Agenda
Advisory Committee on Rules of Civil Procedure

September 26, 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
Court-generated deadline notices	Tab 2	Judge Kate Toomey Debra Moore
Appeals	Tab 3	Cullen Battle
Rule of Small Claims Procedure 3	Tab 4	Judge John Baxter Tim Shea
Post-trial motions: Rules 50, 52, 59, 60.	Tab 5	Frank Carney
Rule 37. Reference to paragraph (e) in paragraphs (g) and (h)	See Tab 7	Judge Todd Shaughnessy
Rule 5: E-filing date not noted on the paper. Rule 5 and Rule 7: Conflict about filing and service.	Tab 6	David Scofield
Consideration of comments: Rule 5, Rule 10, Rule 11, Rule 26, Rule 26.2, Rule 37, Rule 105	Tab 7	Tim Shea
FAQs	Tab 8	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.

October 24, 2012
November 28, 2012
January 23, 2013
February 27, 2013
March 27, 2013
April 24, 2013
May 22, 2013
September 25, 2013
October 23, 2013
November 20, 2013

Tab 1

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE OF THE RULES OF CIVIL PROCEDURE

MAY 23, 2012

PRESENT: Francis M. Wikstrom, Chair, Trystan B. Smith, Honorable John Baxter, Barbara L. Townsend, Terrie T. McIntosh, James T. Blanch, Francis J. Carney, Honorable Derek P. Pullan, Lincoln L. Davies, W. Cullen Battle, Janet H. Smith, Honorable Todd W. Shaughnessy, Robert J. Shelby, Jonathan O. Hafen, Leslie W. Slaugh

EXCUSED: Honorable Kate Toomey, Honorable David O. Nuffer, Honorable Lyle R. Anderson, Lori Woffenden, David W. Scofield

STAFF: Timothy Shea, Diane Abegglen, Sammi Anderson

GUESTS: Michael Zimmerman

I. APPROVAL OF MINUTES.

Mr. Wikstrom entertained comments from the committee concerning the April 25, 2012 minutes. The committee unanimously approved the minutes.

II. RULE 26.2. DISCLOSURES IN PERSONAL INJURY ACTIONS.

Frank Carney introduced and led a discussion regarding subparagraph (d)'s limitation on the use of non-public information obtained during personal injury actions to that litigation. The limitation was originally motivated by the desire to protect private information such as social security numbers. The committee voted unanimously to strike subparagraph (d). Mr Carney proposed as a compromise that subparagraph (b)(3) be amended to state that social security numbers ("SSN") or Medicare health insurance claim ("HICN") numbers may only be used for purposes of compliance with Medicare, Medicaid, etc. Both Judges Shaughnessy and Pullan expressed concern about the possibility of other legitimate uses, e.g., subpoenaing medical records. Mr. Wikstrom suggested to state: "The SSN and HICN may be used only for the purposes of the action, including compliance with the Medicare, Medicaid, and SCHIP Extension Act of 2007, unless otherwise ordered by the Court." The committee voted unanimously to amend subparagraph (b)(3) as proposed by Mr. Wikstrom. Mr. Carney also proposed to revise subparagraph (a) to re-insert a citation to the Internal Revenue Code's definition of "physical injuries or physical sickness." Mr. Carney explained that questions have arisen as to the scope of the definition and therefore the scope of the Rule's application; specifically, whether Rule 26.2 covers wrongful death actions. Judge Pullan renewed his concerns about

citing the Internal Revenue Code in the rule. Judge Shaughnessy recommended that the committee note be revised to address questions about whether wrongful death actions or emotional distress type actions are covered, rather than changing the text of the rule. The committee agreed to include this explanation in the committee note and the motion to amend subparagraph (a) was withdrawn. The committee note will now make reference to the Internal Revenue Code and expressly clarify that Rule 26.2 covers wrongful death actions.

III. RULE 25. SUBSTITUTION OF PARTIES.

Tim Shea reported that the proposed amendments to Rule 25 had been published for comment and that no comments were received. A motion to send amended Rule 25 to the Supreme Court for final action was made and approved by the committee.

IV. SMALL CLAIMS PROCEDURE RULE 3.

Judge Baxter reported that the small claims subcommittee met and discussed the Small Claims Procedure Rule 3, including its history. The subcommittee proposed striking existing Rule 3 in its entirety and incorporating a provision that Civil Procedure Rule 4 will govern service of the small claims affidavit and summons. Ms. McIntosh pointed out that subparagraph (d) should not be stricken because it involves the obligation to serve parties with all court filings once the action has begun. Mr. Wikstrom also noted that subparagraph (b) should not be stricken because it contains time requirements that govern the proceeding going forward. Mr. Slaugh suggested that the proposed language regarding Civil Procedure Rule 4 take the place of original subparagraph (a). The suggested revisions will be incorporated and discussed further at the next meeting.

V. RULE 105.

Tim Shea explained that Utah Code Section 30-3-18 was amended during the legislative session to require “extraordinary circumstances” for waiving the 90-day waiting period in divorce proceedings. The committee voted to amend Rule 105, governing motions for shortening the 90-day waiting period, to include the same standard.

VI. PRIORITY OF PENDING TOPICS.

The committee reviewed a list of open issues raised by members of the Bar, members of the judiciary and the public, and identified those items that warrant action and those that do not. The committee agreed unanimously to amend Rule 4(e)(1) following a suggestion by Judge Shaughnessy to require that a Summons be filed with the court as part of the required "proof of service." The committee also discussed a proposed amendment to Rule 7 to allow for combining a motion and memorandum in support into a single document. There was general conceptual

approval for this idea and some discussion as to whether an amendment could be coordinated with amendments to the local rules of practice for the Federal Rules of Civil Procedure. The committee also discussed the need for a *pro se* manual and the need to make the Frequently Asked Questions and Responses regarding the simplified rules of discovery easier to locate.

VII. ADJOURNMENT.

The meeting adjourned at 5:42 p.m. The next meeting will be held on September 26, 2012 at 4:00 p.m. at the Administrative Office of the Courts.

Tab 2

4TH DISTRICT COURT - PROVO
UTAH COUNTY, STATE OF UTAH

SEVEN C'S COMMUNITY LLC, Plaintiff	:	
vs.	:	ADVISORY NOTICE OF DISCOVERY COMPLETION DATES UNDER UTAH RULES OF CIVIL PROCEDURE (URCP RULE 26)
AMERICAN FORK CITY, Defendant	:	Case No: 120401127 MI Discovery Tier: 1 Judge: JAMES R TAYLOR

To Counsel and Parties:

This is a courtesy notice of estimated dates that judicial support staff will use for general guidance to manage this case. The dates are advisory only and do not supersede the dates established by Rule 26. Parties remain responsible for calculating the dates in accordance with the Rule, and are strongly advised to confer with one another to confirm the discovery schedule.

Based on the filing of defendant's answer, the following dates apply in this case:

Answer filed:		Sep 10, 2012
*	Plaintiff initial disclosures completed:	Sep 27, 2012
*	Defendant's initial disclosures completed:	Oct 29, 2012
*	Fact discovery completed:	Feb 26, 2013
*	Expert discovery completed:	Jun 03, 2013
*	Mediation or ADR completed (unless exempt under CJA 4-510):	Jun 03, 2013
*	Certificate of Readiness for Trial:	Jun 03, 2013

The parties shall promptly notify the Court of any settlements or stipulations. Self Help Resources are available at www.utcourts.gov.

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 120401127 by the method and on the date specified.

MAIL: AMERICAN FORK CITY
EMAIL: LESLIE W SLAUGH

Date: Sep 11, 2012 /s/ KATRINA STORICK
Clerk/Clerk of Court

Tab 3

Appeals

The Rule 58A and Appellate Rule 4 Subcommittee makes the following recommendations:

1) Do not amend Appellate Rule 4.

2) Amend URCP 58A(d) to remove the last sentence.

3) Add a new procedure and rule under Rule 58A(h) to allow a party to seek relief from the entry of judgment when the judgment was entered without notice.

The attached draft is the subcommittee's proposal with bracketed language that flags three issues for further discussion by the full Civil Procedure Committee:

1) whether the relief should be limited to the filing of appeals, or should it extend to other forms of post-judgment relief, e.g., Rule 59 motions;

2) whether the original judgment should be vacated as well as re-entered; and

3) whether the re-entry date should be for all parties and purposes, or limited to the moving party's appeal or other post-judgment rights.

Rule 58A. Entry of judgment; abstract of judgment; re-entry of judgment.

(a) **Judgment upon the verdict of a jury.** Unless the court otherwise directs and subject to Rule 54(b), the clerk shall promptly sign and file the judgment upon the verdict of a jury. If there is a special verdict or a general verdict accompanied by answers to interrogatories returned by a jury, the court shall direct the appropriate judgment, which the clerk shall promptly sign and file.

