Agenda
Advisory Committee on Rules of Civil Procedure

April 25, 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
HB 235, Offer of judgment in civil cases.	Tab 2	Rep. Ken Ivory
Rule 26.2. Disclosures in personal injury actions.	Tab 3	Frank Carney Trystan Smith Michael Zimmerman
Initial disclosure deadlines. Rule 26	Tab 4	James Blanch
Definition of damages. FAQ	Tab 5	Tim Shea
FAQs	Tab 6	Frank Carney Judge Derek Pullan

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

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

May 23, 2012
September 26, 2012
October 24, 2012
November 28, 2012

Tab 1

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

March 28, 2012

PRESENT: Francis M. Wikstrom, Chair, Honorable John L. Baxter, James T. Blanch, Steve Marsden, Terrie T. McIntosh, Jonathan O. Hafen, Leslie Slaugh, Trystan B. Smith, Honorable Kate Toomey, Barbara L. Townsend

EXCUSED: Sammi Anderson, Professor Lincoln L. Davies, Honorable David O. Nuffer, Honorable Derek P. Pullan, Robert J. Shelby, Honorable Todd M. Shaughnessy

PHONE: Honorable Lyle R. Anderson, Francis J. Carney, David W. Scofield, Lori Woffinden

STAFF: Diane Abegglen, Timothy Shea

GUESTS: Michael Zimmerman

I. Approval of minutes.

Mr. Wikstrom entertained comments from the committee concerning the February, 2012 minutes. The committee unanimously approved the minutes.

II. HB 235, Offer of judgment in civil cases.

Rep. Ivory was unable to attend, so the topic will be discussed at the April meeting.

III. Rule 26.2(d).

Mr. Zimmerman represents State Farm Mutual Auto Insurance Company. His client has raised issues with the new Rule 26.2's requirement that "all non-public information disclosed under this rule shall be used only for purposes of the action, unless otherwise ordered by the court."

He noted that much information obtained in litigation goes into the insurer's database as a matter of course, and that restricting the use of this information to "purposes of the action" is unworkable and ill-defined.

Mr. Zimmerman pointed out that state regulations already restrict the use of certain private information by insurance companies, and distributed the insurance

regulation referred to in his letter, Utah Admin. R. 590-206-17. He explained that insurance companies accumulate all data from whatever source in a database and are sometimes required by law to use some of that data in a way that arguably is not "for the purposes of the action," which is the restriction in Rule 26.2. Mr. Zimmerman also said that "non-public information" was overly broad and vague.

Mr. Zimmerman agrees with the purpose of protecting sensitive information without delaying the litigation. He referred to the effort in the federal rules to develop a very detailed "default" protective order, which specifies select information for select purposes. He proposed amending the Rule 26.2(d) to read: "All non-public information disclosed under this rule shall be used only for the purposes of the action, unless otherwise required by law or ordered by the court."

Mr. Carney summarized the evolution of the rule. Because of the reduction in the number of interrogatories, the purpose of Rule 26.2 was to require the disclosure of information routinely produced during discovery. In the process of drafting the rule, the Committee became aware of a need for defendants to obtain Social Security numbers to comply with a new federal requirement to query the Medicaid database in order to determine if it had any lien in a potential settlement or award. When published for comment, there was a significant adverse reaction to the requirement to disclose Social Security numbers and health insurance claim numbers, which has been the subject of frequent dispute arising out of privacy concerns. So the committee originally included a restriction that the SSN could only be used to to query the Medicare database.

Mr. Carney questioned whether the state administrative regulations on privacy applied to non-customers, such as third-party claimants. He further noted that, absent a protective order, and subject to other statutory and common-law restrictions (like HIPAA), information obtained in discovery has been open to persons who are not parties to the action. It might set a precedent with many unintended consequences if a rule were to change the presumption of future availability of information obtained in discovery.

Further discussion in Committee raised the issue of other sensitive information, such as physical and mental health care information unrelated to the action, which would nevertheless have to be disclosed. Under the former rules, a party could have sought a protective order for this information, but under this rule would have to disclose it early in the case.

As a result, the rule was amended to generally include "non-public information" and to restrict its use to "the purposes of the action."

Judge Toomey noted that the Judicial Council has classified specified records and other information into public and non-public categories.

Mr. Wikstrom asked how an insurance company would have handled information that was the subject of a protective order under the former system of discovery. Mr. Zimmerman said the order would be followed. He suggested amending the rule to restrict the use of Social Security numbers and Medicare health insurance claim numbers as originally proposed and to rely on protective orders for restrictions on other sensitive information.

