excerpts from documents supplied by the parties to each other in response to discovery requests:

1. ☐ Counsel for any party may designate any document, information contained in a document, information revealed in an interrogatory response or information revealed during a deposition as confidential if counsel determines, in good faith, that such designation is necessary to protect the interests of the client. Information and documents designated by a party as confidential will be stamped "CONFIDENTIAL." "Confidential" information or documents may be referred to collectively as "confidential information."

2. ☐ Unless ordered by the Court, or otherwise provided for herein, the Confidential Information disclosed will be held and used by the person receiving such information solely for use in connection with the above-captioned action.

3. ☐ In the event a party challenges another party's confidential designation, counsel shall make a good faith effort to resolve the dispute, and in the absence of a resolution, the challenging party may thereafter seek resolution by the Court. Nothing in this Protective Order constitutes an admission by any party that Confidential Information disclosed in this case is relevant or admissible. Each party specifically reserves the right to object to the use or admissibility of all Confidential Information disclosed, in accordance with applicable law and Court rules.

4. ☐ Information or documents designated as "confidential" shall not be disclosed to any person, except:

    a. ☐ The requesting party and counsel, including in-house counsel;

b. ☐ Employees of such counsel assigned to and necessary to assist in the litigation;

c. ☐ Consultants or experts assisting in the prosecution or defense of the matter, to the extent deemed necessary by counsel;

d. ☐ Any person from whom testimony is taken or is to be taken in these actions, except that such a person may only be shown that Confidential Information during and in preparation for his/her testimony and may not retain the Confidential Information; and

e. ☐ The Court (including any clerk, stenographer, or other person having access to any Confidential Information by virtue of his or her position with the Court) or the jury at trial or as exhibits to motions.

5. ☐ Prior to disclosing or displaying the Confidential Information to any person, counsel shall:

a. ☐ inform the person of the confidential nature of the information or documents; and

b. ☐ inform the person that this Court has enjoined the use of the information or documents by him/her for any purpose other than this litigation and has enjoined the disclosure of that information or documents to any other person.

6. ☐ The Confidential Information may be displayed to and discussed with the persons identified in Paragraphs 4(c) and (d) only on the condition that prior to any such display or discussion, each such person shall be asked to sign an agreement to be bound by this Order in the form attached hereto as Exhibit A. In the event such person refuses to sign an agreement in the form attached as Exhibit A, the party desiring to disclose the Confidential Information may seek appropriate relief from the Court.

7. ☐ The disclosure of a document or information without designating it as "confidential" shall not constitute a waiver of the right to designate such document or information as Confidential Information provided that the material is designated pursuant to the procedures set forth herein no later than that latter of fourteen (14) days after the close of discovery or fourteen (14) days after the document or information's production. If so designated, the document or information shall thenceforth be treated as Confidential Information subject to all the terms of this Stipulation and Order.

8. ☐ All information subject to confidential treatment in accordance with the terms of this Stipulation and Order that is filed with the Court, and any pleadings, motions or other papers filed with the Court disclosing any Confidential Information, shall be filed under seal to the extent permitted by law (including without limitation any applicable rules of court) and kept under seal until further order of the Court. To the extent the Court requires any further act by the parties as a precondition to the filing of documents under seal (beyond the submission of this Stipulation and Order Regarding Confidential Information), it shall be the obligation of the producing party of the documents to be filed with the Court to satisfy any such precondition. Where possible, only confidential portions of filings with the Court shall be filed under seal.

9. ☐ At the conclusion of litigation, the Confidential Information and any copies thereof shall be promptly (and in no event later than thirty (30) days after entry of final judgment no longer subject to further appeal) returned to the producing party or certified as destroyed, except that the parties' counsel shall be permitted to retain their working files on the condition that those files will remain confidential.

The foregoing is entirely without prejudice to the right of any party to apply to the Court for any further Protective Order relating to confidential information; or to object to the production of documents or information; or to apply to the Court for an order compelling production of documents or information; or for modification of this Order. This Order may be enforced by either party and any violation may result in the imposition of sanctions by the Court.

EXHIBIT A

I have been informed by counsel that certain documents or information to be disclosed to me in connection with the matter entitled _____ have been designated as confidential. I have been informed that any such documents or information labeled "CONFIDENTIAL – PRODUCED PURSUANT TO PROTECTIVE ORDER" are confidential by Order of the Court.

I hereby agree that I will not disclose any information contained in such documents to any other person. I further agree not to use any such information for any purpose other than this litigation.

