Agenda

Advisory Committee on Rules of Civil Procedure

January 28, 2015
4:00 to 6:00 p.m.

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

Welcome and approval of minutes.	Tab 1	Jonathan Hafen
Electronic service of summons and complaint	Tab 2	Lane Gleave, Utah Court Services, LLC
Report on Utah discovery reforms	Tab 3	Paula Hannaford Cynthia Lee National Center for State Courts
Small Claims Rule 14. Settlement offers.	Tab 4	Tim Shea
Rule 5. Service and filing of pleadings and other papers.	Tab 5	Tim Shea
Rule 11. Signing of pleadings, motions, affidavits, and other papers; representations to court; sanctions.	Tab 6	Tim Shea
Rule 43. Evidence.	Tab 7	Tim Shea
Rule 63. Disability or disqualification of a judge.	Tab 8	Tim Shea

Committee Webpage: http://www.utcourts.gov/committees/civproc/

Meeting Schedule:

February 25, 2015

March 25, 2015

April 22, 2015

May 27, 2015

September 23, 2015

October 28, 2015

November 18, 2015

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – November 19, 2014

Present:	Terrie T. McIntosh, Leslie W. Slaugh, Rod N. Andreason, Amber M. Mettler, Scott S. Bell, Hon. Kate Toomey, Jonathan Hafen, Trystan B. Smith, Lincoln Davies, Hon. James T. Blanch, Hon. Todd Shaughnessy
Telephone:	Paul Stancil, Hon. Derek Pullan, Hon. Lyle R. Anderson
Staff:	Timothy Shea, Heather M. Sneddon
Not Present:	Hon. John L. Baxter, Hon. Evelyn J. Furse, Steve Marsden, Sammi Anderson, David W. Scofield, Barbara L. Townsend, Lori Woffinden

I. Welcome and approval of minutes. [Tab 1]

Jonathan Hafen welcomed the committee and the minutes were offered for approval. After corrections to the list of attendees, Judge Toomey moved to approve the minutes. Mr. Andreason seconded and the minutes were unanimously approved.

II. Responses to circulation of Rule 7. [Tab 2]

Tim Shea identified two comments that were received regarding Rule 7. The first concerns whether a counterclaim should be recognized as a pleading in Rule 7(a). Neither the current URCP rule nor the FRCP rule does so.

Discussion:

- Many committee members considered it odd that a counterclaim is not identified as a pleading in subsection (a). Judge Toomey mentioned that a fee is even required to file a counterclaim.

- Mr. Slaugh questioned whether a counterclaim exists on its own other than as part of an answer. Mr. Andreason mentioned that occasionally a counterclaim is a stand-alone document, but usually it's part of an answer. Mr. Hafen asked whether we are disallowing counterclaims by not including them in answers. Mr. Slaugh pointed out that counterclaims may be filed separately, even though Rule 13(e) seems to contemplate that counterclaims are part of an answer.

- Mr. Davies tells his students that it's odd that counterclaims are not listed in the federal rule. He believes the rule identifies a complaint and answer and then lists several kinds, including counterclaims and crossclaims, then a reply.

- Judge Blanch said that counterclaims join issues in the case. They are no different than other documents that accomplish the same thing, and exclusion from Rule 7 makes little sense.

- If counterclaims are added, Mr. Hafen questioned whether we need to also add crossclaims.

- Mr. Smith questioned whether counterclaims are simply a different term of art than complaints and are not pleadings. Mr. Slaugh and Judge Toomey responded that, oftentimes, counterclaims end up being the dominant pleading in a case.

- Mr. Shea commented that he is not inclined to make a change because Rule 13 treats counterclaims and crossclaims as part of another pleading, i.e., they can be included in any other pleading.

- With no objections, Mr. Hafen stated that Rule 7(a) will be left as is.

Mr. Shea identified the second issue with respect to Rule 7, raised by Ms. Mettler: Will judges be overwhelmed with attachments if parties "must" attach an appendix of relevant portions of documents cited. What about cases and pleadings already on file?

Discussion:

- Mr. Andreason agrees with Ms. Mettler. The proposed amendment exceeds what is in the local federal rule. If we are required to include as attachments everything that is cited, our filings will be huge. The local federal rule says nothing about opinions, statutes or rules. Ms. Mettler commented that the appendix should include only things that the court would not otherwise have. Mr. Andreason suggests changing the amendment to be consistent with the local federal rule.

- Mr. Slaugh commented that the purpose of this is to dovetail with the rule adopted years ago prohibiting the filing of discovery materials. If the motion cites evidence of record, filing an appendix puts that evidence in the record. Mr. Davies agreed; opinions, statutes and rules are not evidence. As such, Mr. Hafen suggested those be excluded from the appendix, which is consistent with the local federal rule. Judge Blanch commented that unpublished opinions could be included if not available through Westlaw, but otherwise, the court has access to Westlaw and does not need copies of cases attached. Mr. Slaugh indicated that it is a question of advocacy, not requirement.

- Mr. Hafen suggested copying the local federal rule to be wholly consistent. Mr. Slaugh agrees; the local rule identifies what must be attached. Judge Toomey commented that things were different before electronic filing. Judges may have looked at copies of cases then, but it is easier now to look at the memorandum and Westlaw in parallel on screen.

- Mr. Andreason moved to replace the Rule 7 language regarding the appendix with the language from the local federal rule. Mr. Shea suggested leaving out "when filed and served." Judge Toomey so moved, Mr. Bell seconded and the motion passed with unanimous consent.

Mr. Hafen met with the Appellate Rules Committee regarding Rule 7. They had a variety of concerns, particularly with respect to enforcing orders/judgments. These issues, however, are not resolvable based on our proposed amendments to Rule 7. Even so, the Appellate Rules Committee would

like clarification in Rule 7(j)(1) on when the time starts for appeal purposes. Mr. Shea recommends addressing this issue in the committee note rather than adding it to the rule.

Discussion:

- Mr. Slaugh proposed adding to the rule: "Court's decision is complete when signed by the judge unless the judge directs further action" or "unless otherwise directed by the judge." If the decision or ruling needs a follow-up ordef, the judge may choose to have the parties prepare it, but our proposed rule doesn't give the judge the leeway. Mr. Hafen pointed out that the language Mr. Shea has proposed to add to the committee note is too unwieldy to put in the rule itself. Mr. Slaugh suggested that perhaps not all of that language is needed.

- Mr. Shea expressed his hesitancy to adopt Mr. Slaugh's proposal. Under the structure we've set up, a decision, whatever it is called, is complete when signed. It may or may not be appealable at that point, however. He would hate to go back to including some condition of a further directive affecting the "completeness" of that decision. Mr. Slaugh recognized that if a judge directs a party to prepare an order, the judge's action is still complete but the order is not appealable until someone prepares it. Messrs. Hafen and Shea agreed.

- Mr. Smith raised the difference between the date when a decision is signed versus when it is entered on the docket. Mr. Shea recognized that they are becoming terms of art (as suggested by Mr. Bell). What we've called a "complete" decision still has to be entered on the docket by the clerk. Under URAP 5, the time in which to file a petition for permission to appeal that decision is 20 days from when it is *entered*. Thus, the decision is complete when signed but may require further implementation before it is appealable. That is the structure Mr. Shea has used in drafting.

- Mr. Hafen raised the addition of Mr. Shea's language to the committee note. Mr. Slaugh so moved and Mr. Smith seconded. The motion passed with unanimous consent. Mr. Shea will report to the Appellate Rules Committee and publish Rule 7 and the committee note for comment.

- With respect to objections, Mr. Smith questioned whether we should leave the 2-day deadline to file an order after receiving an objection (and to file a response to that objection), or change it to 7 days under Rule 7(j)(5)(C). Mr. Slaugh commented that the current rule simply says "after" the objection with respect to when to file the proposed form of order. Mr. Hafen liked the idea of including a deadline. Mr. Slaugh stated that there is no penalty for filing the form of order (or response) late. Judge Blanch commented that responding to an objection is what takes time. Mr. Smith moved to extend the time for filing the form of order and a response to an objection to 7 days, Blanch seconded, and the motion passed unanimously.

- Mr. Shea stated that Rule 58A has the same 2-day provision regarding judgments, and proposed the same change. All agreed. They will be sent out for comment.

III. Consideration of comments to Rules 5, 26, 30, 37 and 45. [Tab 3]

Mr. Shea looked into the issue of filing private documents and learned that there is a way to electronically file them and request that they be classified as private. Such documents will go to the other party, but will not be viewable by the public. Thus, Mr. Bogart's comment is not quite right. Mr. Shea

believes Mr. Bogart's concern has been addressed, although he may not be aware. Currently, however, there is no way to electronically file a "safeguarded" record, i.e., one that will *not* be served on the other parties. There are only a handful of such documents—mostly related to domestic violence victims, juror names, etc., that are automatically so designated. Mr. Shea does not recommend implementing a process to file other records as "safeguarded" through electronic filing, as that may result in many improper "safeguarded" filings. No one proposed any changes with respect to this issue.

Mr. Shea also identified the comments regarding Rules 5, 26, 30, 37 and 45, including the various opinions concerning whether consent should be required to serve parties via email. Mr. Shea is in favor of email service without having to seek consent—that is the new age.

Rule 5. As Mr. Shea described, "Superman" commented that the rule should not require documents to be served before or on the same day as filed, as set forth in line 48. Mr. Shea mentioned that we are moving toward the filing of documents as the triggering date for responses, not service. They are more or less simultaneous now with electronic filing. Superman's "11:58 pm" filing scenario isn't particularly realistic, but his description of temporary order motions being served with petitions for divorce is.

Discussion:

- Mr. Slaugh stated that he believed the prior rule just required service "soon after" filing. Mr. Andreason commented that on bigger cases, it is definitely more conceivable that 11:58 pm filings will occur. Mr. Hafen questions whether this is really an issue. Mr. Davies commented that it could be an issue with respect to service on pro se parties. Mr. Shea pointed out that, currently, the rule focuses on service with filing to occur within a reasonable period after. Mr. Slaugh suggested that we stick with the reasonable time concept. Judge Toomey and Mr. Hafen believe a "reasonable time" is too loose.

- Judge Blanch commented that we want to encourage people to file and serve on the same day, so the rule should reflect that. No one disagreed, so the rule will remain unchanged.

- Ms. McIntosh liked the style change proposed by Mr. Whittaker on line 49, which Mr. Shea is okay with. Ms. McIntosh also identified his proposed change to line 68 concerning service by other means being effective upon delivery. The proposed rule says only that service by electronic means is complete upon sending. Judge Shaughnessy mentioned that the rule is merely meant to clarify. The committee agreed that the rule as drafted is sufficient.

- Mr. Slaugh raised Mr. Whittaker's comment concerning lines 75-76: He believes every paper required to be served must be served by the party *filing* it (rather than preparing it). Same with line 76. Mr. Slaugh is not concerned with the court in line 76, but suggested that a change to line 75 makes sense. Ms. Mettler commented that she prepares discovery that she never files. Mr. Hafen proposed to leave "preparing" in the rule. No objections.

- Ms. McIntosh addressed Mr. Whittaker's comment to line 114, where the rule says "e-filing." "Electronic filing" is used everywhere else. The committee agreed to change that to electronic filing.

- Mr. Davies raised Mr. Whittaker's suggestion for the committee note. Mr. Davies wants to balance what we really have to explain. Mr. Hafen commented that we need to explain when

we're making a change or there is a particularly thorny issue. Mr. Whittaker's proposal sounds more like minutes. Ms. McIntosh agreed; it doesn't provide an interpretation, only a defense of the committee's rule change. Mr. Smith commented that Rule 5 is not that complicated. The committee agreed to leave the committee note as is.

Rules 26 and 30. With respect to Rule 26, Mr. Shea believes the comment from Mr. Schriever is mistaken. Our change to Rule 26(c)(6) refers to the statement of discovery issues under Rule 37(a), which does not require misconduct, bad faith or non-disclosure. No comments were received on Rule 30.

Rule 37 Discussion:

- Mr. Shea mentioned Mr. Dahl's comment concerning the relationship between Rules 37 and 45. Mr. Shea changed "motions" to "requests" given that discovery issues are now governed by the Statement of Discovery Issues under Rule 37(a), which itself is not technically a "motion." Mr. Shea is not sure if this is sufficient and is open to suggestions, but wants to channel people to Rule 37(a). He made the same change in a few other places. Mr. Smith commented that it will take a bit of education, but he likes the change. The committee agreed with the change.

- Mr. Shea also relayed Mr. Sipos' comment expressing confusion regarding "attachments as required by law" in line 60. Mr. Shea mentioned that the Third District Court bench meeting could not think of an example, but out of an abundance of caution, included this language. The committee likewise could not think of any examples and, therefore, proposed to remove the language as likely to cause confusion and unnecessary argument. Mr. Shea asked whether the committee needed to address the second line, beginning at line 62. Mr. Andreason stated that the second line was much more clear, but Mr. Shea and Judge Shaughnessy propose removing the second line. The committee agreed to remove the second line of Rule 37(a)(4).

- Mr. Shea indicated that Mr. Whittaker suggested several changes to the proposed text. Judge Toomey stated that the current draft, as written, was fine without the changes.

- Ms. McIntosh questioned what is a "permitted" attachment, as some commenters had asked. She proposed changing the heading to Rule 37(a)(4) to "Permitted Attachments." All agreed. Ms. McIntosh also mentioned line 69, which references Rule 7(d) that is now 7(g). Mr. Shea will make the necessary changes.

- Mr. Shea raised Mr. Nadesan's comment that the statement of proportionality (at line 53) should not be required when requesting that the court exclude evidence that was not disclosed. Mr. Shea thinks this makes sense. Mr. Slaugh commented that that is difficult to achieve from a drafting standpoint. Mr. Smith agreed. Judge Shaughnessy questioned the context in which this would arise—wouldn't it be a motion in limine? The committee discussed at length whether excluding witnesses or testimony should be addressed through statements of discovery issues or motions in limine. Judge Blanch commented that in reality, if evidence is going to be allowed, it will likely be addressed in the context of a motion in limine, not a separate statement of discovery issues. Judge Shaughnessy said that redrafting the rule to account for this scenario makes little sense.

- Mr. Nadesan also commented that Rule 37 fails to say that it is the sole rule for addressing discovery disputes. Mr. Slaugh mentioned that the new proposed Rule 7 states that discovery

motions must be brought under Rule 37. Mr. Shea confirmed that to be the case, but stated the new Rule 7 has not yet been published for comment.

- Mr. Shea raised Mr. Bogart's comment that it is burdensome to require a nonparty to come to the forum of the parties to seek protection or defend objections. The committee has discussed this – it should be the court where the action is pending. Mr. Slaugh commented that since it is usually handled through telephone conference, it doesn't seem particularly burdensome. Judge Shaughnessy also commented that the requirement doesn't apply to out-of-state parties because such subpoenas must be domesticated and the party must go to the out-of-state court.

- Ms. McIntosh raised Mr. Whittaker's comment on Rule 37, line 106. We have changed expenses to costs, but "costs" are often read as taxable costs, which are much narrower than expenses. In contrast, line 139 addresses motions for attorneys' fees and expenses. Mr. Slaugh and Judge Shaughnessy are in favor of going back to expenses. Mr. Smith expressed his concern that "expenses," to him, mean anything and everything, whereas costs have a definition. Expenses could be huge on a statement of discovery issues, which may be opening the door to something much bigger than the committee was contemplating. The idea behind the statement of discovery issues was to resolve discovery disputes inexpensively and efficiently. Mr. Slaugh pointed out that the phrase "on account of the statement of discovery issues" does not cover a failure of discovery. Judge Shaughnessy described a scenario where a party wants expensive extraordinary discovery that doesn't fit within the definition of "costs"; he wants the ability to permit that discovery but require the party requesting it to pay for it. Judge Blanch commented that costs are automatic, whereas expenses are awarded in the context of "reasonableness." Mr. Shea stated that he believes Judge Shaughnessy's point is covered by lines 98-99. Judge Shaughnessy asked why costs are included in those lines. Mr. Smith responded that those lines deal with something different—whether 2 or 4 depositions are appropriate, for example. Mr. Hafen suggested changing lines 105-06 to pay the other party's reasonable costs, expenses or attorneys' fees, making discretion built-in. Judge Shaughnessy commented that that would make lines 105-06 parallel lines 98-99, although in a different scenario. If different language is used, attorneys will highlight that difference. Judge Blanch recommended leaving financial issues to the judge's discretion, and not limiting to defined "costs." Mr. Shea summarized Mr. Hafen's proposal as copying lines 98-99, including them in lines 106 and 114, but with an "or." Mr. Shaughnessy proposed to make that change throughout the rule to make it consistent. The committee agreed.

- Ms. McIntosh also raised lines 105-06 in Rule 37: Although it discusses "other party's" expenses, a nonparty may also be affected. Mr. Shea proposed to delete "other party's" from the rule. Mr. Hafen agreed. Mr. Slaugh asked whether line 105 should say "party" or "person." He believes this wouldn't be used against a nonparty, as that would be handled through an OSC for contempt. Jurisdiction over the nonparty would have to be obtained. Given that, Mr. Shea questioned whether "other party's" should be reinstated. The committee decided not to include "other party's."

- Mr. Slaugh raised line 107, which only permits recovery "on account of" the statement of discovery issues, not the underlying abuse. Judge Shaughnessy suggested that's what "on account of" really means. Mr. Slaugh suggested changing the language to say "on account of discovery issues." Judge Shaughnessy responded, saying that the existing rule allows judges to tag lawyers with expenses for the underlying abuse. "On account of" is broad enough.

Rule 45 Discussion:

- Mr. Shea raised Mr. Sanders' recommendation of a minimum time frame for serving third-party subpoenas. Mr. Shea suggests 7 days. Mr. Slaugh recalled that the issue had been discussed a year ago, but the decision was not to add a timeframe. The federal rule requires 8 days notice by mail, 5 days electronic. The problem with adding 7 days is that parties already are required to give 14 days' response time to the third-party. If another week is added, they will have tremendous lead-time on subpoenas when we have already limited the fact discovery period. Mr. Smith commented that under the current rule, you already have to give notice, you just don't have to serve the actual subpoena. By the time you get through the whole process, it's a while. Mr. Shea mentioned that if the rule is changed, it would require actual service of the subpoena. The committee's sentiment is not to change the rule.

- Mr. Shea commented that with respect to line 19, we no longer have a subpoena appended to the rules. The court website, however, includes a webpage on subpoenas, including subpoenas out-of-state, subpoenas for states that have enacted the Uniform Subpoena Act, etc. Mr. Shea suggested referencing a court-approved form. Judge Toomey agreed. Mr. Slaugh proposed the addition of a committee note with a link to where the form can be found.

- Ms. McIntosh raised a question regarding the added committee note language regarding nonparties affected by a subpoena. They're advised to request a protective order, but the rule says they may send a letter with the burden shifting to the party who served the subpoena to file a motion. She proposed the removal of that sentence from the note (at line 145). Mr. Slaugh agreed; the current rule says that a nonparty served with a subpoena may object, which ends their obligation to produce. They are not required to file a motion (line 100). Judge Shaughnessy stated that a nonparty has two choices: (1) send a letter objecting, or (2) move to quash. Ms. Mettler mentioned the rule: a party "shall" while a nonparty "may" move to quash. Mr. Bell commented that if you're objecting, you're not moving to quash. Ms. McIntosh said that nonparties should have both choices. Judge Shaughnessy commented that the point of the committee note is to direct nonparties to the statement of discovery procedure. The procedure for quashing a subpoena is set forth in Rule 37(a), the statement of discovery issues. The committee entrusted Mr. Shea to make these changes to the rule.

Judge Toomey moved to approve all rules as modified by the discussion. Mr. Davies seconded, and the motion carried unanimously.

IV. Rule 43. Evidence. [Tab 4]

Mr. Shea reported that Rule 43 is a proposal from the Judicial Council, which is the result of a study by the Ad Hoc Committee. They examined the use of video technology for remote appearances at hearings. In theory, the judge could be the one remotely attending, but a rule is needed for parties and lawyers. The rule would, as drafted, mirror the federal rule. In a separate Judicial Council rule, the definition of contemporaneous transmission will include the concept that everyone can see and hear everybody else. There should also be the ability to have private communications between clients and their counsel. If concerns exist, perhaps a court clerk or proctor could be required to be present with a remote witness. Recently, testimony was given from a hospital bed. In other words, remote appearances are occurring but there are no rules to regulate them. Based on his research, appellate courts are willing to honor the application of a rule or statute on this issue so long as it doesn't impinge on constitutional

rights. But if there is no rule, then appellate courts will not honor it. A challenge to the practice would probably be upheld.

Discussion:

- Judge Shaughnessy is in favor of adopting a rule. He proposed including a note that explains the rule and what appropriate safeguards are. Mr. Slaugh commented that appropriate safeguards are better left to the discretion of the judge. Mr. Andreason agreed.

- Mr. Slaugh also suggested dropping "compelling circumstances"; he believes good cause and appropriate safeguards are enough. Mr. Shea commented that the Juvenile Committee went the other way—they kept compelling circumstances and got rid of good cause. Mr. Hafen stated that the circumstances should be pretty compelling because live witnesses are much better, including for cross-examination purposes.

- Judge Toomey asked about stipulations. Mr. Shea reported that the Judicial Council was in favor of leaving it to the judge's discretion in all circumstances. In other words, the parties may not stipulate around the judge's discretion; a judge cannot be compelled to allow it.

- Judge Pullan asked whether a companion rule exists in the Rules of Criminal Procedure, as it would present confrontation issues. And the URCP apply unless there is a criminal rule that conflicts. Mr. Shea stated that a proposed criminal rule is going through the criminal rules committee. There is no national model to follow on the criminal or juvenile side. The Ad Hoc Committee came up with a handful of hearing types that would require consent of the parties, as well as the judge, and then a handful of hearings when the judge could simply do it without the parties' consent. The juvenile rule took the same approach. The criminal rule is still being developed while the juvenile rule is done and will be published for comment soon.

- Given that backdrop, Judge Pullan recommended that our committee not act until the criminal rule is in place, because it will introduce mischief into criminal cases. If we go first, this rule will apply in criminal cases. Mr. Shea proposed staging the rules and then submitting them as a package to the Supreme Court for approval (civil, criminal and juvenile). A sound approach would be to edit the rule as we see fit, send for comments, and then we'll hold back until we are prepared to submit all three rules from all three committees.

- Looking at the model on the criminal side, Judge Pullan asked whether there are any civil hearings where we would never permit remote appearances. The committee discussed several types of hearings and cases that might never qualify for remote appearances, but concluded that the circumstances would vary such that it should be left to the discretion of the judge rather than identifying types of hearings/cases in the rule. Judge Shaughnessy agreed to write a committee note that explains the rule, the pitfalls and appropriate safeguards and other requirements. Mr. Bell mentioned that while serving as a small claims judge, he has permitted a witness to appear via Skype. Mr. Shea commented that as remote appearances become more prominent, and we become more comfortable with the technology, interstate jurisdiction issues may become a thing of the past. Mr. Slaugh mentioned that there is an extensive committee note on that issue in the federal rule, which addresses the concerns raised by Judge Shaughnessy. Mr. Hafen asked whether the committee should consider a draft note before the rule is sent out for comment. Judge Shaughnessy favored a draft note.

- Mr. Shea raised line 5, as the committee needs to address good cause/compelling circumstances. He is inclined to go with compelling circumstances. Mr. Slaugh commented that the federal rule provides: "good cause in compelling circumstances." Mr. Smith was in favor of adopting the same language. Judge Pullan mentioned the possibility of a case with compelling circumstances, but the reason comes down to lack of diligence. Mr. Smith further commented that the reasons must be more than the fact that live appearance is costly. Mr. Davies commented that the advantage of using the federal language is that case law will have built up around that language that can be used as a guidepost. Judge Blanch commented that we generally track the federal rules unless there is a good reason not to. Mr. Shea mentioned that the note could explain that the rule is intended to cover the same base as the federal rule. Mr. Hafen stated that because there is some value in sticking with the federal rule, even if it is not what we would have chosen, he proposes leaving the rule as is for now and taking it up at the next meeting in conjunction with the committee note.

V. Adjournment.

The meeting adjourned at 5:55 pm. The next meeting will be held on January 28, 2015 at 4:00pm at the Administrative Office of the Courts.

Tab 2

Utah Court Services
P.O. Box 6175
Clearfield, UT 84089

(801) 774-9273
www.utahcourtservices.com

Mr. Timothy Shea
Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84111

October 03, 2014

Mr. Shea,

I spoke with you several months ago regarding a system that my company has developed for serving Civil Process electronically.

At this time, I am requesting your assistance in changing Rule 4 of the Procedures of Civil Process to include electronic service by e-mail; and specifically by downloading the documents from a secure server.

As you know, Rule 4 allows for service by e-mail after the initial service of the paper. I would like to change Rule 4 to include service by email as an initial form of service.

We have done a great deal of research and development regarding electronic service. We have demonstrated that electronic service by e-mail can be much faster, more accurate and more secure than traditional forms of service. We are also working with Legislators from the State of Utah to get this rule changed during the upcoming legislative session.

Thank you in advance for your service. Please feel free to contact me at any time if you have questions, or would like a demonstration of the system that we have developed.

Best Regards,

Lane Gleave

Lane Gleave
Utah Court Service LLC
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Tab 3

Utah: Impact of the Revisions to Rule 26 on Discovery Practice

Draft Report: December 17, 2014

Paula Hannaford-Agor, JD
Director, NCSC Center for Jury Studies

Cynthia G. Lee, JD
Court Research Associate

Acknowledgements

The NCSC project staff are extremely grateful to the judges, lawyers, and court staff within the Utah judicial branch who invited the NCSC to participate in this evaluation and who provided expert technical support and guidance for this project. We are especially indebted to the following individuals:

Hon. Matthew B. Durrant, Chief Justice, Utah Supreme Court

Hon. Christine Durham, former Chief Justice, Utah Supreme Court

Daniel Becker, State Court Administrator, Utah Administrative Office of the Courts

Tim Shea, Staff Attorney, Utah Administrative Office of the Courts

Kim Allard, Court Services Director, Utah Administrative Office of the Courts

Debra Moore, District Court Administrator, Utah Administrative Office of the Courts

Tom Langhorne, Judicial Institute Director, Utah Administrative Office of the Courts

George Braden, Management Analyst, Utah Administrative Office of the Courts

Kim Matheson, Information Analyst, Utah Administrative Office of the Courts

We are also indebted to our NCSC colleagues who provided substantive expertise and administrative support to the project including Richard Schauffler, Director, Research Services; Nicole L. Waters, Principle Court Research Consultant; Amber Will, Research Assistant; Bethany Bostrom, Research Assistant, and Brenda Otto, Program Specialist. This project was partially supported by a grant from the Bureau of Justice Assistance, U.S. Department of Justice (BJA No. 2009-D1-BXK-036). The views expressed in this report are those of the authors and do not necessarily represent those of the U.S. Department of Justice, or the National Center for State Courts.

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Introduction

On Nov. 1, 2011, the Utah Supreme Court enacted sweeping changes to the rules governing discovery in civil cases filed in the Utah district courts. The reforms reflected three years of debate among members of the Utah Supreme Court Advisory Committee on the Rules of Civil Procedure (Advisory Committee) and extensive comment by the practicing bar. In a memorandum filed with the proposed rules, the Advisory Committee outlined the need for the reforms.[1] Noting that the Utah Rules of Civil Procedure had gradually evolved to mirror the federal rules,

> [I]t was perceived that consistency with the federal rules, along with the extensive case law interpreting them, would provide a positive benefit. … [T]he committee has come to question the very premise on which Utah adopted those rules. The federal rules were designed for complex cases with large amounts in controversy that typify the federal system. The vast majority of cases filed in Utah courts are not those types of cases. As a result, our state civil justice system has become unavailable for many people because they cannot afford it.

The concerns raised by the Advisory Committee echo those of judges and lawyers in other states and, ironically, in the federal courts as well. A 2008 survey of trial lawyers found discovery was the primary cause of burgeoning litigation costs.[2] In 2010, the federal Advisory Committee on Civil Rules hosted a national Conference on Civil Litigation at Duke University Law School, which included several sessions focused on issues related to discovery.[3] Proposals from these and other statewide investigations have focused on automatic disclosure requirements,[4] limits on either the amount or timeframe for completing discovery,[5] and cost-sharing or cost-shifting strategies, especially concerning e-discovery.[6]

Like the Federal Rules of Civil Procedure, Rule 26 of the Utah Rules of Civil Procedure in place before November 1, 2011 described provisions concerning discovery including that the general scope of discovery permitted parties to obtain information about "any nonprivileged matter that is relevant to any party's claim or defense. … Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." In Utah, the Advisory Committee concluded that it was necessary to revise Rule 26 of the Utah Rules of Civil Procedure to explicitly introduce the concept of proportionality into process of discovery to slow, if not reverse, the perceived trend toward ever-increasing discovery in civil cases. The committee proposals envisioned a cultural

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[1] UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE, PROPOSED RULES GOVERNING CIVIL DISCOVERY ([date?])[*hereinafter* PROPOSED RULES].

[2] AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT (2009).

[3] JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES AND THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION.

[4] NEW HAMPSHIRE: IMPACT OF THE PROPORTIONAL DISCOVERY/AUTOMATIC DISCLOSURE (PAD) PILOT RULES (NCSC Aug. 19, 2013).

[5] HANNAFORD-AGOR et al., SHORT, SUMMARY & EXPEDITED: THE EVALUATION OF CIVIL JURY TRIALS 58-71 (NCSC 2012); Adoption of Rules for Dismissals and Expedited Actions, Per Curiam Opinion, Misc. Docket No. 12-9191 (Tex. S. Ct., Nov. 13, 2012).

[6] SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM: REPORT ON PHASE ONE (May 20, 2009 – May 1, 2010); SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM: FINAL REPORT ON PHASE TWO (May 2010 – May 2012); SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM: INTERIM REPORT ON PHASE THREE (May 2012 – May 2013).

change in discovery practices "away from a system in which discovery is the predominant aspect of litigation … and toward a system in which each request for discovery must be justified by its proponent, and the focus is on moving quickly and efficiently to the disposition of the merits of the case."[7] The revised Rule 26 ultimately featured seven distinct components:[8]

- Proportionality is the key principle governing the scope of discovery—specifically that the cost of discovery should be proportional to what is at stake in the litigation.
- The party seeking discovery bears the burden of demonstrating that the discovery request is both relevant and proportional.
- The court has authority to order the requesting party to pay some or all of the costs of producing the information sought in discovery if necessary to achieve proportionality.
- The parties must automatically disclose the documents and physical evidence which they may offer as evidence as well as the names of witnesses with a description of the expected testimony. Failure to do so on a timely basis results in the undisclosed evidence or witnesses being deemed inadmissible.[9]
- The rules establish three tiers of cases based on the amount in controversy; each discovery tier has defined limits on the amount of discovery and the timeframe in which fact and expert discovery must be completed. Cases in which no amount in controversy is pleaded (e.g., domestic cases) are assigned to Tier 2. See Table 1 for a breakdown of permitted discovery for each tier.
- Parties seeking discovery above that permitted by the assigned tier may do so by motion or stipulation, but in either case must certify that the clients have reviewed and approved a discovery budget.
- Parties may either accept a report from the opposing party's expert witness or may depose the opposing party's expert witness, but not both. If a party accepts an expert witness report, the expert cannot testify beyond what is fairly disclosed in the report.

[7] PROPOSED RULES, *supra* note 1, at 2.

[8] The revisions were also incorporated into Rule 26.1, which applies to domestic relations cases (e.g., divorce/annulment, child support and custody, and paternity determinations). In this evaluation, any references to Rule 26 also refer to Rule 26.1.