Mr. Carney agreed that the original intent, and the major concern, was to prevent further disclosure of sensitive SSNs/HICNs beyond the purpose of querying the federal databases. He will work with Mr. Zimmerman and Mr. Smith to revise Rule 26.2 to achieve that end They will contact representatives of the defense and plaintiffs' personal injury bars who were involved originally in drafting Rule 26.2.

IV. Rule 83. Vexatious litigants.

Mr. Shea said that the committee's recommendation to adopt the new rule was submitted to the Supreme Court, and the Court asked that the committee consider the two further amendments shown in the draft rule. The Board of District Court Judges has reviewed the further changes and recommends their approval.

The committee further amended Lines 8 - 10 to say "at least <u>five</u> claims, other than small claims actions, that have been finally determined in that person's favor." The committee approved the rule as amended. Mr. Wikstrom and Judge Toomey will present the proposal to the Supreme Court for their final action.

V. Miscellaneous discovery adjustments.

The committee approved Rule 5 to be published for comment.

The committee further amended Rule 10 to change "claim" to "case" in line 8. The objective is that each party filing a claim will designate the correct discovery tier as of that time, taking into account the aggregate damages claimed by all parties up to that point. The committee approved Rule 10, as amended, to be published for comment. Mr. Blanch will draft a section for the FAQs explaining that if a counter or cross claim increases the discovery tier, a plaintiff who can prove damages exceeding the original tier should consider amending its complaint to claim them.

The committee approved Rule 11 to be published for comment.

The committee did not approve the proposed amendment to Rule 26.

The committee further amended Rule 37 to add "is required" after "disclosure" in line 26 and in line 27 to end the sentence after "protection," deleting "from

discovery." The committee also amended line 35 to read: "The court may make orders regarding disclosure or discovery…." Finally, the committee deleted from lines 49-50 "research, development, or commercial." The committee approved Rule 37, as amended, to be published for comment.

VI. Rule 58A. Entry of judgment; abstract of judgment. URAP 4. Appeal as of right: when taken.

The committee confirmed that the better model is to amend URCP 58A and URAP 4 so the time to appeal runs from the date on which proof of service of the judgment is filed, rather than amending URAP 4 so a party can file a motion in the trial court to reset the time in which to appeal. Mr. Wikstrom will propose this approach to the chair of the appellate rules committee for the purpose of a joint proposal to the Supreme Court.

VII. SJR 15 amending URCP 26.

Mr. Shea advised the committee that SJR 15 amending URCP 26 has passed and is now the law. Several committee members said that the better approach would have been to amend the rules of evidence to create an evidentiary privilege, which would apply in federal and state court.

VIII. Adjournment.

The meeting adjourned at 6:00 p.m. Due to the lack of time the committee did not consider the frequently asked questions. The next meeting will be held on April 25, 2012 at 4:00 p.m. at the Administrative Office of the Courts.

Tab 2

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: Aaron Osmond

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

H.B. 235
OFFER OF JUDGMENT IN CIVIL CASES

HOUSE COMMITTEE AMENDMENTS AMENDMENT 1 FEBRUARY 14, 2012 1:37 PM

Representative **Ken Ivory** proposes the following amendments:

1. *Page 1, Lines 11 through 12:*

This bill:

- outlines a process for offers of judgment in civil actions **between business entities where the amount in controversy does not exceed $50,000** ;

2. *Page 2, Line 30:*

(1) **This Section applies to commercial transactions between business entities or organizations in which the amount in controversy does not exceed $50,000.**

(2) At any time {~~before trial,~~} **after commencement of a legal action** but not less than 10 days before commencement of the

3. *Page 2, Lines 39 through 40:*

{~~(3)~~} **(4)** A party may not be subject to the sanctions of Subsections {~~(28)~~} **(29)** through {~~(33)~~} **(34)** for rejection of an offer that is made and served pursuant to Subsection {~~(1)~~} **(2)** or {~~(2)~~} **(3)** less than 10 days

4. *Page 2, Lines 48 through 51:*

{~~(6)~~} **(7)** The offer may specify a longer acceptance period than the period prescribed by Subsection {~~(22)~~} **(23)** , but may not permit an acceptance after the commencement of a trial if the offer is made pursuant to Subsection {~~(2)~~} **(3)** and may not permit an acceptance after the commencement of the proceeding if the offer is made pursuant to Subsection {~~(2)~~} **(3)** .