_____ DATED:

Signed in the presence of:

_____

(Attorney)

Tab 3

LEGISLATIVE GENERAL COUNSEL
₵ Approved for Filing: E. Chelsea-McCarty ₵
₵ 01-30-12 3:25 PM ₵

OFFER OF JUDGMENT IN CIVIL CASES

2012 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Ken Ivory

Senate Sponsor: _____

LONG TITLE

General Description:

This bill creates a process for an offer of judgment in civil litigation.

Highlighted Provisions:

This bill:

- outlines a process for offers of judgment in civil actions;
- requires that the offer be made more than 10 days before trial;
- requires that a response be made within 10 days of service of the offer;
- sets requirements for offers made to multiple parties;
- provides direction to the court for judgment in cases where an offer was made; and
- sets sanctions for a party who rejects an offer but does not receive a more favorable judgment.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

ENACTS:

78B-5-829, Utah Code Annotated 1953

Be it enacted by the Legislature of the state of Utah:

H.B. 235

Section 1. Section **78B-5-829** is enacted to read:

78B-5-829. Offer of judgment -- Process -- Time limits -- Acceptance -- Rejection.

(1) At any time before trial, but not less than 10 days before commencement of the trial, any party may serve to any other party an offer to enter judgment to resolve all claims in the action between those parties accrued through the date of the offer.

(2) When the liability of one party to another has been determined by verdict, order, or judgment, but the amount or extent of the liability remains to be determined by further proceedings, at any time before the commencement of the proceeding to determine the amount or extent of liability, but not less than 10 days before commencement of the proceedings, any party may serve to any other party an offer to enter judgment to resolve all claims in the action between those parties accrued through the date of the offer.

(3) A party may not be subject to the sanctions of Subsections (28) through (33) for rejection of an offer that is made and served pursuant to Subsection (1) or (2) less than 10 days before commencement of the trial or proceedings.

(4) The offer shall allow judgment to be taken in accordance with its terms and may include equitable remedies. Unless otherwise specified, an offer is considered to be for a lump-sum, meaning the terms of the offer are considered to preclude separate post-acceptance awards of costs, attorney fees and interest.

(5) The offer may specify that it is conditioned upon a determination of good faith settlement.

(6) The offer may specify a longer acceptance period than the period prescribed by Subsection (22), but may not permit an acceptance after the commencement of a trial if the offer is made pursuant to Subsection (2) and may not permit an acceptance after the commencement of the proceeding if the offer is made pursuant to Subsection (2).

(7) The offer shall specify that it is based upon this section or it shall specify the complete basis of the offer if it is based upon a combination of this section and U.R.C.P. Rule 68. An offer is not void because it is based upon this section, U.R.C.P. Rule 68, or both.

(8) An offer that resolves less than all of the claims between all the offerors and all the offerees is void.

(9) An offer may not be withdrawn except by written stipulation or as provided in Subsection (23).

(10) An offer that specifies material conditions that are in addition to those provided by this section or that conflict with those provided by this section is void.

(11) An apportioned offer jointly made to more than one party may be conditioned upon the acceptance by all parties to whom the offer is directed.

(12) An offer jointly made by multiple offerors is not required to be apportioned between the offerors.

(13) An unapportioned offer jointly made to multiple parties against whom claims, counterclaims or cross-claims are asserted may be conditioned upon the acceptance by all parties to whom the offer is directed if one entity, person, or group is authorized to accept or reject an offer of settlement for all the claims against all the offerees and:

(a) there is a single common theory of liability against all the offerees;

(b) the liability of some offerees are entirely derivative of the common acts or liability of the others; or

(c) the liability of all offerees are derivative of the common acts or liability of another.

(14) An unapportioned offer jointly made to multiple claimants may be conditioned upon the acceptance by all parties to whom the offer is directed if one entity, person, or group is authorized to accept or reject an offer of settlement for all the claims of all the offerees and:

(a) there is a single common theory of liability claimed by all the offerees;

(b) the damages claimed by some offerees are entirely derivative of an injury to the others; or

(c) the damages claimed by all offerees are derivative of an injury to another.

(15) No combination of offerees that jointly claim or defend under the same common theory of liability concerning jointly owned property is a group as that term is used in Subsection (14) and this Subsection (15). When two or more offerees jointly claim or defend under the same common theory of liability concerning jointly owned property, the burden is on any offeree to establish that no one person has authority to accept or reject an offer of settlement for all the offerees.

(16) If the offeree serves written notice that the offer is accepted within the acceptance period provided by Subsection (22), the offer shall be considered accepted and either party may then file the offer and notice of acceptance together with proof of service. The offer and notice of acceptance shall be filed within 7 days after service of the written notice that the offer is

accepted or before trial or other applicable proceeding, whichever occurs earlier.