[9] The original version of Rule 26 also included provisions for automatic disclosure, but these only required disclosure of the names and contact information, if known, of individuals likely to have discoverable information with a general description of the subject of the information, but not a statement of the expected testimony.

Table 1: Standard Discovery by Tier					
	Number of …				Fact Discovery Completion within …
Standard Discovery	Interrogatories	Requests for Admission	Requests for Production	Deposition Hours for Fact Witnesses	
Tier 1: $50,000 or less	0	5	5	3	120 days
Tier 2: More than $50,000 but less than $300,000, or non-monetary relief	10	10	10	15	180 days
Tier 3: $300,000 or more	20	20	20	30	210 days

Since the amendments to Rule 26 went into effect, a number of related events and changes have occurred that may affect the performance of the rule changes. Concurrent with the Rule 26 changes, for example, the Third District implemented a local rule providing for an expedited procedure for resolving discovery disputes. The rule requires a party to file a "Statement of Discovery Issues" no more than four pages in length in lieu of a motion to compel discovery or a motion for a protective order. The Statement of Discovery Issues must describe the relief sought and the basis for the relief, must include a statement regarding the proportionality of the request under Rule 26(b)(2), and certification that the parties have met and conferred in an attempt to resolve or narrow the dispute without court involvement. Any party opposing the relief sought must file a "Statement in Opposition," also no more than 4 pages in length, within 5 days, after which the filing party may file a Request to Submit for Decision. After receiving the Request to Submit, the court must promptly schedule a telephonic hearing to resolve the dispute. As other judicial districts learned of the rule, they likewise implemented it as local rule. Ultimately, it was adopted as Rule 4-502 of the Utah Rules of Judicial Administration effective January 1, 2013. The Advisory Committee has recommended that it be integrated into Rule 37 of the Utah Rules of Civil Procedure. The expedited discovery disputes procedure was intended to address the problem of long delays in case processing during which the filing of motions related to discovery disputes effectively stayed the case until those disputes could be fully briefed, argued, and decided, which sometimes added months to the process.

At the same time that the rules revisions were being implemented, the Utah judicial branch was also taking steps to strengthen its administrative and technological capacity to support effective case management. Beginning in 2011, the district courts began routinely digitizing civil case filings and implementing a more detailed coding system for identifying and classifying new filings. These steps permitted court staff to more easily allocate routine case management duties to non-judicial court staff, leaving judges free to concentrate on tasks requiring uniquely judicial expertise and discretion. Mandatory e-filing for attorneys was implemented on a statewide basis in April 2013, which automated, and thus greatly increased the effectiveness, of the coding systems. The judicial staffing model within the Utah district courts was also reorganized from clerical operations into judicial and case support teams. The intent of the staffing change was to increase efficiency and enhance efforts to fulfill the court's

mission by improving staff morale and job satisfaction, decreasing turnover and attrition, and providing opportunities for increased training and development.[10]

The Utah Court of Appeals also recently decided two cases affirming the striking of evidence for untimely disclosure. In *R.O.A. Gen., Inc. v. Chung Chu Dai,* the Court of Appeals ruled that it was not an abuse of discretion for the trial court to strike an expert report due to failure to comply with the scheduling order or to dismiss the case for the party's failure to prosecute.[11] Furthermore, in *Townhomes at Pointe Meadows Owners Ass'n v. Pointe Meadows Townhomes, LLC,* the Court noted that Rule 37(b)(2) mandates the exclusion of untimely disclosed expert witnesses and does not require an affirmative finding of bad faith, willfulness, or persistent dilatory conduct.[12] In doing so, it firmly rejected the Appellant's argument that delays in civil litigation are the status quo and should not be subject to sanctions.[13] The message from the appellate bench is clear support for the authority of district court judges to manage their civil dockets in accordance with both the letter and spirit of the revised rules.

The most recent initiative is a planned pilot project in which a small number of judges in the Second, Third, and Fourth Judicial Districts will apply intensive case management practices on incoming Tier 3 cases. The pilot project is premised on the assumption that Tier 3 cases are the most complex cases and therefore would benefit most from early and intensive case management. The techniques that the participating judges plan to employ are standard caseflow management strategies such as setting early case management hearings to identify key issues, setting firm trial dates, setting and consistently enforcing schedules for discovery and pretrial conferences.[14] The interest in experimenting with these techniques reflects a significant philosophical shift on the part of the Utah district court judges, who have traditionally taken the view that the parties, not the bench, should control civil case management.

In addition to the legal and institutional factors of direct relevance to the Rule 26 revisions, the ongoing impact of the 2008 economic recession on civil case processing should be noted. As a result of the economic crisis, Utah district courts—indeed, state courts across the country—experienced tremendous increases in civil filings, especially debt collection and mortgage foreclosure cases at the same time as state and local funding for the judicial branch was cut due to reductions in state tax revenues. Economists generally mark December 2007 as the start and June 2009 as the end of the recession, but effects related to the recession may have persisted in civil case filing and management.

NCSC Evaluation of Rule 26 Revisions

Excessive discovery practice in civil litigation is widely acknowledged as one of the primary factors driving cost and delay in both state and federal courts. Consequently, the revisions adopted by the Utah district courts have generated a great deal of interest nationally. Many court policymakers including the federal Advisory Committee on Civil Rules are considering similar reforms, but are waiting for evidence that the Utah revisions are working as intended before proposing amendments to their own rules. To ensure that state and federal courts have access to reliable information on which to judge the efficacy of these

[10] COMPREHENSIVE CLERICAL COMMITTEE: REPORT AND RECOMMENDATIONS ([date?]).
[11] *R.O.A. Gen., Inc. v. Chung Chu Dai,* 327 P.3d 1233 (Utah App. 2014).
[12] *Townhomes at Pointe Meadows Owners Ass'n v. Pointe Meadows Townhomes, LLC,* 329 P. 3d 815 (Utah App. 2014).
[13] *Id.* at 819.
[14] The inspiration for the pilot project was the publication WORKING SMARTER, NOT HARDER: HOW EXCELLENT JUDGES MANAGE CASES (IAALS 2014).

reforms, the National Center for State Courts (NCSC) secured a grant from the U.S. Department of Justice, Bureau of Justice Assistance, to conduct evaluations of civil rules reform efforts in up to four jurisdictions.[15] With support from the Supreme Court of Utah, the Rule 26 revisions were one of the civil justice reforms selected for evaluation.

The evaluation design was developed over the course of a series of in-person and telephonic meetings with staff of the Utah Administrative Office of the Courts (AOC) in late 2011 and early 2012. These meetings focused on developing a series of working hypotheses about the potential impact that the Rule 26 revisions were intended to achieve and exploring the case-level data captured in the Utah case management automation system (CORIS) to determine the data elements that would reliably measure those impacts. In these discussions, NCSC and AOC staff identified working hypotheses related to both short-term and long-term impacts of the rule changes. The expected short term impacts include:

- An increase in the number of orders to amend pleadings to specify damages so the appropriate discovery tier can be assigned;
- An increase in the number of motions to amend pleadings to adjust the assigned discovery tier;
- A possible increase in the proportion of Tier 2 and Tier 3 cases by parties preemptively pleading a higher amount-in-controversy to secure a higher tier for standard discovery;
- An increase in the amended disclosures as parties seek to ensure that potential witnesses and evidence will be admissible for trial if needed; and
- An increase in stipulations or motions to expand discovery beyond the scope or time permitted under the assigned discovery tier.

The expected long term impacts include:

- A decrease in the amount of time expended to complete discovery;
- A commensurate decrease in the filing-to-disposition time due to the decrease in the discovery period;
- A decrease in costs associated with discovery;
- An increase in filings in lower value (Tier 1) cases;
- A preference by litigants to opt for a written report rather than oral deposition of opposing expert witnesses;
- A lower compliance rate with the automatic disclosure requirements by self-represented litigants compared to litigants represented by legal counsel; and
- An increase in the trial rate, especially for Tier 1 cases, as trials become more affordable due to decreases in discovery costs; or
- Alternatively, a decrease in the trial rate and a corresponding increase in settlements as the automatic disclosure requirements provide sufficient information with which to assess claims and defenses.

To test these hypotheses, the NCSC proposed an evaluation strategy comprised of four components: a comparison of case-level characteristics for cases filed before and after implementation of the Rule 26 revisions and an analysis of trends in aggregate case filings; a survey of attorneys representing parties in

[15] BJA No. 2009-D1-BXK-036. In addition to the Utah Rule 26 evaluation, the NCSC has completed an evaluation of the New Hampshire Pilot Proportional Discovery/Automatic Disclosure (PAD) Rules and case studies of summary jury trials in six jurisdictions.

civil cases subject to the Rule 26 revisions; focus groups with district court judges to assess judicial observations and opinions about the impact of the Rule 26 revisions in court proceedings; and a survey of attorneys to document the costs associated with civil litigation in Utah district courts.

The first component is a comparison of selected case characteristics extracted from CORIS for cases filed before and after the implementation date for the Rule 26 revisions (November 1, 2011). The pre-implementation sample consists of all civil cases subject to Rule 26 filed in the Utah district courts between January 1 and June 30, 2011.[16] The post-implementation sample consists of all civil cases subject to Rule 26 filed between January 1 and June 30, 2012. Both samples of cases were tracked from filing to disposition, or from filing to June 30, 2014, whichever occurred first. For each case, AOC staff extracted detailed case-level information from CORIS. See Table 2 for a list of data elements collected.

Table 2: Data Elements Extracted from CORIS for Pre-Implementation and Post-Implementation Comparison of Case-Level Characteristics
Case number
Case type
Report category
Filing date
Disposition date
Disposition type
Amount-in-controversy at filing
Discovery tier
Answer date
Rule 26 discovery deadline notice dates
Date of Certificate of Readiness for Trial filed
Dates and amounts of judgments
Representation status of litigants
Dates of bench and jury trials
Motions/stipulations to amend pleadings
Motions/stipulations and orders for extraordinary discovery (dates, filing party, relief sought)
Motions and orders concerning discovery disputes (dates, filing party, relief sought)
Motions and orders to exclude evidence due to untimely disclosure (dates, relief sought)

In addition to the comparison of case-level characteristics, the NCSC also examined monthly case filings by case type from January 2000 through June 2014. One of the working hypotheses concerning the impact of the Rule 26 revisions was an increase in filings, especially lower value (Tier 1) cases that might otherwise be foregone due to the anticipated expense of litigation. The monthly filing data were used to determine whether implementation of the Rule had a measurable effect on filing rates while controlling for other factors (notably, the 2008 economic crisis).

The second evaluation component is a survey of attorneys who were listed as counsel of record in CORIS in a civil case filed after implementation of the Rule 26 revisions. The purpose of the survey was twofold. First, it sought to document attorney opinions about how the revised discovery rules affected litigation of that case as well as civil litigation generally. Second, much of the activity that Rule 26 was designed to regulate takes place outside of the courthouse and is typically not reflected in either the electronic data

[16] Case types subject to Rule 26 are asbestos, civil rights, condemnation, contracts, debt collection, malpractice, personal injury, property damage, property rights, water rights, wrongful death, and wrongful termination. Case types subject to Rule 26.1 are custody/support, divorce/annulment, and paternity.

captured by CORIS or in the physical case files. The attorney survey was designed to document this activity, in particular to assess compliance with the Rule 26 restrictions. See Appendix A for the Attorney Survey. The survey was administered on a rolling basis as cases were disposed between July 1, 2012 and June 30, 2014.

The third component was a series of focus groups conducted by the evaluation project director, Paula Hannaford-Agor, with selected district court judges in April 2014.[17] The purpose of the focus groups was to solicit the opinions of the district court judges on the impact of the Rule 26 revisions on judicial caseloads as well as to document what the judges were hearing formally or informally from attorneys in their courtrooms. To facilitate the focus group discussions, Ms. Hannaford-Agor presented preliminary findings from the attorney surveys and requested confirmation of and reactions to those findings.

Finally, the NCSC administered its Litigation Cost Model (LCM) Survey to the attorneys who were listed as counsel of record in civil cases filed after implementation of the Rule 26 revisions. The LCM provides estimates of the amount of time expended and, by implication, the costs incurred by attorneys for variety of litigation-related tasks in different types of cases. The attorney responses reflect estimates of litigation costs in typical cases rather than actual costs in specific cases. Consequently, the findings cannot be used to determine whether Rule 26 resulted in a decrease in litigation costs, but they can be used to provide a baseline estimate of current costs of litigation for the cases most frequently filed in the Utah district courts.

Subsequent sections of this report describe each of these components in greater detail including the data and methods employed, limitations of those methodologies, and findings about the impact of the Rule 26 revisions on discovery and civil litigation generally in the Utah district courts. The report then summarizes with conclusions and recommendations.

[17] The focus groups were conducted in conjunction with the Utah District Court Judges Spring Education Conference on April 23-25, 2014 in Bryce Canyon, Utah.

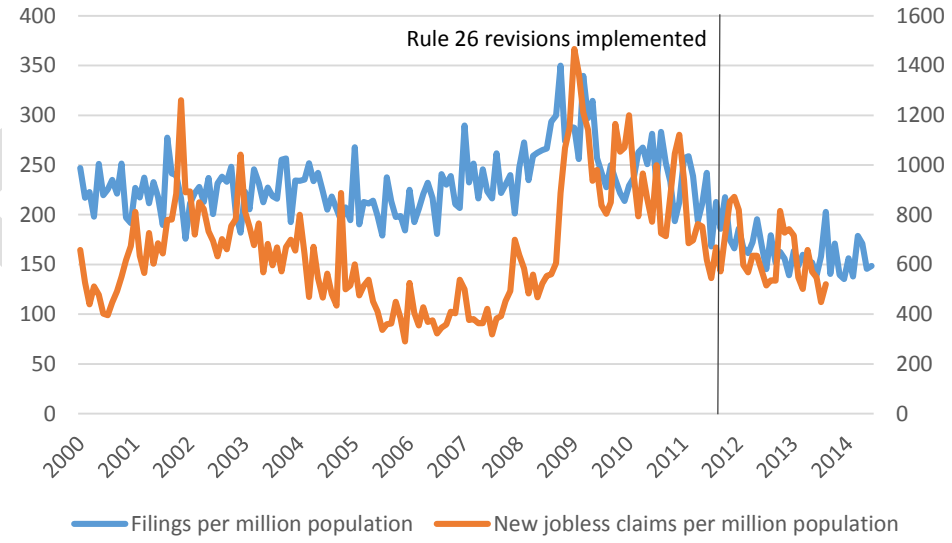
Filings and Case-Level Analyses

Impact on Aggregate Filings

By decreasing the cost of discovery in low-value cases, the Rule 26 revisions were expected to make litigating these cases more affordable, potentially leading to an increase in the number of low-value cases filed. Because it was not possible to break down filings data for the pre-implementation period by tier, filings were analyzed in the aggregate. Because the cost of discovery is not expected to be a major factor in the decision to file a debt collection or domestic relations case, these case types were excluded from the analysis.

Figure 1 shows monthly filings per million population for civil case types other than debt collection and domestic relations from January 2000 through June 2014. Because economic conditions may influence the level of filings, the number of new jobless claims per million population in Utah is plotted on the secondary vertical axis. A vertical line marks the month of November 2011, when the Rule 26 revisions were implemented. The level of filings appears to track relatively closely with the number of new jobless claims, especially in 2009 and later. There does not appear to be a break in the level or trend of filings, however, associated with the implementation of the Rule 26 revisions. A multivariate analysis that controls for new jobless claims as an indicator of economic conditions finds no evidence that the Rule 26 revisions had an impact on the level of civil case filings other than debt collection and domestic relations cases.

Figure 1. Monthly Civil Case Filings and New Jobless Claims per Million Population, January 2000 through June 2014



Note: Filings exclude debt collection and domestic relations cases.

Case-Level Analyses

To assess the impact of the Rule 26 revisions on discovery, the NCSC compared case characteristics and outcomes for cases filed between January 1 and June 30, 2011 (pre-implementation sample) with those for cases filed between January 1 and June 30, 2012 (post-implementation sample). For both samples the Utah AOC extracted descriptive data and case event data from CORIS. Descriptive data were extracted for all cases filed during those time periods, but because the intent of the Rule 26 revisions was to streamline discovery in particular, case event data was extracted only for cases in which an answer was filed. Table 3 shows the breakdown of cases in each sample by the assigned discovery and presumptive tiers.

Only a small handful of cases in the pre-implementation sample were actually assigned a discovery tier, which was expected given that the Rule 26 revisions did not become effective until November 1, 2011. Pre-implementation cases that were assigned a discovery tier involved post-filing activity that made it useful to assign a discovery tier for case management purposes. A greater surprise was the fact that more than one-third of the post-implementation cases (37.2%) were not assigned a discovery tier in CORIS. Subsequent discussions with AOC staff indicated that CORIS was not programmed to automatically assign a discovery tier based on amount-in-controversy or case type until early 2012 and discovery tiers were not assigned retroactively. Even with the programming change, some cases continued to lack a discovery tier assignment through the post-implementation period.[18] For the purpose of the NCSC evaluation, it was necessary to assign presumptive discovery tiers to the pre-implementation sample and to cases in the post-implementation sample for which the discovery tier was missing. The presumptive discovery tiers were assigned based on the amount-in-controversy declared in the complaint; domestic relations cases were assigned as Tier 2. Less than 5% of the cases could not be assigned a presumptive tier using those criteria. Table 3 indicates that the presumptive tier breakdown was comparable for the pre-implementation and post-implementation samples.

Table 3: Assigned and Presumptive Discovery Tiers

	Assigned Discovery Tier				Presumptive Discovery Tier			
	Pre-Implementation		Post-Implementation		Pre-Implementation		Post-Implementation	
Tier 1	1	0%	22,171	47%	41,418	79%	37,073	78%
Tier 2	51	0%	6,796	14%	8,768	17%	8,671	18%
Tier 3	1	0%	407	1%	190	0%	206	0%
Opt Out	-	0%	467	1%	-	0%	-	0%
Undeclared	6	0%	12	0%	-	0%	-	0%
	59	0%	29,853	63%	50,376	96%	45,950	97%
Missing	52,590	100%	17,660	37%	2,273	4%	1,563	3%
TOTAL	52,649	100%	47,513	100%	52,649	100%	47,513	100%

An implicit assumption about the likely impact of the Rule 26 revisions is that effects would only be observed for cases in which an answer was filed. It would be highly unusual that discovery would take place in cases in which an answer was not filed as most of those cases would be resolved either by default

[18] The percentage of cases filed with missing tier assignments in CORIS fell from 63% in January 2012 to 53% in February 2012, 30% in March 2012, and then leveled off to 26% to 28% for April through June 2012. The Utah AOC implemented mandatory e-filing for all civil cases effective April 1, 2013, which automated the discovery tier assignment and reduced the percentage of cases missing an assigned discovery tier almost to zero.

judgment, voluntary dismissal (e.g., the parties agreed to settle the case after the complaint was filed without additional court involvement), or dismissal for failure to prosecute (e.g., no further case activity occurred and the case was dismissed administratively). Of particular significance for the impact of the Rule 26 revisions on the overall caseload is the relatively low rate of answers filed across all three discovery tiers. Overall, the answer rate was only 18% of the pre-implementation cases and only 16% of the post-implementation cases. The overall rate is heavily influenced by the answer rate for Tier 1 cases; an answer was filed in slightly less than one-third of Tier 2 cases and approximately half of the Tier 3 cases. With the exception of Tier 1 non-debt collection cases, the answer rate was lower in the post-implementation sample than in the pre-implementation sample. The difference in the answer rate is statistically significant both overall and for each of the discovery tiers. Only the decrease in Tier 2 non-domestic cases was not statistically measurable. See Table 4. A decrease in the answer rate was not anticipated as a potential impact of the Rule 26 revisions, and may be due to unknown factors that are unrelated to Rule 26.

Table 4: Percentage of Cases with an Answer Filed

	Pre-implementation	Post-implementation	Sig.
Tier 1 Overall	13%	12%	***
Debt collection	13%	11%	***
Non-debt collection	27%	31%	**
Tier 2 Overall	31%	29%	**
Domestic	30%	27%	***
Non-domestic civil	49%	47%	
Tier 3 Overall	57%	49%	†
Total	18%	16%	***

† $p<.1$
* $p<.05$
** $p<.01$
*** $p<.001$

Table 5 documents the discovery tier breakdown for cases in which an answer was filed. The tier assignment is based on the actual tier assignment extracted from CORIS or, if the tier assignment was missing, the presumptive tier assignment based on amount-in-controversy or case type.[19]

[19] These tier assignments were employed for all subsequent analyses in the NCSC evaluation on the theory that even if the CORIS data did not reflect the assigned discovery tier, the attorneys had constructive knowledge that the Rule 26 revisions were in effect and thus should have known which discovery tier applied to the case. Using the presumptive tiers when the CORIS data did not include the assigned discovery tier yielded a larger sample of post-implementation cases, permitting the NCSC to produce more precise estimates of the Rule 26 impact than would have been possible using only the actual discovery tier assignments recorded in CORIS.

Table 5: Discovery Tiers (Cases with Answer Filed)

	Pre-Implementation		Post-Implementation	
Tier 1	5,505	66%	4,466	61%
Tier 2	2,686	32%	2,588	36%
Tier 3	109	1%	220	3%
Total	8,300		7,274	

n = 15,574; χ^2 = 80.294, df = 2.

Tier Inflation

Excluding cases without answers resulted in a subtle difference in the discovery tier breakdown. Of the cases with a tier assignment, two-thirds of the pre-implementation sample (66%), but only 60% of the post-implementation sample were assigned as Tier 1. In contrast, the proportion of the post-implementation cases assigned as Tier 2 and Tier 3 increased from 32% to 35%, and 1% to 3%, respectively. The difference in these proportions is statistically significant, and the decrease in the proportion of Tier 1 cases and corresponding increase in Tier 2 and Tier 3 cases suggest that some litigants may have specified a higher amount-in-controversy in the complaint to secure a higher discovery tier assignment.

Comparing the distribution of case categories across tiers provides more evidence of tier inflation.[20] See Table 6. The proportional distribution of debt collection cases across tiers is comparable for the pre-implementation and post-implementation samples, but there is a marked decrease in the proportion of Tier 1 cases for non-debt collection general civil, property rights, and tort cases and corresponding increases in the proportion for Tier 2 and Tier 3 cases. This shift in the proportional tier distribution within case categories is statistically significant for all three case categories.[21]

[20] All of the pre-implementation domestic cases were presumptively assigned as Tier 2, and all but 13 of the 2,229 (0.6%) of the post-implementation domestic cases were assigned as Tier 2 (actual or presumptively). Consequently, the proportional distribution analysis for domestic cases was excluded from the investigation of tier inflation.

[21] The number of property right and tort cases in which an answer was filed increased substantially from 41 to 63, and 116 to 435, respectively, from the pre-implementation to the post-implementation samples. The proportion of tort cases is comparable between the samples, so the increase is due exclusively to the difference in the answer rate. The proportion of property rights cases filed decreased from .6% to .5% between the pre-implementation and post-implementation samples (F=8.654, df=1, *p*=.003), so the increase in the numbers reflects both the difference in overall proportion and the difference in the answer rate.

Table 6: Discovery Tiers (Cases with Answer Filed), by Case Category

		Pre-Implementation		Post-Implementation	
Debt Collection	Tier 1	5,053	98%	4,046	98%
	Tier 2	104	2%	66	2%
	Tier 3	26	1%	8	0%
	Total	5,177		4,120	
	n=9,297; χ^2=5.654, df=2, p= .059				
		Pre-Implementation		Post-Implementation	
Non-Debt Collection General Civil	Tier 1	340	65%	224	52%
	Tier 2	116	22%	118	28%
	Tier 3	66	13%	87.09	20%
	Total	522		429	
	n=951; χ^2=17.834, df=2, p< .001				
		Pre-Implementation		Post-Implementation	
Property Rights	Tier 1	28	65%	15	25%
	Tier 2	9	21%	38	62%
	Tier 3	6	14%	8	13%
	Total	43		61	
	n=104; χ^2=19.581, df=2, p<.001				
		Pre-Implementation		Post-Implementation	
Tort	Tier 1	86	74%	176	41%
	Tier 2	18	16%	152	35%
	Tier 3	12	10%	107	25%
	Total	116		435	
	n=551; χ^2=41.659, df=2, p<.001				

Case Dispositions

The impact of the Rule 26 revisions on how cases are disposed is of obvious importance to all stakeholders in the civil justice system—plaintiffs and defendants, the practicing bar, and the trial bench. The disposition types that are recorded in CORIS tend to reflect the procedural impact of the disposition (e.g., dismissed with prejudice, judgment) rather than the manner of disposition (e.g., default judgment, settlement, bench or jury trial). Nevertheless, many CORIS disposition types can be used as proxy equivalents of commonly recognized dispositions. Table 7 describes the manner of disposition (dismissal, settlement, judgment) by discovery tier and case type.[22] Dismissals for Tier 1 debt collection cases declined slightly with corresponding increases in settlements and judgments, however settlements for Tier 1 non-debt collection cases increased from 30% to 43% while judgments decreased from 40% to 28%. The vast majority of Tier 2 domestic cases resolve by judgment (e.g., divorce granted, child support modification denied), so there was no expected change in the manner of disposition for these cases. However, dismissals and judgments for Tier 2 non-domestic general civil cases declined significantly while settlements increased significantly. Similar results were observed for Tier 3 cases. The increase in the settlement rate for non-domestic cases is dramatic across all three discovery tiers, especially for non-debt collection cases. To the extent that settlements reflect case outcomes that are accepted by the respective

[22] Dismissals included the following CORIS disposition types: dismissed or dismissed without prejudice; no cause of action; and set aside/withdrawn. Settlements included ADR-stipulated agreement; dismissed with prejudice; and stipulated agreement. Judgments included petitions denied or granted, and monetary judgment awards.

parties as fair (or least fairer than they would otherwise obtain if they didn't settle), the difference in settlement rates between the pre-implementation and post-implementation samples suggests that the Rule 26 revisions, especially the expanded automatic disclosure requirements, are providing litigants with sufficient information about the evidence to engage in more productive settlement negotiations.

When the Rule 26 revisions were originally debated by the Advisory Committee, there was uncertainty as to whether the new rule would result in a higher or lower trial rate. Trials are exceptionally rare events in the Utah district courts. Breaking down those rates by discovery tier and case type would produce sample sizes too small to produce statistically measurable results. Overall, however, the bench trial rate decreased by 27% (2.6% to 1.9%).[23] There were too few cases (6 pre-implementation, 6 post-implementation) to document an impact on jury trial rates.

[23] N=17,029, $\chi^2$7.870, df=1, *p*=.005.

Tier 1	**Debt collection**		Pre-Implementation		Post-Implementation	
		Dismissmal	1184	24%	870	22%
		Settlement	875	18%	753	19%
		Judgment	2800	58%	2404	60%
		Total	4859		4027	
		n=8,896, χ^2=9.926, df=2, p= .007				
	Non-debt collection		Pre-Implementation		Post-Implementation	
		Dismissmal	127	30%	119	29%
		Settlement	126	30%	181	43%
		Judgment	172	40%	117	28%
		Total	425		417	
		n=842, χ^2=13.510, 20.507, df=2, p<. 001				
Tier 2	**Domestic**		Pre-Implementation		Post-Implementation	
		Dismissmal	403	17%	376	17%
		Settlement	3	0%	6	0%
		Judgment	1962	83%	1818	83%
		Total	2368		2200	
		n=4,568, χ^2=1.245, df=2, p= .537				
	Non-domestic civil		Pre-Implementation		Post-Implementation	
		Dismissmal	75	34%	106	29%
		Settlement	74	33%	180	49%
		Judgment	73	33%	78	21%
		Total	222		364	
		n=586, χ^2=16.256, df=2, p<. 001				
Tier 3	**All cases**		Pre-Implementation		Post-Implementation	
		Dismissmal	21	24%	56	26%
		Settlement	33	38%	120	56%
		Judgment	32	37%	40	19%
		Total	86		216	
		n=302, χ^2=12.653, df=2, p=.002				

Filing-to-Disposition Time

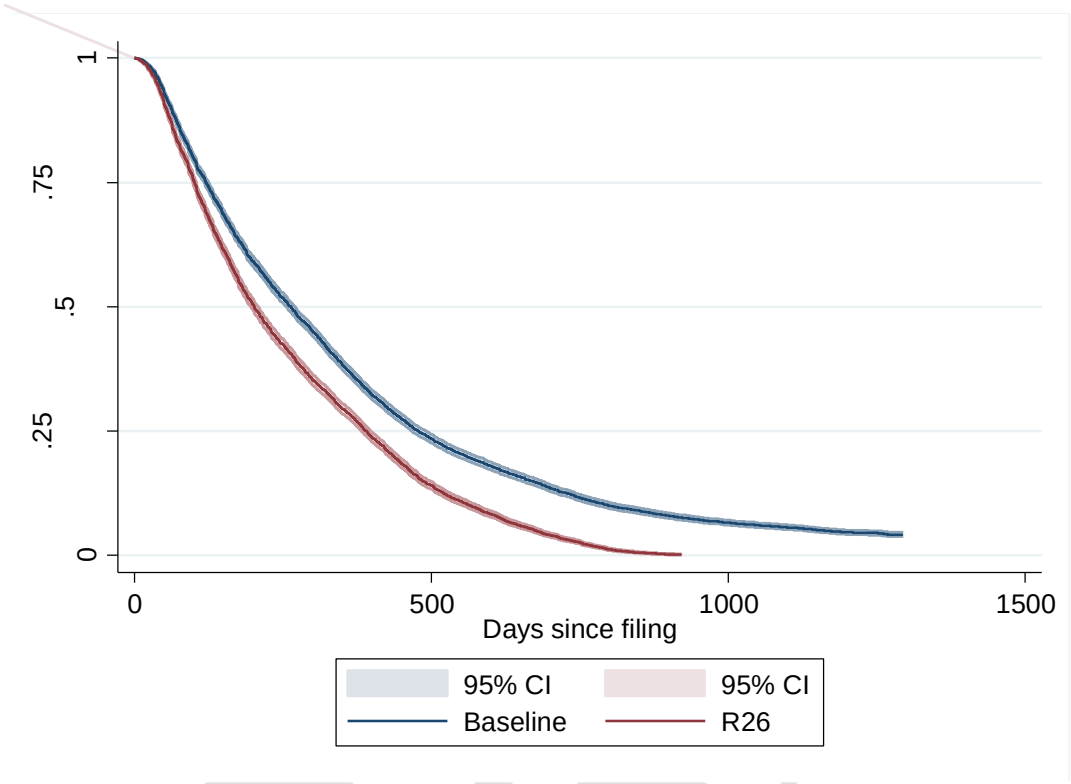
One of the hypothesized impacts of the revisions to Rule 26 was the expectation that streamlining the discovery process would result in cases resolving earlier than before the revisions were adopted. A comparison of filing-to-disposition time for the pre-implementation and post-implementation cases is complicated by the fact that as of June 30, 2014, a larger proportion of post-implementation cases were pending (4.7%) compared to cases in the pre-implementation sample (3.9%). The average length of time from filing to disposition would not reflect the impact of cases that had not fully resolved by the end of the data collection period. To analyze the impact of the Rule 26 revisions on time to disposition, the NCSC employed Kaplan-Meier survival analysis. Survival analysis examines how long a unit (e.g., a civil case) "survives" in one state (e.g., pending) before experiencing "failure," or a transition to another state (e.g., disposed). In practice, it is not possible to observe the event of failure for each unit in a sample because some units will not fail until after the study has concluded. For these observations, known as "censored" observations, the observed survival time ends when the study's follow-up period ends, which is earlier than the actual point of failure. Because the observed survival times of the censored observations are shorter than their actual survival times, estimates of mean survival times would be biased, and comparison of mean survival times across groups might lead to erroneous conclusions. Survival models take censoring into account, eliminating the associated bias.[24]

Here, the unit of analysis is the case, failure is defined as the first disposition, and survival time is defined as the number of active days from filing until disposition or the end of the follow-up period, whichever occurred first. Figure 2 shows the Kaplan-Meier survivor functions for cases filed before and after the implementation of the Rule 26 revisions. Because the Rule 26 revisions apply to case events which occur after the filing of the answer, only cases in which an answer was filed are included in this analysis. Each survivor function plots the cumulative probability of a case's "surviving" without a disposition (on the vertical axis) up to a particular point in time (on the horizontal axis).[25] As expected from the working hypotheses, the survivor function for post-implementation cases lies below the survivor function for pre-implementation cases, indicating that the Rule 26 revisions are associated with a reduction in the cumulative probability of survival at any given point in time, and hence a decrease in time to disposition. The shaded bands represent 95% confidence intervals for the survivor functions. The confidence intervals do not overlap, indicating that the impact of the Rule 26 revisions on time to disposition is statistically significant. The log-rank test confirms that there is a statistically significant difference in the time path of case dispositions between the two groups of cases.