(b) **Judgment in other cases.** Except as provided in paragraphs (a) and (f) and Rule 55(b)(1), all judgments shall be signed by the judge and filed with the clerk.

(c) **When judgment entered; recording.** A judgment is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when it is signed and filed as provided in paragraphs (a) or (b). The clerk shall immediately record the judgment in the register of actions and the register of judgments.

(d) **Notice of judgment.** ~~A~~ The party preparing the judgment shall promptly serve a copy of the signed judgment ~~shall be promptly served by the party preparing it~~ on the other parties in the manner provided in Rule 5 and promptly file proof of service with the court. ~~The time for filing a notice of appeal is not affected by this requirement.~~

(e) **Judgment after death of a party.** If a party dies after a verdict or decision upon any issue of fact and before judgment, judgment may nevertheless be entered.

(f) **Judgment by confession.** If a judgment by confession is authorized by statute, the party seeking the judgment must file with the clerk a statement, verified by the defendant, to the following effect:

(f)(1) If the judgment is for money due or to become due, it shall concisely state the claim and that the specified sum is due or to become due.

(f)(2) If the judgment is for the purpose of securing the plaintiff against a contingent liability, it must state concisely the claim and that the specified sum does not exceed the liability.

(f)(3) It must authorize the entry of judgment for the specified sum.

The clerk shall sign and file the judgment for the specified sum, with costs of entry, if any, and record it in the register of actions and the register of judgments.

(g) **Abstract of judgment.** The clerk may abstract a judgment by a signed writing under seal of the court that:

(g)(1) identifies the court, the case name, the case number, the judge or clerk that signed the judgment, the date the judgment was signed, and the date the judgment was recorded in the registry of actions and the registry of judgments;

(g)(2) states whether the time for appeal has passed and whether an appeal has been filed;

(g)(3) states whether the judgment has been stayed and when the stay will expire; and

(g)(4) if the language of the judgment is known to the clerk, quotes verbatim the operative language of the judgment or attaches a copy of the judgment.

(h) **Re-entry of judgment.** The court may direct the re-entry of a judgment [*or vacate and direct the re-entry of judgment*] upon motion and a showing that the moving party was deprived of the right to appeal or seek other post-judgment relief [*or the right to appeal only*] because the party lacked notice of the entry of judgment, and the party exercised due diligence in monitoring the proceedings in the case. If the motion is granted, the date the judgment is re-entered shall be deemed the date of entry of judgment for all purposes [*or for the limited purpose of allowing the moving party to file an appeal or seek other post-judgment relief*].

Tab 4

Rule 3. Service of the affidavit and summons.

(a) ~~After filing the affidavit and receiving a trial date, plaintiff must serve the affidavit and summons on defendant. To serve the affidavit, plaintiff must either:~~

~~(a)(1) have the affidavit served on defendant by a sheriff's department, constable, or person regularly engaged in the business of serving process and pay for that service; or~~

~~(a)(2) have the affidavit delivered to defendant by a method of mail or commercial courier service that requires defendant to sign a receipt and provides for return of that receipt to plaintiff.~~

~~(b)~~ Service of the small claims affidavit and summons shall be as provided in Utah Rule of Civil Procedure 4.The affidavit and summons must be served at least 30 calendar days before the trial date. ~~Service by mail or commercial courier service is complete on the date the receipt is signed by defendant. If the affidavit is not served within 120 days after filing, the action may be dismissed without prejudice upon the court's own initiative with notice to the plaintiff.~~

~~(c)~~ (b) Proof of service of the affidavit and summons must be filed ~~with the court~~ as provided in Utah Rule of Civil Procedure 4 no later than 10 business days after service. ~~If service is by mail or commercial courier service, plaintiff must file a proof of service. If service is by a sheriff, constable, or person regularly engaged in the business of serving process, proof of service must be filed by the person completing the service.~~

~~(d)~~ (c) Each party shall serve on all other parties a copy of all documents filed with the court other than the counter affidavit. Each party shall serve on all other parties all documents as ordered by the court. Service of all papers other than the affidavit and counter affidavit may be by first class mail to the other party's last known address. The party mailing the papers shall file proof of mailing with the court no later than 10 business days after service. If the papers are returned to the party serving them as undeliverable, the party shall file the returned envelope with the court.

Tab 5

Names of Trial Motions

Francis J. Carney

September 15, 2012

Rule 50 describes the motions for a "directed verdict" and for "judgment notwithstanding the verdict."

Do we want to revise the antiquated and anachronistic names of these motions-- as the federal courts did more than twenty years ago-- to motions "for judgment as a matter of law" and "renewal of motion for judgment as a matter of law."

I attach the state rule and the federal rule with the notes to the various amendments to Rule 50. The note to the 1991 amendment is most useful:

> *The revision abandons the familiar terminology of direction of verdict for several reasons. The term is misleading as a description of the relationship between judge and jury. It is also freighted with anachronisms some of which are the subject of the text of former subdivision (a) of this rule that is deleted in this revision. Thus, it should not be necessary to state in the text of this rule that a motion made pursuant to it is not a waiver of the right to jury trial, and only the antiquities of directed verdict practice suggest that it might have been. The term "judgment as a matter of law" is an almost equally familiar term and appears in the text of Rule 56; its use in Rule 50 calls attention to the relationship between the two rules. Finally, the change enables the rule to refer to preverdict and post-verdict motions with a terminology that does not conceal the common identity of two motions made at different times in the proceeding.*

I wonder if we want to revamp Rule 50 entirely, not to change the standards for the motions, but to modernize and simplify the language, and delete that which is unnecessary.

FJC

Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.

(a) Motion for directed verdict; when made; effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific ground(s) therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) Motion for judgment notwithstanding the verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than ten days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within ten days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) Same: conditional rulings on grant of motion.

(1) If the motion for judgment notwithstanding the verdict, provided for in Subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for a new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the respondent on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than ten days after entry of the judgment notwithstanding the verdict.

(d) Same: denial of motion. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as respondent, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the respondent is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

RULE 50. JUDGMENT AS A MATTER OF LAW IN A JURY TRIAL; RELATED MOTION FOR A NEW TRIAL; CONDITIONAL RULING

(a) JUDGMENT AS A MATTER OF LAW.

(1) *In General.* If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) *Motion.* A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) RENEWING THE MOTION AFTER TRIAL; ALTERNATIVE MOTION FOR A NEW TRIAL. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

(c) GRANTING THE RENEWED MOTION; CONDITIONAL RULING ON A MOTION FOR A NEW TRIAL.

(1) *In General.* If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.

(2) *Effect of a Conditional Ruling.* Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders.

(d) TIME FOR A LOSING PARTY'S NEW-TRIAL MOTION. Any motion for a new trial under Rule 59 by

a party against whom judgment as a matter of law is rendered must be filed no later than 28 days after the entry of the judgment.

(e) DENYING THE MOTION FOR JUDGMENT AS A MATTER OF LAW; REVERSAL ON APPEAL. If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

NOTES

(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivision (a). The present federal rule is changed to the extent that the formality of an express reservation of rights against waiver is no longer necessary. See *Sampliner v. Motion Picture Patents Co.*, 254 U.S. 233 (1920); *Union Indemnity Co. v. United States*, 74 F.(2d) 645 (C.C.A.6th, 1935). The requirement that specific grounds for the motion for a directed verdict must be stated settles a conflict in the federal cases. See Simkins, *Federal Practice* (1934) §189.

Note to Subdivision (b). For comparable state practice upheld under the conformity act, see *Baltimore and Carolina Line v. Redman*, 295 U.S. 654 (1935); compare *Slocum v. New York Life Ins. Co.*, 228 U.S. 364 (1913).

See *Northern Ry. Co. v. Page*, 274 U.S. 65 (1927), following the Massachusetts practice of alternative verdicts, explained in Thorndike, *Trial by Jury in United States Courts*, 26 Harv.L.Rev. 732 (1913). See also Thayer, *Judicial Administration*, 63 U. of Pa.L.Rev. 585, 600–601, and note 32 (1915); Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 Harv.L.Rev. 669, 685 (1918); Comment, 34 Mich.L.Rev. 93, 98 (1935).

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

Subdivision (a). The practice, after the court has granted a motion for a directed verdict, of requiring the jury to express assent to a verdict they did not reach by their own deliberations serves no useful purpose and may give offense to the members of the jury. See 2B Barron & Holtzoff, *Federal Practice and Procedure* §1072, at 367 (Wright ed. 1961); Blume, *Origin and Development of the Directed Verdict*, 48 Mich.L.Rev. 555, 582–85, 589–90 (1950). The final sentence of the subdivision, added by amendment, provides that the court's order granting a motion for a directed verdict is effective in itself, and that no action need be taken by the foreman or other members of the jury. See Ariz.R.Civ.P. 50(c); cf. Fed.R.Crim.P. 29 (a). No change is intended in the standard to be applied in deciding the motion. To assure this interpretation, and in the interest of simplicity, the traditional term, “directed verdict,” is retained.