(17) Except as otherwise provided in Subsection (27), the clerk or judge shall enter judgment accordingly. If permitted by law or contract, the court shall award costs in accordance with U.R.C.P. Rule 54, attorney fees and interest as applicable, but may not make an award if the terms of the offer preclude separate awards of costs, attorney fees, and interest. If the terms of the offer permit an award of interest, any portion of any claim or demand for damages that is asserted or disclosed in writing before the offer is served draws interest but the entire claim or demand for damages that is asserted or disclosed in writing before the offer is served does not draw interest. If the offer contains no apportionment between claims that do and do not draw interest:

(a) the court shall award interest on the entirety of all damages when the offer is made to a claimant and judgment is entered pursuant to this section; and

(b) the court may not award interest on any damages when the offer is made to a defending party and judgment is entered pursuant to this section.

(18) Any judgment entered pursuant to this section shall be expressly designated a compromise and settlement of a disputed claim.

(19) A defending party who pays the principal amount of the offer within a reasonable time after the filing of the offer and notice of acceptance and pays any applicable awards of costs, attorney fees and interest within a reasonable time after the awards are ordered shall obtain an order of dismissal with prejudice and, if applicable, an order withdrawing the judgment.

(20) A claimant who has not been paid within a reasonable time may obtain an order to amend the judgment and remove the Subsection (18) designation of compromise and settlement.

(21) A final judgment or order of dismissal entered pursuant to this section shall have the preclusive effect of a valid judgment on the merits.

(22) An offer made pursuant to Subsection (1) may be accepted before trial or within 10 days after service, whichever period is shorter. An offer made pursuant to Subsection (2) may be accepted before the commencement of the proceeding or within 10 days after service, whichever period is shorter.

(23) The offer shall be considered rejected by the offeree if not accepted within the

period prescribed by Subsection (22). If this period is enlarged by the court, the offeror may serve a written withdrawal of the offer at any time after the expiration of the initial acceptance period and prior to acceptance of the offer.

(24) Evidence of the offer is not admissible except in a proceeding to determine costs and attorney fees. Evidence of a void offer is not admissible in a proceeding to determine the attorney fees of any party.

(25) The fact that an offer is made but not accepted does not preclude a subsequent offer. The service of a subsequent offer does not operate to revoke a prior offer. A party may not be subject to the sanctions of Subsections (28) through (33) for the rejection of a prior offer from the same offeror.

(26) The service of a counter-offer does not operate as a rejection of a prior offer.

(27) For apportioned offers to multiple offerees that are conditioned upon the acceptance by all parties to whom the offer was directed, each offeree may serve a separate acceptance of the offer, but if the offer is not accepted by all offerees, no judgment or order of dismissal may be entered pursuant to Subsections (16) through (21) and the action shall proceed as to all. Any offeree who fails to accept the offer shall be subject to the sanctions in Subsections (28) through (33).

(28) Except as otherwise provided in Section (32), if a party who rejects an offer fails to obtain a more favorable judgment, the court:

(a) may not award to the party any discretionary costs or discretionary attorney fees from the commencement of the action to the entry of the judgment;

(b) may not award to the party any other costs or attorney fees for the period from the date of the service of the offer to the entry of the judgment;

(c) may not award to the party any interest for the period from the date of service of the offer to the date of entry of the judgment;

(d) shall order the party to pay the taxable costs and applicable interest incurred by the offering party or parties from the date of the service of the offer to the entry of the judgment; and

(e) may order the party to pay the offering party any or all of the following:

(i) reasonable costs incurred by the offering party for each expert witness whose services were reasonably necessary to prepare for and conduct the trial of the case for the

period from the date of the service of the offer to the date of the entry of judgment, together with any applicable interest; or

(ii) reasonable attorney fees incurred by the offering party for the period from the date of the service of the offer to the date of entry of the judgment, together with any applicable interest.

(29) In determining whether and how to award attorney fees, the trial court shall consider the following factors:

(a) whether the claim or defense was brought in good faith;

(b) whether the offer of judgment was reasonable and in good faith in both its timing and amount; and

(c) whether the decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith.

(30) In determining whether an offeree acted in bad faith or was unreasonable in rejecting an offer and proceeding to trial, the trial court may consider whether the offeree had sufficient information to determine the merits of the offer.

(31) An award against a party made pursuant to Subsections (28) through (33) may not exceed that portion of the costs, attorney fees, and applicable interest that are severally attributable to the party.

(32) The court may suspend the application of this section to prevent manifest injustice or if the offer was made in bad faith.

(33) An offeror may not be considered the prevailing party solely due to the offeree's failure to obtain a more favorable judgment.

(34) To determine whether a party who rejected an offer failed to obtain a more favorable judgment:

(a) If the offer provided that the court could award costs, attorney fees, or interest upon acceptance, the court shall compare the amount of the offer with the principal amount of the judgment, without inclusion of costs, attorney fees, or interest.

