Agenda
Advisory Committee on Rules of Civil Procedure

October 24, 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
Appeals	Tab 2	Cullen Battle
FAQs	Tab 3	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.

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

SEPTEMBER 26, 2012

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

PHONE: Honorable Lyle R. Anderson, Professor David Moore

STAFF: Tim Shea, Sammi Anderson, Diane Abegglen

GUESTS: Michael Zimmerman, Debra Moore

I. APPROVAL OF MINUTES.

Mr. Wikstrom entertained comments from the committee concerning the May 23, 2012 minutes. The committee unanimously approved the minutes.

II. RULE 26.2 REVISIONS.

Mr. Carney recapped for the committee the revisions to Rule 26.2, which were intended to clarify permissible uses for social security numbers and other personal information. The revisions have been out for public comment and no substantive comments were received. A motion to approve the revisions was made and the committee unanimously approved the motion.

III. SMALL CLAIMS PROCEDURE RULE 3.

Mr. Shea discussed proposed revisions to Small Claims Procedure Rule 3. The justice courts have asked that the rule be revised to require that service be effectuated pursuant to Rule 4 of the Rules of Civil Procedure. Mr. Slaugh clarified some issues regarding alternative service methods now available pursuant to Rule 4. The committee voted unanimously to send the proposed revisions out for public comment.

IV. COURT GENERATED DEADLINE NOTICES.

Debra Moore, Court Administrator, joined the committee to discuss court-generated deadline notices. The notices are sent from the court and designed to provide estimated completion dates to parties and counsel in light of the new,

simplified rules of discovery. Ms. Moore explained the evolution of the process for devising and sending notices, as well as the way dates are calculated, *ie*, always using outside dates (holidays, weekends, etc.) and including 3 days mailing. The judges on the committee emphasized the need to have deadlines, especially for fact discovery, in the court file. Ms. Moore also explained the desire to educate and remind the Bar that the new rules are in effect and may have a dramatic impact on the timing of the case.

The committee considered a number of different options to address ambiguity in the dates and potential confusion among the Bar when they receive a notice that may contain slightly different dates than required by the rules, including the option that the "notice" become an Order by the court, informing parties that these dates will govern the case, unless stipulation or motion to the court. The committee next discussed keying all dates in the notice from the filing of the Answer. Once the Answer is filed, dates can be calculated with a higher degree of precision. The notice will still function only as a notice, as opposed to an Order, so that parties can stipulate around the dates, if they so elect, without seeking relief from the court. Three days mailing can be eliminated because due dates would be keyed from date of filing, as opposed to service.

Judge Blanch agreed to revise the notice for further discussion at the next meeting. The committee also approved a motion to change the word "service" on line 30 of Rule 26 to "filing".

V. RULE 58A.

Mr. Battle led a discussion concerning the potential due process implications associated with notice of the judgment not being served and a party's consequent failure to timely appeal the judgment. Mr. Battle described the history of discussions with the Appellate Rules committee and the conclusion that a resolution would have to be found within the Rules of Civil Procedure. Mr. Battle explained the reasoning behind the proposed changes and raised additional questions for the committee's consideration, including whether the judgment should be vacated in its entirety or only "re-entered" with respect to the aggrieved party. Vacation of the judgment could affect other parties and priority of judgment liens, among other things. Judge Shaughnessy opined that the judgment should not be vacated under these circumstances because vacation would have all sorts of untoward consequences that would extend beyond the aggrieved party's harm.

Mr. Battle posed the question whether there should be a hard deadline by which a motion seeking relief from the judgment has to be made. Also whether the ability to seek relief should include only the right to appeal, or to make post-trial motions? The committee discussed that the narrowest possible solution would be to allow parties who lacked notice, but could show they had exercised due diligence, to seek re-entry of the judgment only as to them and only for purposes of the right to appeal or for such other purposes as the court may order.

Mr. Wikstrom proposed tabling the action item until next month so that committee members can further consider the various issues associated with the proposed amendment. The committee agreed.