[24] *See* JANET M. BOX-STEFFENSMEIER & BRADFORD S. JONES, EVENT HISTORY MODELING 7-16 (2004).

[25] The Kaplan-Meier technique relies upon no assumptions regarding the shape of the baseline survivor function, estimating the function entirely on the basis of the available data and eliminating the possibility of bias due to faulty assumptions about the functional form. The technique estimates the survivor function by calculating the cumulative probability of survival at each failure point. Each case in which the event of failure was observed is factored into the analysis along the entire curve. A censored observation, in which the event of failure was not observed, is only factored into the analysis up to the time when observation ceased.

Figure 2. All Civil Case Types—Cumulative Probability of Survival Without Disposition For Cases Filed Before and After Rule 26 Revisions

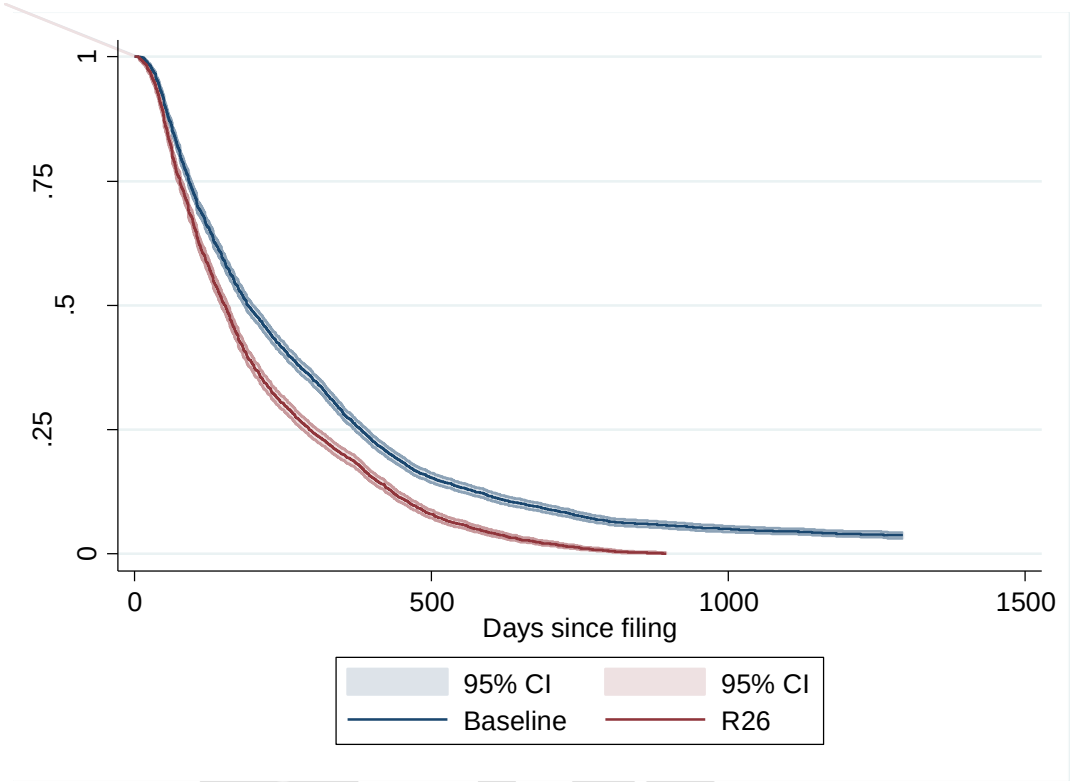


n = 17,029; 16,541 failures.
Log-rank test for equality of survivor functions: $\chi^2 = 525.21$, 1 degree of freedom, $p(\chi^2) < .001$.
Note: Includes only cases in which an answer was filed.

To analyze whether the impact of the Rule 26 revisions on time to disposition varies for different types of cases, we plotted the Kaplan-Meier survivor functions for pre-implementation and post-implementation cases by tier and case type. As shown in Figure 3, the revisions are associated with a statistically significant decrease in time to disposition for Tier 1 cases. The impact is similar for both Tier 1 debt collection cases (Figure 4) and Tier 1 non-debt collection cases (Figure 5). For Tier 1 non-debt collection cases, however, the probability of a disposition at early time points is similar for pre-implementation and post-implementation cases; the Rule 26 revisions are not associated with a statistically significant decrease in the probability of survival until more than a year after filing, as indicated by the point in time when the red and blue confidence intervals stop overlapping.[26] It is also important to note that the shaded confidence intervals around the survivor functions are considerably broader for the Tier 1 non-debt collection cases, indicating that the estimates are less precise.

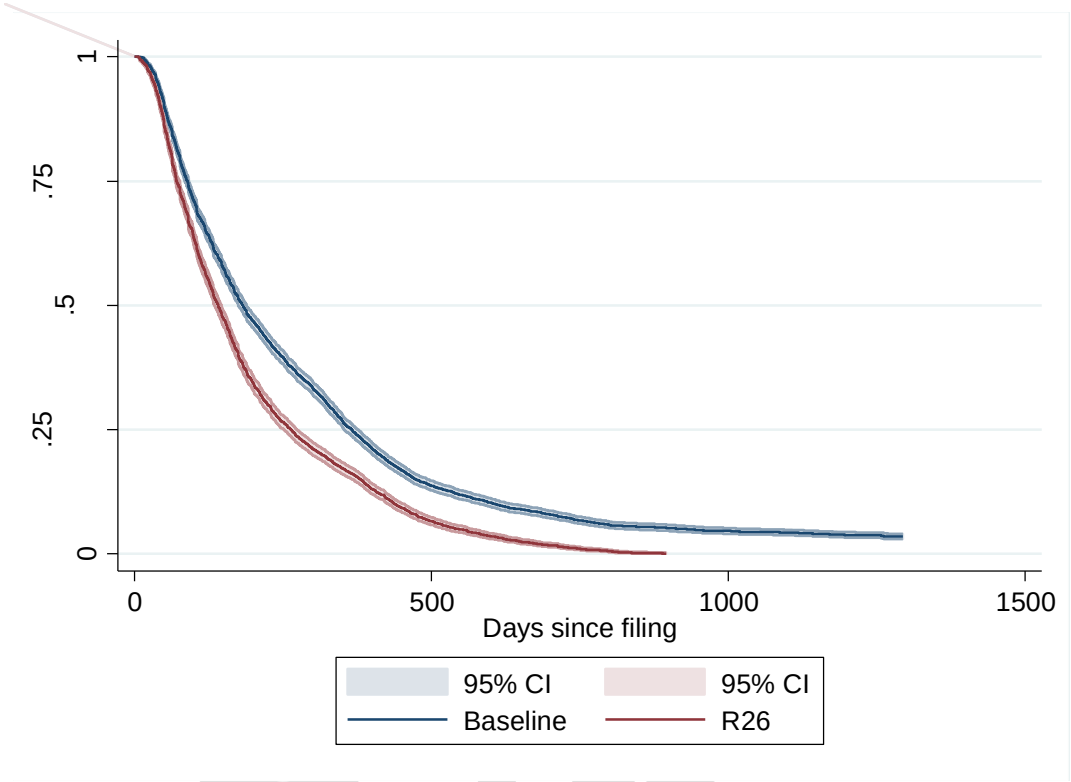
[26] The log-rank test, which tests for the equality of the survivor functions over all points in time, does indicate that there is an overall decrease in time to disposition for Tier 1 non-debt collection cases.

Figure 3. Tier 1 Cases—Cumulative Probability of Survival Without Disposition, All Case Types Filed Before and After Rule 26 Revisions, All Case Types



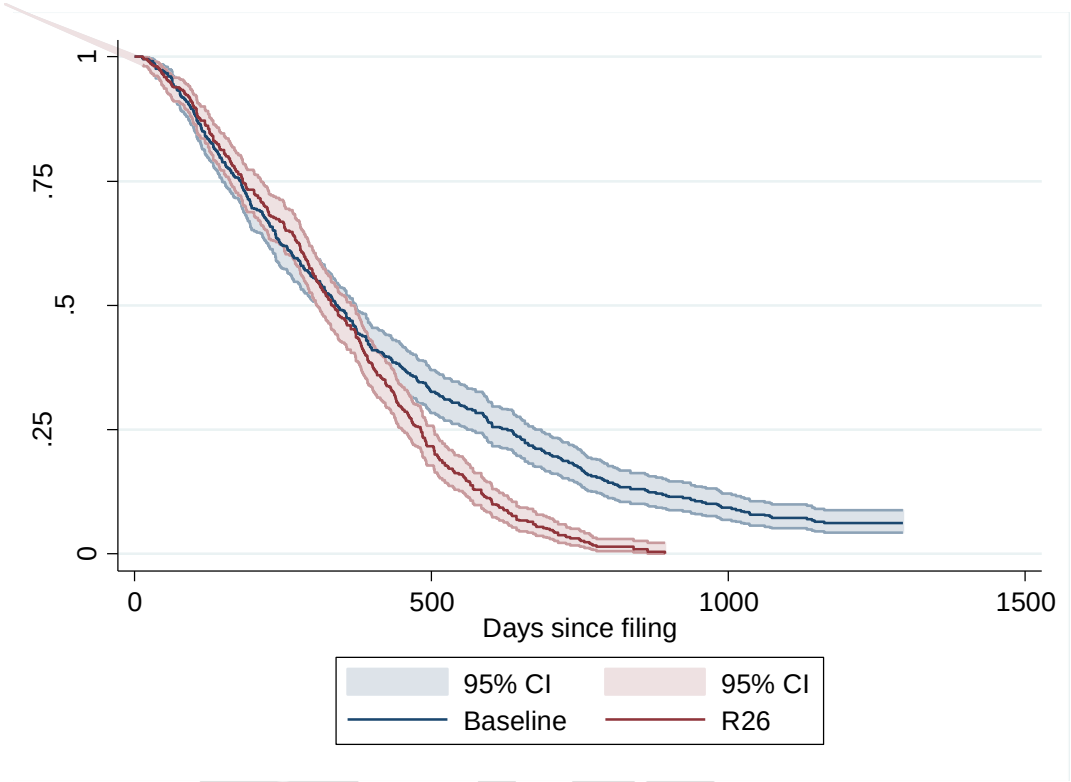
n = 9,971; 9,738 failures.
Log-rank test for equality of survivor functions: $\chi^2 = 268.79$, 1 degree of freedom, $p(\chi^2) < .001$.
Note: Includes only cases in which an answer was filed.

Figure 4. Tier 1 Debt Collection Cases—Cumulative Probability of Survival Without Disposition, Cases Filed Before and After Rule 26 Revisions



n = 9.097; 8,896 failures.
Log-rank test for equality of survivor functions: $\chi^2 = 273.11$, 1 degree of freedom, $p(\chi^2) < .001$.
Note: Includes only cases in which an answer was filed.

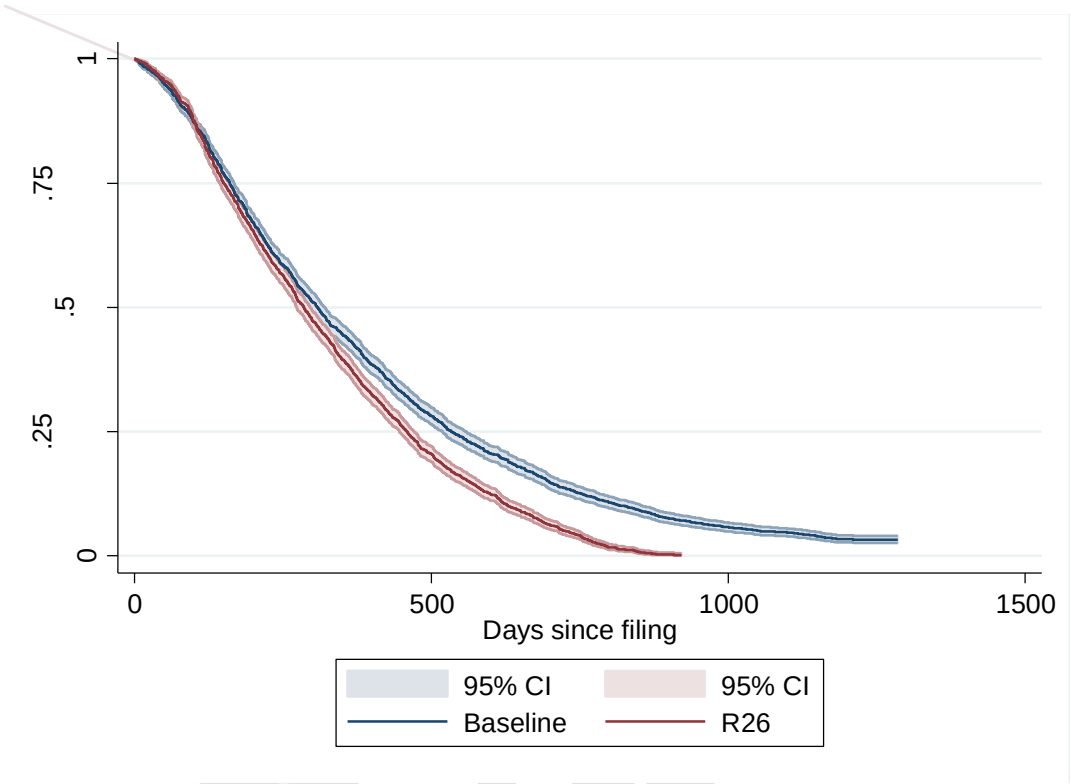
Figure 5. Tier 1 Non-Debt Collection Cases – Cumulative Probability of Survival Without Disposition, Cases Filed Before and After Rule 26 Revisions



n = 874; 842 failures.
Log-rank test for equality of survivor functions: χ^2 =29.99, 1 degree of freedom, p(χ^2) < .001.
Note: Includes only cases in which an answer was filed.

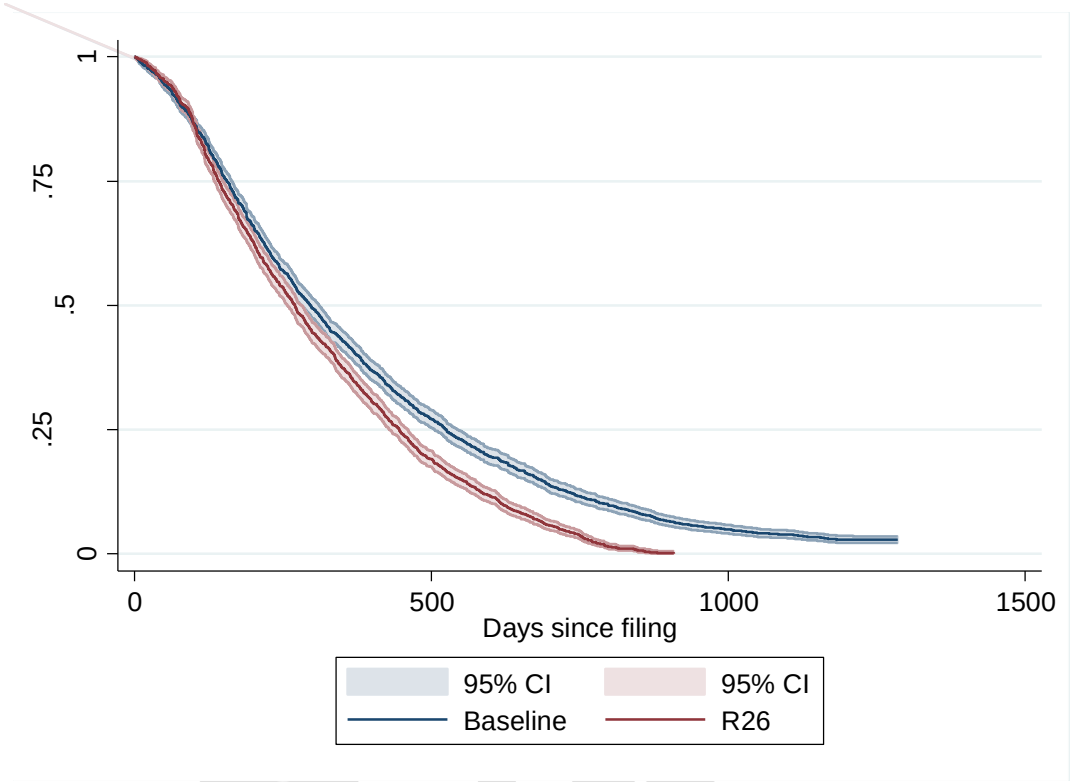
The impact of the Rule 26 revisions on Tier 2 cases is similar to the impact on Tier 1 non-debt collection cases (Figure 6). Although the log-rank test indicates an overall decrease in time to disposition for post-implementation cases, the difference does not begin to emerge until approximately one year after filing. This general pattern holds for both domestic relations (Figure 7) and non-domestic relations (Figure 8) cases in Tier 2, as well as for Tier 3 cases (Figure 9). Similar to Figure 5, the shaded confidence intervals around the survivor functions are much broader for Tier 2 non-domestic and Tier 3 cases, indicating that the estimates are less precise.

Figure 6. Tier 2 Cases – Cumulative Probability of Survival Without Disposition, All Case Types Filed Before and After Rule 26 Revisions



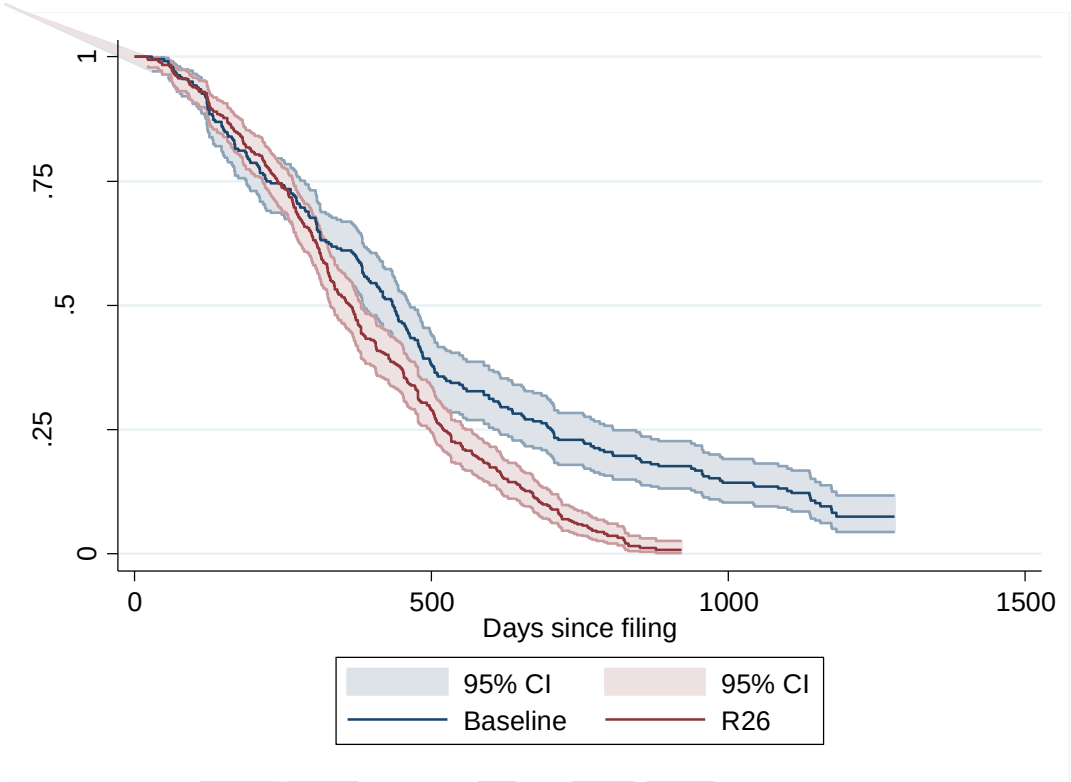
n = 5,274; 5,154 failures.
Log-rank test for equality of survivor functions: $\chi^2 = 105.57$, 1 degree of freedom, $p(\chi^2) < .001$.
Note: Includes only cases in which an answer was filed.

Figure 7. Tier 2 Domestic Relations Cases—Cumulative Probability of Survival Without Disposition, Cases Filed Before and After Rule 26 Revisions



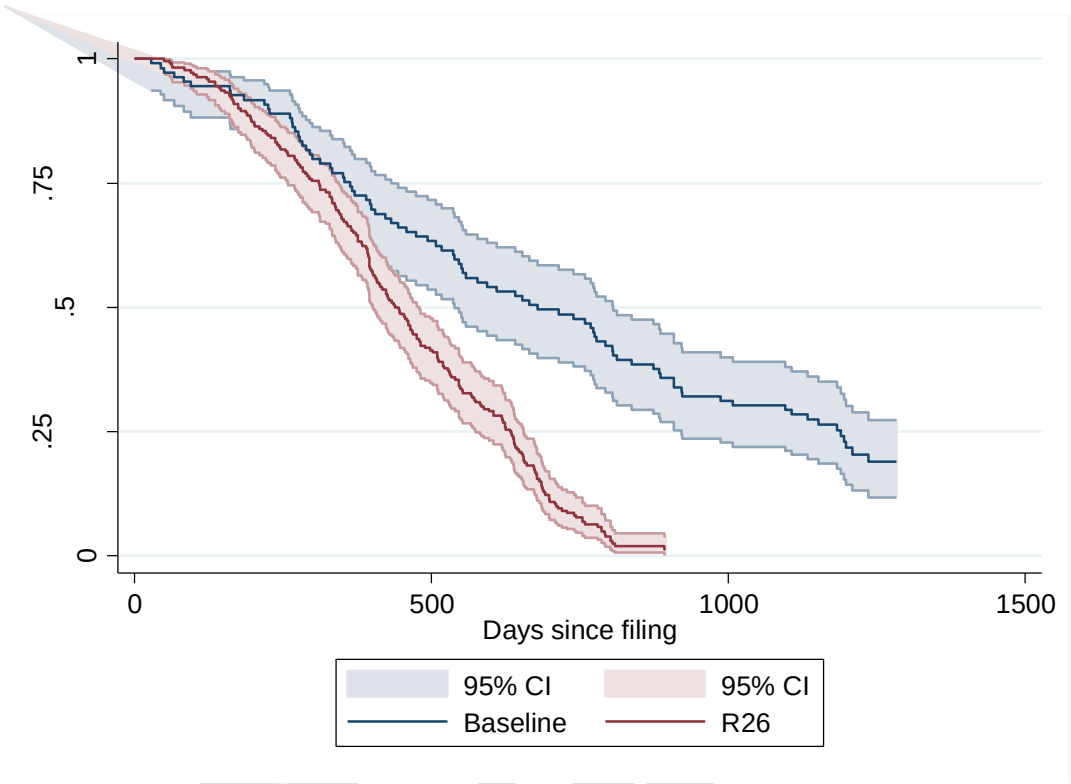
n = 4,658; 4,568 failures.
Log-rank test for equality of survivor functions: $\chi^2 = 93.97$, 1 degree of freedom, $p(\chi^2) < .001$.
Note: Includes only cases in which an answer was filed.

Figure 8. Tier 2 Non-Domestic Relations—Cumulative Probability of Survival Without Disposition, Cases Filed Before and After Rule 26 Revisions



n = 616; 586 failures.
Log-rank test for equality of survivor functions: $\chi^2 = 29.94$, 1 degree of freedom, $p(\chi^2) < .001$.
Note: Includes only cases in which an answer was filed.

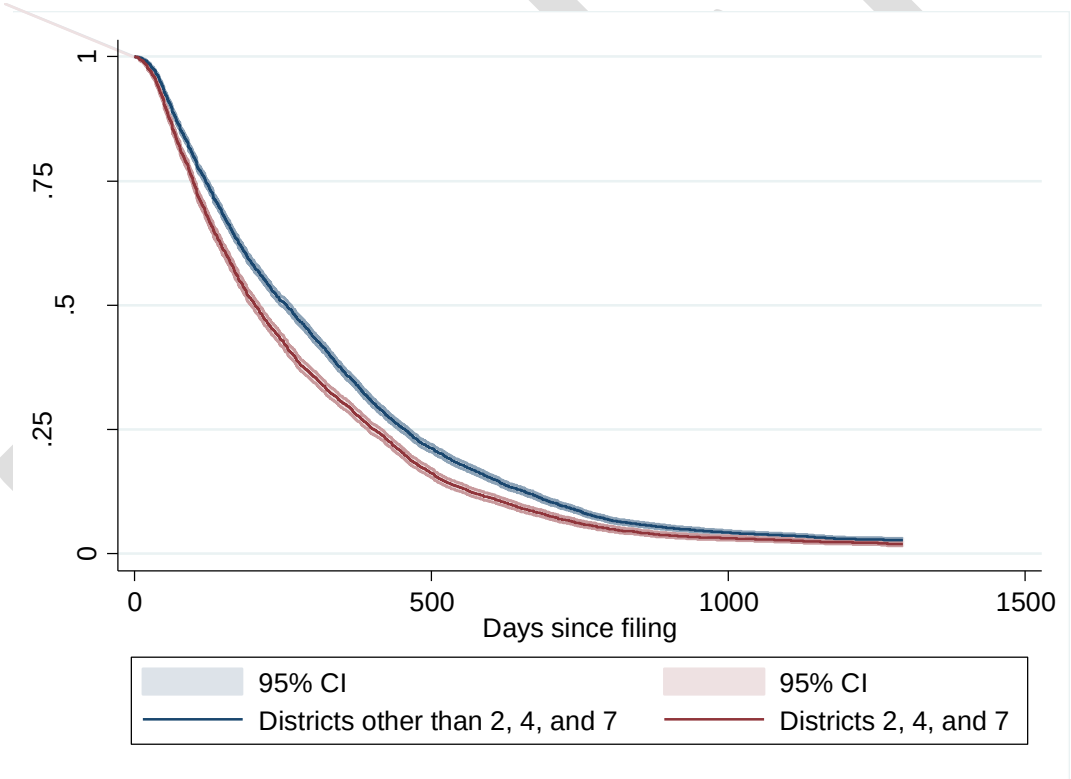
Figure 9. Tier 3 Cases – Cumulative Probability of Survival Without Disposition, All Case Types Filed Before and After Rule 26 Revisions



n = 329; 302 failures.
Log-rank test for equality of survivor functions: $\chi^2 = 59.31$, 1 degree of freedom, $p(\chi^2) < .001$.
Note: Includes only cases in which an answer was filed.

In terms of local court culture, there are significant differences among the judicial districts with respect to utilization of judicial caseflow management techniques in civil cases. In particular, the Second, Fourth, and Seventh Districts have a stronger tradition of caseflow management than other districts across the state. The NCSC compared the filing-to-disposition time for these districts to determine whether the impact of the Rule 26 revisions differed based on the case management practices employed in the various judicial districts. As shown in Figure 10, which included both pre-implementation and post-implementation cases, time to disposition is shorter in those districts currently practicing active case management than in districts not practicing active case management. To determine whether the impact of the Rule 26 revisions on time to disposition is influenced by existing case management practices, we analyzed time to disposition before and after the implementation of the revisions separately for districts practicing active case management (Figure 10) and for districts not practicing active case management (Figure 11).

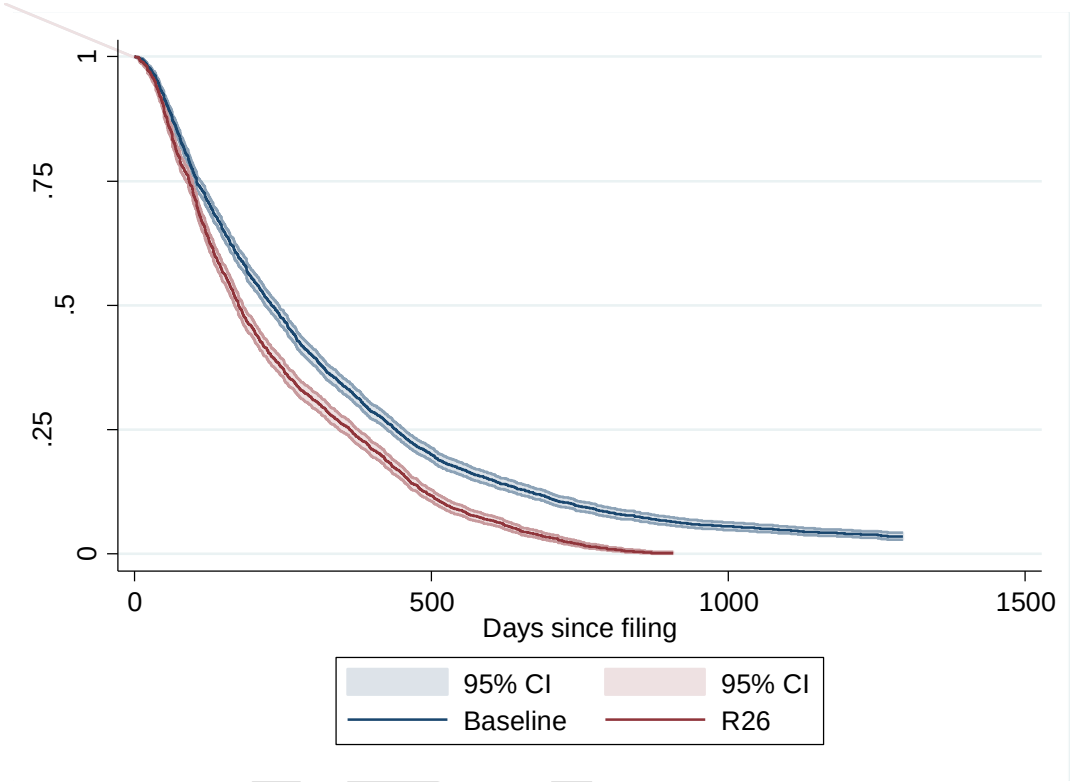
Figure 10. Districts 2, 4 and 7 versus All Other Districts—Cumulative Probability of Survival Without Disposition, All Civil Case Types



n = 17,029; 16,541 failures.
Log-rank test for equality of survivor functions: $\chi^2 = 105.13$, 1 degree of freedom, $p(\chi^2) < .001$.
Note: Includes only cases in which an answer was filed. Includes cases filed during both pre-implementation and post-implementation periods.