(b) If the offer precluded a separate award of costs, attorney fees, or interest upon acceptance, the court shall compare the amount of the offer with the sum of:

(i) the principal amount of the judgment; and

(ii) the amount of applicable taxable costs, attorney fees, and interest, including

applicable interest on the costs and attorney fees, incurred up to and including the date the offer was served.

(c) In making this comparison, the court shall calculate interest at the rate in effect on the date the offer was rejected.

(35) The court shall take into account any additur or remittitur before making the comparison.

(36) The court shall assign no value to a determination of good faith settlement when making the comparison.

(37) Every offer shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address.

(38) An unsigned offer is void. The signature of the attorney or party certifies that the offer is made in good faith and for the purpose of obtaining a settlement.

(39) This section does not apply to actions for personal injury, divorce, alimony, separate maintenance, or custody of children.

Legislative Review Note
as of 1-27-12 8:27 AM

Office of Legislative Research and General Counsel

Tab 4

FAQs

(1) Question 1.

Rule 1 provides that "these rules shall govern all actions brought after they take effect and all further proceedings in actions then pending." However, the advisory committee note states that the 2011 amendments are effective "only as to cases filed on or after the effective date, November 1, 2011, unless otherwise agreed to by the parties or ordered by the court." Which controls?

Answer:

The Supreme Court order adopting the 2011 amendments makes the amendments effective only as to cases filed on or after November 1, 2011 unless otherwise agreed to by the parties or ordered by the court. This court order controls the effective date.

(2) Question 2.

Who will keep track of the standard discovery deadlines?

Answer:

To provide competent representation, counsel must track discovery deadlines. Failure to act timely under the new rules is not without consequence. See, for example:

- URCP 26(d)(4) (party who fails to disclose or supplement disclosures timely cannot 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).
- URCP 26(c)(6) (party who fails to file a timely motion or stipulation for extraordinary discovery cannot obtain discovery beyond standard discovery limits).
- URCP 26(a)(4)(C)(i)(ii) (if a party fails to elect timely an expert deposition or written report, no further discovery of the expert is permitted).

The new rules contemplate increased judicial case management. It is anticipated the judges will track discovery deadlines and use existing procedures to deal with cases which have no activity after discovery deadlines expire. These procedures include, but are not limited to, scheduling conferences, final pretrial conferences, and orders to show cause for dismissal.

(3) Question 3.

What damages are considered in arriving at the damage amount for purposes of the tier level? For example, what if a party pleads $40,000.00 in compensatory damages and then for such punitive damages as are reasonable? Assuming a tier 1 case, would the jury be limited to awarding $10,000.00 in punitive damages? Does prejudgment interest and attorney's fees count toward the damage amount?

Answer:

"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." URCP 26(c)(4). "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)." URCP 8(a).

Parties should anticipate the value of any punitive damage claim and plead in to the appropriate tier. This is important because "a pleading that qualifies for tier 1 or tier 2 discovery shall constitute a waiver of any right to recover damages above the tier limits specified in Rule 26(c)(3), unless the pleading is amended under Rule 15." URCP 8(a).

To determine the appropriate tier, a party should include in the damage calculation all amounts sought as damages. Depending on the nature of the claim, prejudgment interest and attorney's fees may constitute damages.

(4) Question 4.

Is the tier designation of a case based on damages claimed by the plaintiff only, or based on the damages claimed by all parties in all claims for relief?

Answer:

"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." URCP 26(c)(4).

(5) Question 5.

What if a party is not permitted to state an amount of damages (as in medical malpractice claims), or a party simply wants to plead reasonable damages?

Answer:

"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)." URCP 8(a).

(6) Question 6.

Can I serve interrogatories or other discovery with my initial disclosures?

Answer:

Yes. Rule 26 provides that "methods of discovery may be used in any sequence." URCP

26(c)(2). A party who satisfies initial disclosure obligations, may then seek discovery from any source. Id.

(7) Question 7.

Does "that party" as used in Rule 26(c)(2) refer to the party requesting discovery, or the party from whom discovery is sought?

Answer:

Rule 26(c)(2) provides: "Except for cases exempt under paragraph (a)(3), a party man not seek discovery from any source before that party's initial disclosure obligations are satisfied." In other words, a party cannot seek discovery until his own initial disclosure obligations are satisfied.

(8) Question 8.

Do the new discovery rules place any limits on third-party subpoenas?

Answer: No.

(9) Question 9.

Are defendants or third-party defendants with legitimate conflicts between them required to share their standard discovery allocation for depositions, interrogatories, requests for production, and requests for admission?