Subdivision (b). A motion for judgment notwithstanding the verdict will not lie unless it was preceded by a motion for a directed verdict made at the close of all the evidence.

The amendment of the second sentence of this subdivision sets the time limit for making the motion for judgment n.o.v. at 10 days after the entry of judgment, rather than 10 days after the reception of the verdict. Thus the time provision is made consistent with that contained in Rule 59(b) (time for motion for new trial) and Rule 52(b) (time for motion to amend findings by the court).

Subdivision (c) deals with the situation where a party joins a motion for a new trial with

his motion for judgment n.o.v. or prays for a new trial in the alternative, and the motion for judgment n.o.v. is granted. The procedure to be followed in making rulings on the motion for the new trial, and the consequences of the rulings thereon, were partly set out in *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 253, 61 S.Ct. 189, 85 L.Ed. 147 (1940), and have been further elaborated in later cases. See *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 67 S.Ct. 752, 91 L.Ed. 849 (1947); *Globe Liquor Co., Inc. v. San Roman*, 332 U.S. 571, 68 S.Ct. 246, 92 L.Ed. 177 (1948); *Fountain v. Filson*, 336 U.S. 681, 69 S.Ct. 754, 93 L.Ed. 971 (1949); *Johnson v. New York, N.H. & H.R.R. Co.*, 344 U.S. 48, 73 S.Ct. 125, 97 L.Ed. 77 (1952). However, courts as well as counsel have often misunderstood the procedure, and it will be helpful to summarize the proper practice in the text of the rule. The amendments do not alter the effects of a jury verdict or the scope of appellate review.

In the situation mentioned, *subdivision (c)(1)* requires that the court make a "conditional" ruling on the new-trial motion, i.e., a ruling which goes on the assumption that the motion for judgment n.o.v. was erroneously granted and will be reversed or vacated; and the court is required to state its grounds for the conditional ruling. Subdivision (c)(1) then spells out the consequences of a reversal of the judgment in the light of the conditional ruling on the new-trial motion.

If the motion for new trial has been conditionally granted, and the judgment is reversed, "the new trial shall proceed unless the appellate court has otherwise ordered." The party against whom the judgment n.o.v. was entered below may, as appellant, besides seeking to overthrow that judgment, also attack the conditional grant of the new trial. And the appellate court, if it reverses the judgment n.o.v., may in an appropriate case also reverse the conditional grant of the new trial and direct that judgment be entered on the verdict. See *Bailey v. Slentz*, 189 F.2d 406 (10th Cir. 1951); *Moist Cold Refrigerator Co. v. Lou Johnson Co.*, 249 F.2d 246 (9th Cir. 1957), cert. denied, 356 U.S. 968, 78 S.Ct. 1008, 2 L.Ed.2d 1074 (1958); *Peters v. Smith*, 221 F.2d 721 (3d Cir.1955); *Dailey v. Timmer*, 292 F.2d 824 (3d Cir. 1961), explaining *Lind v. Schenley Industries, Inc.*, 278 F.2d 79 (3d Cir.), cert. denied, 364 U.S. 835, 81 S.Ct. 58, 5 L.Ed.2d 60 (1960); *Cox v. Pennsylvania R.R.*, 120 A.2d 214 (D.C.Mun.Ct.App. 1956); 3 Barron & Holtzoff, *Federal Practice and Procedure* §1302.1 at 346-47 (Wright ed. 1958); 6 *Moore's Federal Practice* 59.16 at 3915 n. 8a (2d ed. 1954).

If the motion for a new trial has been conditionally denied, and the judgment is reversed, "subsequent proceedings shall be in accordance with the order of the appellate court." The party in whose favor judgment n.o.v. was entered below may, as appellee, besides seeking to uphold that judgment, also urge on the appellate court that the trial court committed error in conditionally denying the new trial. The appellee may assert this error in his brief, without taking a cross-appeal. *Cf. Patterson v. Pennsylvania R.R.*, 238 F.2d 645, 650 (6th Cir. 1956); *Hughes v. St. Louis Nat. L. Baseball Club, Inc.*, 359 Mo. 993, 997, 224 S.W.2d 989, 992 (1949). If the appellate court concludes that the judgment cannot stand, but accepts the appellee's contention that there was error in the conditional denial of the new trial, it may order a new trial in lieu of directing the entry of judgment upon the verdict.

Subdivision (c)(2), which also deals with the situation where the trial court has granted the motion for judgment n.o.v., states that the verdict-winner may apply to the trial court for a new trial pursuant to Rule 59 after the judgment n.o.v. has been entered against him. In arguing to the trial court in opposition to the motion for judgment n.o.v., the verdict-winner may, and often will, contend that he is entitled, at the least, to a new trial, and the court has a range of discretion to grant a new trial or (where plaintiff won the verdict) to order a dismissal of the action without prejudice instead of granting judgment n.o.v. See *Cone v. West Virginia Pulp & Paper Co., supra*, 330 U.S. at 217, 218 67 S.Ct. at 755, 756, 91 L.Ed. 849. Subdivision (c)(2) is a reminder that the verdict-winner is entitled, even after entry of judgment n.o.v. against him, to move for a new trial in the usual course. If in these circumstances the motion is granted, the judgment is superseded.

In some unusual circumstances, however, the grant of the new-trial motion may be only conditional, and the judgment will not be superseded. See the situation in *Tribble v. Bruin*,

279 F.2d 424 (4th Cir. 1960) (upon a verdict for plaintiff, defendant moves for and obtains judgment n.o.v.; plaintiff moves for a new trial on the ground of inadequate damages; trial court might properly have granted plaintiff's motion, conditional upon reversal of the judgment n.o.v.).

Even if the verdict-winner makes no motion for a new trial, he is entitled upon his appeal from the judgment n.o.v. not only to urge that that judgment should be reversed and judgment entered upon the verdict, but that errors were committed during the trial which at the least entitle him to a new trial.

Subdivision (d) deals with the situation where judgment has been entered on the jury verdict, the motion for judgment n.o.v. and any motion for a new trial having been denied by the trial court. The verdict-winner, as appellee, besides seeking to uphold the judgment, may urge upon the appellate court that in case the trial court is found to have erred in entering judgment on the verdict, there are grounds for granting him a new trial instead of directing the entry of judgment for his opponent. In appropriate cases the appellate court is not precluded from itself directing that a new trial be had. See *Weade v. Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801, 69 S.Ct. 1326, 93 L.Ed. 1704 (1949). Nor is it precluded in proper cases from remanding the case for a determination by the trial court as to whether a new trial should be granted. The latter course is advisable where the grounds urged are suitable for the exercise of trial court discretion.

Subdivision (d) does not attempt a regulation of all aspects of the procedure where the motion for judgment n.o.v. and any accompanying motion for a new trial are denied, since the problems have not been fully canvassed in the decisions and the procedure is in some respects still in a formative stage. It is, however, designed to give guidance on certain important features of the practice.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1991 AMENDMENT

Subdivision (a). The revision of this subdivision aims to facilitate the exercise by the court of its responsibility to assure the fidelity of its judgment to the controlling law, a responsibility imposed by the Due Process Clause of the Fifth Amendment. *Cf. Galloway v. United States*, 319 U.S. 372 (1943).

The revision abandons the familiar terminology of *direction of verdict* for several reasons. The term is misleading as a description of the relationship between judge and jury. It is also freighted with anachronisms some of which are the subject of the text of former subdivision (a) of this rule that is deleted in this revision. Thus, it should not be necessary to state in the text of this rule that a motion made pursuant to it is not a waiver of the right to jury trial, and only the antiquities of directed verdict practice suggest that it might have been. The term "judgment as a matter of law" is an almost equally familiar term and appears in the text of Rule 56; its use in Rule 50 calls attention to the relationship between the two rules. Finally, the change enables the rule to refer to preverdict and post-verdict motions with a terminology that does not conceal the common identity of two motions made at different times in the proceeding.

If a motion is denominated a motion for directed verdict or for judgment notwithstanding the verdict, the party's error is merely formal. Such a motion should be treated as a motion for judgment as a matter of law in accordance with this rule.

Paragraph (a)(1) articulates the standard for the granting of a motion for judgment as a matter of law. It effects no change in the existing standard. That existing standard was not expressed in the former rule, but was articulated in long-standing case law. *See generally* Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903 (1971). The expressed standard makes clear that action taken under the rule is a performance of the court's duty to assure enforcement of the controlling law and is not an

intrusion on any responsibility for factual determinations conferred on the jury by the Seventh Amendment or any other provision of federal law. Because this standard is also used as a reference point for entry of summary judgment under 56(a), it serves to link the two related provisions.