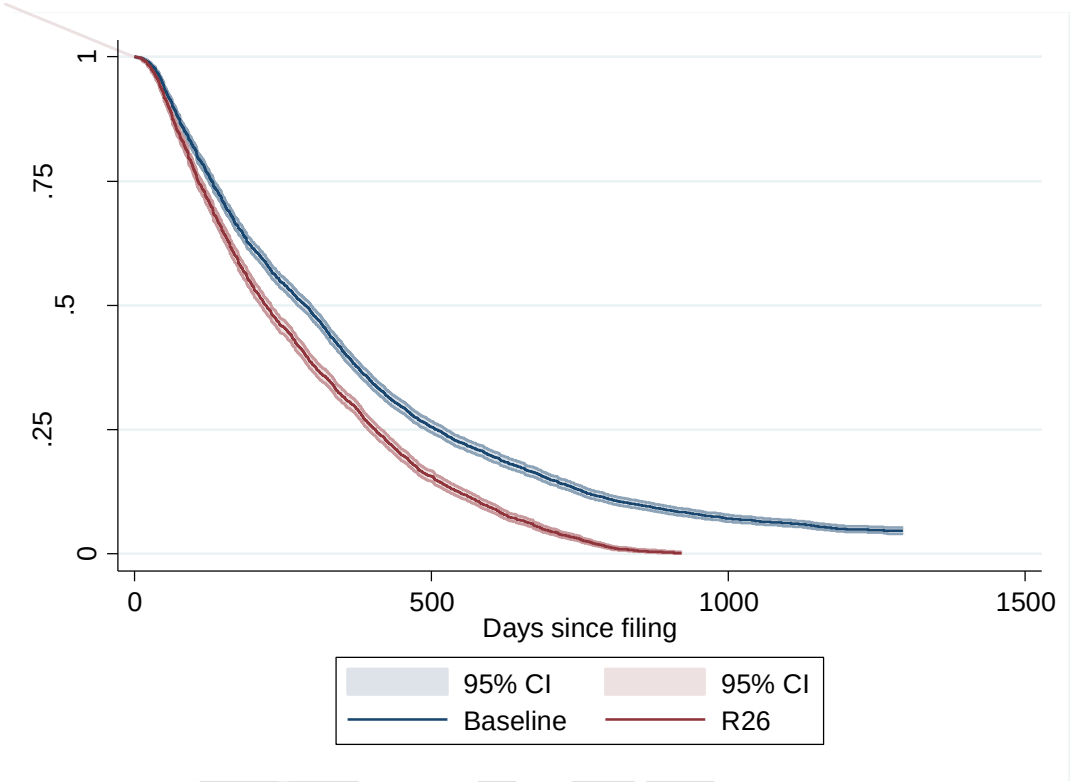
The NCSC then examined the impact of the Rule 26 revisions in courts with and without strong case management practices, and found that they were associated with similar decreases in time to disposition in both groups of districts.

Figure 11. Districts 2, 4 and 7—Cumulative Probability of Survival Without Disposition, All Civil Case Types Filed Before and After Rule 26 Revisions



n = 6,554; 6,400 failures.
Log-rank test for equality of survivor functions: $\chi^2 = 179.43$, 1 degree of freedom, $p(\chi^2) < .001$.
Note: Includes only cases in which an answer was filed.

Figure 12. All Other Districts—Cumulative Probability of Survival Without Disposition, All Civil Case Types Filed Before and After Rule 26 Revisions



n = 10,475; 10,141 failures.
Log-rank test for equality of survivor functions: $\chi^2 = 341.70$, 1 degree of freedom, $p(\chi^2) < .001$.
Note: Includes only cases in which an answer was filed.

Short-Term Impact of Rule 26 Revisions

A number of the working hypotheses for this evaluation posited that there would be a brief period of time during which attorneys who were not fully aware of the Rule 26 revisions would seek adjustments to the pleadings or motions to secure a higher discovery tier assignment as well as amended disclosures to ensure full compliance with the automatic disclosure requirements and thus prevent the opposing party from striking evidence due to untimely disclosures. Table 8 shows the percentage of post-implementation cases in which documents were filed that may reflect initial adjustments in response to the Rule 26 revisions. Cases were identified based on the document title recorded in CORIS (e.g., "Amend Complaint and Jury Demand (Tier 3 Claiming More than $300,000 in Damages"). Not all titles made reference to the assigned discovery tier and may have only reflected additional claims or defenses without seeking to adjust the discovery tier. Consequently, the totals reflected in Table 8 may be over-inclusive. In any event, the actual proportion of cases in which these types of documents were filed are quite small—typically less than 1% of all post-implementation cases in which an answer was filed. The NCSC had no initial expectations about the precise proportion of post-filing adjustments, but thought that it would be higher than what actually occurred. Given the strong evidence of tier inflation documented in Tables 5 and 6, it appears that most attorneys were well aware of the Rule 26 revisions and preemptively adjusted the

pleadings to secure the discovery tier desired, rather than having to seek a post-filing adjustment in the discovery tier.

Table 8: Short Term Impact of Rule 26

	Tier 1		Tier 2		Tier 3		Other Tier Assignment		Total	
Amended pleading filed	7	0.1%	8	0.1%	8	0.1%	3	0.0%	26	0.4%
Amended disclosures filed	27	0.4%	22	0.3%	9	0.1%	4	0.1%	62	0.9%

Motions/Stipulations for Extraordinary Discovery

Of the 111 motions and stipulations for extraordinary discovery filed, 85% requested that the scope of discovery be expanded; the remaining 15% requested additional time to complete discovery. Most of the motions and stipulations were filed in Tier 3 cases. See Table 9. A total of 64 court orders were entered in response to those filings (58%), of which only four ultimately denied the motion or disapproved the stipulation. Like the post-filing adjustments, the proportion of cases seeking extraordinary discovery was smaller than NCSC initial expectations. The high rate of orders granting the motions or approving the stipulations suggests that the majority of litigants seeking extraordinary discovery did so only in meritorious circumstances.

Table 9: Motions/Stipulations for Extraordinary Discovery

	Tier 1		Tier 2		Tier 3		Other Tier		Total	
Motion	5	0.1%	15	0.6%	8	4.7%	3	2.4%	31	0.4%
Stipulation	18	0.4%	39	1.5%	35	15.9%	7	5.5%	99	0.9%

Compliance with Certificate of Readiness for Trial Deadlines

In designing the evaluation methodology, the NCSC examined a sample of cases filed in 2008 to assess the suitability of case-level data extracted from CORIS for use in the evaluation. In that sample, a Certificate of Readiness for Trial was filed in only 8% of non-domestic cases and 11% of domestic cases in which an answer was filed. The Certificate of Readiness for Trial is the only discovery document that is required to be filed when discovery is complete, and consequently is the only field in the CORIS data that would accurately measure the length of time from filing to completion of discovery. The review of 2008 data revealed that the filing date for the Certificate of Readiness for Trial would be an unreliable field to measure the completion of discovery because so few litigants actually complied with the filing requirement.[27] The NCSC was particularly interested in examining this variable in the post-implementation sample to assess both compliance with the filing requirement itself, but also indirectly with the timeframes established for standard discovery.[28]

[27] February 22, 2011 Memorandum from Paula Hannaford-Agor to Tim Shea, p. 4 (noting that a Certificate of Readiness for Trial was only filed in 43% of non-domestic cases and 57% of domestic cases in which a bench or jury trial was held, suggesting that this document is not routinely filed even in cases that complete discovery and proceed to a disposition on the merits).

[28] One of the operational changes that was implemented with the Rule 26 revisions was the ability for CORIS to automatically calculate discovery deadlines based on the assigned discovery tier including the date for filing a

Of the 4,626 post-implementation cases for which a discovery tier was assigned and an answer was filed, two-thirds (3,083) were disposed before the Certificate of Readiness for Trial was due. Of the remaining 1,543 cases for which a Certificate of Readiness for Trial should have been filed, one was found in CORIS in only 91 cases (5% non-domestic, 8% domestic). See Table 10. In just over half of those cases (51%), the Certificate of Readiness for Trial was filed on or before the due date; in another 21% of cases, the Certificate of Readiness was filed within 90 days after the due date. In the remaining 28% of cases, the Certificate of Readiness for Trial was filed more than 90 days after the due date. Perhaps not surprisingly, the Certificate of Readiness for Trial was filed in a timely manner or within 90 days after the date most often in Tier 1 (88%) followed by Tier 2 cases (63%) and Tier 3 (38%).

Table 10: Certificate of Readiness for Trial Filed

	Tier 1 (n=25)	Tier 2 (n=56)	Tier 3 (n=8)	Total (n=91)
On or before due date	44%	38%	13%	51%
Within 90 days of due date	44%	25%	25%	21%
91 to 180 days after due date	8%	23%	38%	14%
181 to 270 days after due date	0%	9%	25%	9%
271 to 365 days after due date	4%	2%	0%	3%
More than 365 days after due date	0%	4%	0%	2%

For cases in which no Certificate of Readiness for Trial was filed, approximately one-third (34%) were ultimately disposed within 90 days of the due date for the Certificate of Readiness for Trial. See Table 11. Forty percent (40%) were disposed more than 6 months after the Certificate of Readiness for Trial was supposed to be filed. The fact that so few litigants filed a Certificate of Readiness for Trial in a timely manner for cases that had not otherwise been disposed suggests the possibility that they are likewise not complying with the timeframes for Rule 26 standard discovery.

Table 11: Case Disposed without filing Certificate of Readiness for Trial

	Tier 1 (n=720)	Tier 2 (n=707)	Tier 3 (n=108)	Total (n=1,543)
Within 90 days of COR due date	34%	36%	30%	34%
91 to 180 days after COR due date	28%	24%	23%	26%
181 to 270 days after COR due date	20%	17%	25%	19%
271 to 365 days after COR due date	10%	14%	16%	12%
More than 365 days after COR due date	9%	9%	7%	9%

Frequency and Timing of Discovery Disputes

Taken together, the Rule 26 reforms were expected to decrease the incidence of discovery disputes. To investigate this hypothesis, the NCSC reviewed the CORIS data for use of the following terms in motions filed to indicate the existence of a discovery dispute: compel, protective order, Rule 37, Statement of Discovery Issues, duces tecum, sanctions, and Rule 4-502. The title of each filing was then reviewed to ensure that the motion involved initial disclosures, interrogatories, requests for production, requests for

Certificate of Readiness for Trial, and these deadlines were mailed to litigants to advise them of the timeframes for completing fact and expert discovery and for filing the Certificate of Readiness for Trial.

admission, depositions, or expert witness reports. As shown in Table 12, the overall frequency of litigated discovery disputes increased in the post-implementation sample by 1.2 percentage points, or more than one-quarter of the pre-implementation rate of 4.7%. When the results are broken down by discovery tier, however, it becomes apparent that the increase in the frequency of discovery disputes is being driven by Tier 1 debt collection cases, which more than doubled. The frequency of discovery disputes exhibited a statistically significant decrease for Tier 1 non-debt collection cases. Although the frequency of discovery disputes in non-domestic Tier 2 cases decreased from 10.2% to 8.3%, the decrease was not statistically significant, possibly due to the small number of cases (244, 372)[29]; the frequency of discovery disputes in Tier 2 domestic cases did not change in response to the Rule 26 revisions. The frequency of discovery disputes in Tier 3 cases dropped by more than one-third, but the difference was only marginally significant, again likely due to the small number of cases in Tier 3 (109, 220).

Table 12: Frequency of Discovery Disputes

	Pre-implementation	Post-implementation	Sig.
Tier 1 Overall	2.6%	5.2%	***
Debt collection	2.2%	5.6%	***
Non-debt collection	6.2%	1.7%	***
Tier 2 Overall	6.9%	6.5%	
Domestic	6.6%	6.2%	
Non-domestic civil	10.2%	8.3%	
Tier 3 Overall	18.3%	10.9%	*
Total	4.7%	5.9%	***

* $p<.05$
*** $p<.001$

When discovery disputes did occur, however, they did so significantly earlier in the life of the case. See Table 13. Overall, the average number of days from initial case filing to the filing of the first discovery motion decreased approximately by half from 355 days in the pre-implementation sample to 184 days in the post-implementation sample. The magnitude of the decreases was large and statistically significant across all three discovery tiers, and extended to Tier 1 debt collection and Tier 2 domestic cases. Only the decrease in the timing of discovery disputes for Tier 1 non-debt collection cases was not statistically significant, likely due to the small number of cases (28, 7). Although this decrease in the timing of discovery disputes was not anticipated in the evaluation, it can certainly be viewed as a positive impact insofar that it alerts the trial judge and allows him/her to intervene in the case and get it back on track at an earlier point in the litigation than would otherwise occur.

[29] $\chi^2=0.652$, df=1, *p=ns*

Table 13: Number of days from case filing to filing of first discovery dispute motion			
	Pre-implementation	Post-implementation	Sig.
Tier 1 Overall	234	109	***
Debt collection	203	104	***
Non-debt collection	360	270	
Tier 2 Overall	421	275	***
Domestic	417	279	***
Non-domestic civil	449	256	**
Tier 3 Overall	347	225	*
Total	355	184	***
* $p<.05$			
** $p<.01$			
*** $p<.001$			

Impact of Representation Status on Impact of Rule 26 Revisions

One of the debates concerning the adoption of the Rule 26 revisions focused on its likely impact on self-represented litigants. In particular, Advisory Committee members and commentators on the draft version of the rules that were promulgated for public comment expressed the concern that self-represented litigants would be less likely than litigants represented by attorneys to comply with the Rule 26 discovery restrictions due to the complexity of the automatic disclosure requirements. The NCSC obtained information about the representation status of litigants for cases in which an answer was filed to investigate this question. See Table 14.

Table 14: Litigant Representation Status

	Pre-implementation (9,474)			
	Both parties represented	P represented / D pro se	P pro se / D represented	Both parties pro se
Tier 1 Overall	13%	85%	1%	2%
Debt collection	10%	87%	<1%	2%
Non-debt collection	42%	54%	3%	2%
Tier 2 Overall	31%	26%	14%	29%
Domestic	28%	25%	15%	32%
Non-domestic	60%	34%	2%	2%
Tier 3 Overall	84%	16%	1%	0%
Total	26%	60%	5%	10%
	Post-implementation (n=7,555)			
	Both parties represented	P represented / D pro se	P pro se / D represented	Both parties pro se
Tier 1 Overall	17%	82%	1%	1%
Debt collection	12%	87%	<1%	1%
Non-debt collection	61%	33%	3%	2%
Tier 2 Overall	32%	25%	14%	29%
Domestic	26%	25%	16%	33%
Non-domestic	72%	24%	2%	2%
Tier 3 Overall	83%	10%	6%	2%
Total	26%	58%	6%	11%

Although there was little change in the overall breakdown of representation status between the pre-implementation and post-implementation samples, there were some significant changes within the discovery tiers. For example, the proportion of Tier 1 non-debt collection cases in which both parties were represented increased from 42% to 61%, and the proportion of Tier 2 non-domestic cases in which both parties were represented increased from 60% to 72%. In both instances, the shift is due exclusively to an increase in the proportion of plaintiffs retaining counsel in cases for which the defendant is self-represented; there is no difference in other representation categories. It is not immediately apparent why the plaintiff's decision to retain legal counsel would be affected by the Rule 26 revisions unless they perceived the task of navigating the revised discovery rules as too daunting.

Not surprisingly, litigant representation status does affect the manner of disposition in civil cases. For example, Tier 1 cases were significantly more likely to be dismissed or to settle, and less likely to result in a judgment, when both parties were represented by counsel compared to cases in which one or both parties were self-represented. But the Rule 26 revisions did not have an effect on the distribution of disposition types based on representation status. There was also no evidence that self-represented plaintiffs contributed to the tier inflation phenomenon that was observed in Table 6 for the non-debt collection and non-domestic cases. Indeed, it would be surprising if they did given that a self-represented litigant would be unlikely to have sufficient knowledge of the discovery rules to preemptively plead the case to obtain a higher discovery tier.

Representation status did have an effect on Rule 26 short term impacts and compliance. Ironically, it was cases in which both parties were represented by counsel that were most likely to file an amended pleading[30] and least likely to file a Certificate of Readiness for Trial.[31] Post-implementation Tier 1 debt collection cases in which both parties were represented were also marginally more likely to involve discovery disputes (5.9%) compared to cases in the pre-implementation sample (4.4%), but otherwise there were no differences in the frequency of discovery disputes based on representation status.

[30] Both parties represented=93.3%, one or more parties self-represented=6.7%, χ^2=72.583, df=3, p<.001.

[31] COR filing rates: both parties represented=2.9%, one or more parties self-represented=7.5%; χ^2=14.036, df=1, p<.001.

Attorney Survey

One of the challenges of evaluating the impact of the Rule 26 revisions is that the rule is intended to regulate litigation activity that takes place largely outside the courthouse. Discovery is the process of exchanging information about the evidence that the parties need to support their respective claims and defenses. In the vast majority of cases, judges do not get involved in supervising the process except to the extent necessary to resolve disputes between the parties concerning whether requested information must be disclosed. Rule 26 does not require that the parties file copies of automatic disclosures and various discovery requests with the court, although many attorneys routinely file proof of service to create a record that disclosures or requested discovery were provided to the opposing party. Thus, information recorded in CORIS cannot be used to confirm the extent to which attorneys have complied with the Rule 26 provisions concerning either the scope or the deadlines for completing discovery. This information must come from the attorneys themselves either through a review of attorney case files or through a survey asking attorneys to self-report on their discovery activities. The former approach offers the advantage of not having to rely on attorneys' willingness to self-report and ability to recall details about individual cases. Nevertheless, it is logistically problematic insofar that client confidentiality concerns would likely lead most attorneys to decline access to their case files and the review process for those few that would allow such access would be prohibitively time-consuming and expensive. Moreover, an attorney case file review would not provide information about the attorneys' opinions regarding the revisions.

For all of the reasons listed above, the NCSC adopted the approach of surveying attorneys for the present evaluation. The surveys were administered in an online format to attorneys who were listed as counsel of record in civil cases filed between January 1 and June 30, 2012. See Appendix A for a MS Word version of the survey. The Utah AOC extracted the names and email addresses of attorneys of record for civil cases in the evaluation sample in which an answer was filed on a rolling basis as cases disposed. To create the email distribution list for the survey, NCSC staff eliminated records that were missing the attorney name or email address. To prevent attorneys who were listed as attorney of record for multiple cases in the same survey batch from receiving multiple versions of the survey, NCSC staff randomly selected a single case for each attorney.[32] The surveys were administered on a quarterly basis beginning October 1, 2012 and ending June 30, 2014 for a total of eight survey batches. Table 15 shows the impact of the data cleaning process for each survey batch. The final dataset consisted of 817 attorney survey responses for 725 unique cases. These reflect an average attorney response rate of 19% for 27% of the cases on the survey distribution list.

[32] NCSC staff also implemented a policy of excluding attorneys who had already responded to three previous surveys from receiving future surveys.

Table 15: Attorney Survey										
Batch	Disposition Dates	Original Sample			Distribution List		Survey Responses			
		Total Records	Cases	Attorneys	Cases	Attorneys	Cases	%	Attorneys	%
1	July 1, 2012 to Sept. 30, 2012	11,576	3,445	888	595	845	161	27%	177	21%
2	Oct. 1, 2012 to Dec. 31, 2012	10,572	1,185	724	453	714	120	26%	139	19%
3	Jan. 1, 2013 to March 31, 2013	4,267	425	674	420	674	126	30%	146	22%
4	April 1, 2013 to June 30, 2013	3,891	1,036	373	264	372	122	46%	136	37%
5	July 1, 2013 to Sept. 30, 2013	4,313	505	543	302	536	59	20%	62	12%
6	Oct. 1, 2013 to Dec. 31 2013	9,435	403	359	243	466	52	21%	59	13%
7	Jan. 1, 2014 to March 31, 2014	4,311	278	437	206	423	46	22%	54	13%
8	April 1, 2014 to June 30, 2014	2,066	171	339	152	339	39	26%	44	13%

One implication of the data cleaning process is the skewed distribution of case types compared to the original sample of post-implementation cases. See Table 16. The exclusion of all but one case per batch for attorneys who disposed multiple cases during the batch period had a disproportionate effect on the proportion of debt collection cases reflected in the survey responses. For example, one attorney in Batch 1 was listed as attorney of record in 307 separate debt collection cases, but only one of those cases was selected for the survey distribution list. Debt collection cases were also more likely to have an attorney of record recorded for the plaintiff because so many of the defendants were self-represented litigants, who were not included in the attorney survey distribution list. Finally, Tier 3 cases were more likely than Tier 1 or Tier 2 cases to have multiple attorneys of record recorded for each side. To increase the likelihood of receiving a response, the survey distribution list included all unique attorneys of record, not just the lead attorney for each case. The net result is underrepresentation of general civil cases, largely due to a low proportion of debt collection cases, and overrepresentation of domestic cases, driven by an overly large proportion of divorce/annulment cases. In addition, the initial screening criteria focusing on attorneys of record for cases in which an answer was filed resulted in a disproportionate number of attorneys representing plaintiffs/petitioners on the distribution list. Across all case categories, plaintiffs/petitioners were more likely to be represented by counsel than defendant/respondents, and differential default rates across case types exacerbated this effect.

Table 16: Caseload Composition for Filings, Survey Distribution List, and Survey Respondents

Case Type	Cases filed 1/1/12 to 6/30/2012		Survey Distribution List: Cases		Survey Respondents: Cases	
Asbestos	1	<1%	-	0%	-	0%
Civil rights	4	<1%	1	<1%	1	<1%
Condemnation	41	<1%	12	<1%	7	1%
Contracts	1,590	3%	539	7%	123	18%
Debt Collection	36,414	77%	4,341	57%	152	22%
Malpractice	76	<1%	25	<1%	9	1%
Personal injury	693	1%	421	6%	144	21%
Property damage	185	<1%	54	1%	13	2%
Property rights	171	<1%	58	1%	20	3%
Water rights	11	<1%	4	<1%	1	<1%
Wrongful death	22	<1%	8	<1%	1	<1%
Wrongful termination	7	<1%	2	<1%	2	<1%
Subtotal General Civil	39,215	83%	5,465	72%	473	68%
Custody/Support	546	1%	190	3%	18	3%
Divorce/Annulment	7,087	15%	1,631	22%	173	25%
Paternity	665	1%	275	4%	35	5%
Subtotal Domestic	8,298	17%	2,096	28%	226	32%
GRAND TOTAL	47,513	100%	7,561	100%	699	100%

Differential response rates further distort the caseload composition. Only 22% of survey respondents represented litigants in debt collection cases compared to 57% on the survey distribution list. In contrast, attorneys representing clients in contract and personal injury cases were more likely to respond, while attorneys representing clients in domestic cases responded in roughly the same proportion as they appeared on the distribution list. These response rates likely indicate stronger, and possibly more negative, opinions compared to those who did not respond to the survey. Moreover, it is possible that some attorneys may not have always accurately remembered the cases they were asked to document in the survey, particularly with respect to detailed information about the scope and timeframe of discovery undertaken in those cases. All of these implications should be kept in mind when considering the responses themselves.

Respondent Case Characteristics

Attorneys responding to the survey represented clients in Tier 1 and 2 cases about equally. See Table 17. Although the Tier 3 cases accounted for only 13% of the attorney surveys, Tier 3 cases comprised less than 3% of the cases in which an answer was filed in the evaluation sample. Thus, Tier 3 cases are considerably overrepresented in the attorney survey results. Tier 1 respondents are underrepresented (61% of Tier 1 cases with an answer, 45% of survey respondents). Tier 2 attorneys are slightly overrepresented (36% of cases with an answer, 42% of survey responses). With respect to specific case types, divorce/annulment cases dominate the domestic cases in all three tiers, and domestic cases comprise more than half of the Tier 2 cases reflected in the attorney survey data (compared to 65% of the Tier 2 cases with answers). Of general civil cases, debt collection dominates Tier 1 (45%) followed by personal injury (24%) and contract cases (22%). Personal injury (40%) and contract cases (36%) dominated the Tier 3 survey responses.

Table 17: Caseload Composition by Tier

	Tier 1		Tier 2		Tier 3	
Asbestos	0	0%	0	0%	0	0%
Civil rights	1	0%	0	0%	0	0%
Condemnation	6	2%	1	1%	1	1%
Contracts	60	22%	38	28%	33	36%
Debt Collection	125	45%	20	15%	7	8%
Malpractice	4	1%	1	1%	4	4%
Personal injury	68	24%	56	41%	36	40%
Property damage	7	3%	3	2%	4	4%
Property rights	7	3%	15	11%	5	5%
Water rights	0	0%	0	0%	0	0%
Wrongful death	0	0%	0	0%	1	1%
Wrongful termination	1	0%	1	1%	0	0%
Subtotal General Civil	**279**	**85%**	**135**	**44%**	**91**	**95%**
Custody/Support	7	14%	12	7%	0	0%
Divorce/Annulment	36	73%	131	75%	5	100%
Paternity	6	12%	31	18%	0	0%
Subtotal Domestic	**49**	**15%**	**174**	**56%**	**5**	**5%**
GRAND TOTAL	**328**		**309**		**96**	
	45%		42%		13%	

An examination of case dispositions shows that most cases settled[33] and more than half of the cases in the attorney sample resolved by withdrawal, dismissal, default judgment or settlement before discovery was completed. See Table 18. Twenty-three (23) respondents reported that the cases were still pending at the time the survey was distributed, and were excluded from further analysis.

Table 18: Manner of Disposition, by Discovery Tier

	Tier 1		Tier 2		Tier 3	
Withdrawn	5	2%	12	4%	8	9%
Dismissed	18	6%	9	3%	2	2%
Default judgment	11	4%	3	1%	4	4%
Settlement before discovery completed	123	41%	162	56%	35	38%
Settlement after discovery completed	55	18%	76	26%	33	36%
Summary judgment	32	11%	9	3%	3	3%
Bench trial	7	2%	8	3%	0	0%
Jury trial	0	0%	0	0%	2	2%
Other disposition	47	16%	10	3%	5	5%
Total	298	96%	289	99%	92	100%

In addition to issues related to representation, some caveats are warranted about the weight to accord to the survey data in the overall evaluation of the Rule 26 revisions. First, a comparison of case events reported by attorneys with data extracted from CORIS reveals some inconsistencies. For example, respondents reported filing motions to amend the pleadings in 5 cases, but the CORIS data confirmed only one of those cases; in addition, the CORIS data indicated a motion to amend the pleadings in an additional 6 cases that were not reported by the attorneys. Similarly, 29 respondents (4.1%) reported that a stipulation for extraordinary discovery was filed in a total of 26 cases. CORIS confirms that information for 13 of the attorney responses in 10 unique cases (3 cases involved reports from multiple attorneys),

[33] Across all discovery tiers, 47% settled before discovery was complete and 23% after discovery was complete.

but 16 of the attorney claims could not be verified with CORIS. Moreover, CORIS also indicated an additional 21 cases in which a stipulation for extraordinary discovery was filed, but the 25 attorneys who completed surveys failed to confirm these stipulations in their survey responses. Similar discrepancies were found concerning attorney responses of motions for extraordinary discovery and discovery disputes (motions to compel discovery and motions for protective orders). In most instances in which CORIS data could be used to confirm attorney reports, the incidence of underreporting (CORIS data indicates an event that was not reported by the attorneys) greatly outweighs the incidence of over-reporting (attorneys reporting events that are not reflected in CORIS data). It is likely that some of the attorneys who responded to the survey confused the case on which they were asked to assess the impact of the Rule 26 revisions with other cases. Even when attorneys correctly remembered the case processing details that occurred in those cases, respondents in cases that did not complete discovery cannot provide a fully informed perspective on the impact of the Rule 26 revisions.

Case Events

Table 19 documents case activity related to discovery. Even taking into account the likelihood of substantial underreporting of case events by the attorneys who responded to the survey, these statistics reveal remarkably little activity in response to the Rule 26 revisions. Attorneys reported filing motions to amend the pleadings to adjust the discovery in only four cases (less than 1%), and filed motions or stipulations for extraordinary discovery in only 31 cases (5%). Evidence of formal discovery disputes were reported in only 38 cases (5%). In the vast majority of these cases, the motions were granted or stipulations approved, which suggests that attorneys only sought formal relief in meritorious circumstances. Although the precise percentages differ, these rates largely conform to findings from the case-level analysis that the relative number of formal discovery tier adjustments is quite modest.[34] There are two possible conclusions to be drawn from these findings: first, the standard discovery provided under Rule 26 is sufficient to meet to the needs of most cases; or, second, attorneys that believe their cases require more discovery than is permitted by the assigned discovery tier are simply agreeing to do so among themselves without seeking formal court authorization. Of course, these two conclusions are not necessarily mutually exclusive.

Table 19: Case Activity (725 total cases)

	# Cases (%)		# Granted / Approved (%)	
Motion to amend pleadings	4	< 1%	3	75%
Motion for extraordinary discovery	7	1%	6	86%
Stipulation for extraordinary discovery	24	4%	20	83%
Motion to compel discovery*	29	4%	18	62%
Motion for protective order*	11	2%	9	82%

* Two cases involved both motions to compel discovery and motions for a protective order

[34] *See* Table 9, *supra.*

Reported Compliance with Rule 26 Restrictions on Discovery

Copies of discovery requests are only rarely filed with the court, and usually only as an appendix to a motion concerning a discovery dispute. To learn whether attorneys are complying with standard discovery provisions, the survey asked the attorneys to report the number of discovery requests made both by the respondent and by the opposing party.[35] Table 20 describes the percentage of plaintiff and defendant reports that complied with the scope and timeframe for each discovery tier. Overall compliance with the scope of discovery was very good, generally exceeding 90% for both plaintiffs and defendants for all types of discovery requests across all three tiers.

Table 20: Reported Compliance with Rule 26 Scope of Discovery Provisions

			Percent Compliance	
		Rule 26 Requirements	Plaintiff / Petitioner	Defendant / Respondent
Tier 1 (n=217)	Number of Fact Witnesses		2.5	0.9
	Interrogatories	0	88%	92%
	Request for Admission	5	89%	100%
	Requests for Production	5	93%	97%
	Deposition Hours for Fact Witnesses	3	97%	95%
	Days to Completion of Fact Discovery*	120	38%	
Tier 2 (N=207)	Number of Fact Witnesses		2.0	1.2
	Interrogatories	10	94%	94%
	Request for Admission	10	99%	99%
	Requests for Production	10	98%	94%
	Deposition Hours for Fact Witnesses	15	99%	99%
	Days to Completion of Fact Discovery*	180	25%	
Tier 3 (N=49)	Number of Fact Witnesses		3.3	2.7
	Interrogatories	20	93%	98%
	Request for Admission	20	100%	100%
	Requests for Production	20	95%	96%
	Deposition Hours for Fact Witnesses	30	100%	96%
	Days to Completion of Fact Discovery*	210	0%	

* Calculated for cases in which parties settled after discovery completion, summary judgment, bench and jury trials only.

In fact, one of the most intriguing findings from the attorney survey is the proportion of cases in which respondents indicated that NO formal discovery took place. Respondents reported that neither the plaintiff nor the defendant conducted discovery in the form of interrogatories, requests for production or admission, or witness deposition in the nearly one-third (32%) of both Tier 1 and Tier 2 cases. An additional 23% of Tier 1 cases and 17% of Tier 2 cases reported no formal discovery for at least one of the

[35] Requesting information from both the respondent and the opposing party in that case ensured that the attorney survey captured information even if the attorney for the opposing party failed to respond to the survey.

parties.[36] There was no formal discovery beyond the automatic disclosures in 9% of Tier 3 cases and an additional 13% had no formal discovery by at least one of the parties.