Answer:

Yes. Standard fact discovery is "per side (plaintiffs collectively, defendants collectively, and third-party defendants collectively." URCP 26(c)(5). Significant conflicts between defendants may be grounds for seeking extraordinary discovery proportional to what is at stake in the litigation.

(10) Question 10.

What happens to the discovery deadlines if new parties are added?

Answer:

The days to complete standard fact discovery are calculated from the date the first defendant's first disclosure is due." URCP 26(c)(5). This creates a strong incentive for counsel to join all parties from the outset of the litigation.

A defendant joined sometime after the plaintiff's initial disclosures are due, must make his own initial disclosures within 28 days after his appearance. URCP 26(a)(2)(A).

When the timing of joinder impairs a party's fact discovery, that party may seek extraordinary discovery by stipulation or by motion.

(11) Question 11

If the plaintiff pleads a tier 1 case, and the defendant pleads a counterclaim which raises the damages above $50,000 moving the case into tier 2, is the plaintiff's recovery still capped at tier 1 limits?

Answer:

Yes. Under the rules, the limit on a party's right to recover is tied to the tier into which he plead, not to the cumulative total of damages sought. URCP(8)(a) ("A pleading that qualifies for tier 1 or tier 2 discovery shall constitute a waiver of any right to recover damages above the tier limits specified in Rule 26(c)(3), unless the pleading is amended under Rule 15").

The cumulative total of damages sought may move a case into tier 2 or 3 and the parties may conduct discovery accordingly. However, absent a motion to amend, no party can recover more than the tier ceiling into which that party first plead.

(12) Question 12.

Length of Depositions

Rule 30(d): "(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." The Committee Note to Rule 26 says that "deposition hours are charged to a side for the time spent asking questions of the witness. In a particular deposition, one side may use two hours while the other side uses only 30 minutes." Does this mean that a deposition of a nonparty, such as a treating physician, could take eight hours? (Four hours by defense counsel, and four hours by plaintiff's counsel.) Or is it only four hours total?

Under Rule 30(d) (or Rule 26(a)(40(B) as to non-retained experts), a deposition of a nonparty could in theory last up to eight hours, with fours hours per side. Under Rule 26(c)(5), on standard discovery, hours are calculated collectively per side, not per party or per witness, and the Committee intended that the same calculation rule apply to experts.

(13) Question 13.

Need for Order on Extraordinary Discovery

Is an order needed for stipulations to extend discovery, or is just a "stipulated statement" to be filed? (If the judge has to approve the stipulation by signing and order, why bother judges with these pro forma orders?)

If the proposed extraordinary discovery does not interfere with a previously-set trial date, discovery cutoff, or hearing date, then no order is necessary, and the parties need only file a "stipulated statement" that complies with Rule 29.

(14) Question 14.

Stipulations on Expert Discovery

How can you stipulate to extend the 28 days on expert disclosures if under Rule 29 such stipulations must be filed before the close of fact discovery?

Option One: They can't. Stipulations must be filed, even as to expert discovery, before the close of standard discovery.

Option Two: Rule 29, as worded, technically applies only to standard discovery. Nevertheless, the intent of the Committee is that parties may modify the limits and procedures for expert discovery under Rule 26(a)(4) after the close of standard discovery, and during expert discovery, by filing the same "stipulated statement" as required under Rule 29.

(15) Question 15.

Length of Expert Depositions

Expert depositions are limited to 4 hours under Rule 26(a)(4)(B) ("A deposition shall not exceed four hours . . .") Does this mean per side or in total? Rule 26(c)(5) refers to the hour and other limits on discovery as pertaining to plaintiffs collectively, defendants collectively, and third-party defendants collectively, but this applies to standard discovery, and not expert discovery.

It is the intent of the Committee that the limitation on deposition hours set forth for standard discovery under Rule 26(c)(5) also apply as to expert discovery.

(16) Question 16.

Timing on Election of Report or Deposition

The election of report or deposition must be made within 7 days "after" the opponent's expert designation. Rule 26(a)(4)(C)(i). I assume this means service of the expert designation, meaning I would always have additional time if it was mailed, or for weekends. Is this true? Or are expert designations filed, and the election deadline runs from then?

Timing on expert designations is calculated using Rule 6. That is, three extra days are added for service by mail, and intermediate weekends and holidays are excluded from the calculation of the seven-day period.

(17) Question 17.

What Does "Reaching the Limits of Standard Discovery" Mean?

Rule 29 says that the parties may stipulate for additional discovery "before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules." Suppose I am in a tier 3 case, and have used up all of my deposition time, but

not my interrogatories or my requests for production. Does this really mean I have to use those up as well before I can stipulate or move for additional discovery? I guess that it means "discovery of the same type for which I want more;" in other words, I shouldn't be asking for more interrogatories until I have used up all those available to me. Am I right?