The revision authorizes the court to perform its duty to enter judgment as a matter of law at any time during the trial, as soon as it is apparent that either party is unable to carry a burden of proof that is essential to that party's case. Thus, the second sentence of paragraph (a)(1) authorizes the court to consider a motion for judgment as a matter of law as soon as a party has completed a presentation on a fact essential to that party's case. Such early action is appropriate when economy and expedition will be served. In no event, however, should the court enter judgment against a party who has not been apprised of the materiality of the dispositive fact and been afforded an opportunity to present any available evidence bearing on that fact. In order further to facilitate the exercise of the authority provided by this rule, Rule 16 is also revised to encourage the court to schedule an order of trial that proceeds first with a presentation on an issue that is likely to be dispositive, if such an issue is identified in the course of pretrial. Such scheduling can be appropriate where the court is uncertain whether favorable action should be taken under Rule 56. Thus, the revision affords the court the alternative of denying a motion for summary judgment while scheduling a separate trial of the issue under Rule 42(b) or scheduling the trial to begin with a presentation on that essential fact which the opposing party seems unlikely to be able to maintain.

Paragraph (a)(2) retains the requirement that a motion for judgment be made prior to the close of the trial, subject to renewal after a jury verdict has been rendered. The purpose of this requirement is to assure the responding party an opportunity to cure any deficiency in that party's proof that may have been overlooked until called to the party's attention by a late motion for judgment. Cf. *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 786 F.2d 1342 (9th Cir. 1986) ("If the moving party is then permitted to make a later attack on the evidence through a motion for judgment notwithstanding the verdict or an appeal, the opposing party may be prejudiced by having lost the opportunity to present additional evidence before the case was submitted to the jury"); *Benson v. Allphin*, 786 F.2d 268 (7th Cir. 1986) ("the motion for directed verdict at the close of all the evidence provides the nonmovant an opportunity to do what he can to remedy the deficiencies in his case . . ."); *McLaughlin v. The Fellows Gear Shaper Co.*, 4 F.R.Serv. 3d 607 (3d Cir. 1986) (per Adams, J., dissenting: "This Rule serves important practical purposes in ensuring that neither party is precluded from presenting the most persuasive case possible and in preventing unfair surprise after a matter has been submitted to the jury"). At one time, this requirement was held to be of constitutional stature, being compelled by the Seventh Amendment. Cf. *Slocum v. New York Insurance Co.*, 228 U.S. 364 (1913). But cf. *Baltimore & Carolina Line v. Redman*, 295 U.S. 654 (1935).

The second sentence of paragraph (a)(2) does impose a requirement that the moving party articulate the basis on which a judgment as a matter of law might be rendered. The articulation is necessary to achieve the purpose of the requirement that the motion be made before the case is submitted to the jury, so that the responding party may seek to correct any overlooked deficiencies in the proof. The revision thus alters the result in cases in which courts have used various techniques to avoid the requirement that a motion for a directed verdict be made as a predicate to a motion for judgment notwithstanding the verdict. E.g., *Benson v. Allphin*, 788 F.2d 268 (7th cir. 1986) ("this circuit has allowed something less than a formal motion for directed verdict to preserve a party's right to move for judgment notwithstanding the verdict"). *See generally* 9 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE §2537 (1971 and Supp.). The information required with the motion may be supplied by explicit reference to materials and argument previously supplied to the court.

This subdivision deals only with the entry of judgment and not with the resolution of particular factual issues as a matter of law. The court may, as before, properly refuse to instruct a jury to decide an issue if a reasonable jury could on the evidence presented decide that issue in only one way.

Subdivision (b). This provision retains the concept of the former rule that the post-verdict motion is a renewal of an earlier motion made at the close of the evidence. One purpose of this concept was to avoid any question arising under the Seventh Amendment. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940). It remains useful as a means of defining the appropriate issue posed by the post-verdict motion. A post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion. *E.g., Kutner Buick, Inc. v. American Motors Corp.*, 848 F.2d 614 (3d cir. 1989).

Often it appears to the court or to the moving party that a motion for judgment as a matter of law made at the close of the evidence should be reserved for a post-verdict decision. This is so because a jury verdict for the moving party moots the issue and because a pre-verdict ruling gambles that a reversal may result in a new trial that might have been avoided. For these reasons, the court may often wisely decline to rule on a motion for judgment as a matter of law made at the close of the evidence, and it is not inappropriate for the moving party to suggest such a postponement of the ruling until after the verdict has been rendered.

In ruling on such a motion, the court should disregard any jury determination for which there is no legally sufficient evidentiary basis enabling a reasonable jury to make it. The court may then decide such issues as a matter of law and enter judgment if all other material issues have been decided by the jury on the basis of legally sufficient evidence, or by the court as a matter of law.

The revised rule is intended for use in this manner with Rule 49. Thus, the court may combine facts established as a matter of law either before trial under Rule 56 or at trial on the basis of the evidence presented with other facts determined by the jury under instructions provided under Rule 49 to support a proper judgment under this rule.

This provision also retains the former requirement that a post-trial motion under the rule must be made within 10 days after entry of a contrary judgment. The renewed motion must be served and filed as provided by Rule 5. A purpose of this requirement is to meet the requirements of F.R.App.P. 4(a)(4).

Subdivision (c). Revision of this subdivision conforms the language to the change in diction set forth in subdivision (a) of this revised rule.

Subdivision (d). Revision of this subdivision conforms the language to that of the previous subdivisions.

Notes of Advisory Committee on Rules—1993 Amendment

This technical amendment corrects an ambiguity in the text of the 1991 revision of the rule, which, as indicated in the Notes, was not intended to change the existing standards under which "directed verdicts" could be granted. This amendment makes clear that judgments as a matter of law in jury trials may be entered against both plaintiffs and defendants and with respect to issues or defenses that may not be wholly dispositive of a claim or defense.

Notes of Advisory Committee on Rules—1995 Amendment

The only change, other than stylistic, intended by this revision is to prescribe a uniform explicit time for filing of post-judgment motions under this rule—no later than 10 days after entry of the judgment. Previously, there was an inconsistency in the wording of Rules 50, 52, and 59 with respect to whether certain post-judgment motions had to be filed, or merely served, during that period. This inconsistency caused special problems when motions for a new trial were joined with other post-judgment motions. These motions affect the finality of the judgment, a matter often of importance to third persons as well as the parties and the court. The Committee believes that each of these rules should be revised to require filing before end of the 10-day period. Filing is an event that can be determined with certainty from court records. The phrase "no later than" is used—rather than "within"—to include post-judgment motions that sometimes are filed before actual

entry of the judgment by the clerk. It should be noted that under Rule 6(a) Saturdays, Sundays, and legal holidays are excluded in measuring the 10-day period, and that under Rule 5 the motions when filed are to contain a certificate of service on other parties.

COMMITTEE NOTES ON RULES—2006 AMENDMENT

The language of Rule 50(a) has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 50(b) is amended to permit renewal of any Rule 50(a) motion for judgment as a matter of law, deleting the requirement that a motion be made at the close of all the evidence. Because the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion. The earlier motion informs the opposing party of the challenge to the sufficiency of the evidence and affords a clear opportunity to provide additional evidence that may be available. The earlier motion also alerts the court to the opportunity to simplify the trial by resolving some issues, or even all issues, without submission to the jury. This fulfillment of the functional needs that underlie present Rule 50(b) also satisfies the Seventh Amendment. Automatic reservation of the legal questions raised by the motion conforms to the decision in *Baltimore & Carolina Line v. Redman*, 297 U.S. 654 (1935).

This change responds to many decisions that have begun to move away from requiring a motion for judgment as a matter of law at the literal close of all the evidence. Although the requirement has been clearly established for several decades, lawyers continue to overlook it. The courts are slowly working away from the formal requirement. The amendment establishes the functional approach that courts have been unable to reach under the present rule and makes practice more consistent and predictable.

Many judges expressly invite motions at the close of all the evidence. The amendment is not intended to discourage this useful practice.

Finally, an explicit time limit is added for making a posttrial motion when the trial ends without a verdict or with a verdict that does not dispose of all issues suitable for resolution by verdict. The motion must be made no later than 10 days after the jury was discharged.