The same level of compliance cannot be said about the timeframes to complete discovery. Attorneys reported that less than half (38%) of Tier 1 cases completed fact discovery within the 120 days mandated by Rule 26.[37] Nor were the deadlines missed by a small margin. Only 52% of the Tier 1 cases had completed discovery within 30 days of the Rule 26 deadline and the average time from the answer date to the completion of fact discovery for cases that missed the deadline was 267 days. Tier 2 and Tier 3 cases fared even worse with respect to compliance with discovery deadlines. Only 25% of Tier 2 cases and none of the Tier 3 cases completed fact discovery within the required timeframes.[38] For those cases that exceeded the timeframe, the average number of days to complete fact discovery was 362 and 363 days, respectively. The fact that so few survey respondents reported completing fact discovery within the required timeframe is surprising given the significant decrease in filing-to-disposition time that was observed in the CORIS data analysis and mostly likely can be attributed either to self-selection bias by the survey respondents or possibly to inaccurate reporting by the attorneys about the fact discovery completion date.

The survey respondents also reported the number of expert witnesses retained by each side, the number of expert witness reports accepted, the length of expert depositions, and the date that expert discovery completed. See Table 21. As a general matter, only a small percentage of attorneys reported retaining any expert witnesses for the case—on average, approximately one in 10 per side for both Tier 1 and Tier 2 cases, and one in three per side for Tier 3 cases. Excluding cases that settled before discovery was completed or were resolved by dismissal, default judgment or other non-meritorious manner, 19% of Tier 1 plaintiffs and 17% of Tier 1 defendants retained one or more experts. For Tier 2 and Tier 3 cases, the expert witness retention rates were 19% and 58% for plaintiffs, and 21% and 50% for defendants, respectively. Although much of the criticism about litigation focuses on expenses related to expert witnesses, these reports suggest that such costs are incurred in only a small proportion of cases.[39]

For cases in which an expert witness was retained, approximately half of the Tier 1 and Tier 2 litigants and three-quarters of the Tier 3 litigants accepted the expert witness report in lieu of taking a deposition. For those that opted to depose the opposing party's expert witness, the length of the depositions were within the maximum time permitted (4 hours per expert) across all discovery tiers. Like fact discovery, however, respondents reporting that the proportion of cases in which expert discovery was completed within 120

[36] Plaintiffs were more likely to forego formal discovery (14% Tier 1, 13% Tier 2) compared to defendants (10% Tier 1, 5% Tier 2).

[37] The number of days to complete fact discovery was calculated from the date the answer was filed according to CORIS to the date fact discovery was completed as reported by the attorney. Cases that settled before discovery was completed or that resolved by non-meritorious means (default judgment, dismissal, etc.) were excluded from the analysis.

[38] Only 31% of Tier 2 cases and 8% of Tier 3 cases completed fact discovery within 30 days of the required deadlines.

[39] In a national survey of attorneys for cases filed in federal court, the Federal Judicial Center found that slightly less than one-third of attorney respondents reported disclosure of expert reports, which is similar to proportion of reported by attorneys in Tier 3 cases in the present survey. EMERY G. LEE III & THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 9 (Oct. 2009).

days of the fact discovery completion date was fairly small: just over half the Tier 1 cases, approximately one-third of Tier 2 cases, and none of the Tier 3 cases completed expert discovery within the timeframe allowed by Rule 26. Again, this may be related to self-selection bias or inaccurate reporting on the part of the survey respondents.

Table 21: Compliance with Rule 26 Expert Discovery Provisions

		Plaintiff / Petitioner	Defendant / Respondent
Tier 1 (n=195)	Cases with Expert Witnesses	9%	8%
	Percent Accepting Expert Report	53%	79%
	No more than 4 Hours of Depositions per Expert Witness	100%	100%
	Days to Completion of Expert Discovery*	56%	
Tier 2 (n=179)	Cases with Expert Witnesses	11%	12%
	Percent Accepting Expert Report	53%	47%
	No more than 4 Hours of Depositions per Expert Witness	100%	100%
	Days to Completion of Expert Discovery*	36%	
Tier 3 (n=57)	Cases with Expert Witnesses	39%	33%
	Percent Accepting Expert Report	73%	78%
	No more than 4 Hours of Depositions per Expert Witness	100%	100%
	Days to Completion of Expert Discovery*	0%	

* Expert Discovery to be completed within 120 days of completion of fact discovery

Opinions about Revised Rules 26 Provisions

In addition to documenting case events and scope of discovery, the attorney survey solicited the respondents' opinions about the impact of the Rule 26 revisions on the specified case. The first three opinion questions inquired about the impact of the rules on attorneys' ability to obtain sufficient information about the claims and defenses. Specifically, they focused on the opposing party's compliance with the automatic disclosure requirements, the restrictions on the scope of discovery under standard discovery for the assigned discovery tier, and the impact of the proportionality requirement on discovery. In general, attorney opinions tended to be more positive than negative on these issues with a fairly large proportion of neutral responses. See Table 22. Respondents in Tier 1 cases expressed the most negative opinions on these three items.

The second set of opinion questions inquired into the impact of the Rule 26 revisions on costs and timeliness. Attorneys expressed considerable disagreement with statements that the Rule 26 revisions decreased the amount of time for discovery completion and case resolution, and discovery costs. This is surprising insofar that it is inconsistent with the case-level findings that filing-to-disposition times were significantly shorter in the post-implementation sample.[40] It is consistent, however, with the attorney survey reports concerning compliance with time restrictions. It is possible that the attorneys who responded to the survey had a less positive experience with the Rule 26 revisions with respect to time-to-

[40] *See* Figures 2-9 and accompanying text, *supra.*

disposition and were thus more highly motivated to respond to the attorney survey. This would also explain their comparatively more negative opinions.

Table 22: Attorney Opinions about Rule 26

	Disagree / Strongly disagree	Neutral	Agree / Strongly agree
Opposing party complied with automatic disclosure provisions.			
Tier 1	42.5%	30.2%	27.2%
Tier 2	32.1%	26.0%	42.0%
Tier 3	25.3%	24.1%	50.6%
Disclosure and standard discovery under Rule 26 provided sufficient information to inform assessment of claims.			
Tier 1	26.2%	34.9%	38.9%
Tier 2	19.8%	33.2%	46.9%
Tier 3	27.8%	22.8%	49.4%
Discovery was proportional to case complexity and amount in controversy.			
Tier 1	15.6%	42.2%	42.2%
Tier 2	9.9%	38.9%	51.1%
Tier 3	11.4%	31.6%	57.0%
Discovery was completed more quickly due to Rule 26 restrictions.			
Tier 1	40.0%	40.0%	20.0%
Tier 2	37.4%	38.5%	23.9%
Tier 3	51.9%	29.1%	19.0%
Case was resolved more quickly due to Rule 26 restrictions.			
Tier 1	44.4%	40.7%	14.9%
Tier 2	42.4%	38.9%	18.7%
Tier 3	55.7%	32.9%	11.4%
Discovery costs were lower due to Rule 26 restrictions.			
Tier 1	46.5%	37.1%	16.4%
Tier 2	41.2%	40.1%	18.7%
Tier 3	53.2%	30..4%	16.5%

The party the responding attorney represented did affect attorneys' opinions about the impact of the Rule 26 revisions. Overall, attorneys representing plaintiffs were significantly less likely to report that the opposing party complied with the automatic disclosure requirement,[41] and the effect was particularly noticeable for plaintiff attorneys in Tier 1 cases.[42] This may be related to the large proportion of self-represented defendants in Tier 1 debt collection cases who may not have been fully aware of or understood the automatic disclosure requirements. On the other hand, plaintiff attorneys were significantly more likely than defendant attorneys to report that discovery was completed more quickly

[41] On a scale of 1 (completely disagree) to 5 (completely agree), the mean plaintiff response was 2.79 compared to 2.98 for defendants (p=0.470).

[42] The mean plaintiff response (n=185) was 2.52 compared to 2.84 for defendants (n=85), F=3.452, df=2, *p*=.030.

and the costs less due to the Rule 26 restrictions.[43] Overall, plaintiff attorneys did not report that the cases resolved more quickly than defendant attorneys, but compared to Tier 3 defendants (n=43), Tier 3 plaintiffs (n=36) reported marginally more positive opinions about the impact of the Rule 26 revisions on discovery time[44] and significantly more positive opinions about their impact on costs and on the timeliness of case resolution.[45]

Case type may also play a role in attorneys' opinions about Rule 26. For many of the case types reflected in the attorney survey, there were too few responses to analyze. However, aggregating the responses based on the Utah AOC reporting categories suggests how case types may affect attorney views of the revisions. All of the attorney opinions differed significantly based on reporting category. Attorneys in general civil cases expressed the most negative opinions in all three questions related to the impact of Rule 26 on their ability to obtain sufficient information about the claims and defenses. Attorneys in property rights cases expressed the most positive opinions in the questions about the automatic disclosure requirements and the adequacy of the standard discovery restrictions; attorneys in domestic cases expressed the most positive opinions about the proportionality of discovery undertaken.[46] In the second set of opinion questions, attorneys in tort cases consistently expressed the most negative opinions while attorneys in domestic cases expressed the most positive opinions.[47]

The NCSC also investigated whether opinions changed over the two years of the survey period. The average rating did not change for any of the survey questions, but there were significant decreases in the proportion of neutral responses for the first three opinion questions and a marginal decrease in the proportion of neutral responses concerning costs of discovery.[48] That is, attorneys responding to more recent survey batches (e.g., post-implementation cases that resolved later in the survey period) were less likely to indicate a neutral opinion about the impact of the Rule 26 revisions. Although some attorneys in later batches responded with greater proportions of negative responses, there were slight but significant increases in positive responses for the questions concerning the adequacy of standard discovery and the proportionality of discovery, and marginal increases in positive responses for questions concerning the

[43] Respondents were asked to rate their agreement with statements on a scale of 1 (strongly disagree) to 5 (strongly agree). The average plaintiff agreement with the statement that discovery completed more quickly was 2.75 (n=380) compared to 2.52 for defendants (n=227), F=3.137, df=2, p=0.044); the mean plaintiff agreement with the statement that costs were lower was 2.62 (n=380) compared to 2.42 for defendants (n=227), F=3.282, df=2, p=0.38.

[44] Discovery was completed more quickly: Tier 3 plaintiffs=2.75, Tier 3 defendants=2.28, F=3.661, df=2, p=0.059.

[45] Costs were lower: Tier 3 plaintiffs=2.81; Tier 3 defendants=2.14, F=7.465, df=2, p=0.046; Case resolved more quickly: Tier 3 plaintiffs=2.61, Tier 3 defendants=2.16, F=4.106, df=2, p=0.008.

[46] Compliance with automatic disclosure requirements: General Civil=2.61, Domestic=2.94, Torts=3.13, Property Rights=3.37, F=8.551, df=3, p<0.001; Standard discovery sufficient: General Civil=3.03, Torts=3.04,Domestic-3.34, Property Rights=3.37, F=4.498, df=3, p=0.007; Proportional: General Civil=3.24, Torts=3.42, Property Rights=3.44, Domestic=3.50, F=2.998, df=3, p=0.030.

[47] Discovery completed more quickly: Torts=2.47, Property Rights=2.63, General Civil=2.65, Domestic=2.84, F=3.427, df=3, p=0.017; Case resolved more quickly: Torts=2.36, General Civil=2.53, Property Rights=2.56, Domestic=2.72, F=3.253, df=3, p=0.021; Costs were lower: Torts=2.28, General Civil=2.54, Property Rights=2.63, Domestic=2.76, F=5.613, df=3, p=0.001.

[48] Percentage of neutral responses for compliance with automatic disclosures, F=2.811, df=7, p=0.007; adequacy of standard discovery, F=2.594, df=7, p=0.012; proportionality, F=2.784, df=7, p=0.00); speedier discovery, F=1.217, df=7, p=.217; speedier case resolution, F=1.441, df=7, p=.186; decreased costs, F=1.806, df=7, p=0.083).

speed and costs of discovery.[49] These trends may indicate that the beneficial effects of the Rule 26 revisions do not appear for cases that resolve relatively early in the litigation. Alternatively, attorneys may be responding based on more general opinions about the Rule 26 revisions rather than their experience with a particular case, which would indicate that attorney acceptance of the rule may be improving with time.

Opinions about Rule 4-502

Two of the opinion questions in the attorney survey focused on views about the expedited process for resolving discovery disputes, which was adopted as Rule 4-502 of the Utah Judicial Council Rules of Judicial Administration. A total of 176 attorneys answered the question about whether discovery disputes were resolved in a timely fashion, however the CORIS data confirmed the existence of a discovery dispute for only 36 of those attorneys. The discrepancy suggests that a significant number of attorneys either experienced a discovery dispute in the case but failed to bring it to the court's attention for resolution or mistakenly reported on their experience with a discovery dispute in different case that was not selected for the attorney survey. This was an important factor in attorney responses to these questions. See Table 23.

Table 23: Attorney Opinions about Rule 4-502

	Disagree / Strongly disagree	Neutral	Agree / Strongly agree
Discovery disputes were resolved in a timely manner.			
Discovery dispute confirmed by CORIS	38.9%	30.6%	30.6%
Discovery dispute not confirmed by CORIS	44.1%	47.1%	8.9%
Statement of Discovery Issues and Statement in Opposition provided sufficient information for the court to decide the discovery dispute.			
Discovery dispute confirmed by CORIS	25.9%	25.9%	48.1%
Discovery dispute not confirmed by CORIS	41.2%	48.0%	10.7%

Attorneys reporting on cases in which the CORIS dataset confirmed the existence of a discovery dispute had marginally more favorable opinions about whether the dispute was resolved in a timely manner.[50] They were also significantly more likely to report that the Statement of Discovery Issues and Statement in Opposition provided sufficient information for the court to decide the discovery dispute.[51] There was no difference in attorney opinions about whether discovery disputes were resolved in a timely manner based on discovery tier. There were too few cases to investigate whether the timing of the Request to Submit

[49] Percentage of positive responses for compliance with automatic disclosures (p=.370); adequacy of standard discovery (p=0.010); proportionality (p=.024); speedier discovery (p=0.060); speedier case resolution (p=.256); decreased costs (p=0.057).

[50] Discovery dispute confirmed by CORIS (mean=2.81), discovery dispute not confirmed by CORIS (mean=2.64), F=3.493, df=2, p=0.063.

[51] Discovery dispute confirmed by CORIS (mean=3.22), discovery dispute not confirmed by CORIS (mean=2.51), F=10.257, df=2, p=0.002.

for Decision filing caused a delay in the resolution of the discovery dispute, as was suggested as a possibility in the judicial focus groups in April 2014.[52] In two-thirds of the cases in which CORIS confirmed the existence of a discovery dispute, the order resolving the dispute was entered within 42 days of the first motion, but a Request to Submit for Decision was only found in the CORIS data in seven of those cases.

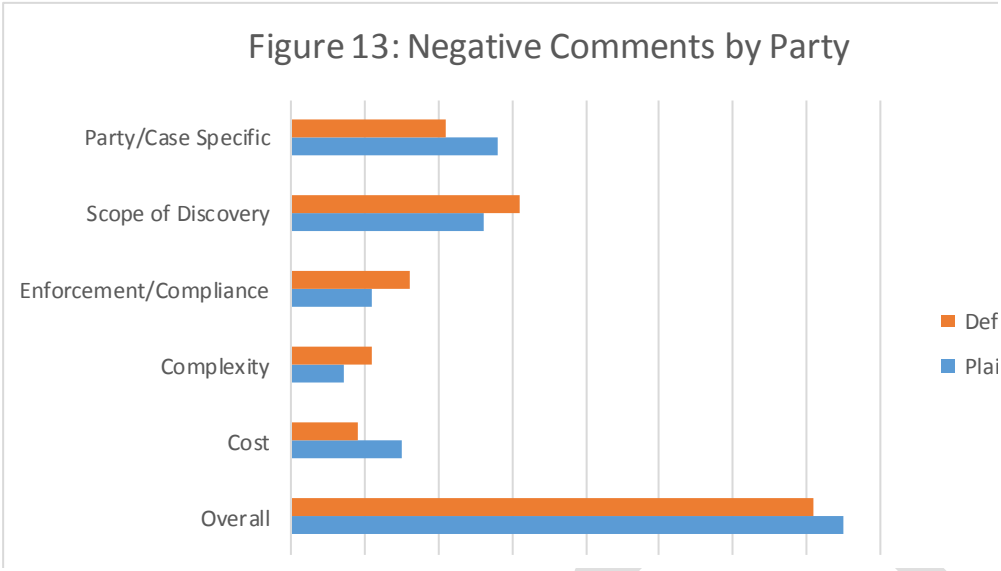
Open-ended Attorney Comments

The attorney survey concluded with an opportunity for respondents to provide written comments about the Rule 26 revisions and their impact on the case or on legal practice generally. An average of 39% of responding attorneys chose to complete the comment section. Because the comment section was an optional field, self-selection bias may have resulted in comments submitted by attorneys with stronger, more negative, opinions than those who skipped the comment section. The NCSC analyzed the comments to identify common themes and to provide additional information with which to interpret data from other components of the evaluation.

A coding system was created to quantify the written comments. Most comments raised multiple issues, so the coding was based on discernable themes rather than individual comments. Negative themes were assigned a negative number, positive themes were assigned a positive number, and neutral or "other" themes were assigned a zero (0). Each comment was assigned up to four different numbers to represent the different issues or themes addressed by the attorney. The final coding scale ranges from -74 to 11, indicating significantly more unique negative themes than positive themes. Theme codes were then combined into seven categories: cost, complexity, enforcement/compliance, discovery tier issues, party or case type specific issues, positive comments, and "other" comments. These general categories make it possible to analyze the comment themes by batch, district, party, and case type. Appendix B provides an explanation and examples of each of the theme categories.

The vast majority of the comments (74%) reflect criticism of the Rule 26 revisions with only 9% positive and 17% neutral comments. Overall, there was no difference in the proportion of negative comments reported by attorneys representing plaintiffs versus defendants, although there were subtle differences in the theme categories for their comments. See Figure 13. Plaintiff attorneys, for example, were significantly more likely than defense attorneys to express criticism about the Rule 26 revisions related to costs as well as party and case-specific complaints. Defense attorneys were more concerned with the complexity of the rule, the scope of discovery permitted under the standard discovery tiers, and enforcement/compliance with the rules.

[52] *See infra* at n. 51 and accompanying text.



There were also subtle differences in the comments based on the Utah reporting categories. Overall, attorneys in property rights and domestic cases were the least negative in their criticism (70% of comments) compared to attorneys in tort cases (75%) and contract cases (78%). Again, the specific nature of the criticisms varied by reporting category. See Table 23. There were no significant differences by reporting category concerning cost and complexity issues, but attorneys in contract cases raised enforcement/compliance issues approximately half as often (7%) as attorneys in other types of cases. Attorneys in domestic cases were the least concerned with issues related to the scope of discovery permitted by the standard discovery tiers (11%) and also offered the greatest proportion of positive comments (17%). Attorneys in tort and property rights cases were most concerned with the scope of discovery (38% and 44%, respectively).

Table 23: Comment Themes by Utah Reporting Category

	Cost	Complexity	Enforcement / Compliance	Scope of Discovery	Party / Case Specific	Positive
Domestic	14%	8%	17%	11%	34%	17%
General Civil	14%	10%	8%	34%	25%	10%
Property Rights	13%	13%	13%	44%	19%	0%
Tort	10%	12%	16%	38%	14%	11%
Total	13%	10%	12%	30%	24%	11%

Finally the timing of the survey batches also affected the nature of the comments. See Figure 14. Comments related to cost and complexity trended downward in later survey batches while complaints about enforcement/compliance issues trended upward. This is likely related to the nature of the cases themselves. Cases that resolved relatively early in the survey period (e.g., Batches 1 and 2) tended to be smaller and less complex, so attorneys in these cases reported that they were unnecessarily costly and complex. Cases that resolved later in the survey period tended to be more complex, and attorneys voiced greater concern about enforcement of the rules.

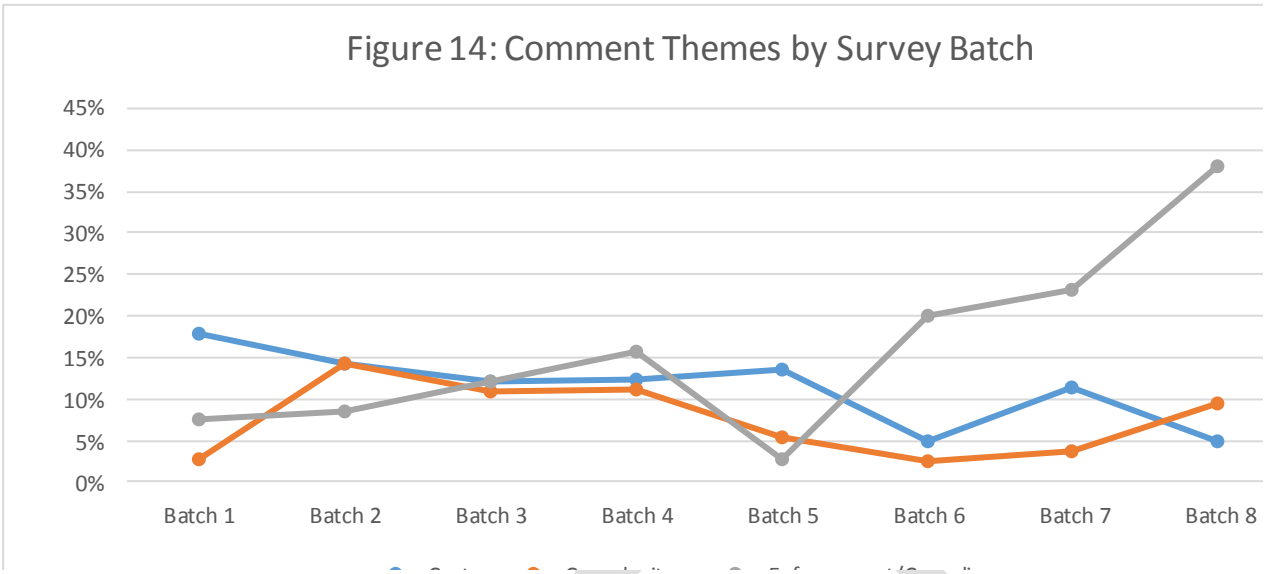


Figure 14: Comment Themes by Survey Batch
45%
40%
35%
30%
25%
20%
15%
10%
5%
0%
Batch 1
Batch 2
Batch 3
Batch 4
Batch 5
Batch 6
Batch 7
Batch 8

Judicial Focus Groups

To gauge the impact of the Rule 26 revisions from the perspective of the Utah district court judges, NCSC project director Paula Hannaford-Agor conducted a series of judicial focus groups in conjunction with the 2014 District Court Spring Conference (April 23-25, 2015 at Bryce Canyon, Utah). A total of 20 district court judges were invited to participate in the focus groups. Judges were selected both with respect to their interest in the Rule 26 revisions and to ensure representation from all of the judicial districts. A total of 15 district court judges plus Utah AOC staff participated in the focus groups.[53]

To guide the focus group discussions, the NCSC prepared preliminary findings from the attorney survey (through Batch 6) and asked judges to help interpret them. Ms. Hannaford-Agor also asked about how judges were interpreting and applying the proportionality requirement when attorneys sought extraordinary discovery, whether judges were seeing an increase or decrease in the number or types of discovery disputes, and what they were hearing about the impact of the Rule 26 revisions either formally in motion arguments or informally from attorneys. Appendix C contains the written handout provided to judges who attended the focus groups. During the same visit, she also met with staff of the Utah Administrative Office of the Courts who had been involved in the planning and implementation of the Rule 26 revisions and attended a meeting of the District Judges Board Meeting to learn about the pilot project proposed by the Civil Rules Committee to implement intensive case management on Tier 3 cases.

A recurring theme across all of the focus group discussions was judicial awareness of the difficulty involved in changing well-established legal practices and culture in a relatively short period of time. Several judges noted that lawyers' penchant for excessive discovery had developed over several generations, and they believed it would take at least that long for the practicing bar to become acclimated to the new discovery procedures. They also remarked that younger attorneys, who had not become firmly entrenched in bad habits, and older attorneys, who remembered litigation practice from their youth, seemed to be the most comfortable with the Rule 26 revisions. In addition, several judges noted that there were some early missteps in which the rules were interpreted in a more complex manner than necessary in relatively straight-forward cases. Finally, several judges admitted to having initial concerns about the potential for backlash if judges enforced the rules too strictly because the legal culture in Utah had traditionally viewed civil case management as the responsibility of the lawyers.

Compliance with Standard Discovery

The focus group discussions began with a brief description of preliminary findings from the attorney surveys through December 2013, which indicated that filings to adjust the discovery tier or seeking extraordinary discovery were quite low. Many of the judges noted that they were seeing very few stipulations to expand the scope of discovery, but many motions for extensions of the discovery deadlines. Although Rule 26(c)(6) defines extraordinary discovery as discovery beyond the limits established for standard fact discovery in Rule 26(c)(5), including deadlines for the completion of fact discovery, many of

[53] District court judges who participated in the focus groups included David M. Conners (2nd), Robert J. Dale (2nd), Noel S. Hyde (2nd), Thomas L. Kay (2nd), James T. Blanche (3rd), L. A. Dever (3rd), Paul Parker (3rd), Todd M. Schaunnessey (3rd), Kate A. Toomey (3rd), Derek P. Pullan (4th), James R. Taylor (4th), William Barrett (5th), Wallace A. Lee (6th), Lyle R. Anderson (7th), Edwin T. Peterson (8th); AOC staff who participated included State Court Administrator Daniel Becker, District Court Administrator Debra J. Moore, and Judicial Education Director Thomas Langhorne.

the judges participating in the focus groups appeared to view extensions on the deadlines as not included within the definition of extraordinary discovery.

The judges expressed widespread suspicion that attorneys are routinely agreeing to discovery stipulations at the beginning of litigation, but not filing those stipulations with the court unless they are needed to extend the discovery period. They were also unsure about the extent to which attorneys were complying with the certification of client informed consent requirement in Rule 26(c)(6) when filing motions or stipulations for extraordinary discovery; several judges noted that they had disapproved stipulations for extraordinary discovery on grounds that the attorneys had failed to comply with the certification requirement. One judge who was a member of the Advisory Committee while the revisions to Rule 26 were being debated suggested that the Advisory Committee should consider removing the ability of attorneys to stipulate to time extensions and only permit them by leave of court.

Most judges expressed their belief that the disclosure requirements in Rule 26(a) have been quite helpful in helping attorneys understand and assess the merits of the respective claims and defenses, and thus cases move forward faster. Attorneys in Tier 1 cases seemed to catch on more quickly about the need to get moving on discovery. But at least one judge thought that attorneys had many more opportunities to enter objections to evidence on the grounds of untimely disclosure than they were actually taking, possibly due to unfamiliarity with the detailed requirements of Rule 26(a).

Discovery Disputes

Many judges indicated that they had experienced significant decreases in the number of motions to compel discovery and motions for protective order. They believed part of the decrease was the result of the restrictions on discovery associated with the discovery tiers; because the amount of discovery is significantly curtailed, especially for Tier 1 and Tier 2 cases, there is simply less material on which to disagree. In addition, the Rule 4-502 procedure does not stay the discovery deadlines while a Statement of Discovery Issues and Statements in Opposition are pending. Many lawyers are cognizant of the limited time to complete discovery and have taken a "pick your battles" approach to litigation. The combination of fewer discovery disputes and the expedited process has resulted in an increase in the availability of judges to decide disputes in a timely manner.

Most of the focus with respect to discovery disputes has shifted to the automatic disclosure requirements. On the few occasions when discovery disputes arise, a major benefit of Rule 4-502 is the requirement that attorneys submit a proposed order with the Statement of Discovery Issues and Statement in Opposition, which helps judges focus on the disputed issues instead of having to wade through the often lengthy briefs that accompanied motions to compel and motions for protective orders.

Use of CORIS for Oversight/Enforcement

There was a lengthy discussion in one of the focus groups about the preliminary finding from the attorney survey that a significant proportion of attorneys disagreed that discovery disputes were resolved in a timely manner.[54] One explanation that was offered for the dissatisfaction was possibly confusion on the

[54] After comparing the attorney survey responses with the CORIS data, the NCSC found that attorney opinions about the timeliness of resolving discovery disputes was significantly more positive for cases in which the CORIS data confirmed that a Statement of Discovery Issues had been filed. *See, supra* Table 23. The CORIS data was not available when the judicial focus groups took place in April 2014.

part of attorneys about the mechanism for requesting a judicial decision on discovery disputes. Rule 4-502 requires the filing party to file a Notice to Submit for Decision after the opposing party has had an opportunity to file a Statement in Opposition. The Notice to Submit for Decision alerts the judge that the issue is ripe for decision. Without the Notice to Submit filing, most judges would be unaware that the issue is pending.

Much of the subsequent focus group discussion centered on the most appropriate and effective remedy for addressing delays (and the resulting dissatisfaction) associated with attorneys' failure to file the Notice to Submit for Decision. Some judges believed that improved attorney education was necessary, particularly insofar that most attorneys would not be aware that the Utah e-filing system implemented in April 2013 does not automatically alert judges when a Statement of Discovery Issues is filed. One judge explained that he has taken a proactive approach in discovery disputes: he asks his judicial assistant to be on the lookout for Rule 4-502 Statements and rather than waiting for the Statement in Opposition and Notice to Submit for Decision to be filed, he telephones the attorneys and resolves the dispute informally.[55] Other judges were less forgiving, opining that the practice of filing a Notice to Submit for Decision predated the Rule 4-502 and that attorneys who fail to follow the rule requirements should not complain when their lapses affect the timeliness of decisions on discovery disputes. This point lead to a discussion about whether a technological approach – namely, programming CORIS to identify a Statement of Discovery Issues at filing and automatically alert the judge of the pending filing after the 5-day period for filing a Statement in Opposition has expired – would be a more effective approach.

The discussion about technology-related factors contributing delay also prompted a discussion about the extent to which judges were using the CORIS case management tools for routine oversight and enforcement of the Rule 26 revisions. CORIS was programmed to generate advisory notices of discovery deadlines including the due date for filing a Certificate of Readiness for Trial. Although many of the judges authorize their judicial assistants to issue Orders to Show Cause when cases have not registered any activity for a defined period of time (usually 120 days), most were unaware that CORIS had the capability to monitor Rule 26 compliance and had not directed their judicial assistants to include noncompliance in routine case management oversight.

Overall Impressions

In general, the judges who participated in the focus groups were fairly positive about the impact of the Rule 26 revisions thus far. There was general agreement that one benefit of the revisions was that they leveled the playing field between smaller and larger law firms insofar that larger firms could no longer bury the small firms with excessive discovery requests. Several also opined that the automatic disclosure requirements had forced collection agencies to interact more constructively with defendants, who were disproportionately self-represented. Finally, the judges expressed greater confidence in their authority to enforce the disclosure rules by excluding evidence from trial due to explicit language mandating exclusion in Rule 37(h).

[55] The NCSC investigated the relationship between the frequency and timing of Notices to Submit Decision and the timing of subsequent decisions on discovery disputes. A Statement of Discovery Issues was filed in 103 cases, but a subsequent Notice to Submit for Decision was only filed in 40 of those cases (40%). Judicial decisions on the Statement of Discovery Issues were identified in 41 cases. The average number of days from the filing of the Statement of Discovery Issues to the entry of a judicial decision on the issue was 50 days and there was no statistically significant difference based on whether a Notice to Submit for Decision was filed (21 cases) or not (20 cases).