The Committee intends a common-sense approach to interpretation of the rules. Too little discovery has never been the problem, and the Committee does not intend that a party would have to submit meaningless discovery. The intent is to require a party use up all of the allotted time or numbers in a discovery category before asking for more.

(18) Question 18.

Can experts be designated early and, if so, does that change the timing on opposing experts

Can an expert be designated early; i.e., before the close of standard discovery? If so, what happens with the other side's deadlines? (Note- this is the same as a question posed to

What if a plaintiff discloses his expert at the very outset of the case? Is the opposing party's report/depo election due seven days after that actual disclosure, or seven days after the last possible date for disclosure, which would be fourteen days after the close of fact discovery?

Rule 26(a)(4)(C)(I) assumes that fact and expert discovery will occur in sequence; i.e. fact discovery first, then expert discovery after the close of standard (fact) discovery. The Committee is of the view that the deadlines for disclosure of expert witnesses cannot be short-circuited by one party's designation before the time that its expert disclosures are due. In the example given, the defendant would still have seven days from the close of fact discovery in which to designate its experts.

(19) Question 19.

Rebuttal Experts

Please explain how the designation of rebuttal experts is to work. Does the rule even provide for them? Rule 26 (a)(4)(C)(ii) is a bit confusing.

Rather than calculating expert designation dates by a party's status as plaintiff or defendant, the rules now require the calculation to be made by which party has the burden of proof on a particular issue. For example, in the usual case, a plaintiff would designate its experts on liability, causation, and damages within seven days of the close of fact discovery. (These are all issues on which it has the burden of proof.)

Within seven days thereafter, the defendant needs to serve an election of either a deposition or report. These depositions or reports are to be completed within 28 days.

Then, within seven days of getting the report or taking the deposition, defendant must designate its own contravening experts.

Within seven days of those designations, plaintiff must serve its own election of depositions or report from the defense experts. Again, those reports or depositions must be completed with 28 days.

As to any issue requiring a rebuttal expert, plaintiff would in turn have seven days after receiving that expert's report or taking the expert's deposition in which to serve a designation of a rebuttal expert.

If a party, the plaintiff for example, fails to timely serve an election of report or deposition for defendant's expert- and thus no report is produced or deposition taken from the plaintiff's expert-- then the "trigger" for the defendant to file its own designations is 7 days after the date that the plaintiff's election was due.

(20) Question 20.

Production of "all data and other information that was relied upon" by an expert

In disclosing an expert, Rule 26(a)(4)(A) says that you need to provide "A brief summary of the anticipated opinions, along with all data and other information that was relied upon." What does this latter phrase mean? Does it mean produce actual records? Or does it mean just a summary list, such as "my training, my education, my 30 years of experience, the medical records of the plaintiff"?

The Committee intends that "a brief summary of the anticipated opinions, along with all data and other information that was relied upon" would mean a short, but concise, summary of the opinions, in the same way that a summary of the expected testimony of fact witnesses is to be disclosed in initial disclosures under Rule 26(a)(1)(A)(ii). It is sufficient if the expert witness disclosure identifies in general terms the basis for the opinion, including materials reviewed, texts consulted, and so forth, keeping in mind that full exploration of such foundational topics would normally be made in the report or deposition.

(21) Question 21.

Payment for report preparation

Does the requesting party have to pay for the preparation of a report from the opposing expert witness?

No. Rule 26(a)(4)(B) only requires payment for the cost of giving a deposition, not for preparing reports. That expense has to be paid by the party producing the expert.

(22) Question 22.

Multiple defendants- what if no election is filed?

The rule says that you must file an election or you get neither a report nor a deposition. What happens when multiple defendants do not file an election? Does it default to a deposition?

No. Rule 26(a)(4)(D) only defaults to a deposition where "competing" elections are served; i.e. one defendant asks for a report and the other asks for a deposition. In that case, it defaults to a deposition. However, where no defendant files an election, the default is no further discovery (no report, no deposition) under Rule 26(a)(4)(C)(ii).

(23) Question 23.

Argument for award in excess of tier limits

Can you argue for an award in excess of the tier limits? Why should you not be able to argue for damages in excess of the tier limits? for example, tortfeasor may have only $50,000 in coverage, and therefore you want to plead it is a tier 1 claim. However, you may have additional UIM coverage, and the amount the jury determines as the full amount of your damages will determine whether you can recover on the UIM policy. Sure, the judge can reduce your recovery against the tortfeasor to $50,000, but you ought to be allowed to argue for your actual damages.