Changes Made After Publication and Comment. This recommendation modifies the version of the proposal as published. The only changes made in the rule text after publication are matters of style. One sentence in the Committee Note was changed by adopting the wording of the 1991 Committee Note describing the grounds that may be used to support a renewed motion for judgment as a matter of law. A paragraph also was added to the Committee Note to explain the style revisions in subdivision (a). The changes from the published rule text are set out below. [Omitted]

COMMITTEE NOTES ON RULES—2007 AMENDMENT

The language of Rule 50 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 50(b) stated that the court reserves ruling on a motion for judgment as a matter of law made at the close of all the evidence "[i]f, for any reason, the court does not grant" the motion. The words "for any reason" reflected the proposition that the reservation is automatic and inescapable. The ruling is reserved even if the court explicitly denies the motion. The same result follows under the amended rule. If the motion is not granted, the ruling is reserved.

Amended Rule 50(e) identifies the appellate court's authority to direct the entry of judgment. This authority was not described in former Rule 50(d), but was recognized in *Weisgram v. Marley Co.*, 528 U.S. 440 (2000), and in *Neely v. Martin K. Eby Construction*

Company, 386 U.S. 317 (1967). When Rule 50(d) was drafted in 1963, the Committee Note stated that "[s]ubdivision (d) does not attempt a regulation of all aspects of the procedure where the motion for judgment n.o.v. and any accompanying motion for a new trial are denied * * *." Express recognition of the authority to direct entry of judgment does not otherwise supersede this caution.

Committee Notes on Rules—2009 Amendment

Former Rules 50, 52, and 59 adopted 10-day periods for their respective post-judgment motions. Rule 6(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introduce the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10-day periods are expanded to 28 days. Rule 6(b) continues to prohibit expansion of the 28-day period.

Changes Made after Publication and Comment. The 30-day period proposed in the August 2007 publication is shortened to 28 days.

‹ Rule 49. Special Verdict; General Verdict and Questions | up | Rule 51. Instructions to the Jury; Objections; Preserving a Claim of Error ›

Post-Trial Motions
Francis J. Carney

Issue #1: Please see the attached chart. The state rules provide that post-trial motions may be "made" or "served" within 10 days after the triggering event; the federal rules the post-trial motions must be "filed" (with the exception of 60(b) motions) within 10 days after the triggering event.

A. What does "made" mean in Rule 50(b)– does this mean filed or served? **Do we want to clarify this?**

B. There was discussion in the January meeting of standardizing and changing all "served" and "made" references in the post-trial motion rules to "filed," as is the case in federal court. **Do we want to do this?**

Issue #2: For many years, it was the rule that a motion for directed verdict challenging the legal sufficiency of the evidence must be made at close of the opponent's case and also *renewed* at the close of all the evidence.

The theory behind the requirement was to permit the party subject to the motion a chance to produce what is needed to fix the "gap" in the sufficiency of the evidence. Failure to renew it at the close of all the evidence barred the party from making a motion for JNOV on "lack of legal sufficiency" grounds. Wright & Miller has a good discussion of this point:

> Prior to the 2006 amendment of the Federal Rule, it was long established that a post-verdict motion under Rule 50(b) for judgment as a matter of law could not be made unless a previous Rule 50(a) motion for judgment as a matter of law was made by the moving party at the close of all the evidence. The purpose of requiring a renewed motion for judgment as a matter of law at that time was to give the opposing party an opportunity to cure the defects in proof that otherwise might preclude the party from taking the case to the jury. A large sample of illustrative and relatively recent cases is set out in the note below.
>
> Because this requirement was a potential trap for the unwary, the federal courts fortunately took a liberal view of what constituted a motion for judgment as a matter of law at the close of all the evidence in deciding whether there was a sufficient foundation for the later motion under Rule 50(b). The note below contains numerous examples of the mechanisms used by the courts to employ the liberal view of what constitutes an end of trial motion for judgment as a matter of law. Other courts, however, were less willing to excuse noncompliance with the requirement of the rule and applied it in a more demanding fashion.
>
> . . .

> Before the rule was amended in 2006, when the movant failed inexcusably to raise an objection to the sufficiency of evidence in a motion for judgment as a matter of law at the close of all the evidence, some courts denied all review, although others reviewed, but only for clear error. . . This review was exceedingly narrow, and only unusual circumstances justified allowing a motion at the close of the plaintiff's case to stand in place of a motion at the close of all the evidence.
>
> The 2006 amendments were designed to render all of this confusion and technicality moot. The amendments revised Rule 50(b) to permit renewal after verdict of any Rule 50(a) motion for judgment as a matter of law. This abolished the earlier requirement that a motion for judgment as matter of law had to be made at the close of all the evidence. However, the district court only can grant the Rule 50(b) motion on the grounds advanced in the preverdict motion, because the former is conceived of as only a renewal of the latter. . . .

9B Fed. Prac. & Proc. Civ.3d § 2537.

The federal Advisory Committee Note to the 2006 amendments makes clear that removing this procedural trap was the intent of the amendments:

> *Rule 50(b) is amended to permit renewal of any Rule 50(a) motion for judgment as a matter of law, deleting the requirement that a motion be made at the close of all the evidence.* Because the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion. The earlier motion informs the opposing party of the challenge to the sufficiency of the evidence and affords a clear opportunity to provide additional evidence that may be available. The earlier motion also alerts the court to the opportunity to simplify the trial by resolving some issues, or even all issues, without submission to the jury. . . .
>
> This change responds to many decisions that have begun to move away from requiring a motion for judgment as a matter of law at the literal close of all the evidence. Although the requirement has been clearly established for several decades, lawyers continue to overlook it. The courts are slowly working away from the formal requirement. The amendment establishes the functional approach that courts have been unable to reach under the present rule and makes practice more consistent and predictable.
>
> Many judges expressly invite motions at the close of all the evidence. The amendment is not intended to discourage this useful practice.
>
> . . .

(Emphasis added.)

So the federal Rule 50(b) now reads:

> If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 10 days after the entry of judgment — or if the motion addresses a jury issue not decided by a verdict, no later than 10 days after the jury was discharged — the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59.

But our Utah Rule 50(b) still requires the motion to be renewed at the close of all the evidence:

> Motion for judgment notwithstanding the verdict. Whenever a motion for a directed verdict *made at the close of all the evidence* is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than ten days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict . . . .

(Emphasis added.)

Do we want to remove or retain this requirement?

FJC

Timing on Post-Trial Motions

State	Federal
Rule 50: Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict. Rule 50(b)- . . . Not later than ten days after the entry of judgment, a party who has moved for a directed verdict may **move** to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within ten days after the jury has been discharged, may move for judgment in accordance with his motion for directed verdict.	Rule 50- Judgment as a Matter of Law (b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 10 days after the entry of judgment — or if the motion addresses a jury issue not decided by a verdict, no later than 10 days after the jury was discharged — the movant may **file** a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59.
Rule 59 New trials; amendments of judgment. (b) Time for motion. A motion for a new trial shall be **served** not later than 10 days after the entry of the judgment. (e) Motion to alter or amend a judgment. A motion to alter or amend the judgment shall be **served** not later than 10 days after entry of the judgment.	Rule 50(d)- Time for Rule 59 New Trial Motion (d) Time for a Losing Party's New-Trial Motion. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be **filed** no later than 10 days after the entry of the judgment.
	Rule 59. New Trial; Altering or Amending a Judgment (b) Time to File a Motion for a New Trial. A motion for a new trial must be **filed** no later than 10 days after the entry of judgment.
	Rule 59 (e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be **filed** no later than 10 days after the entry of the judgment.

Rule 60. Relief from judgment or order. The motion shall be **made** within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken.	Rule 60. Relief from Judgment or Order (c)(1) Timing. A motion under Rule 60(b) must be **made** within a reasonable time — and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.
Rule 52. Findings by the court. (b) Amendment. Upon motion of a party **made** not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly.	Rule 52. Findings and Conclusions by the Court; Judgment on Partial Findings (b) Amended or Additional Findings. On a party's motion **filed** no later than 10 days after the entry of judgment, the court may amend its findings — or make additional findings — and may amend the judgment accordingly.

Note: U.R.Civ.P 6(b) Enlargement: *When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect;* ***but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.*** The federal rule is the same.

Tab 6

(1) Filing date

Utah R. Civ. P. 5(e): “Filing with the court defined. A party may file with the clerk of court using any means of delivery permitted by the court. The court may require parties to file electronically with an electronic filing account. Filing is complete upon the earliest of acceptance by the electronic filing system, the clerk of court or the judge. The filing date shall be noted on the paper.”

Unlike electronic filings in federal court, where the filing date is in fact affixed to the electronically filed paper, the state court system does not affix the date of filing “on the paper” and instead creates a separate electronic record.

(2) Filing and service

Utah R. Civ. P. 7(c)(1): “Within ten days after service of the motion and supporting memorandum, a party opposing the motion shall file a memorandum in opposition. Within five days after service of the memorandum in opposition, the moving party may file a reply memorandum, which shall be limited to rebuttal of matters raised in the memorandum in opposition. No other memoranda will be considered without leave of court.”