Civil Litigation Cost Model Survey

One component of this evaluation was intended to provide estimates of litigation costs (attorneys' fees and expert witness fees) for civil cases. In 2012, the NCSC developed the Civil Litigation Cost Model (CLCM), a new methodology for estimating litigation costs. The CLCM employs survey methodology to measure the amount of time expended by attorneys to complete a variety of litigation tasks in civil cases. The survey also documents hourly billing rates for senior and associate attorneys and paralegal staff to generate costs associated with the completion of those litigation tasks. The NCSC pilot-tested the CLCM with the membership of the American Board of Trial Advocates (ABOTA).[56] ABOTA's review of the findings from the pilot test concluded that the CLCM estimates were reasonable given the members' extensive experience in civil litigation. For the Utah evaluation, the NCSC distributed a modified version of the CLCM survey to attorneys identified as counsel of record for civil cases filed between January 1 and June 30, 2012. The modifications included an expanded list of civil cases to generate litigation costs for the most common types of civil cases filed in the Utah District Courts subject to Rule 26. The survey also included a series of questions intended to provide context about the substantive and procedural characteristics of a "typical" case that would likely affect the amount of time expended during litigation (e.g., the number and types of litigants, the number of claims and defenses raised, the expected value of the case, the likelihood of *Daubert* motions or other pretrial dispositive motions, and probabilities about how the case would resolve).

CLCM Methodology and Survey Responses

The Utah CLCM was distributed via email to 2,487 attorneys of record in post-implementation sample cases. The attorneys were directed to the online survey beginning June 2 through June 13, 2014. The attorneys were asked a series of questions about their law practice including the county in which they most often practice, the size of the law firm, the hourly billing rates or average annual salaries for senior and associate-level attorneys and paralegals in the firm, and the types of civil cases on which they regularly practice. The survey then directed the attorneys to describe the substantive and procedural characteristics of a typical case with which they had indicated they regularly practice followed by estimates of the number of hours senior and associate-level attorneys and paralegals would normally expend to complete the litigation tasks associated with case initiation, discovery, settlement negotiations, pretrial preparation, trial, and post-disposition. The estimates requested for trials did not differentiate between bench trials and jury trials. A MS Word version of the survey is attached as Appendix D.

A total of 255 attorneys completed the CLCM survey (10.3% response rate). Table 24 provides a description of respondent characteristics. More than two-thirds of respondents (69%) report that they practice primarily in the Third Judicial District, another 10% practice in the Second and Fourth Judicial Districts respectively, and the remaining 11% of respondents practice elsewhere in the state. All of the Utah judicial districts are represented by at least one respondent in the survey. Slightly more than half of the respondents (52%) work in relatively small law firms (e.g., less than 5 attorneys) or as solo practitioners. Approximately one-third work in law firms of 6 to 20 lawyers. Only 13% work in firms of 50

[56] PAULA HANNAFORD-AGOR & NICOLE L. WATERS, CASELOAD HIGHLIGHTS: ESTIMATING THE COST OF CIVIL LITIGATION (NCSC Jan. 2013); Paula Hannaford-Agor, *Measuring the Cost of Civil Litigation: Findings from a Survey of Trial Lawyers,* VOIR DIRE 22 (Spring 2013).

or more lawyers. Most of the law firms (63%) have practices that serve both plaintiffs and defendants as clients; 22% are plaintiff-oriented law firms and 11% are defendant-oriented law firms, 7% of which represent insurance carriers. Seven respondents were in-house counsel. Nine out of ten respondents work in law firms that routinely practice in the area of tort, contract and real property law; 50 respondents practice in boutique firms that specialize in one particular area of law. One-third routinely practice domestic relations law.

Although the NCSC has confidence that the estimates generated by the CLCM provide reliable estimates of the range of costs associated with different types of civil cases, some caveats about the limitations of the methodology should be acknowledged. First, the accuracy of the estimates is based on attorney reports of the anticipated time expended in a "typical case" of each type, which is a challenging task for many attorneys as evidenced by the number of emailed comments that no cases are ever "typical," all are completely unique. It is clear from both the emailed comments and the survey responses that most attorneys craft their responses envisioning a case that proceeds to a conclusion on the merits. Consequently, case events such as motions *in limine* and dispositive motions are anticipated even though other data from the evaluation (e.g., case-level disposition statistics, attorney surveys) suggest that most cases do not progress far enough to necessitate those events. In addition, plaintiff attorneys in particular reported great difficulty in estimating the amount of time expended on various litigation tasks due to practicing in contingency fee environments in which records of billable hours are not routinely kept.

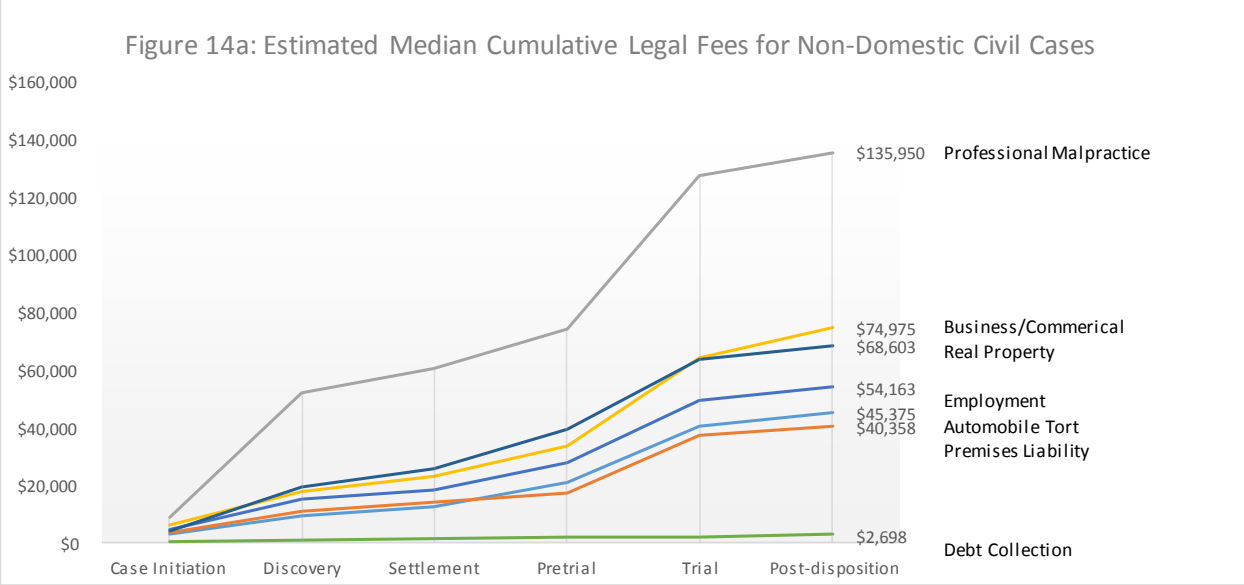
Table 24: Respondent Characteristics		
Primary Practice Area	Number	%
First District	6	2%
Second District	25	9.8%
Third District	176	69.0%
Fourth District	25	9.8%
Fifth District	15	5.9%
Sixth District	4	1.6%
Seventh District	1	0.4%
Eighth District	3	1.2%
Law Firm Size		
Solo Practioner	56	22.0%
2-5 Attorneys	79	31.0%
6-20 Attorneys	71	27.8%
21-50 Attorneys	16	6.3%
More than 50 Atoorneys	36	14.1%
Law Firm Clientele		
In-house counsel	7	2.7%
Primarily Plaintiffs	57	22.4%
Both Plaintiffs and Defendants	161	63.1%
Primarily Defendants	30	11.8%
Insurance Carriers	19	7.5%

Practice Areas			**Boutique Specialty**	
General Civil	**230**	**90.2%**	**37**	16.1%
Automobile Tort	101	39.6%	3	3.0%
Premises Liability	69	27.1%	0	0.0%
Professional Malpractice	67	26.3%	7	10.4%
Business/Commercial	160	62.7%	9	5.6%
Insurance Subrogation	16	6.3%	0	0.0%
Employment	34	13.3%	0	0.0%
Debt Collection	82	32.2%	12	14.6%
Real Property	135	52.9%	6	4.4%
Domestic Relations	**94**	**36.9%**	**14**	14.9%
Divorce	92	36.1%	13	14.1%
Paternity	71	27.8%	0	0.0%
Support/Custody	80	31.4%	1	1.3%

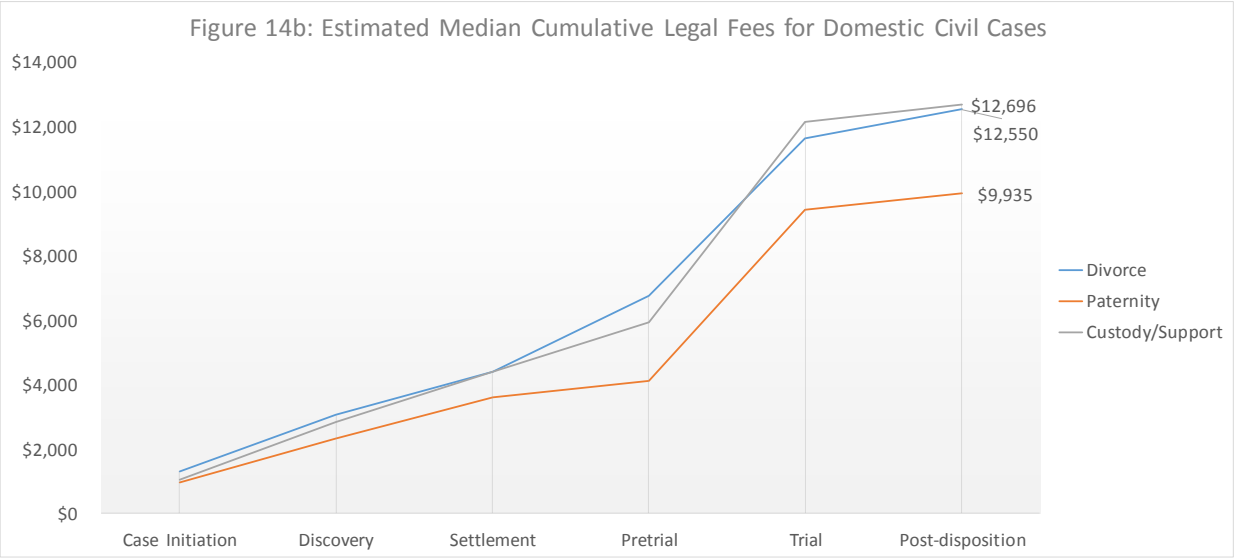
Estimates for Litigation Time and Costs

The findings report the interquartile range of estimates – that is, the estimates for time and costs for the 25th, 50th and 75th percentiles – which has the advantage of displaying the likely variation in time and costs for similar cases and also mutes the effect of extreme outliers in the data. Detailed summaries of time and cost estimates and substantive and procedural case characteristics are attached in Appendix E.

Figures 14a and 14b display the median estimated cumulative costs of litigation per side by litigation stage for the non-domestic and domestic case types included in the Utah CLCM survey.[57] Looking at the slopes at each litigation phase for different types of cases, we can see that the costs expended for trial result in the steepest increase for all cases. In addition, discovery in professional malpractice cases is considerably more expensive than for other general civil case types and is virtually flat for debt collection cases. The implication is that if Rule 26 is effective, it should have the greatest impact on malpractice cases, a more moderate impact on domestic and most other general civil cases, and no appreciable impact on debt collection cases.



[57] The median costs for automobile tort, professional malpractice, and real property cases are comparable to those reported in the ABOTA survey, but considerably lower for median costs for premises liability (75% of ABOTA median costs), business/commercial (83% of ABOTA median costs), and employment disputes (62% of ABOTA median costs). Some of the explanation for the lower costs may be related to the hourly billing rates for attorneys paralegal staff, which tended to be somewhat lower in Utah for premises liability and employment dispute cases compared to the ABOTA sample. For the business/commercial cases, the hourly billing rates were somewhat higher in Utah compared to the ABOTA sample, but the explanation may lie in the terminology reflected in the two version of the surveys. The ABOTA version asked attorneys to provide time estimates for breach of contract cases, while the Utah version requested time estimates for business/commercial cases.



Discovery as a proportion of all time expended on litigation tasks

Because the revisions to Rule 26 were intended to place restrictions on the scope and timing of discovery, it is useful to examine the time expended in discovery efforts as a proportion of time expended for all litigation stages if the case progressed through trial and post-disposition tasks. Table 25 shows the estimated number of hours and the proportion of time expended in discovery tasks. The estimates differ dramatically based on the type of case. Debt collection and domestic cases tended to expend the lowest estimated number of hours in discovery, while professional malpractice, real property, and business/commercial cases expended the most. Proportionately, however, discovery tasks accounted for approximately 10% to 25% of the total amount of time expended if the case progressed through trial and post-disposition. For most case types, the proportion of time expended in discovery tended to increase progressively from the 25th to the 75th percentile. That is, attorneys who estimated higher amounts of time expended in litigation tended to report greater proportions of that time spent in discovery tasks. Employment, debt collection, and real property cases were exceptions, however, with the proportion of time expended in discovery either fluctuating or remaining fairly constant across percentiles.

Table 25: Total Hours and Proportion of Time Expended in Discovery Tasks						
	25th Percentile		50th Percentile		75th Percentile	
	Hours	%	Hours	%	Hours	%
Non-Domestic Civil						
Automobile Tort	12	13%	35	16%	93	19%
Premises Liability	4	8%	39	20%	104	25%
Professional Malpractice	70	28%	200	32%	550	39%
Business/Commercial	14	12%	54	17%	158	22%
Employment	28	20%	50	20%	80	16%
Debt Collection	-	0%	4	24%	12	19%
Real Property	32	25%	78	24%	176	25%
Domestic						
Divorce	3	13%	9	15%	35	19%
Paternity	1	6%	7	15%	24	16%
Custody/Support	4	12%	10	16%	38	18%

Probability of Case Disposition and Correlation to Time Expended on Litigation Tasks

The CLCM survey asked attorneys to estimate the percentage of cases that resolve by default judgment, dismissal, settlement, summary judgment, bench trial and jury trial. Settlement was estimated as the predominant manner of disposition for all case types except debt collection. The average percentages for each case type are reported in Table 26 in descending order for settlement. For the purpose of estimating litigation costs, the manner of disposition is important insofar that it provides a mechanism to isolate time and costs for tasks that take place relatively early in the litigation process from tasks that take place in later stages of litigation (e.g., summary judgment motions and trials). Table 27 illustrates that the majority of cases for all case types settle or are resolved without undertaking pretrial preparation or trial tasks. Moreover, the attorney surveys in this evaluation reported most cases (68% to 82% depending on the assigned discovery tier) settle without completing discovery. The CORIS data indicated that non-domestic cases in which an answer was filed settle at rates between 17% (debt collection) and 56% (Tier 3 cases). However, the estimates of cases resolved by bench trial (7% overall average) and jury trial (5% overall average) are extremely inflated (2% and less than 1%, respectively).

Table 26: Average Probability of Disposition by Case Type

	Default Judgment	Dismissal	Settlement	Summary Judgment	Bench Trial	Jury Trial
Non-Domestic Civil						
Automobile Tort	1%	2%	81%	4%	3%	9%
Premises Liability	1%	4%	77%	7%	2%	9%
Professional Malpractice	0%	7%	67%	12%	2%	12%
Employment	4%	10%	60%	18%	6%	6%
Business/Commercial	6%	2%	55%	19%	12%	6%
Real Property	6%	4%	54%	21%	11%	6%
Debt Collection	50%	3%	36%	9%	4%	1%
Domestic						
Divorce	9%	4%	73%	3%	10%	1%
Paternity	7%	3%	71%	6%	10%	3%
Custody/Support	11%	3%	70%	4%	12%	1%

The NCSC examined the relationship between the attorney estimates of various case dispositions and the amount of time expended on litigation tasks. See Table 27. As attorney expectations that the case will result in a default judgment, the amount of time expended on both discovery tasks and all litigation tasks is significantly reduced. In contrast, as attorney expectations that the case will be resolved by summary judgment or by jury trial, the amount of time expended on discovery and on all litigation tasks is significantly increased. There was no correlation with attorney expectations for settlements or bench trials, and only a marginal correlation with total time for dismissals. In essence, the attorney expectation about how a typical case of that type will be resolved may act as an incentive to either expend very little time and effort preparing the case (default judgments) or to expend significantly more time and effort (summary judgments and jury trials).

Table 27: Case Disposition Probabilities and Time Expended on Litigation Tasks

	Pearson R-Squared	
	Total Time	**Discovery Time**
Default judgment	-0.525 ***	-0.455 ***
Dismissal	0.123 †	0.106
Settlement	0.113	0.045
Summary judgment	0.349 ***	0.356 ***
Bench trial	-0.057	-0.06
Jury trial	0.37 ***	0.356 ***

† Significant at .10
* Significant at .05
** Significant at .01
*** Significant at .001

Conclusions and Recommendations

The Rule 26 revisions have been the focus of intense scrutiny across the country as both state and federal courts seek approaches to improve civil case management. The Utah district courts focused their efforts on the discovery phase of civil litigation. The revisions to Rule 26 were intended to ensure that the scope and timing of discovery, and by extension the costs associated with discovery, were proportional to the interests at stake in the litigation. There is some irony, therefore, that one of the first notable findings from this evaluation is that remarkably few cases filed in the Utah district courts were "litigated" in the traditional sense of that term. The vast majority of cases in both the pre-implementation and post-implementation samples were uncontested and were ultimately disposed by default judgment or administrative dismissal. An impact from the Rule 26 revisions would not be expected for cases in which discovery never took place. For cases in which an answer was filed, however, the general conclusion is that the Rule 26 revisions have had a positive impact on civil case management in terms of both reduced filing-to-disposition time overall, and decreased frequency of discovery disputes in non-debt collection and non-domestic cases.

The reduced filing-to-disposition time was observed for cases in all three discovery tiers, for both debt collection and non-debt collection Tier 1 cases, and for both domestic and non-domestic Tier 2 cases. The uniformity of this effect is remarkable in itself as many other civil justice reforms tend to have differential effects depending on case type. In addition, the NCSC found that impact on filing-to-disposition time was independent of other caseflow management effects. The Second, Fourth, and Seventh Districts have a stronger tradition of judicial case management than other districts across the state, and consequently had significantly shorter filing-to-disposition times for cases in the post-implementation sample. However, the impact of the Rule 26 revisions was observed in districts both with and without traditions of judicial case management. Finally, the Rule 26 revisions appear to shift dispositions for non-domestic cases in all three tiers from judgments to settlements, which suggests that the parties are engaging in more constructive settlement negotiations, presumably resolving the cases in ways that are perceived as fair to both parties.

There was a difference in the impact of the Rule 26 revisions on the frequency of discovery disputes based on case type. In Tier 1 debt-collection cases, the frequency of discovery disputes more than doubled from 2.2% to 5.6%. Although generally this would be perceived as an undesirable effect, it may actually confirm judicial beliefs that these types of cases are now being litigated on a more even playing field between collection agencies and debtors. All other non-debt collection civil cases experienced decreased rates of discovery disputes, although the reduction observed in Tier 3 cases from 18.3% to 10.9% was the only tier in which the difference was statistically measurable. Moreover, when discovery disputes occurred, they arose significantly earlier in the litigation process across all discovery tiers, case categories, and case types. It is not clear whether the earlier emergence of discovery disputes is occurring because attorneys have shifted the focus of discovery from standard discovery to the automatic disclosures or, alternatively, because the time clock for completing discovery is running and attorneys are now buckling down and identifying issues to raise earlier in the case. In either event, it provides the trial judges an opportunity to intervene and get the case back on track earlier than would have happened before the Rule 26 revisions went into effect.

The Rule 26 revisions also had an unexpected impact on litigant representation status: the proportion of plaintiffs who retained legal counsel in non-debt collection and non-domestic civil cases increased

significantly for both Tier 1 and Tier 2, which also corresponded with the shift in case dispositions from judgments to dismissals and settlements. Representation status did have an effect on Rule 26 short-term impacts and compliance, but it was cases in which both parties were represented were more likely contribute to tier inflation, to file amended pleadings, and to fail to file a Certificate of Readiness for Trial as compared to cases in which one or both parties were self-represented.

It was not possible to document whether the reduction in filing-to-disposition time resulted in a corresponding decrease in litigation costs, but that is certainly a plausible conclusion for many cases. A sizeable majority of attorney survey respondents either agreed that disclosure and standard discovery under Rule 26 provided sufficient information with which to assess claims or were neutral in their opinions on this question. The majority of attorneys reported that they were able to resolve the case without completing discovery. Indeed, attorney reports about the scope of discovery undertaken in their respective cases suggest that very little discovery takes place, even in cases in which an answer was filed. It is possible that the information provided in automatic disclosures is more than sufficient for many litigants to resolve the case with less formal discovery than before the Rule 26 revisions were implemented. Moreover, because the automatic disclosures are due relatively early in the litigation, the parties may be able to resolve those cases earlier than previously. Finally, the decrease in the frequency of discovery disputes in non-debt collection and non-domestic cases would likewise reduce costs associated with satellite litigation, and the explicit limits on the length of briefs accompanying discovery motions under Rule 4-502 should also reduce the amount of time involved in drafting motions.

CORIS data could not be used to assess the extent to which parties complied with the standard discovery restrictions, but responses from the attorney surveys requesting information about the scope of discovery suggest very high compliance—generally 90% or higher for all types of discovery and for all three discovery tiers. The survey was administered only to attorneys of record in cases filed between January 1 and June 30, 2012, so there is no data available to compare the scope of discovery before the Rule 26 revisions went into effect. In drafting the Rule 26 revisions, the Advisory Committee intended that the expanded scope of information required for automatic disclosures would substantially reduce the amount of information to be disclosed through traditional discovery (interrogatories, requests for admission and production, and witness depositions). It is likely that the high compliance with standard discovery restrictions reflects the impact of the expanded automatic disclosure requirements, in effect replacing the need for traditional discovery.

The attorney survey responses, especially the open-ended comments, voiced some criticism that the expanded automatic disclosure requirements added an unnecessary complexity to the pretrial process, increasing costs. This may be an accurate assessment insofar that it describes a shift in the complexity of the information exchange from the formal discovery phase of litigation to the automatic disclosure process, which typically takes place much earlier in litigation. The overall effect of more information on which parties can assess the merits of their respective claims and defenses, and the resulting shift in dispositions from judgments to settlements, suggests that the trade-off is a fair one that may lead to greater perceptions of just outcomes on the litigants' part.

It is also possible, moreover, that the vast majority of cases never needed as much discovery as was permitted under the former version of rule. The original formulation of the rules permitted virtually unlimited discovery provided that requests were "reasonably calculated to lead to the discovery of

admissible evidence."[58] The surprisingly large proportion of cases in which no discovery other than automatic disclosures took place at all raises the question of whether the standard discovery restrictions established in the Rule 26 revisions may still be excessively generous. The NCSC notes that the pilot project beginning in January 2015 in the Second, Third, and Fourth Judicial Districts will involve intensive judicial case management for Tier 3 cases including an initial case management conference in which the trial judge and attorneys will meet to identify disputed issues and establish an individualized discovery plan for the case. If that pilot project proves successful, the Advisory Committee should consider restricting the scope of discovery even further, especially for Tier 2 and Tier 3 cases, and expanding the use of intensive judicial case management to Tier 2 non-domestic cases in which an answer is filed. In essence, the default standard discovery for non-domestic Tier 2 and Tier 3 cases would be the same as Tier 1 with adjustments decided during the Rule 16 conference. The open-ended comments from the attorney survey certainly suggested that additional judicial involvement in case management and meaningful enforcement of the rules would be welcomed by both plaintiff and defense attorneys.

Some additional concerns about the impact of the Rule 26 revisions are worth noting. Very few attorneys sought post-filing adjustments either to obtain a higher, less restrictive discovery tier or to request extraordinary discovery. Instead, there is ample evidence in non-debt collection and non-domestic cases that many attorneys are preemptively inflating the amount in controversy in the pleadings to secure a higher discovery tier. In addition, judges who participated in the judicial focus groups voiced suspicions that attorneys are routinely agreeing to extraordinary discovery among themselves, but only filing stipulations to that effect if and when they are needed. Although the filing-to-disposition time analyses indicate that most cases are resolving sooner as a result of the Rule 26 revisions, many attorneys still fail to file a Certificate of Readiness for Trial even when it is apparent that the deadline for completing standard discovery has elapsed by a significant time. This raises a significant question of whether this is normatively a bad thing. On the one hand, there is a reasonable argument that litigants should not be allowed to game the system, stipulate out of the rules, or ignore established deadlines without express court approval. That, after all, is the point of the certification requirement—to ensure that trial judges have the opportunity to disapprove stipulations for extraordinary discovery if the client has not been informed about the potential for increased costs and time or the proposed discovery is disproportional to the stakes of the case. On the other hand, the Rule 26 revisions may have already sufficiently raised expectations concerning timely discovery, particularly in light of judges increased confidence in striking evidence for untimely disclosure, to achieve the desired effects without requiring the district court judges to engage in aggressive procedural oversight of the litigation.

Second, it is important to note that the survey responses indicate that many attorneys are still unenthusiastic about the Rule 26 revisions. Negative opinions on the part of survey respondents may be affected by self-selection bias—that is, attorneys who were more critical of the Rule 26 revisions were more likely to respond to the survey than attorneys who were pleased or simply neutral about the changes. Some caution about relying too heavily on the survey findings is also due given the inconsistencies between respondent reports about events that took place in the cases on which they were asked to report and what the CORIS data reflected concerning case events. This may indicate that attorneys were relying more heavily on their general perceptions about the rule changes than on their actual experiences in specific cases. Finally, it is possible that negative opinions are related to the limited

[58] FEDERAL RULES OF CIVIL PROCEDURE Rule 26(b)(1).

time that the revisions have been in place, particularly for those attorneys who responded fairly early in the evaluation period.

As policymakers within the Utah judicial branch consider the findings from this evaluation, the NCSC also recommends that they keep in mind the increased capacity of the district courts for engaging in effective oversight and enforcement in civil case management. The statewide mandatory e-filing makes discovery tier assignments virtually automatic and now generates advisory notices about discovery deadlines in all cases. The technology infrastructure in place in CORIS can largely automate compliance reviews for key case events (e.g., completion of fact discovery, completion of expert discovery, trial readiness certificates). The staffing models in place in Utah provide judges with more experienced judicial support than most, if not all, state courts across the country. Yet the judicial focus group discussions indicated that many judges were unaware of the increased functionality in CORIS to track compliance with Rule 26 deadlines and had not authorized their judicial case management teams to routinely monitor caseloads and bring cases that are not in compliance to the attention of the trial judge for appropriate remedial action. The combination of experienced non-judicial support teams and enhanced technology functionality could be used to conduct routine case management functions including monitoring compliance with benchmark events throughout the case. Doing so would provide more consistent oversight and permit earlier judicial intervention in appropriate cases, which would likely decrease the need for more intensive judicial intervention later in the litigation.

Finally, this evaluation focused on the impact of the Rule 26 revisions on cases in which an answer was filed. As noted previously, those cases comprise only a small proportion of total civil cases filed each year in the Utah district courts. The NCSC found no difference in the answer rates for the pre-implementation and post-implementation samples, so there is no evidence that the rule revisions themselves affected access to justice by inducing a greater proportion of defendants to engage in the litigation process by responding to a complaint. Nor did the NCSC find a difference in the filing rates that would suggest that reduced discovery time and costs were resulting in more plaintiffs filing cases that they would have otherwise foregone. This may be merely the fact that too little time has elapsed for the legal community to adapt their practices to the rules; a difference in filing and answer rates may become more apparent over time. In the meantime, however, the NCSC was struck by how much of the civil caseload is uncontested and the implications of that finding for public trust and confidence. It is neither possible nor necessarily good policy to force litigants to actively engage in the litigation process in every case; some litigants may obtain mutually acceptable resolutions to their disputes outside of the judicial process. Moreover, judicial resources should ordinarily be focused only on those cases in which the parties are actively engaged in litigation. Nevertheless, the NCSC recommends that state court policymakers take a closer look at the cases in which no answer is filed to determine if systematic factors are dissuading parties from actively litigating their cases.

Appendix A: Attorney Survey

Utah Discovery Rules Evaluation

Attorney Survey

The Utah Supreme Court has requested that the National Center for State Courts (NCSC) evaluate the impact of revisions to the Utah Rules of Civil Procedure related to discovery. This survey is intended to document your experience with the revised discovery procedures. You have been selected to participate because, according to the case management system for the District Court, you were an attorney of record in a civil case filed in the Utah District Courts between January 1, 2012 and June 30, 2012 that has since fully resolved.

We anticipate that the survey will take approximately 20 minutes to complete. Your responses will be kept strictly confidential and the evaluation findings will be presented only in aggregate form. If you have questions about the survey or the Rule 26 Evaluation, please contact Paula Hannaford-Agor at phannaford@ncsc.org or Nicole Waters at nwaters@ncsc.org.

Confirm Case Information

According to the case management system for the District Court, you are an attorney of record in the following case. Please verify that this information is correct, and if it is incorrect, please edit.

	Please edit if incorrect	Correct
Case Number:	124500024	☐
Case Name:	Ashley v. Ashley	☐
Case Type:	❍ Divorce / Annulment	☐
Representing:	❍ Plaintiff/Petitioner ❍ Defendant/Respondent ❍ Other	☐
Filing Date (MM-DD-YY):	4/12/2012	☐
Disposition Date (MM-DD-YY):	7/12/2012	☐
Discovery Tier:	❍ 2	☐

Please indicate how this case was disposed:

❍ Case withdrawn by plaintiff/petitioner
❍ Default judgment for defendant/respondent
❍ Settlement by parties before discovery completed
❍ Settlement by parties after discovery completed
❍ Summary judgment
❍ Bench trial
❍ Jury trial
❍ Other disposition [specify]_____

Litigation Actions Related to Discovery
Did you file a motion to amend the pleadings to specify a different discovery tier?

❍ Yes
❍ No

Did the trial judge grant the motion?

❍ Yes
❍ No

Did you file a stipulation with opposing party for extraordinary discovery with the court?

❍ Yes
❍ No

Did the trial judge deny or modify the stipulation?

❍ Yes
❍ No

Did you file a motion for extraordinary discovery with the court?

❍ Yes
❍ No

Did the trial judge grant the motion?

❍ Yes
❍ No

Did you file a motion to compel discovery?

❍ Yes
❍ No

Did the trial judge grant the motion?

❍ Yes
❍ No

Did you file a motion for a protective order?

❍ Yes
❍ No

Did the trial judge grant the motion?

❍ Yes
❍ No

Confirm Fact Discovery Conducted

Please indicate the amount of fact discovery conducted on behalf of your client.

	Plaintiff/Petitioner	Defendant/Respondent
Number of…		
Fact witnesses for …	_____	_____
Requests for production served on …	_____	_____
Requests for admission served on …	_____	_____
Interrogatories served on …	_____	_____
Hours (rounded to nearest 30 minutes) of depositions of fact witnesses for …	_____	_____

Please indicate the approximate date on which discovery of fact witnesses was completed:

❍ Date (date must occur after filing date and before disposition date)_____
❍ N/A. Case resolved before fact discovery was completed.

Confirm Expert Discovery Conducted

Please indicate the amount of expert discovery conducted on behalf of your client.

	Plaintiff/Petitioner	Defendant/Respondent
Number of...		
Expert witnesses for …	_____	_____
Expert reports accepted for...	_____	_____
Hours (rounded to nearest 30 minutes) of depositions of expert witnesses for …	_____	_____

Please indicate the approximate date on which discovery of expert witnesses was completed:

❍ Date (date must occur after filing date and before disposition date)_____
❍ N/A. Case resolved before expert discovery was completed.