The rules do not specify an answer to this question, and the Committee is undetermined as to the answer. There are arguments each way.

(24) Question 24.

Partial Motions to Dismiss and Deadlines

If there is a Rule 12 motion to dismiss on some claims, but answers are filed on other claims, are the deadlines stayed?

No. As under the rules applicable to cases filed before November 1, 2011, there is no automatic stay unless a motion to dismiss is filed as to all claims for relief. As the Committee Note states, "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."

The trigger for the deadlines under Rule 26(c)(5) is the date the first defendant's first disclosure is due and that, in turn, is determined under Rule 26 (a)(2) by the service of the first answer to the complaint. Careful practice requires filing an answer as to claims on which no motion to dismiss has been filed, although a stipulation commonly obviates the need for this. If an answer is filed, and absent any order or stipulation otherwise, the deadlines would begin to run.

(25) Question 25.

Is the jury told about the tier limits?

Is the jury advised of the tier limits?

The rules do not specify an answer to this question, and the Committee is undetermined as to the answer. There are arguments each way.

(26) Question 26.

What if a jury awards in excess of the tier limits? May a motion to amend to conform to the evidence be made at that point?

What if without being asked to do so, a jury awards over the tier limit, say $75,000 on a Tier 1 claim? May the plaintiff move under Rule 15(b) to amend to conform to the evidence?

Not in the opinion of the Committee. Rule 8(a) specifies that party who pleads the case as a tier 1 or tier 2 case has waived any right to recover damages above the tier limits, unless an amendment is made under Rule 15. The choice of a lower tier is made, one assumes, to be free of significant discovery in return for giving up the chance to obtain greater damages. It would hardly be fair if a party were allowed to plead a case into tier 1, prevent the defense from conducting the discovery befitting a larger claim, and then recover an amount in excess of the tier limit.

(27) Question 27.

Designation of experts on affirmative defenses

If I am understanding this correctly, both a plaintiff and a defendant would need to designate experts within seven days of the close of fact discovery, if the defendant is claiming comparative fault or anything else on which it has the burden of proof. Is that correct?

Yes. Under Rule 26(a)(4)(C), the deadlines for expert designations are determined by who bears the burden of proof on the issue for which the expert is being offered, not the status of the party as plaintiff or defendant. Thus, if a defendant has an expert on an issue for which it has the burden of proof- such as an affirmative defense- it must designate that expert within seven days of the close of fact discovery and before its "contravening" experts. This, of course, can be changed by stipulation under Rule 29 or court order under Rule 6(b).

(28) Question 28.

Must an expert produce his complete file?

Why does the committee note (line 362) say that an expert must produce his "complete file" when Rule 26(a)(4) says nothing about this?

(29) Question 29.

Prior reports from medical examiners via subpoena

The old rule 35(c) on getting prior reports from medical examiners has been eliminated. Can we still get those reports through subpoenas?

Yes, subject to requirements of proportionality and relevance under Rule 26. The amendment to Rule 35 simply eliminated the need for automatic production of such prior reports, without request.

(30) Question 30.

Special practice area rules

One of the committee notes suggests that specialty practice groups may propose their own rules. Are there any limitations on this?

As long as the proposed rules for the speciality do not significantly conflict with the intent of the November 2011 amendments (see Committee Note to Rule 1), speciality practice groups are free to devise additional rules applicable to their areas.

(31) Question 31.

Wrongful Death Claims and Rule 26.2

Does Rule 26.2 (applicable to "personal injury" actions) apply to actions claiming wrongful death?

Yes. The Committee intended that "actions seeking damages arising out of personal physical injuries or physical sickness" be broadly interpreted, and used IRS Code Section 104(a)(2) as its model. That would include wrongful death claims.

(32) Question 32.

(Committee) Does Rule 26.2 apply only to cases filed on or after its effective date, December 22, 2011, to cases filed on or after the effective date of the other disclosure and discovery amendments November 1, 2011, or to all pending cases?

(33) Question 33.

(Judge Thomas Higbee) How will the limitations on the number of discovery requests be allocated in a case with multiple parties on one side who are pointing the finger at one another for purposes of allocating fault?

(34) Question 34.

(Bob Wilde) In a divorce modification seeking to increase child support where assets and net worth are irrelevant, is it necessary to disclose the non-income items in 26.1(c)?