Utah R. Civ. P. 5(d): “Filing. All papers after the complaint required to be served upon a party shall be filed with the court either before or within a reasonable time after service.”

The seeming conflict is between Rule 5, which governs filing and allows filing to occur within a reasonable time after service, and Rule 7, which requires memoranda to be filed, rather than served and followed by a later filing.

Electronic filing eliminates the majority of practical problems. One problem remains, however. That is the requirement to obtain leave to file an over-length memorandum. A memorandum may not be filed, as required by Rule 7, on the deadline in the rule, even though it may be served by that deadline. Rule 5, which governs filing, would say that service is enough if the memorandum is filed after the deadline but within a reasonable time after service. Rule 5 therefore would allow what Rule 7 does not, namely, service on the deadline and filing after the deadline when the permission to file an over-length memorandum is granted.

Tab 7

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
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: September 18, 2012
Re: Rules for final action

The comment period for the following rules has closed, and they are ready for your final recommendations.

Rule summary

URCP 005. Service and filing of pleadings and other papers. Requires a certificate of service appended to each document that has to be served. Permits the court to serve documents by email.

URCP 010. Form of pleadings and other papers. Requires designation of the discovery tier in the caption of a claim. Requires a court-approved coversheet for counterclaims and cross claims as well as complaints. Requires that a lawyer's contact information on a paper be the same as on file with the Utah State Bar.

URCP 011. Signing of pleadings, motions, affidavits, and other papers; representations to court; sanctions. Deletes a provision that conflicts with Rule 26(e). The consequence will be that the signature on disclosures, discovery requests and discovery responses is a certification under Rule 11.

URCP 026. General provisions governing disclosure and discovery. Changes the time for initial disclosures. Provides for timing of disclosure and discovery of rebuttal experts. Clarifies that disclosure and discovery documents must be served.

URCP 026.02. Disclosures in personal injury actions. Narrows the limitation on the further use of disclosures to Plaintiff’s Social Security number and Medicare health insurance claim numbers. In a committee note, describes the committee's intent regarding the scope of the rule.

URCP 037. Discovery and disclosure motions; Sanctions. Allows the court to enter sanctions if a motion for a protective order or motion to compel is denied.

URCP 105. Shortening 90 day waiting period in domestic matters. Changes the standard of "good cause" to "extraordinary circumstances" in keeping with Section 30-3-18.

Comments

There were no comments about proposed amendments to Rules 5, 11, 37 or 105.

Rule 10

What is the motivation for requiring a party to identify what discovery tier a case occupies? Is this a rule that is needed?

Posted by Eric Johnson August 23, 2012 11:56 AM

I agree with the comments already posted regarding Rule 10. It is unnecessary to require one mailing address. And requiring one email address should be sufficient instead of a physical mailing address to accomplish whatever goal this rule change was intended for.

Posted by Ashley Bown July 9, 2012 11:40 AM

The proposed amendment to Rule 10, that all pleadings and papers have the same one contact information as is listed with the Utah Bar Association, is unnecessary and burdens attorneys who have more than one office.

Many attorneys and law firms have more than one office. Moreover, as the practice of law becomes more mobile, many attorneys have post office boxes, and work from home. The rules should accommodate the reality of the practice of law, and reflect the changes in the practice of law, rather than attempt to prevent change.

Requiring attorneys with more than one office to use only one address will increase costs for clients because of the increased administrative burden created by processing and transmitting papers at two offices, rather than at one office. There will be increased cost incurred when an attorney has to transmit copies from one office to the office where a case is actually being handled.

A better solution is to require that each attorney have an email address, and that all papers be served on an attorney at that email address, which the attorney can access anywhere in the world. It works in federal court. There is no reason it can't work in Utah.

Posted by R. King July 6, 2012 03:51 PM

Regarding URCP 010 - It is a good change to require the tier to appear in the caption. However I have already had the experience that one tier is claimed in the complaint together with an inconsistent amount of damages with that plead tier. (i.e. a tier 1 pled case specifically asking for tier 3 damages). This rule should clarify what tier is being plead and that the caption governs over any inconsistent pleading....or something to this effect. Better to fix this now. Al Gray

Posted by Al Gray July 6, 2012 11:13 AM

Rule 10 requires that attorney contact information on the caption of a pleading be the same as is listed with the Utah State Bar. The rule should NOT require this. The proposed amendment ignores the reality that many attorneys and law firms that have more than one office and more than one address.

The proposed amendment to Rule 10 increases the administrative burden and cost to clients when an attorney has more than one office address because Clients must pay to have documents transferred between offices.

There is nothing wrong with requiring opposing counsel to send papers to the address on a caption instead of the address on file with the Bar. A better solution would be to amend to rules to require the Court and Counsel to serve an attorney at one email address, which can be accessed anywhere in the world by the recipient attorney.

Posted by Rule 10 July 6, 2012 11:11 AM

Commenting on the requirement in Rule 10 to provide contact info that is on file with the bar. This rule ignores the reality of the legal field right now. Many attorneys (including many recent grads) work for multiple law firms, whether on a contract basis or a part-time w-2 basis. Some firms will take an attorney part-time while that attorney tries to grow his/her own practice in another area of law. However, for liability and confidentiality purposes, the attorney needs to be able to file under different contact information. A firm won't be willing to hire an attorney part-time if all of the court filings from another practice are being sent to the one office. Each office needs to be able to keep its appropriate records. Even requiring one e-mail address isn't sufficient because one of these attorneys could have an e-mail with each firm, and using the appropriate e-mail helps the firm keep appropriate records in the digital age.

This rule will really hurt the opportunity for young lawyers to gain experience by working on a contract or part-time basis for multiple firms, and the ability to work in this manner is critical with this poor economy where full-time jobs for a new attorney are very hard to obtain.

In my opinion, if this rule stays and is put into effect, then the Bar needs to have a way to record all of the phone numbers, addresses, and e-mail addresses used by that attorney. Otherwise, our ability to practice, keep the appropriate records, and keep our work separate for liability and confidentiality reasons will be seriously restricted.

Austin Hepworth

Rule 26

I have a comment to go along with the change to Rule 26(a)(2)(B). Rule 26(c)(5) states that the time for discovery runs from when the defendant's first disclosure is due. With the limits on fact discovery in Rule 26(c), plaintiffs don't want to start discovery until they receive the defendant's disclosures. If a defendant serves his disclosures late, the time available to the plaintiff is reduced because a plaintiff can't waste discovery requests on

information he may get in the tardy disclosure. Thus, the plaintiff waits for a week or a month for disclosures, burning valuable discovery time. It would be better to have the fact discovery period begin when the defendant's first disclosure is served rather than when it is due. That way, plaintiffs get the full time allotted, and the parties won't have to ask the Court for extra time because a defendant served his initial disclosures late.

Posted by M. Barnhill July 26, 2012 11:03 AM

I do not like the change to Rule 26(a)(2)(B), which requires a defendant to automatically serve his/her answers without compliance by the plaintiff. If a plaintiff fails to comply with filing his/her initial disclosures, then a defendant should be able to bring a motion to compel or dismiss before being required to go to the expense of preparing initial disclosures. I think the current version of the rule is better.

Posted by Ashley Bown July 9, 2012 11:40 AM

I think the changes to Rules 26 and 26.2 are good. One issue has recently come up with the new rules that I think the Committee needs to address. An attorney for the plaintiff in a personal injury case our Firm is handling filed his client's Retained Expert Disclosures with his client's Initial Disclosures. He is taking the position that his filing triggers the requirement for the defendant to elect a report or a deposition and that we need to get started on expert discovery now. We have taken the position that his client can certainly choose to designate early, but the defense does not need to make our election of a report or deposition until the close of fact discovery. I do not think the new rule is intended to force the defense into undertaking expert discovery before discovering the basic facts of the case. Hypothetically, if the plaintiff's attorney in our case is correct, a plaintiff could file their expert disclosures with their Complaint and the defense would have to determine which experts they intend to use before even having an opportunity to review a plaintiff's initial disclosures.

Posted by Ryan Atkinson July 6, 2012 12:04 PM

Encl. Draft rules

Rule 5. Service and filing of pleadings and other papers.

(a) **Service: When required.**

(a)(1) Except as otherwise provided in these rules or as otherwise directed by the court, every judgment, every order required by its terms to be served, every pleading subsequent to the original complaint, every paper relating to discovery, every written motion other than one heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties.