Perceptions of Rule 26

Indicate the extent to which you agree or disagree with the following statements based on your experience in this case.

	Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
The opposing party complied with the automatic disclosure provisions of Rule 26, including supplementing disclosures .	☐	☐	☐	☐	☐
The amount of disclosure and standard discovery permitted under Rule 26 provided sufficient information to inform my assessment of the merits of the opposing party's claims.	☐	☐	☐	☐	☐
The amount of discovery undertaken in this case was proportional to the legal and factual complexity of the case and the amount in controversy.	☐	☐	☐	☐	☐

Compared to similar cases filed before November 1, 2011...

	Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
Discovery was completed more quickly due to the restrictions imposed by the Rule 26 revisions.	☐	☐	☐	☐	☐
This case was resolved more quickly due to the restrictions imposed by the Rule 26 revisions.	☐	☐	☐	☐	☐
The discovery costs were lower due to the restrictions imposed by the Rule 26 revisions.	☐	☐	☐	☐	☐

Discovery disputes that arose in this case were resolved in a timely manner by the expedited procedures in Rule 10-1-306.

- ❍ Strongly Disagree
- ❍ Disagree
- ❍ Neutral
- ❍ Agree
- ❍ Strongly Agree
- ❍ N/A. No discovery disputes arose in this case.

The Statement of Discovery Issues and Statement in Opposition provided sufficient information to the District Court to make an informed decision on the merits of the discovery dispute.

- ❍ Strongly Disagree
- ❍ Disagree
- ❍ Neutral
- ❍ Agree
- ❍ Strongly Agree
- ❍ N/A. No Statement of Discovery Issues or Statement in Opposition were filed in this case.

General Comments

The Utah Supreme Court is interested in any favorable or unfavorable critical analysis that you may have about how the Rule 26 revisions operate in practice. Please provide your comments in the space below.

Appendix B: Coding Themes for Attorney Survey Comments

Litigation Costs

Comments with a **cost** theme said that the new rules require initial discovery and depositions that are unneeded. The lack of interrogatories in Tier 1 was cited as a specific reason for increased cost. The rules also force cases to go to trial that could be resolved in a more efficient manner. Examples:

"I believe that in most cases the Rule 26 revisions significantly increase the costs to litigate cases that would normally resolve in settlement because the Initial Disclosures are more in depth and, thus, take much longer to prepare." (Batch 1, #90)

"For the parties themselves, the new rules have made it more difficult to settle cases without going to trial." (Batch 4, #420)

Litigation Complexity

Comments with the **complexity** theme stated that the new rules surrounding expert witnesses was confusing and that attorneys have to gather too much evidence and can't focus on what is relevant. Examples:

"In almost all cases, I don't need one year's worth of paychecks, three months of bank statements or old appraisals from real estate. . . It seems that paperwork is being produced to produce paperwork." (Batch 3, #12)

"The part that takes too long and stalls the case is the process of resolving discovery disputes. In my experience, it takes months and months before a discovery dispute will be resolved. During that time, the case comes to a halt and cannot move forward, particularly in domestic cases." (Batch 4, #508)

Enforcement and Compliance

Comments focusing on **enforcement and compliance** stated that judges are not enforcing the rules or there aren't any consequences for not complying. The rules also encourage parties to undermine each other. Examples:

"There is great uncertainty as to whether one judge will, and another judge will not, extend the deadlines." (Batch 2, #88)

"The threat of Rule 11 sanctions is very serious and was dealt with in this case as though it were common place. The judge allowed these bullying tactics by both the Defendant and his attorneys. Discovery sanctions were not granted, but additional time to conduct discovery was granted." (Batch 6, #347)

Discovery Tiers / Standard Discovery

Comments related to **defining tiers and the permissible scope and time frame of discovery** stated that cases don't fit in standard deadlines and recovery of attorneys' fees is limited by what tier the case is in. Comments suggested adding interrogatories for Tier 1 cases, allowing parties to determine timing, and other specific changes to make the process more efficient.

"There [are] many, many cases that have incalculable value, and are of incalculable importance to parties, that have a dollar value less the $50,000.00. Justice should not have a price tag on it." (Batch 4, #472)

"If the debt is small, the party may plead the case as a tier one case, only to find out that a difficult defendant (or defense attorney) makes the case extremely expensive to litigate, to the point that the attorney's fee recovery would put the case into a tier two case." (Batch 4, #130400284)

"Timing of discovery deadlines, expert disclosures cannot be determined in advance and are determined only after other events." (Batch 7, #58)

"In Tier 3 cases, we still need expert reports AND depositions." (Batch 4, #130404392)

"The lack of interrogatories makes discovery more difficult, as does the fact that most courts send out an advisory deadline notice. It seems the court should either set the dates, or let the parties set the dates, but to send out advisory dates, which are not set in stone, just adds to the confusion that can cause deadlines to be missed." (Batch 3, 61)

Party or Case-Type Specific Themes

Party or case type-specific comments stated that the rules put a certain group at a disadvantage. Examples:

"It has been my experience that pro se litigants are often unaware of the initial disclosure requirements or, if they are aware, they fail to understand their duty to participate and disclose relevant information." (Batch 1, #126)

"I think the rule changes are well intentioned, and I can see how they would be very effective in certain types of cases, personal injury for example, but in divorce and child custody cases, it just creates more work than necessary." (Batch 5, #187)

"Generally on other cases--especially as to interrogatories and request for documents, the new discovery only seriously hurt Plaintiffs/Petitioners and benefit Defendants and benefit court reporters because depositions are now the only avenue for a more open discovery exchange." (Batch 4, 139900934)

Positive Comments

Positive comment examples:

"I typically represent consumers in debt collection cases. I have generally found the disclosure rules to enable my clients to present their defenses in a cost-effective manner." (Batch 4, #641)

"In my practice the only useful aspects of Rule 26 revisions were shifting the burden to the party seeking discovery and the elimination of attorney conferences." (Batch 1, #50)

"I appreciate the limitations on interrogatories and requests for production that unreasonably escalated the attorney fees and costs in divorce actions based on "canned" discovery requests on issues not relevant to the outcome of the divorce action." (Batch 1, #59)

Appendix C: Handout and Focus Group Discussion Questions

Overview of NCSC Evaluation Approach

- Review of CMS data to identify case-level changes in evaluation metrics
  - Compare civil and domestic cases filed between January 1 and June 30, 2012 with comparable cases filed between January 1 and June 30, 2011.
  - Focus mainly on cases in which an Answer was filed (approximately half (56%) of civil cases and one-third (31%) of domestic cases.
- Attorney survey of Rule 26 impact on individual cases and attorney opinions
  - Attorneys surveyed quarterly on a rolling basis as cases resolved.
  - Caveats about data cleaning to prevent multiple surveys being sent to the same attorney.
  - Survey batches through December 31, 2013 included responses from 742 attorneys in 658 cases. Overall response rate was 22% and 31% of cases.
- Judicial focus groups to assess impact on judicial workload.

- Working hypotheses (short term)

  - Increase in the number of orders to amend pleadings to specify damages so the appropriate discovery tier can be assigned;
  - Increase in the number of motions to amend pleadings to adjust the assigned discovery tier;
  - Increase in the amended disclosures as parties seek to ensure that potential witnesses and evidence will be admissible for trial if needed; and
  - Increase in stipulations or motions to expand discovery beyond the scope or time permitted under the assigned discovery tier.

- Working hypotheses (long term)
  - Decrease in the amount of time expended to complete discovery;
  - Commensurate decrease in the filing-to-disposition time due to the decrease in the discovery period;
  - Decrease in costs associated with discovery;
  - Increase in filings in lower value cases;
  - Preference by litigants to opt for a written report rather than oral deposition of opposing expert witnesses;
  - Increase in the number of retained expert witnesses;
  - Lower compliance rate with the automatic disclosure requirements by self-represented litigants compared to litigants represented by legal counsel; and
  - Increase in the trial rate, especially for Tier 1 cases.

Short term working hypothesis that substantial numbers of attorneys would seek extraordinary discovery

Adjusted discovery tiers/Extraordinary discovery sought	# Cases	%	Granted / Approved
Motion to amend pleadings to adjust discovery tier (n=545)	5	<1%	3
Stipulation for extraordinary discovery (n=560)	17	3%	13
Motion for extraordinary discovery (n=560)	5	<1%	3

A. Confirm with judges that these numbers/percentages appear to be correct.

B. Are judges hearing from attorneys informally that Rule 26 tiers are reasonable/unreasonable?

C. Most motions/stipulations are granted/approved, but not all. On what basis are decisions on motions/stipulations related to proportionality made?

Reported compliance with Discovery Tier Restrictions

Table 5: Compliance with Rule 26 Scope of Discovery Provisions			
		Percent Compliance	
	Rule 26	Petitioner	Respondent
Tier 1 (n=181)			
Average Number of Fact Witnesses		1.8	1
Interrogatories	0	90%	92%
Requests for Admission	5	97%	99%
Requests for Production	5	94%	98%
Deposition Hours for Fact Witnesses	3	98%	95%
Days to Completion of Fact Discovery*	120	41%	
Tier 2 (n=159)			
Average Number of Fact Witnesses		1.6	1.2
Interrogatories	10	95%	95%
Requests for Admission	10	99%	95%
Requests for Production	10	97%	87%
Deposition Hours for Fact Witnesses	15	99%	99%
Days to Completion of Fact Discovery*	180	34%	
Tier 3 (n=29)			
Average Number of Fact Witnesses		3.4	2.8
Interrogatories	20	86%	94%
Requests for Admission	20	100%	100%
Requests for Production	20	97%	95%
Deposition Hours for Fact Witnesses	30	97%	97%
Days to Completion of Fact Discovery*	210	9%	
* Calculated for cases in which parties settled after discovery completion, bench trials, and summary judgment only.			

Overall, the vast majority of attorneys – 90% or more for all discovery tiers and for all types of discovery – report that they are complying with Rule 26. In the 13 cases in which attorneys reported that discovery exceeded the Rule 26 requirements, nearly half (6) either entered a motion or stipulated to extraordinary discovery, which was accepted by the trial courts. In the remaining 7 cases, however, the attorneys either moved for or stipulated to extraordinary discovery, but the motion was denied by the trial court, and the attorneys nevertheless reported exceeding the scope of discovery permitted by Rule 26. In several of these cases, it was apparent from the attorney comments on the survey that they had agreed to exchange documents outside of the Rule 26 restrictions, regardless of whether the judge gave leave to do so. Other comments suggest that judges were not enforcing the limitations strongly enough.

Determining the extent of compliance with the discovery timeframes established by Rule 26 is somewhat more challenging due to logical inconsistencies in the data. For example, 15 attorneys reported the date on which fact discovery was completed (which was used to calculate the amount of time from filing to completion of fact discovery) for cases in which they also reported that the case was settled BEFORE discovery was completed; the average time for filing to fact discovery completion for these 15 cases was 308 days regardless of discovery tier. Ironically, for those 15 cases, Tier 1 cases had the longest average time for filing to fact discovery completion (339 days) compared to Tier 2 (301 days) and Tier 3 cases (249 days). It is not clear whether the attorneys simply reported discovery completion dates in error or whether some of these cases simply languished on the court's docket after the parties had agreed to settle, but failed to notify the court in a timely way.

Note that only 21% of attorneys said that discovery was completed more quickly due to the Rule 26 restrictions compared to similar cases filed before November 1, 2011 (40% disagreed, 39% neutral).

To minimize the potential for skewed analysis on this measure, we focused instead on cases in which the attorneys reported settlement AFTER discovery was completed or another form of disposition on the merits (bench trial or summary judgment). For these cases, the compliance with discovery timeframes was 48% of Tier 1 cases completing discovery within 120 days of filing (average = 159 days), 24% of Tier 2 cases within 180 days of filing (average = 205 days), and just 9% of Tier 3 cases within 210 days of filing (average = 303 days). Although it is clear that some cases are completing discovery within the requisite timeframes, most are exceeding those timeframes by a wide margin. If these reports from the attorney survey are representative of all cases, it does not bode well for expectations that Rule 26 will ultimately result in overall reduced filing-to-disposition times.

A. Request reactions for reported compliance with Rule 26 tier restrictions.

B. Request reactions for lack of timeliness in completion of fact discovery.

C. Request reactions to attorney comments suggesting deliberate noncompliance or judicial failure to enforce discovery restrictions. What repercussions do attorneys face with non-compliance to the Rule 26 timeframes? Explore whether the judges are incentivizing compliance adequately. Or is the non-compliance a function of caseflow management practices within the court?

Discovery of Expert Witnesses

Cases with Expert Witnesses				
	Petitioner		Respondent	
	# Cases	%	# Cases	%
Tier 1 (n=168)	15	9%	18	11%
Tier 2 (n=150)	12	8%	17	11%
Tier 3 (n=27)	9	32%	5	20%

Nearly two-thirds (64%) of attorneys in cases involving expert witnesses reported that they accepted the expert report while only 15% took expert depositions instead; all depositions conformed to the Rule 26 limit of no more than four hours per expert.

A. Surprisingly few cases had ANY expert witnesses retained for either side. Confirm with judges that this is consistent with past practice. Or has the retention of expert witnesses declined since adoption of Rule 26? If so, why?

B. The attorney survey asked whether discovery costs were lower due to the restrictions imposed by Rule 26 compared to similar cases filed before November 1, 2011. Only 17% agreed (43% disagreed, 39% neutral). Is the reason for the lack of an impact due to the fact that very little expert discovery actually takes place? Or some other reason?

Resolution of Discovery Disputes

Judicial Management of Discovery Disputes					
	Strongly disagree	Disagree	Neutral	Agree	Strongly Agree
Discovery disputes were resolved in a timely fashion (n=148)	18%	22%	47%	11%	2%
	40%		47%	13%	
Statement of Discovery Issues and Statement in Opposition provided sufficient information for court to decide discovery dispute (n=105)	17%	20%	48%	12%	3%
	37%		48%	15%	

A. New procedures put in place to expedite the resolution of discovery disputes. Why no improvement demonstrated in attorney surveys?

Appendix D: Utah CLCM Survey

UTAH LITIGATION COST MODEL SURVEY

At the direction of the Supreme Court of Utah, the National Center for State Courts (NCSC) is conducting an evaluation of the impact of revisions to Rule 26 of the Utah Rules of Civil Procedure on litigation practices in the District Courts. One component of the evaluation is a survey intended to assess the amount of attorney time and costs associated with litigating a variety of civil and domestic cases.

You have been selected as an experienced trial attorney with knowledge about the amount of attorney time needed to complete various litigation tasks. The survey should take approximately 20-30 minutes to complete. Your identity will remain anonymous and all individual responses will be kept confidential. Your responses will be aggregated with others to develop state and national estimates for litigation costs.

In which county do you practice most often? [drop down menu of Utah counties]

How many attorneys are employed in your law firm/office? [numeric: xx,xxx]

What types of clients does your law firm/office generally represent?

- In-house counsel
- Primarily plaintiffs
- Both plaintiffs and defendants
- Primarily defendants
    - Primarily insurance carrier defense

What is the average hourly billable rate OR annual salary for members of your law firm/office?

- Senior attorney _____ hourly billable rate _____ annual salary
- Junior attorney _____ hourly billable rate _____ annual salary
- Paralegal _____ hourly billable rate _____ annual salary

What percentage of your law firm income is based on contingency fees? _____

Please indicate the types of civil cases on which you regularly practice (check all that apply):

Civil

- Asbestos
- Civil Rights
- Condemnation
- Contracts
- Debt Collection
- Malpractice
- Personal Injury
- Property Damage
- Property Rights
- Sexual Harassment
- Water Rights
- Wrongful Death
- Wrongful Termination
- Other Civil (please specify)

Domestic

- Custody and Support
- Divorce/Annulment
- Paternity
- Other Domestic (please specify)

You will be presented with a series of questions concerning one of the types of civil cases on which you regularly practice. For each type of case, please consider a "typical" case for your law firm or office. Assume the following:

- The case is "typical" – that is, it neither poses extraordinarily difficult or time-consuming issues nor is it an easy case that resolves quickly.
- The case is staffed appropriately in the context of your law firm or office. That is, senior-level attorney participation is focused on case supervision and more complex litigation tasks and junior-level attorneys and paralegal staff focus on more routine litigation tasks.

You will first be asked to provide a general description of case and litigant characteristics for a typical case of this type that your law firm or office undertakes. Then enter the estimated number of hours spent by both attorneys and paralegals on each stage of the litigation process. Report in increments of half-hours (e.g., 0.5 hours). If possible, use actual billing records to estimate average hours. Each litigation stage includes a description of litigation tasks that are routinely undertaken during that stage.

[Case type heading]

This case would typically be filed in [state/federal] court.

The plaintiff in this case would typically be:

- An individual
- A business entity
- A government agency
- Multiple plaintiffs (please indicate what types of litigants by selecting all that apply)
    - Individuals
    - Business entities
    - Government agencies

A defendant in this case would typically be:

- An individual
- A business entity
- A government agency
- Multiple defendants (please indicate what types of litigants by selecting all that apply)
    - Individuals
    - Business entities
    - Government agencies

Court costs would typically be:

- Less than $100
- $101 to $250
- $251 to $500
- $501 to $750
- $750 to $1,000
- More than $1,000

Please indicate whether the following statements are true or false with respect to a typical case.

The plaintiff in this case would typically allege multiple theories of liability. [T/F]

The defendant in this case would typically raise multiple affirmative defenses. [T/F]

This case would typically involve a claim for punitive damages. [T/F]

This case would typically involve motions for state class action certification. [T/F]

If liability were established, the reasonable expected economic and non-economic compensatory damages would typically be:

- Less than $50,000
- $50,000 to $249,99
- $250,000 to $499,999
- $500,000 to $1 million
- More than $1 million

How many experts would the plaintiff(s) typically retain in this case? **[**numeric: xx]

What is a reasonable fee (excluding travel) for EACH plaintiff expert? [currency: $xx,xxx]

How many experts would the defendant(s) typically retain in this case? [numeric: xx]

What is a reasonable fee (excluding travel) for EACH defendant expert? [currency: $xx,xxx]

Discovery in this case would typically involve electronically stored information (ESI). [T/F]

This case typically involves participation in the following types of formal or court-mandated ADR (check all that apply):

- Mediation
- Arbitration
- Other ADR
- Not applicable; ADR participation does not typically occur.

This case would typically involve *Daubert* motions concerning the reliability of expert witness testimony. [T/F]

A motion for summary judgment would typically be filed in this case? [T/F]

Please indicate the likelihood that this case will ultimately be resolved by (percentages should total 100%)

- Default judgment _____%
- Dismissal/withdrawal by plaintiff _____%
- Negotiated settlement by parties _____%
- Summary judgment _____%
- Bench trial _____%
- Jury trial _____%

What proportion of [type] cases is atypically difficult or complex? _____%

What proportion of [type] cases is atypically easy or straight-forward? _____%

Please enter the estimated hours spent by both attorneys and paralegals on each stage of the litigation process. Report in increments of half-hours (e.g., 0.5 hours). If possible, use actual billing records to estimate average hours. Each litigation stage includes a description of litigation tasks that are routinely undertaken during that stage.

	Senior.-level Attorney	Junior.-level Attorney	Paralegal
	Number of hours spent on case:		
Case Initiation			
Client intake, initial fact investigation, legal research, draft complaint/answer, cross-claim, counterclaim or third-party claim, motion to dismiss on procedural grounds, defenses to procedural motions, meet and confer regarding case scheduling and discovery.			
Discovery			
Draft and file mandatory disclosures, draft/answer interrogatories, respond to requests for production of documents, identify and consult with experts, review expert reports, identify and interview non-expert witnesses, depose opponent's witnesses, prepare for and attend opponent's depositions, resolve electronically stored information issues, review discovery/case assessment, resolve discovery disputes.			
Settlement			
Mandatory ADR, settlement negotiations, settlements conferences, draft settlement agreement, file motion to dismiss			
Pre-trial motions			
Legal research, draft motion *in limine*, draft motion for summary judgment, answer opponent's motions, prepare for motion hearings, argue motions.			
Trial			
Legal research, prepare witnesses and experts, meet with co-counsel (trial team), prepare for *voir dire*, motion to sequester, prepare opening and closing statements, prepare for direct (and cross) examination, prepare jury instructions, proposed findings of fact and conclusions of law, proposed orders, and conduct trial.			
Post-disposition			
Conduct post-disposition settlement negotiations, draft motions for rehearing, JNOV, additur, remittitur, enforce judgment, and any appeal activity			

Appendix E: Summaries of Time and Cost Estimates by Case Type

Automobile Tort Cases

Case description

According to the 23 attorneys who responded to questions concerning automobile tort cases, typical cases have the following characteristics:

- They are universally filed in state, rather than federal court;
- The overwhelming majority of plaintiffs (87%) are individuals, rather than business or government organizations;
- Three-quarters of complaints allege multiple claims and almost all (96%) of answers raise multiple defenses;
- Plaintiffs seek damages less than $50,000 in 17% of cases, between $50,000 and $250,000 in 74% of cases, and more than $250,000 in 9% of cases;
- Plaintiffs seek punitive damages in 17% of cases;
- All cases employ ADR to resolve the disputes, usually by mediation (76%) or arbitration (5%) or both (19%);
- One-third of cases file *Daubert* motions and 39% file summary judgment motions;
- The substantial majority of cases resolve by settlement (81%) with most of the remaining cases resolved on the merits by summary judgment (4%), bench trial (4%) or jury trial (9%).

Time estimates

	Senior Attorney			Junior Attorney			Paralegal		
Percentile	**25th**	**50th**	**75th**	**25th**	**50th**	**75th**	**25th**	**50th**	**75th**
Intake	2.0	5.0	16.0	1.0	5.0	17.5	2.0	5.0	12.5
Discovery	5.0	10.0	27.5	2.5	15.0	40.0	4.0	10.0	25.0
Settlement	5.0	8.0	15.0	0.0	4.0	20.0	0.0	5.0	10.0
Pretrial	5.0	15.0	27.5	10.0	20.0	40.0	0.0	0.0	8.0
Trial	32.5	40.0	62.5	12.5	35.0	55.0	2.5	20.0	45.0
Post-disposition	5.0	10.0	20.0	2.5	10.0	25.0	0.0	5.0	10.0
Subtotal of Time	54.5	88.0	168.5	28.5	89.0	197.5	8.5	45.0	110.5
Prevailing Hourly Rates	225	$ 275	$ 350	$ 175	$ 200	$ 250	$ 75	$ 75	$ 125
Billable Costs	$ 12,263	$ 24,200	$ 58,975	$ 4,988	$ 17,800	$ 49,375	$ 638	$ 3,375	$ 13,813

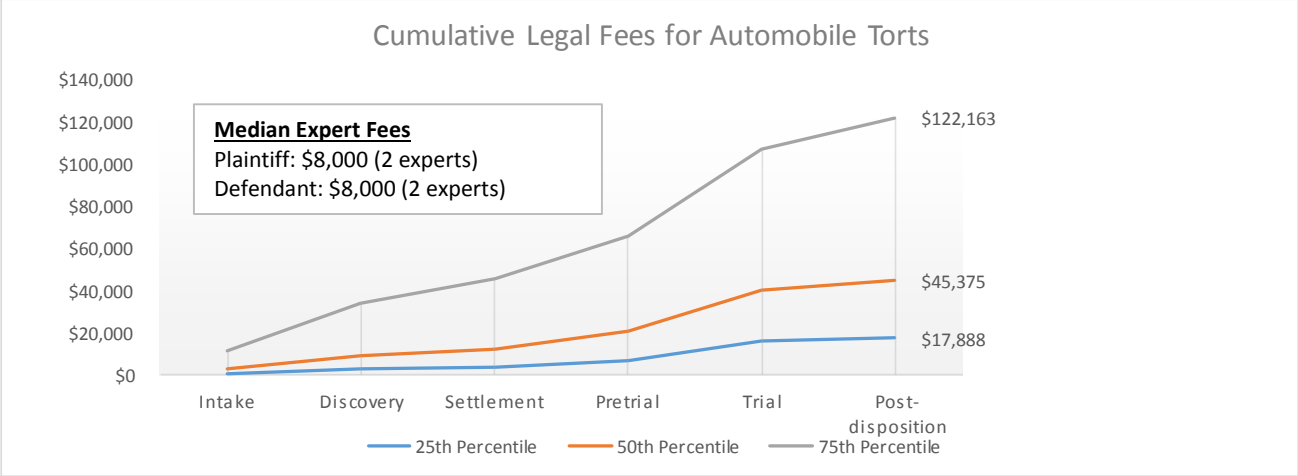
Expert Witnesses

Percentile	**25th**	**50th**	**75th**
Number of plaintiff experts	1	2	2
Plaintiff Expert Fees	$ 1,500	$ 4,000	$ 5,000
Number of defendant experts	2	2	3
Defendant expert fees	$ 1,500	$ 4,000	$ 6,000
Total Expert Costs	$ 4,500	$ 16,000	$ 28,000

Proportion of Time Expended per Litigation Stage

	TOTAL TIME					
Percentile	**25th**		**50th**		**75th**	
Intake	5	5.5%	15	6.8%	46	9.7%
Discovery	12	12.6%	35	15.8%	93	19.4%
Settlement	5	5.5%	17	7.7%	45	9.4%
Pretrial	15	16.4%	35	15.8%	76	15.8%
Trial	48	51.9%	95	42.8%	163	34.1%
Post-disposition	8	8.2%	25	11.3%	55	11.5%
Subtotal of Time	92		222		477	

Estimated Costs



Premises Liability Cases

Case description

According to the 24 attorneys who responded to questions concerning premises liability cases, typical cases have the following characteristics:

- They are universally filed in state, rather than federal court;
- The overwhelming majority of plaintiffs (96%) are individuals, rather than business or government organizations;
- Nine-tenths of complaints allege multiple claims and almost all (96%) of answers raise multiple defenses;
- Plaintiffs seek damages less than $50,000 in 13% of cases, between $50,000 and $250,000 in 79% of cases, and more than $250,000 in 8% of cases;
- Plaintiffs seek punitive damages in 4% of cases;
- Approximately one-third (38%) of cases involves discovery of electronically stored information (ESI);
- All cases employ ADR to resolve the disputes, usually by mediation (75%) or a combination of arbitration and mediation (25%);
- One-third of cases file *Daubert* motions and nearly half (46%) file summary judgment motions;
- More than three-quarters of cases resolve by settlement (77%) with most of the remaining cases resolved on the merits by summary judgment (7%), bench trial (2%) or jury trial (9%).

Time estimates

	Senior Attorney			Junior Attorney			Paralegal		
Percentile	**25th**	**50th**	**75th**	**25th**	**50th**	**75th**	**25th**	**50th**	**75th**
Intake	2.3	10.0	23.8	0.0	2.0	10.0	0.0	4.5	10.0
Discovery	2.0	25.0	50.0	0.0	3.5	13.8	2.0	10.0	40.0
Settlement	5.0	10.0	20.0	0.0	2.0	8.8	0.0	1.0	10.0
Pretrial	2.0	10.0	25.0	0.0	4.5	10.0	0.0	1.0	5.0
Trial	35.0	70.0	100.0	0.0	5.0	30.0	2.0	20.0	30.0
Post-disposition	2.0	10.0	15.0	0.0	2.0	10.0	0.0	1.0	10.0
Subtotal of Time	48.3	135.0	233.8	0.0	19.0	82.5	4.0	37.5	105.0
Prevailing Hourly Rates	200	$ 250	$ 275	$ 175	$ 180	$ 210	$ 75	$ 85	$ 120
Billable Costs	$ 9,650	$ 33,750	$ 64,281	$ -	$ 3,420	$ 17,325	$ 300	$ 3,188	$ 12,600

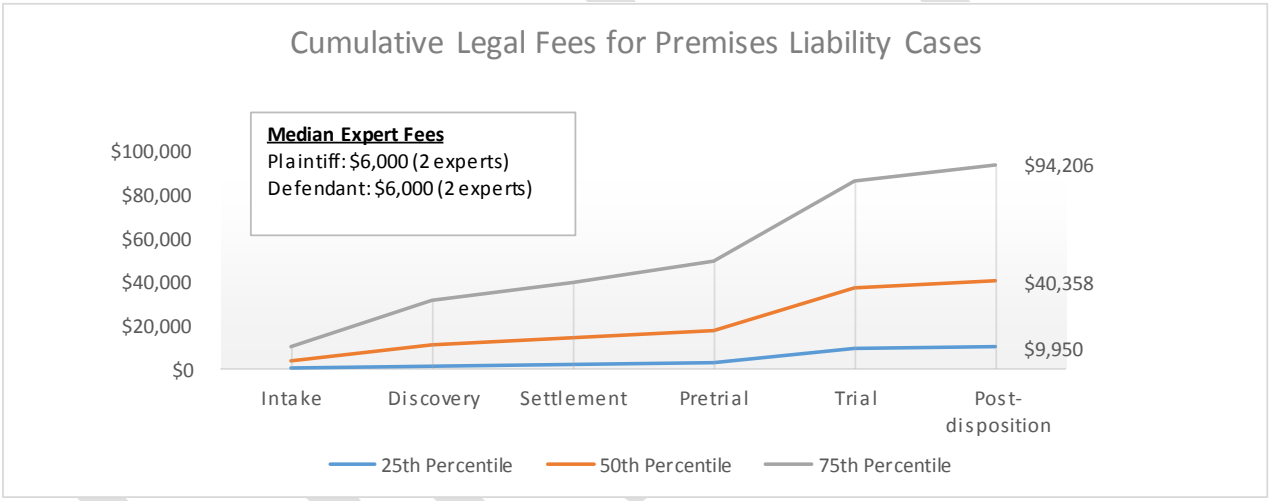
Expert Witnesses

Percentiles	**25th**	**50th**	**75th**
Number of plaintiff experts	1	2	2
Plaintiff Expert Fees	$ 1,500	$ 3,000	$ 5,000
Number of defendant experts	1	2	3
Defendant expert fees	$ 2,000	$ 3,000	$ 5,000
Total Expert Costs	$ 3,500	$ 12,000	$ 25,000

Proportion of Time Expended per Litigation Stage

	Total Time					
Percentile	**25th**		**50th**		**75th**	
Intake	2	4.3%	17	8.6%	44	10.4%
Discovery	4	7.7%	39	20.1%	104	24.6%
Settlement	5	9.6%	13	6.8%	39	9.2%
Pretrial	2	3.8%	16	8.1%	40	9.5%
Trial	37	70.8%	95	49.6%	160	38.0%
Post-disposition	2	3.8%	13	6.8%	35	8.3%
Subtotal of Time	52		192		421	

Estimated Costs



Professional Malpractice Cases

Case description

According to the 22 attorneys who responded to questions concerning professional malpractice cases, typical cases have the following characteristics:

- They are universally filed in state, rather than federal court;
- Approximately three-quarters of plaintiffs (73%) are individuals with the remaining plaintiffs evenly split between business organizations and government agencies (14% each);
- Four-fifths tenths of complaints allege multiple claims and almost all (96%) of answers raise multiple defenses;
- Plaintiffs seek damages less than $50,000 in 23% of cases, between $50,000 and $250,000 in 14% of cases, and more than $250,000 in 41% of cases;
- Plaintiffs seek punitive damages in 18% of cases;
- Approximately three-quarters (77%) of cases involves discovery of electronically stored information (ESI);
- The overwhelming majority of cases employ ADR to resolve the disputes, usually by mediation (86%) or a combination of arbitration and mediation (5%);
- More than half of cases file *Daubert* motions (55%) and nearly three-quarters (73%) file summary judgment motions;
- Two-thirds of cases resolve by settlement (67%) with most of the remaining cases resolved on the merits by summary judgment (7%), bench trial (2%), or jury trial (12%).