5. *Page 2, Lines 57 through 58:*

{~~(9)~~} **(10)** An offer may not be withdrawn except by written stipulation or as provided in Subsection {~~(23)~~} **(24)** .

6. *Page 3, Lines 80 through 82:*

{~~(15)~~} **(16)** 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)~~} **(15)** and this Subsection {~~(15)~~} **(16)** . When two or more offerees jointly

claim or defend

7. *Page 3, Lines 86 through 87:*

{~~(16)~~} (17) If the offeree serves written notice that the offer is accepted within the acceptance period provided by Subsection {~~(22)~~} (23), the offer shall be considered accepted and either party may

8. *Page 4, Line 91:*

{~~(17)~~} (18) Except as otherwise provided in Subsection {~~(27)~~} (28), the clerk or judge shall enter

9. *Page 4, Lines 111 through 113:*

{~~(20)~~} (21) A claimant who has not been paid within a reasonable time may obtain an order to amend the judgment and remove the Subsection {~~(18)~~} (19) designation of compromise and settlement.

10. *Page 4, Lines 116 through 118:*

{~~(22)~~} (23) An offer made pursuant to Subsection {~~(1)~~} (2) may be accepted before trial or within 10 days after service, whichever period is shorter. An offer made pursuant to Subsection {~~(2)~~} (3) may be accepted before the commencement of the proceeding or within 10 days after service,

11. *Page 4, Line 120 through Page 5, Line 121:*

{~~(23)~~} (24) The offer shall be considered rejected by the offeree if not accepted within the period prescribed by Subsection {~~(22)~~} (23). If this period is enlarged by the court, the offeror may

12. *Page 5, Lines 127 through 129:*

{~~(25)~~} (26) 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)~~} (29) through {~~(33)~~} (34) for the rejection of a prior offer

13. *Page 5, Lines 132 through 138:*

{~~(27)~~} (28) 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)~~} (17) through {~~(21)~~} (22) 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)~~} (29) through {~~(33)~~} (34) .

{~~(28)~~} (29) Except as otherwise provided in Section {~~(32)~~} (33) , if a party who rejects an offer fails

14. Page 6, Line 167:

{~~(31)~~} (32) An award against a party made pursuant to Subsections {~~(28)~~} (29) through {~~(33)~~} (34) may not

Renumber all remaining Subsections accordingly

Tab 3

Rule 26.2 Disclosures in personal injury actions.

(a) **Scope.** This rule applies to all actions seeking damages arising out of personal physical injuries or physical sickness as defined by 26 U.S.C. Sec. 104(2)(a).

(b) **Plaintiff's additional initial disclosures.** Except to the extent that plaintiff moves for a protective order, plaintiff's Rule 26(a) disclosures shall also include:

(b)(1) A list of all health care providers who have treated or examined the plaintiff for the injury at issue, including the name, address, approximate dates of treatment, and a general description of the reason for the treatment.

(b)(2) A list of all other health care providers who treated or examined the plaintiff for any reason in the 5 years before the event giving rise to the claim, including the name, address, approximate dates of treatment, and a general description of the reason for the treatment.

(b)(3) Plaintiff's Social Security number or Medicare health insurance claim number (HICN), full name, and date of birth. The SSN and HICN may only be used by defendant for purposes of compliance with the Medicare, Medicaid, and SCHIP Extension Act of 2007.

(b)(4) A description of all disability or income-replacement benefits received if loss of wages or loss of earning capacity is claimed, including the amounts, payor's name and address, and the duration of the benefits.

(b)(5) A list of plaintiff's employers for the 5 years preceding the event giving rise to the claim if loss of wages or loss of earning capacity is claimed, including the employer's name and address and plaintiff's job description, wage, and benefits.

(b)(6) Copies of all bills, statements, or receipts for medical care, prescriptions, or other out-of-pocket expenses incurred as a result of the injury at issue.

(b)(7) Copies of all investigative reports prepared by any public official or agency and in the possession of plaintiff or counsel that describe the event giving rise to the claim.

(b)(8) Except as protected by Rule 26(b)(5), copies of all written or recorded statements of individuals, in the possession of plaintiff or counsel, regarding the event giving rise to the claim or the nature or extent of the injury.

(c) **Defendant's additional disclosures.** Defendant's Rule 26(a) disclosures shall also include:

(c)(1) A statement of the amount of insurance coverage applicable to the claim, including any potential excess coverage, and any deductible, self-insured retention, or reservations of rights, giving the name and address of the insurer.