(a)(2) No service need be made on parties in default except that:

(a)(2)(A) a party in default shall be served as ordered by the court;

(a)(2)(B) a party in default for any reason other than for failure to appear shall be served with all pleadings and papers;

(a)(2)(C) a party in default for any reason shall be served with notice of any hearing necessary to determine the amount of damages to be entered against the defaulting party;

(a)(2)(D) a party in default for any reason shall be served with notice of entry of judgment under Rule 58A(d); and

(a)(2)(E) pleadings asserting new or additional claims for relief against a party in default for any reason shall be served in the manner provided for service of summons in Rule 4.

(a)(3) In an action begun by seizure of property, in which no person is named as defendant, any service required to be made prior to the filing of an answer, claim or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) **Service: How made.**

(b)(1) If a party is represented by an attorney, service shall be made upon the attorney unless service upon the party is ordered by the court. If an attorney has filed a Notice of Limited Appearance under Rule 75 and the papers being served relate to a matter within the scope of the Notice, service shall be made upon the attorney and the party.

(b)(1)(A) If a hearing is scheduled 5 days or less from the date of service, the party shall use the method most likely to give prompt actual notice of the hearing. Otherwise, a party shall serve a paper under this rule:

(b)(1)(A)(i) upon any person with an electronic filing account who is a party or attorney in the case by submitting the paper for electronic filing;

(b)(1)(A)(ii) by sending it by email to the person's last known email address if that person has agreed to accept service by email;

(b)(1)(A)(iii) by faxing it to the person's last known fax number if that person has agreed to accept service by fax;

(b)(1)(A)(iv) by mailing it to the person's last known address;

(b)(1)(A)(v) by handing it to the person;

(b)(1)(A)(vi) by leaving it at the person's office with a person in charge or leaving it in a receptacle intended for receiving deliveries or in a conspicuous place; or

(b)(1)(A)(vii) by leaving it at the person's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.

(b)(1)(B) Service by mail, email or fax is complete upon sending. Service by electronic means is not effective if the party making service learns that the attempted service did not reach the person to be served.

(b)(2) Unless otherwise directed by the court:

(b)(2)(A) an order signed by the court and required by its terms to be served or a judgment signed by the court shall be served by the party preparing it;

(b)(2)(B) every other pleading or paper required by this rule to be served shall be served by the party preparing it; and

(b)(2)(C) an order or judgment prepared by the court shall be served by the court.

(c) **Service: Numerous defendants.** In any action in which there is an unusually large number of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting

an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) **Filing.** All papers after the complaint required to be served upon a party shall be filed with the court either before or within a reasonable time after service. The papers shall be accompanied by a certificate of service showing the date and manner of service completed by the person effecting service. Rule 26(f) governs the filing of papers related to discovery.

(e) **Filing with the court defined.** A party may file with the clerk of court using any means of delivery permitted by the court. The court may require parties to file electronically with an electronic filing account. Filing is complete upon the earliest of acceptance by the electronic filing system, the clerk of court or the judge. The filing date shall be noted on the paper.

(f) **Certificate of service.** Every pleading, order or paper required by this rule to be served shall include a signed certificate of service showing the name of the document served, the date and manner of service and on whom it was served.

(g) **Service by the court.** The court may serve papers on a party or attorney by email.

Advisory Committee Notes

Rule 10. Form of pleadings and other papers.

(a)~~(1)~~ **Caption; names of parties; other necessary information.**

(a)(1) All pleadings and other papers filed with the court shall contain a caption setting forth the name of the court, the title of the action, the file number, the name of the pleading or other paper, and the name, if known, of the judge (and commissioner if applicable) to whom the case is assigned. A party filing a claim for relief, whether by original claim, counterclaim, cross-claim or third-party claim, shall include in the caption the discovery tier for the case as determined under Rule 26.

(a)(2) In the complaint, the title of the action shall include the names of all the parties, but other pleadings and papers need only state the name of the first party on each side with an indication that there are other parties. A party whose name is not known shall be designated by any name and the words "whose true name is unknown." In an action in rem, unknown parties shall be designated as "all unknown persons who claim any interest in the subject matter of the action."

(a)(3) Every pleading and other paper filed with the court shall state in the top left hand corner of the first page the name, address, email address, telephone number and bar number of the attorney or party filing the paper, and, if filed by an attorney, the party for whom it is filed. An attorney's address, email address and telephone number shall match the information on file with the Utah State Bar.

(a)(4) ~~The plaintiff shall file together with the complaint a~~ A party filing a claim for relief, whether by original claim, counterclaim, cross-claim or third-party claim, shall also file a completed cover sheet substantially similar in form and content to the cover sheet approved by the Judicial Council. The clerk may destroy the coversheet after recording the information it contains.

(b) **Paragraphs; separate statements.** All statements of claim or defense shall be made in numbered paragraphs. Each paragraph shall be limited as far as practicable to a single set of circumstances; and a paragraph may be adopted by reference in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) **Adoption by reference; exhibits.** Statements in a paper may be adopted by reference in a different part of the same or another paper. An exhibit to a paper is a part thereof for all purposes.

(d) **Paper format.** All pleadings and other papers, other than exhibits and court-approved forms, shall be 8½ inches wide x 11 inches long, on white background, with a top margin of not less than 2 inches, a right and left margin of not less than 1 inch and a bottom margin of not less than one-half inch, with text or images only on one side. All text or images shall be clearly legible, shall be double spaced, except for matters customarily single spaced, and shall not be smaller than 12-point size.

(e) **Signature line.** The name of the person signing shall be typed or printed under that person's signature. If a paper is electronically signed, the paper shall contain the typed or printed name of the signer with or without a graphic signature.

(f) **Non-conforming papers.** The clerk of the court shall examine all pleadings and other papers filed with the court. If they are not prepared in conformity with ~~subdivisions~~ paragraphs (a) – (e), the clerk shall accept the filing but may require counsel to substitute properly prepared papers for nonconforming papers. The clerk or the court may waive the requirements of this rule for parties appearing pro se. For good cause shown, the court may relieve any party of any requirement of this rule.

(g) **Replacing lost pleadings or papers.** If an original pleading or paper filed in any action or proceeding is lost, the court may, upon motion, with or without notice, authorize a copy thereof to be filed and used in lieu of the original.

(h) **No improper content.** The court may strike and disregard all or any part of a pleading or other paper that contains redundant, immaterial, impertinent or scandalous matter.

(i) **Electronic papers.**

(i)(1) Any reference in these rules to a writing, recording or image includes the electronic version thereof.

(i)(2) A paper electronically signed and filed is the original.

(i)(3) An electronic copy of a paper, recording or image may be filed as though it were the original. Proof of the original, if necessary, is governed by the Utah Rules of Evidence.

(i)(4) An electronic copy of a paper shall conform to the format of the original.

(i)(5) An electronically filed paper may contain links to other papers filed simultaneously or already on file with the court and to electronically published authority.

Advisory Committee Notes

Rule 11. Signing of pleadings, motions, affidavits, and other papers; representations to court; sanctions.

(a) **Signature.**

(a)(1) Every pleading, written motion, and other paper shall be signed by at least one attorney of record, or, if the party is not represented, by the party.

(a)(2) A person may sign a paper using any form of signature recognized by law as binding. Unless required by statute, a paper need not be accompanied by affidavit or have a notarized, verified or acknowledged signature. If a rule requires an affidavit or a notarized, verified or acknowledged signature, the person may submit a declaration pursuant to Utah Code Section 78B-5-705. If a statute requires an affidavit or a notarized, verified or acknowledged signature and the party electronically files the paper, the signature shall be notarized pursuant to Utah Code Section 46-1-16.

(a)(3) An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) **Representations to court.** By presenting a pleading, written motion, or other paper to the court (whether by signing, filing, submitting, or advocating), an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(b)(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(b)(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(b)(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(b)(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) **Sanctions.** If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(c)(1) **How initiated.**

(c)(1)(A) **By motion.** A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney fees incurred in presenting or opposing the motion. In appropriate circumstances, a law firm may be held jointly responsible for violations committed by its partners, members, and employees.

(c)(1)(B) **On court's initiative.** On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(c)(2) **Nature of sanction; limitations.** A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation.

(c)(2)(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(c)(2)(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(c)(3) **Order.** When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

~~(d) **Inapplicability to discovery.** Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.~~

Advisory Committee Notes

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~~ serve on the 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~~ served on the other parties:

(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~~ serve on 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~~ serve on the other parties 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~~ served on the other parties, within 28 days after the election is ~~made~~ served on the other parties. If no election is ~~made~~ served on the other parties, 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~~ serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of ~~(i)~~ (A) the date on which the election under paragraph (a)(4)(C)(i) is due, or ~~(ii)~~ (B) 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~~ served on the other parties, within 28 days after the election is ~~made~~ served on the other parties. If no election is ~~made~~ served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(iii) If the party who bears the burden of proof on an issue wants to designate rebuttal expert witnesses it shall serve on the other parties the

information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(ii) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(ii). 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 served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, 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~~ serve on the other parties 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~~ serve on the 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~~ served on the other parties 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~~ serve on the other parties 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

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.