Tab 5

Administrative Office of the Courts

Chief Justice Christine M. Durham
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: February 14, 2012
Re: Disclosure and discovery workshops

(1) Suggested Amendments

Several of us from the Administrative Office of the Courts conducted local workshops for judges and clerks from all of the districts. The workshops were designed, not to raise awareness, but to encourage planning for internal operations. Several questions were raised that can be discussed at some point, but the participants encouraged the committee to consider these further amendments:

- Amend Rule 5 to permit court to email notice to lawyers and parties.
    - The courts are developing a notice of interim deadlines based on the date of the answer that will be emailed to lawyers and self-represented parties.
- Amend Rule 10 to require that all of the attorney contact information provided on a pleading must match that provided to the Bar.
- Amend Rule 10 to require coversheet for counter and crossclaims.
    - The coversheet will be used to designate a tier.
- Amend Rule 10 to require tier designation in the caption.
- Amend Rule 26 to default to tier 1 if no tier is designated in a claim for damages.
- Amend Rule 26 to reinstate the exemption from disclosures for contract cases under $20,000.
    - Excluding evidence that pro se parties failed to produce receipts in debt collection cases will be unfair.
- In motions and stipulation for extraordinary discovery, amend Rule 26 to ensure that the client, not the lawyer representing a party, has approved a discovery budget.

(2) Civil Rules not Applicable

During the workshops, the question was posed whether the designation of a tier, mandatory disclosures, and time limits on disclosure and discovery apply to select

450 South State Street / POB 140241 / Salt Lake City, Utah 84114-0241 / 801-578-3808 / Fax: 801-578-3843 / email: tims@email.utcourts.gov

casetypes. I have advised the district court that select casetypes are entirely exempt from the Rule of Civil Procedure, at least in some circumstances.

URCP 1 provides:

> These rules govern the procedure in the courts of the state of Utah in all actions of a civil nature, except as governed by … statutes enacted by the Legislature and except as stated in Rule 81.

Rule 81 provides:

> (a) Special statutory proceedings. These rules shall apply to all special statutory proceedings, except insofar as such rules are by their nature clearly inapplicable….
>
> (b) Probate and guardianship. These rules shall not apply to proceedings in uncontested probate and guardianship matters, but shall apply to all proceedings subsequent to the joinder of issue therein….
>
> (c) Application to small claims. These rules shall not apply to small claims proceedings except as expressly incorporated in the Small Claims Rules.
>
> (d) On appeal from or review of a ruling or order of an administrative board or agency. These rules shall apply to the practice and procedure in appealing from or obtaining a review of any order, ruling or other action of an administrative board or agency, except insofar as the specific statutory procedure in connection with any such appeal or review is in conflict or inconsistent with these rules.

I believe that statutes describing special procedures in the casetypes listed below are sufficiently different from the Rules of Civil Procedure that "such rules are by their nature clearly inapplicable." This exemption goes well beyond Rule 26(a)(3), which exempts from initial disclosures actions:

- for judicial review of adjudicative proceedings or rule making proceedings of an administrative agency;
- governed by Rule 65B or Rule 65C;
- to enforce an arbitration award;
- for water rights general adjudication under Title 73, Chapter 4.:

I believe that the following casetypes are not governed by the Rules of Civil Procedure, but rather by the statutes creating the cause of action. In the context of Rule 26, this means that disclosure and discovery are not part of case management and the parties do not have to declare a discovery tier.

Cases governed by statutes and exempt under Rule 81(a):

- Civil Stalking: Section 77-3a-101 et seq.
- Cohabitant Abuse: Title 77, Chapter 36.
- Eviction/Forcible Entry and Detainer: Section 78B-6-801 et seq.

- Expungement: Title 77, Chapter 40.
- Foreign Domestic Decree: Section 78B-13-305 and Title 78B, Chapter 14, Section 601 et seq.
- Forfeiture of Property: Title 24, Chapter 1.
- Hospital Lien: Title 38, Chapter 7.
- Lien/Mortgage Foreclosure: Title 38.
- Post Conviction Relief: Title 78B, Chapter 9.
- Temporary Separation: Section 30-3-4.5.
- Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA): Title 78B, Chapter 13.
- Uniform Interstate Family Support Act (UIFSA): Title 78B, Chapter 14.
- Wrongful Lien: Title 38, Chapter 9a.

Cases classified as "probate" and exempt under Rule 81(b) until the issues are joined:

As probate cases, the following casetypes are exempt under Rule 81(b) until the issues are joined by an answer/objection being filed. Since none of these cases includes a demand for damages, they are tier 2 cases. The designation should be at the time of the petition, but the designation would have no impact unless an answer/objection is filed.

- Adoption
- Conservatorship
- Estate Personal Representative - Formal and Informal
- Gestational Agreement
- Guardianship
- Involuntary Commitment
- Minor's Settlement
- Name Change
- Supervised Administration
- Trusts
- Unspecified Probate

Appeal of an administrative agency action and exempt under Rule 81(d):

- Administrative Agency Review
- Tax Court (Appeal of Tax Commission Decision)