(c)(2) Unless the plaintiff makes a written request for a copy of an entire insurance policy to be disclosed under Rule 26(a)(1)(D), it is sufficient for the defendant to disclose a copy of the declaration page or coverage sheet for any policy covering the claim.

(c)(3) Copies of all investigative reports, prepared by any public official or agency and in the possession of defendant, defendant's insurers, or counsel, that describe the event giving rise to the claim.

(c)(4) Except as protected by Rule 26(b)(5), copies of all written or recorded statements of individuals, in the possession of defendant, defendant's insurers, or counsel, regarding the event giving rise to the claim or the nature or extent of the injury.

(c)(5) The information required by Rule 9(l).

~~(d) All non-public information disclosed under this rule shall be used only for the purposes of the action, unless otherwise ordered by the court.~~

Advisory Committee Note

This rule requires disclosure of the key fact elements that are typically requested in initial interrogatories in personal injury actions. The rule refers to the definition of physical personal injuries used by the Internal Revenue Code, as that definition is amply defined by regulation and case law. The Medicare information disclosure, including Social Security numbers, is designed to facilitate compliance with the requirements for insurers under 42 U.S.C. § 1395y(b)(8)(C). See, Hackley v. Garofano, 2010 WL 3025597 (Conn.Super.) and Seger v. Tank Connection, 2010 WL 1665253 (D.Neb.). Due to privacy concerns, the use of this information is expressly limited to querying the relevant federal or state databases.

The committee anticipates full disclosures in most cases as a matter of course. However, there may be rare circumstances warranting a protective order in which a party would otherwise have to disclose particularly sensitive information wholly unrelated to the injury at issue, such as a particularly sensitive healthcare procedure or treatment. Information and documents not included in the application for a protective order must be provided within the timeframe of this rule.

Tab 4

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)(3), 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, except for an adverse party, 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)(5);

(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)(2) **Timing of initial disclosures.** The disclosures required by paragraph (a)(1) shall be made:

(a)(2)(A) by the plaintiff within 14 days after service of the first answer to the complaint; and

(a)(2)(B) by the defendant within ~~28~~ 42 days after ~~the plaintiff's first disclosure~~ the service of the first answer to the complaint or within 28 days after that defendant's appearance, whichever is later.

(a)(3) **Exemptions.**

(a)(3)(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)(3)(A)(i) for judicial review of adjudicative proceedings or rule making proceedings of an administrative agency;

(a)(3)(A)(ii) governed by Rule 65B or Rule 65C;

(a)(3)(A)(iii) to enforce an arbitration award;

(a)(3)(A)(iv) for water rights general adjudication under Title 73, Chapter 4, Determination of Water Rights.

(a)(3)(B) In an exempt action, the matters subject to disclosure under paragraph (a)(1) are subject to discovery under paragraph (b).

(a)(4) **Expert testimony.**

(a)(4)(A) **Disclosure of 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 Rule 702 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)(4)(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)(4)(C) **Timing for expert discovery.**

(a)(4)(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)(4)(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)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(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)(4)(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)(4)(A) within seven days after the later of (i) the date on which the election under paragraph (a)(4)(C)(i) is due, or (ii) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(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)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(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)(4)(D) **Multiparty actions.** 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)(4)(B) and Rule 30.

(a)(4)(E) **Summary of non-retained expert testimony.** If a party intends to present evidence at trial under Rule 702 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)(4)(C). A deposition of such a witness may not exceed four hours.

(a)(5) **Pretrial disclosures.**

(a)(5)(A) A party shall, without waiting for a discovery request, provide to other parties:

(a)(5)(A)(i) 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)(5)(A)(ii) 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)(5)(A)(iii) 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)(5)(B) Disclosure required by paragraph (a)(5) 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. Privileged matters that are not discoverable or admissible in any proceeding of any kind or character include all information in any form provided during and created specifically as part of a request for an investigation, the investigation, findings, or conclusions of peer review, care review,

or quality assurance processes of any organization of health care providers as defined in the Utah Health Care Malpractice Act for the purpose of evaluating care provided to reduce morbidity and mortality or to improve the quality of medical care, or for the purpose of peer review of the ethics, competence, or professional conduct of any health care provider.

(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)(4), 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)(4), 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) **Methods, sequence and timing of discovery; tiers; limits on standard discovery; extraordinary discovery.**

(c)(1) **Methods of discovery.** 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) **Sequence and timing of discovery.** 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)(3), 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.