(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 (SSN) or Medicare health insurance claim number (HICN), full name, and date of birth. The SSN and HICN may be used only for the purposes of the action, including compliance with the Medicare, Medicaid, and SCHIP Extension Act of 2007, unless otherwise ordered by the court.

(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 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.).

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.

This rule is intended to apply to actions based on personal injury and personal sickness using the broad definitions under 26 U.S.C. Sec. 104(a)(2). This includes wrongful death actions, in which case the disclosures will usually be of the decedent's records rather than of the plaintiff's, and emotional distress accompanied by physical injury or physical sickness.

Rule 37. Discovery and disclosure motions; Sanctions.

(a) **Motion for order compelling disclosure or discovery.**

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

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

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

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

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

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

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

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

(b) **Motion for protective order.**

(b)(1) A party or the person from whom disclosure is required or discovery is sought may move for an order of protection ~~from discovery~~. The moving party shall attach to the motion a copy of the request for discovery or the response at issue. The moving party shall also attach a certification that the moving party has in good

faith conferred or attempted to confer with other affected parties to resolve the dispute without court action.

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) **Expenses and sanctions for motions.** If the motion to compel or for a protective order is granted or denied, or if a party provides disclosure or discovery or withdraws a disclosure or discovery request after a motion is filed, the court may order the party, witness or attorney to pay the reasonable expenses and attorney fees incurred on account of the motion if the court finds that the party, witness, or attorney did not act in good faith or asserted a position that was not substantially justified. A motion to compel or for a protective order does not suspend or toll the time to complete standard discovery.

(e) **Failure to comply with order.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

information lost as a result of the routine, good-faith operation of an electronic information system.

Advisory Committee Notes

Rule 105. Shortening 90 day waiting period in domestic matters.

A motion for a hearing less than 90 days from the date the petition was filed shall be accompanied by an affidavit setting forth the date on which the petition for divorce was filed and the facts constituting ~~good cause~~ extraordinary circumstances.

Tab 8

FAQs

(1) Monitoring discovery deadlines.

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

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

Question: If a plaintiff specifies Tier 1 or Tier 2 in the complaint, and a subsequent pleading (such as a counterclaim) elevates the case to a higher standard discovery tier pursuant to Rules 26(c)(3)-(4), does the plaintiff then automatically have the right to seek higher damages at trial commensurate with the higher tier?

Answer: No. The rule does not automatically give the plaintiff that right. Although Rules 26(c)(3)-(4) are clear that additional standard discovery will be available in the case due to the higher tier triggered by the later pleading, Rule 8(a) nevertheless states that "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." Although the parties will conduct standard discovery commensurate with a higher tier, Rule 8(a) nevertheless continues to limit the plaintiff's damages if the face of the complaint still specifies the lower tier. The best practice for a plaintiff in this circumstance is to amend the complaint pursuant to Rule 15 to identify the higher tier and claim the right to recover damages commensurate with that tier. Otherwise, the plaintiff may face the unfortunate circumstance of conducting more

extensive and costly discovery in keeping with the higher tier but still being limited to the lower-tier damages prayed for in the complaint. However, this option is of course limited to cases where the plaintiff has a basis under Rule 11 to seek damages consistent with the higher tier. This would be the case, for example, if the plaintiff initially chose to forego the right to seek available higher-tier damages in order to enjoy the benefits of speedier and less costly discovery that accompany the lower tiers.

Already Published:

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. 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).

(3) Length of depositions.

Question: How long may a deposition be? Rule 30(d) states that “oral questioning of a nonparty shall not exceed four hours, and oral questioning of a party shall not exceed seven hours,” but 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?

Answer: It is only four hours total. Under Rule 30(d), the maximum total length of a deposition of a nonparty is four hours of oral questioning from all parties, and the maximum total length of a deposition of a party is seven hours of oral questioning from all parties. Under Rules 26(a)(4)(B) and 30(d), the maximum total length of a deposition of an expert witness is four hours of oral questioning from all parties.

The limitations in Rule 26(c)(5) on total deposition hours per side address the aggregate amount of standard fact discovery permitted and have no bearing on the permissible length of any individual deposition, except that if one side has exhausted its available deposition hours, that may function to limit the length of a specific deposition. (Indeed, each side in a Tier 1 case is limited to three total fact deposition hours and therefore may not take a four- or seven-hour deposition, despite the language of Rule 30(d).) The deposition time limitations in Rules 26(c)(5) and 30(d) accomplish different purposes and apply separately from each other. Each side must plan its overall deposition strategy to fall within the aggregate time limitations specified in the Rule 26(c)(5) tier system, and multiple parties on the same side are encouraged to cooperate with each other (or to seek court guidance if necessary) in allocating that time appropriately. Rules 30(d) and 26(a)(4)(B) operate independently of the tier system to ensure no nonparty or expert deposition exceeds four hours total, and no party deposition exceeds seven hours total. Nothing in Rule 26(c)(5) allows any individual deposition to exceed these time limits.

(4) Effect of premature disclosure of expert witnesses

Question: I represent a defendant. Shortly after the commencement of the case--indeed, before the exchange of initial disclosures--the plaintiff moved for summary judgment and purported to serve his expert disclosures under Rule 26(a)(4)(A) along with the summary judgment motion. He appears to have felt this was necessary in order to support his summary judgment motion with declarations from his experts. Does this mean I must elect with seven days to depose the plaintiffs' experts or get expert reports? That doesn't seem right, considering we haven't conducted any fact discovery yet, but I want to make sure I don't waive my right under Rule 26(a)(4)(C)(i) to conduct expert discovery at the appropriate time.

Answer: The plaintiff's expert disclosures are premature and do not trigger the defendant's obligation to elect an expert deposition or report, nor do they otherwise impact the timing of expert disclosures and discovery. The 2011 amendments do not permit any party to "jump-start" the expert disclosure and discovery process by serving expert disclosures prematurely. Rule 26(a)(4)(C)(i) states "[t]he 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) [i.e., the initial expert disclosure] within seven days after the close of fact discovery." This specifies a window within which the

parties must provide their initial expert disclosures; it is not merely a deadline for such disclosures. There is nothing wrong with submitting an expert declaration in support of a summary judgment motion at any time, but a formal "disclosure of expert testimony" under Rule 26(a)(4)(A) is premature and ineffective if made prior to the close of fact discovery.

(5) Effect of discovery tier on limiting the judgment.

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: Attorneys may, to the extent consistent with the law, argue for any award amount. However, pleading into a tier constitutes a waiver by that party of any claim to damages above the tier limit. See Rule 8(a). Thus, the court must reduce any damages awarded in excess of the tier limit to the applicable tier limit, irrespective of the jury's determination.

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?

Answer: No. Under Rule 8(a), a party who pleads the case as a tier 1 or tier 2 case has waived any right to recover damages above the applicable tier limits. Thus, unless the party has appropriately amended its pleading pursuant to Rule 15, the tier limit restricts the amount of damages that can be awarded. An award in excess of the tier must be reduced by the court to the applicable tier limit. The choice of a lower tier confers the benefit of no significant discovery in return for the party's giving up the chance to obtain greater damages. It would be inequitable 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.

Question: Is the jury told about the tier limits?

Answer: No. For evidentiary purposes, the court should treat tier limits the same way that statutory damage caps are treated. The tier limits restrict the amount of damages that can be recovered, see Rule 8(a), but do not constitute admissible evidence.

(6) 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.

(7) 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.

(8) 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.

(9) 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.

(10) 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.

(11) 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).

(12) 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.

(13) 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:

(14) 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.

(15) 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.

(16) 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).

(17) 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.

(18) 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.

(19) 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.

(20) 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.

(21) 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.

(22) 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:

(23) 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:

(24) Supplementing disclosures

From Todd

Question: How frequently must a party supplement disclosures?

From Frank:

I have a med mal case where specials are under $5,000 however the general damages are substantial, permanent and lifelong. Cases like this have been tried to verdict across the nation as high as 1.2 million but most are in the $300,000 to $600,000 range. I have filed complaint alleging tier 3. Defendant files (after answer) with "Motion for Protective Order & Issuance of an Order that the Claim falls Under Tier 1." I have reread the committee notes of the new rules but really nothing on point regarding tier limits. Do the new rules provide that the Plaintiff can claim what damages they think they are? To hold otherwise would allow the Court to determine damages.

From John Bogart

If I serve an interrogatory on Mr. A and Mr. A's LLC is that one interrogatory or two?

As they are aligned and for practical purposes the same, it could be one. But there are two parties. Does any of that matter? Is it interrogatories directed to a side now, rather to a party? Rule 33 is still by party, but the allocation isn't.