VI. RULE 37.

Judge Shaughnessy directed the Committee's attention to Rule 37(e)(2), which makes available particular sanctions for the failure to follow Court's orders. Subpart (h) establishes the sanctions available for failure to disclose evidence, but, Judge Shaughnessy pointed out, the last sentence allows a court to consider imposing a (e)(2) sanction for failure to disclose. Judge Shaughnessy's concern is that the (e)(2) sanctions are really intended for situations of bad faith and/or prejudice. If a party fails to turn over a document that is helpful to their case, the sanction should only be exclusion of the evidence, not the more severe sanctions such as stricken pleadings or termination of the case. That being said, where a party fails to turn over a document that hurts their case, a sanction of excluding the document is not sufficient because it only helps the violating party. In that situation, the court should be able to enter (e)(2) sanctions.

The committee discussed splitting subsection (h) into a sub-provision that governs disclosures of information that is helpful to the party's case, *e.g.*, initial disclosures, and a sub-provision that governs a party's failure to respond to the other side's discovery request and/or to supplement previous requests. The sanction for the former is exclusion, for the latter, the sanctions available under (e)(2).

VII. RULE 5(e).

Mr. Scofield explained that the state e-filing system does not affix the date to the filed pleading. This is inconsistent with rule, which states "the filing shall be noted on the paper." The committee voted no action was necessary after Mr. Shea explained that the paper does contain the filing date.

VIII. RULE 7(c)(1).

Mr. Schofield raised an issue with respect to requests for overlength memoranda, noting an inconsistency between 7(c)(2) and 7(c)(1). The committee decided that no action was necessary.

IX. ADJOURNMENT.

The meeting adjourned at 6:05 pm. The next meeting will be held on October 24, 2012 at 4:00 p.m. at the Administrative Office of the Courts.

Tab 2

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 upon motion and a showing that the moving party was deprived of the right to appeal *[or other post-judgment relief]* 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 the limited purpose of allowing the moving party to file an appeal or seek such other post-judgment relief as the court may order.

Tab 3

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 has created 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. However, notwithstanding these judicial efforts, the parties themselves bear the ultimate responsibility to track and meet deadlines imposed under the new rules.

(2) Discovery tiers — 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 Rule 26(c)(3)-(4) is 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. This option is of course limited to cases in which 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 higher 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) Discovery tiers — 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, the 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. 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.

(4) Depositions — 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.

(5) Expert discovery — 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 affect the timing of expert disclosures and discovery. The rules 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 before the close of fact discovery.

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

Question: Does a defendant need to designate experts within seven days after the close of fact discovery, if the defendant is claiming comparative fault or anything else on which it has the burden of proof?

Answer: Yes. Under Rule 26(a)(4)(C), the deadline for designation of experts is 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, the defendant must designate that expert within seven days after the close of fact discovery and before its "contravening" experts.

(7) 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). Does this mean after service of the expert designation? Is the time for the election calculated under Rule 6?

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 seven-day period. The committee's intent was that the time for the election would be from service of the designation. An amendment to that effect is in the works.

(8) Extraordinary discovery — 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 parties should not have to make meaningless requests for discovery, and the court should not have to deal with serial stipulations or motions for additional discovery. The intent is to require a party to exhaust all permitted and desired discovery before asking for more. If the party has used all of the permitted discovery by one or more methods and does not intend any further discovery by other methods, then a stipulation or motion for extraordinary discovery is appropriate. But if the party is still engaged in discovery by methods other than the one (or more) that has been exhausted, the party should wait before filing a stipulation or motion for more.

(9) Extraordinary discovery — Order.

Question: Is an order needed for stipulations to extend discovery, or is just a "stipulated statement" to be filed?

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. However, the judge retains the authority under Rule 16 to manage discovery, so it is possible that a judge who believes a stipulation goes beyond what is proportional may deny the stipulation and schedule a conference for deciding discovery limits.

(10) 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.

(11) 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.

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

Question: In disclosing an expert, Rule 26(a)(4)(A) says to provide "A brief summary of the anticipated opinions, along with all data and other information that was relied upon." Does this latter phrase mean the party must 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:

(13) 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.

(14) 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.

(15) 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).

(16) 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.

(17) 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.

(18) 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.

(19) 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.

(20) 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:

(21) 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:

(22) 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.