(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 paragraphs(a)(4)(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

Legislative Note

Tab 5

Definition of “damages” for designation of a discovery tier.

Question: 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? Do 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 by all parties up to that point. Depending on the nature of the claim, prejudgment interest and attorney's fees may constitute damages.

Question: 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).

Tab 6

FAQs

(1) Monitoring discovery deadlines.

Question: Who will keep track of the standard discovery deadlines?

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Answer: Counsel and unrepresented parties 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. The Administrative Office of the Courts is creating a notice of presumptive deadlines to be sent to the parties in each case. The notice assumes no extensions of time for extraordinary discovery or otherwise, and therefore may not be accurate. 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. However, notwithstanding these judicial efforts, the parties themselves bear the ultimate responsibility to track and meet deadlines imposed under the new rules.

(2) Designating a tier without specified damages.

Question: 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).

(3) Effect of not designating a discovery tier

Question: What if a party fails to designate a specified tier as required by Rule 26(c)(3), but pleads a claim for specified damages and unspecified damages in an amount to be determined at trial. For example, what if a party pleads $20,000 in economic damages and for such non-economic damages in an amount to be determined at trial?

Answer: Parties should anticipate the value of all their claims for relief and damage calculations, and plead in to the appropriate tier. In the above example, if a party claims

economic and non-economic damages and seeks an award of $50,000 or more, she should designate an appropriate tier or specify the damages sought for economic and non-economic damages.

(4) Third-party subpoenas.

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

Answer: Yes. Rule 26(c)(1) expressly includes subpoenas in the definitions of “methods of discovery.” That means subpoenas are subject to the limitations of proportionality, relevance, and privilege which apply to all discovery methods under Rule 26(b). However, there is no stated limitation on subpoenas in the "standard fact discovery" grid of Rule 26(c)(5).

(5) Definition of “damages” for designation of a discovery tier.

Question: 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.

> Already Published:
>
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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.

Question: 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).

(6) Length of Depositions.

Question:

Answer: 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.

(7) Reaching the limits of standard discovery.

Question: 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?

Answer: 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.

(8) Extraordinary discovery order.

Question: 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?)

Answer: 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.

(9) Expert discovery—Stipulations.

Question: 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?

Answer: 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.

(10) Expert discovery—Timing on election of report or deposition.

Question: The election of a 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?

Answer: 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.

(11) Expert discovery—Designating experts.

Question: 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?

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?

Answer: 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.

(12) Expert discovery—Designation of experts on affirmative defenses.

Question: 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?

Answer: 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).

(13) Expert discovery—Rebuttal experts.

Question: 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.

Answer: 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.

(14) Expert discovery—Data relied upon by an expert.

Question: 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"?

Answer: 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.

Question: 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?

Answer:

(15) Expert discovery—Payment for expert's report preparation.

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

Answer: 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.

(16) Expert discovery—Length of expert depositions.

Question: 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.

Answer: 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.

(17) Expert discovery—Discovery between aligned parties.

Question: 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?

Answer: 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).

(18) Judgment exceeding tier limits.

Question: 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.

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

Question: What if a jury awards an amount 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?

Answer: 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.

(19) Partial motions to dismiss and deadlines.

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

Answer: 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.

(20) Discovery tier limits and the jury.

Question: Is the jury told about the tier limits?

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

(21) Subpoena for medical examiner reports.

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

Answer: 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.

(22) Special practice rules.

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

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

(23) Special practice rules—Wrongful death claims.

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

Answer: 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.

(24) Special practice rules—Effective date.

Question: 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?

Answer:

(25) Special practice rules—Divorce modification.

(Bob Wilde) **Question:** 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)?

Answer:

From Frank:

Q- "I have been unable to find any rules about rebuttal expert witnesses in the new rules. Am I missing something?"

Q- "On the discovery dates that courts have started to send out automatically, there is no deadline for rebuttal designations. One defense lawyer has raised the question of whether rebuttal designations are even allowed after defense designations. Rule 26(A)(4) does not expressly refer to rebuttal unless it is considered to be in the nature of an expert designation by one who does not bear the burden of proof. This does not seem entirely accurate as there may be occasions where I could be offering rebuttal on an issue as to which I do bear the burden but I am responding to defense expert testimony in a different specialty than my original designation. It would be absurd to think that plaintiff would have to designate rebuttals before the defense expert designations. In any event, is the issue of rebuttal designation one that you have considered?"