Time estimates

	Senior Attorney			Junior Attorney			Paralegal		
Percentile	**25th**	**50th**	**75th**	**25th**	**50th**	**75th**	**25th**	**50th**	**75th**
Intake	10.0	20.0	50.0	5.0	10.0	30.0	1.0	10.0	20.0
Discovery	50.0	75.0	200.0	10.0	100.0	200.0	10.0	25.0	150.0
Settlement	10.0	20.0	30.0	1.0	10.0	20.0	0.0	5.0	10.0
Pretrial	20.0	25.0	60.0	20.0	30.0	75.0	0.0	10.0	20.0
Trial	80.0	100.0	200.0	15.0	100.0	150.0	5.0	50.0	100.0
Post-disposition	10.0	20.0	40.0	5.0	10.0	40.0	0.0	5.0	10.0
Subtotal of Time	180.0	260.0	580.0	56.0	260.0	515.0	16.0	105.0	310.0
Prevailing Hourly Rates	250	$ 283	$ 306	$ 185	$ 200	$ 230	$ 95	$ 100	$ 120
Billable Costs	$ 45,000	$ 73,450	$ 177,625	$ 10,360	$ 52,000	$ 118,450	$ 1,520	$ 10,500	$ 37,200

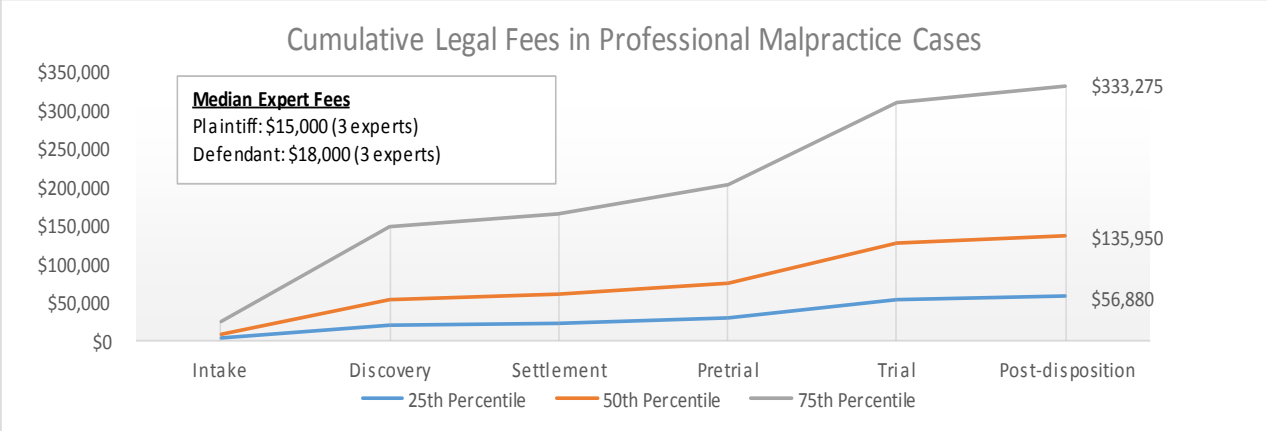
Expert Witnesses

Percentile	**25th**	**50th**	**75th**
Number of plaintiff experts	2	3	4
Plaintiff Expert Fees	$ 4,625	$ 5,000	$ 10,000
Number of defendant experts	3	3	4
Defendant expert fees	$ 5,000	$ 6,000	$ 12,500
Total Expert Costs	$ 23,000	$ 33,000	$ 90,000

Proportion of Time Expended per Litigation Stage

	Total Time					
Percentile	**25th**		**50th**		**75th**	
Intake	16	6.3%	40	6.4%	100	7.1%
Discovery	70	27.8%	200	32.0%	550	39.1%
Settlement	11	4.4%	35	5.6%	60	4.3%
Pretrial	40	15.9%	65	10.4%	155	11.0%
Trial	100	39.7%	250	40.0%	450	32.0%
Post-disposition	15	6.0%	35	5.6%	90	6.4%
Subtotal of Time	252		625		1,405	

Estimated Costs



Business/Commercial Litigation Cases

Case description

According to the 25 attorneys who responded to questions concerning business/commercial litigation cases, typical cases have the following characteristics:

- Nine-tenths of cases (92%) are filed in state with the remaining 8% filed in federal court;
- Four-fifths of plaintiffs (80%) are business entities with the remaining plaintiffs comprised of individuals (20%);
- Nine-tenths of complaints (88%) allege multiple claims and almost all (96%) of answers raise multiple defenses;
- Plaintiffs seek damages less than $50,000 in 4% of cases, between $50,000 and $250,000 in 32% of cases, between $250,000 and $500,000 in 20% of cases, between $500,000 and $1 million in 24% of cases, and more than $1 million in 20% of cases;
- Plaintiffs seek punitive damages in 20% of cases;
- The overwhelming majority (84%) of cases involves discovery of electronically stored information (ESI);
- The overwhelming majority of cases employ ADR to resolve the disputes, usually by mediation (86%), arbitration or a combination of arbitration and mediation (10%);
- Less than one-fifth of cases file *Daubert* motions (16%), but four-fifths (80%) file summary judgment motions;
- Slightly more than half of cases resolve by settlement (55%) with most of the remaining cases resolved on the merits by summary judgment (19%), bench trial (12%), or jury trial (6%); an additional 6% of cases are disposed by default judgment.

Time estimates

	Senior Attorney			Junior Attorney			Paralegal		
Percentile	**25th**	**50th**	**75th**	**25th**	**50th**	**75th**	**25th**	**50th**	**75th**
Intake	3.5	12.5	26.3	1.9	10.0	24.8	0.0	2.5	7.0
Discovery	8.8	20.0	45.0	3.5	20.0	70.0	1.8	13.5	42.5
Settlement	5.0	13.5	26.3	0.0	4.5	10.5	0.0	0.5	5.0
Pretrial	9.5	20.0	31.5	4.8	20.0	40.0	0.0	2.0	5.3
Trial	40.0	55.0	105.0	20.0	55.0	105.0	8.8	20.0	50.0
Post-disposition	5.8	19.0	50.0	1.5	20.0	38.8	0.0	6.5	25.0
Subtotal of Time	72.5	140.0	284.0	31.6	129.5	289.0	10.5	45.0	134.8
Prevailing Hourly Rates	250	$ 320	$ 350	$ 175	$ 200	$ 250	$ 58	$ 95	$ 150
Billable Costs	$ 18,125	$ 44,800	$ 99,400	$ 5,535	$ 25,900	$ 72,250	$ 604	$ 4,275	$ 20,213

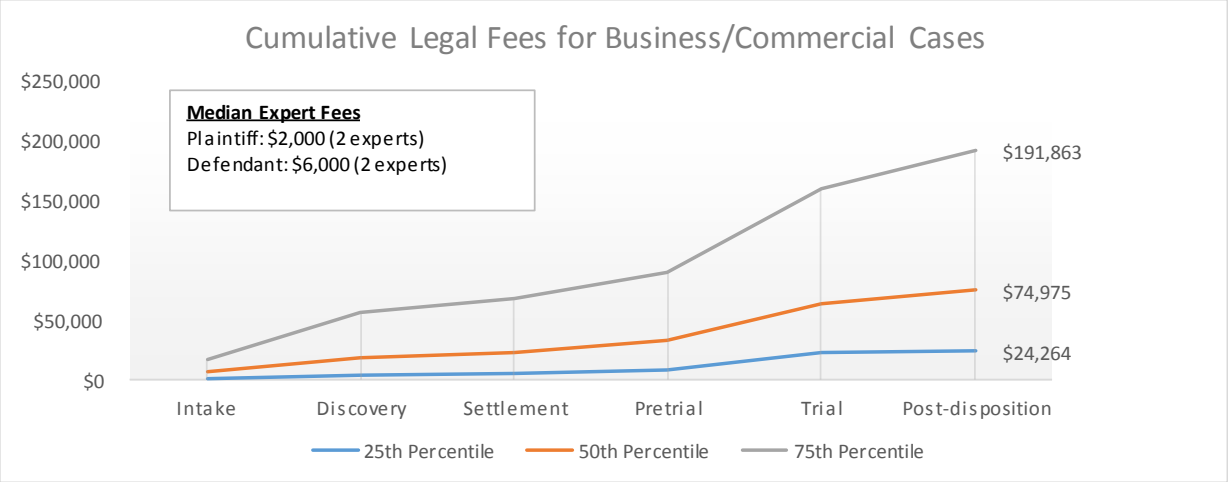
Expert Witnesses

Percentiles	**25th**	**50th**	**75th**
Number of plaintiff experts	1	2	2
Plaintiff Expert Fees	$ 300	$ 1,000	$ 10,000
Number of defendant experts	1	2	2
Defendant expert fees	$ 300	$ 3,000	$ 10,000
Total Expert Costs	$ 600	$ 8,000	$ 40,000

Proportion of Time Expended per Litigation Stage

	Total Time					
Percentile	**25th**		**50th**		**75th**	
Intake	5	4.7%	25	7.9%	58	8.2%
Discovery	14	12.2%	54	17.0%	158	22.3%
Settlement	5	4.4%	19	5.9%	42	5.9%
Pretrial	14	12.4%	42	13.4%	77	10.8%
Trial	69	60.0%	130	41.3%	260	36.7%
Post-disposition	7	6.3%	46	14.5%	114	16.1%
Subtotal of Time	115		315		708	

Estimated Costs



Employment Dispute Cases

Case description

According to the 21 attorneys who responded to questions concerning employment disputes, typical cases have the following characteristics:

- Two-thirds of cases (67%) are filed in state with the remaining one-third (33%) filed in federal court;
- The overwhelming majority of plaintiffs (86%) are individuals with the remaining plaintiffs comprised of business entities (10%) and government agencies (5%);
- Almost all complaints (95%) allege multiple claims and nine-tenths (91%) of answers raise multiple defenses;
- Plaintiffs seek damages less than $50,000 in 14% of cases, between $50,000 and $250,000 in 67% of cases, between $250,000 and $500,000 in 10% of cases, and between $500,000 and $1 million in 10% of cases;
- Almost half of all plaintiffs (48%) seek punitive damages;
- The overwhelming majority (86%) of cases involves discovery of electronically stored information (ESI);
- Three-quarters of cases (77%) employ ADR to resolve the disputes, usually by mediation (71%) or a combination of arbitration and mediation (6%);
- One-third of cases file *Daubert* motions (35%), but three-quarters (76%) file summary judgment motions;
- Slightly more than half of cases resolve by settlement (60%) with most of the remaining cases resolved on the merits by summary judgment (18%), bench trial (6%), or jury trial (6%); an additional 10% of cases are dismissed.

Time estimates

	Senior Attorney			Junior Attorney			Paralegal		
Percentile	**25th**	**50th**	**75th**	**25th**	**50th**	**75th**	**25th**	**50th**	**75th**
Intake	5.0	10.0	10.0	4.0	10.0	20.0	0.0	0.0	7.5
Discovery	10.0	20.0	20.0	17.5	20.0	40.0	0.0	10.0	20.0
Settlement	10.0	10.0	10.0	1.0	5.0	7.5	0.0	0.0	5.0
Pretrial	8.0	15.0	40.0	12.5	25.0	45.0	0.0	5.0	12.5
Trial	40.0	48.0	100.0	18.0	40.0	80.0	0.0	10.0	35.0
Post-disposition	5.0	10.0	20.0	3.5	10.0	27.5	0.0	0.0	10.0
Subtotal of Time	78.0	113.0	200.0	56.5	110.0	220.0	0.0	25.0	90.0
Prevailing Hourly Rates	198.75	$ 263	$ 331	$ 125	$ 200	$ 240	$ 45	$ 100	$ 120
Billable Costs	$ 15,503	$ 29,663	$ 66,250	$ 7,063	$ 22,000	$ 52,800	$ -	$ 2,500	$ 10,800

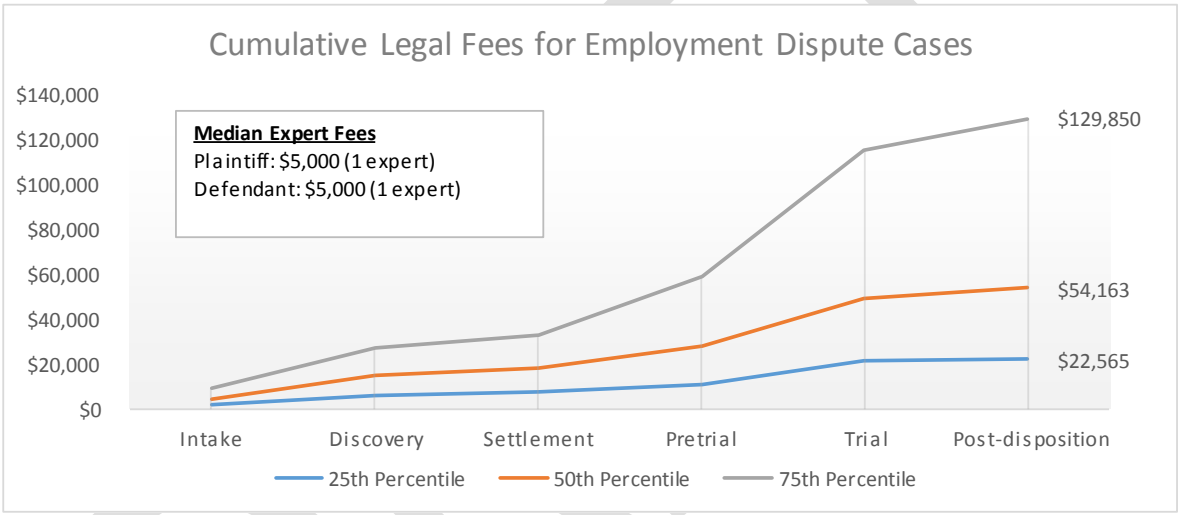
Expert Witnesses

Percentiles	**25th**	**50th**	**75th**
Number of plaintiff experts	1	1	2
Plaintiff Expert Fees	$ 1,075	$ 5,000	$ 7,375
Number of defendant experts	1	1	2
Defendant expert fees	$ 1,125	$ 5,000	$ 8,500
Total Expert Costs	$ 2,200	$ 10,000	$ 33,875

Proportion of Time Expended per Litigation Stage

	Total Time					
Percentile	**25th**		**50th**		**75th**	
Intake	9	6.7%	20	8.1%	38	7.4%
Discovery	28	20.4%	50	20.2%	80	15.7%
Settlement	11	8.2%	15	6.0%	23	4.4%
Pretrial	21	15.2%	45	18.1%	98	19.1%
Trial	58	43.1%	98	39.5%	215	42.2%
Post-disposition	9	6.3%	20	8.1%	58	11.3%
Subtotal of Time	135		248		510	

Estimated Costs



Debt Collection Cases

Case description

According to the 25 attorneys who responded to questions concerning debt collection cases, typical cases have the following characteristics:

- They are universally filed in state court, rather than federal court;
- The overwhelming majority of plaintiffs (88%) are business entities with the remaining plaintiffs comprised of individuals (8%) and government agencies (4%);
- More than two-thirds of complaints (68%) allege multiple claims and nearly two-thirds (64%) of answers raise multiple defenses;
- Plaintiffs seek damages less than $50,000 in 80% of cases, between $50,000 and $250,000 in 4% of cases, between $250,000 and $500,000 in 12% of cases, and between $500,000 and $1 million in 4% of cases;
- Plaintiffs do not generally seek punitive damages;
- More than half (60%) of cases involves discovery of electronically stored information (ESI);
- Less than one-third of cases (32%) employ mediation to resolve the dispute; no other form of ADR is used for these cases;
- *Daubert* motions are not generally filed in debt collection cases, but more than half (56%) file summary judgment motions;
- Half of cases resolve by default judgment (50%) with most of the remaining cases resolved by settlement (36%) or summary judgment (9%).

Time estimates

	Senior Attorney			Junior Attorney			Paralegal		
Percentile	**25th**	**50th**	**75th**	**25th**	**50th**	**75th**	**25th**	**50th**	**75th**
Intake	0.5	2.0	4.5	0.0	0.0	0.5	0.0	0.5	1.0
Discovery	0.0	3.0	10.0	0.0	0.0	1.0	0.0	0.5	1.0
Settlement	0.1	1.0	5.0	0.0	0.0	0.3	0.0	0.0	0.8
Pretrial	0.5	2.0	7.5	0.0	0.0	1.0	0.0	0.5	1.5
Trial	0.0	2.0	14.5	0.0	0.0	1.0	0.0	0.0	2.0
Post-disposition	0.3	3.0	9.0	0.0	0.0	1.0	0.0	0.0	2.0
Subtotal of Time	1.3	13.0	50.5	0.0	0.0	4.8	0.0	1.5	8.3
Prevailing Hourly Rates	200	$ 200	$ 250	$ 175	$ 175	$ 200	$ 35	$ 65	$ 75
Billable Costs	$ 260	$ 2,600	$ 12,625	$ -	$ -	$ 960	$ -	$ 98	$ 623

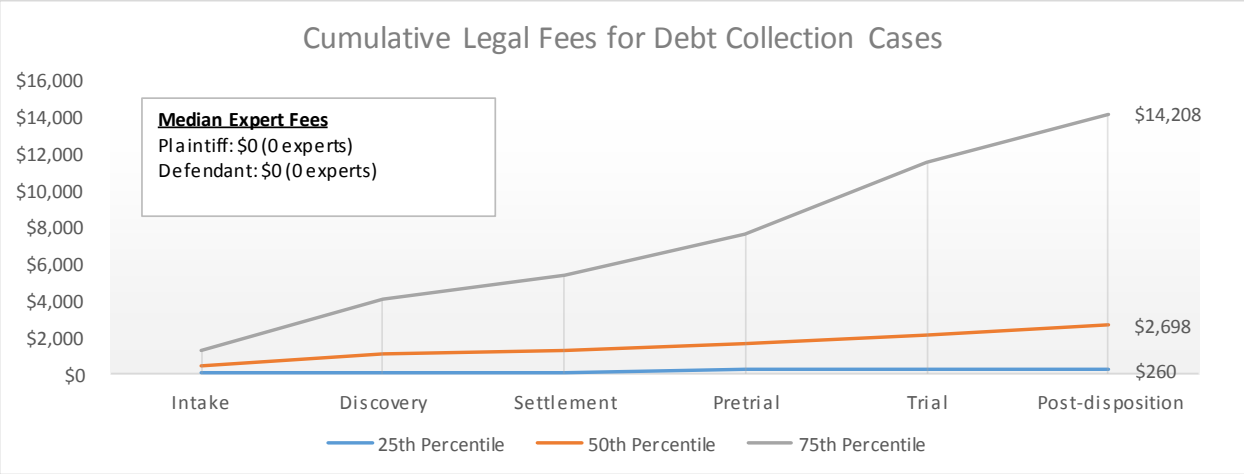
Expert Witnesses

Percentiles	**25th**	**50th**	**75th**
Number of plaintiff experts	-	-	-
Plaintiff Expert Fees	$ -	$ -	$ 550
Number of defendant experts	-	-	-
Defendant expert fees	$ -	$ -	$ 251
Total Expert Costs	$ -	$ -	$ -

Proportion of Time Expended per Litigation Stage

	Total Time					
Percentile	**25th**		**50th**		**75th**	
Intake	1	38.5%	3	17.2%	6	9.4%
Discovery	-	0.0%	4	24.1%	12	18.9%
Settlement	0	3.8%	1	6.9%	6	9.6%
Pretrial	1	38.5%	3	17.2%	10	15.7%
Trial	-	0.0%	2	13.8%	18	27.5%
Post-disposition	0	19.2%	3	20.7%	12	18.9%
Subtotal of Time	1		15		64	

Estimated Costs



Divorce Cases

Case description

According to the 21 attorneys who responded to questions concerning debt collection cases, typical cases have the following characteristics:

- They are universally filed in state court, rather than federal court;
- Less than one-fourth of complaints (24%) allege multiple claims and slightly more than one-third (38%) of answers raise multiple defenses;
- The monetary value at issue is less than $50,000 in 48% of cases, between $50,000 and $250,000 in 29% of cases, between $250,000 and $500,000 in 14% of cases, between $500,000 and $1 million in 5% of cases, and more than $1 million in 5% of cases;
- Approximately half (48%) of cases involves discovery of electronically stored information (ESI);
- Nine-tenths of cases (91%) employ mediation to resolve the dispute; no other form of ADR is used for these cases;
- *Daubert* motions are filed in only 5% of divorce cases, and motions for summary judgment are filed in only 14% of cases;
- More than two-thirds (71%) of cases resolve by settlement with most of the remaining cases resolve by default judgment (7%) or bench trial (10%).

Time estimates

	Senior Attorney			Junior Attorney			Paralegal		
Percentile	**25th**	**50th**	**75th**	**25th**	**50th**	**75th**	**25th**	**50th**	**75th**
Intake	3.0	4.0	5.0	0.0	1.0	2.0	0.0	1.0	3.0
Discovery	3.0	5.0	20.0	0.0	1.5	10.0	0.0	2.0	5.0
Settlement	3.0	5.0	10.0	0.0	0.0	3.0	0.0	1.0	2.0
Pretrial	2.0	5.0	10.0	0.0	5.0	10.0	0.0	1.0	5.0
Trial	10.0	18.0	48.0	0.0	0.0	16.0	0.0	4.0	20.0
Post-disposition	2.0	2.0	5.0	0.0	2.0	5.0	0.0	0.0	1.0
Subtotal of Time	23.0	39.0	98.0	0.0	9.5	46.0	0.0	9.0	36.0
Prevailing Hourly Rates	217.5	$ 250	$ 294	$ 165	$ 200	$ 200	$ 68	$ 100	$ 100
Billable Costs	$ 5,003	$ 9,750	$ 28,788	$ -	$ 1,900	$ 9,200	$ -	$ 900	$ 3,600

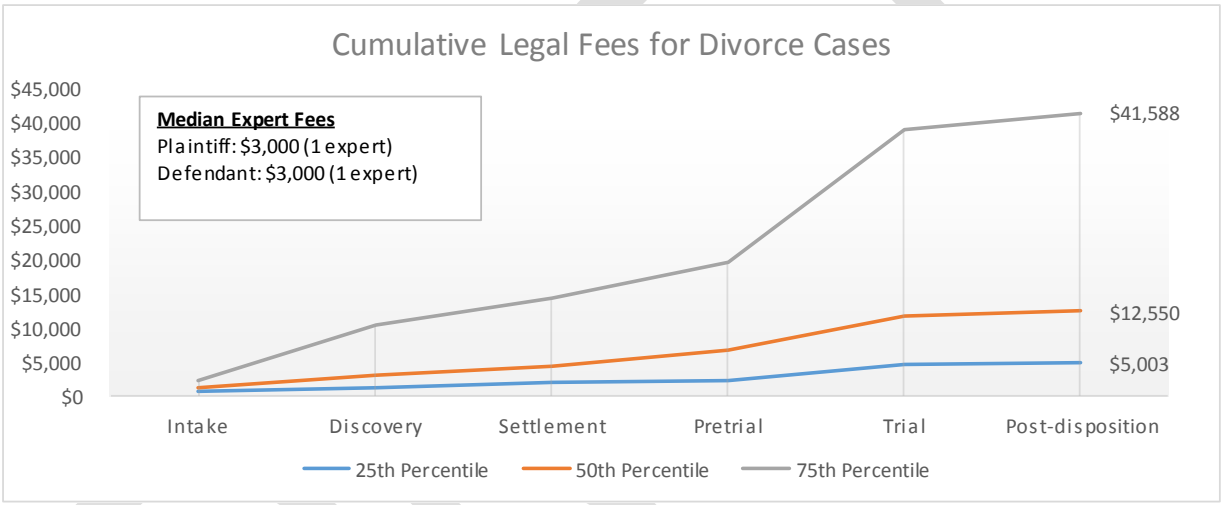
Expert Witnesses

Percentile	**25th**	**50th**	**75th**
Number of plaintiff experts	1	1	2
Plaintiff Expert Fees	$ 400	$ 3,000	$ 5,000
Number of defendant experts	1	1	2
Defendant expert fees	$ 400	$ 3,000	$ 5,000
Total Expert Costs	$ 800	$ 6,000	$ 15,000

Proportion of Time Expended per Litigation Stage

	Total Time					
Percentile	**25th**		**50th**		**75th**	
Intake	3	13.0%	6	10.4%	10	5.6%
Discovery	3	13.0%	9	14.8%	35	19.4%
Settlement	3	13.0%	6	10.4%	15	8.3%
Pretrial	2	8.7%	11	19.1%	25	13.9%
Trial	10	43.5%	22	38.3%	84	46.7%
Post-disposition	2	8.7%	4	7.0%	11	6.1%
Subtotal of Time	23		58		180	

Estimated Costs



Paternity Cases

Case description

According to the 30 attorneys who responded to questions concerning debt collection cases, typical cases have the following characteristics:

- They are universally filed in state court, rather than federal court;
- Approximately one-fourth of complaints (27%) allege multiple claims and 43% of answers raise multiple defenses;
- The monetary value at issue is less than $50,000 in 80% of cases, between $50,000 and $250,000 in 10% of cases, and between $250,000 and $500,000 in 7% of cases;
- Approximately one-third (30%) of cases involves discovery of electronically stored information (ESI);
- Nearly all cases (95%) employ mediation to resolve the dispute; no other form of ADR is used for these cases;
- *Daubert* motions are filed in only 3% of paternity cases, and motions for summary judgment are filed in only 17% of cases;
- Nearly three-quarters (73%) of cases resolve by settlement with most of the remaining cases resolve by default judgment (9%) or bench trial (10%).

Time estimates

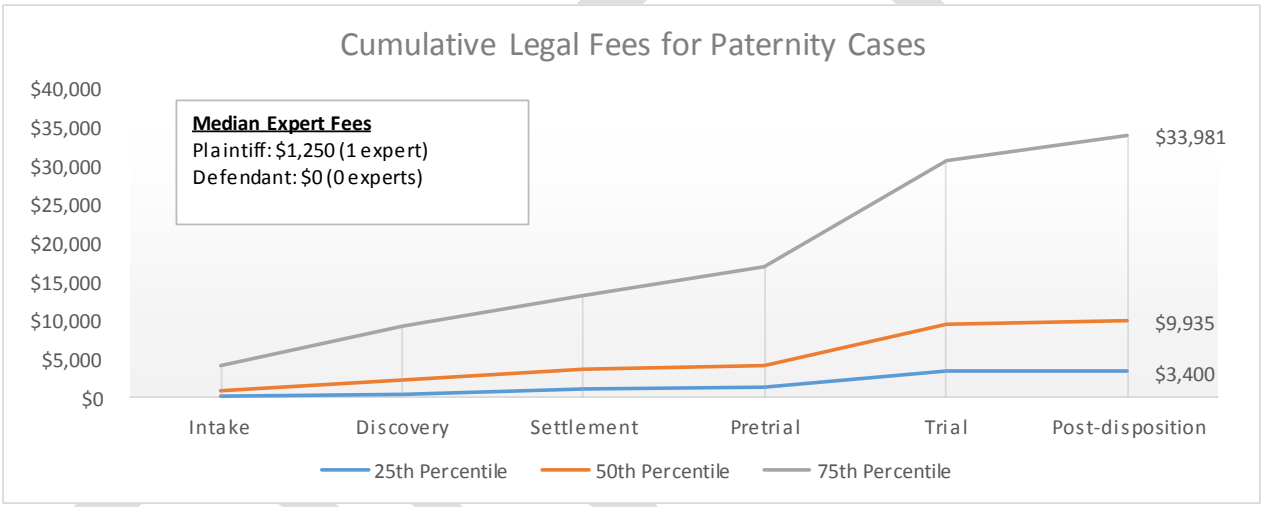
	Senior Attorney			Junior Attorney			Paralegal		
Percentile	**25th**	**50th**	**75th**	**25th**	**50th**	**75th**	**25th**	**50th**	**75th**
Intake	1.0	3.5	12.5	0.0	0.0	3.0	0.0	1.0	2.0
Discovery	1.0	5.0	13.8	0.0	0.0	5.0	0.0	1.5	5.0
Settlement	4.0	5.0	10.0	0.0	0.0	5.0	0.0	0.5	2.0
Pretrial	1.0	2.0	11.3	0.0	0.0	3.0	0.0	0.0	2.0
Trial	10.0	20.0	40.0	0.0	0.0	10.0	0.0	4.0	10.0
Post-disposition	0.0	2.0	10.0	0.0	0.0	2.0	0.0	0.0	2.0
Subtotal of Time	17.0	37.5	97.5	0.0	0.0	28.0	0.0	7.0	23.0
Prevailing Hourly Rates	200	$ 250	$ 268	$ 150	$ 175	$ 200	$ 55	$ 80	$ 100
Billable Costs	$ 3,400	$ 9,375	$ 26,081	$ -	$ -	$ 5,600	$ -	$ 560	$ 2,300

Expert Witnesses			
Percentile	**25th**	**50th**	**75th**
Number of plaintiff experts	-	1	1
Plaintiff Expert Fees	$ -	$ 1,250	$ 5,000
Number of defendant experts	-	1	1
Defendant expert fees	$ -	$ -	$ 5,000
Total Expert Costs	$ -	$ 1,250	$ 10,000

Proportion of Time Expended per Litigation Stage

	Total Time					
Percentile	**25th**		**50th**		**75th**	
Intake	1	5.9%	5	10.1%	18	11.8%
Discovery	1	5.9%	7	14.6%	24	16.0%
Settlement	4	23.5%	6	12.4%	17	11.4%
Pretrial	1	5.9%	2	4.5%	16	10.9%
Trial	10	58.8%	24	53.9%	60	40.4%
Post-disposition	-	0.0%	2	4.5%	14	9.4%
Subtotal of Time	17		45		149	

Estimated Costs



Custody/Support Cases

Case description

According to the 30 attorneys who responded to questions concerning debt collection cases, typical cases have the following characteristics:

- They are universally filed in state court, rather than federal court;
- Approximately one-third of complaints (30%) allege multiple claims and 57% of answers raise multiple defenses;
- The monetary value at issue is less than $50,000 in 78% of cases, between $50,000 and $250,000 in 13% of cases, between $250,000 and $500,000 in 4% of cases; and between $500,000 and $1 million in 4% of cases;
- Approximately two-thirds (65%) of cases involves discovery of electronically stored information (ESI);
- Nine-tenths of cases (90%) employ ADR to resolve the dispute, usually by mediation (85%) or a combination of mediation and arbitration (5%);
- *Daubert* motions are not generally in custody/support cases, and motions for summary judgment are filed in only 9% of cases;
- More than two-thirds (70%) of cases resolve by settlement with most of the remaining cases resolve by default judgment (11%) or bench trial (12%).

Time estimates

	Senior Attorney			Junior Attorney			Paralegal		
Percentile	**25th**	**50th**	**75th**	**25th**	**50th**	**75th**	**25th**	**50th**	**75th**
Intake	1.0	2.5	10.0	0.0	1.0	2.8	1.0	2.5	17.0
Discovery	2.0	5.0	11.5	0.0	0.8	8.8	1.5	4.5	17.5
Settlement	5.0	6.0	8.0	0.0	0.0	5.8	0.0	1.0	4.0
Pretrial	3.0	5.0	10.0	0.0	0.5	9.5	1.0	2.0	5.0
Trial	10.0	20.0	30.0	0.0	2.0	35.0	2.8	10.0	25.0
Post-disposition	1.0	2.0	5.8	0.0	0.0	2.0	0.0	0.3	1.8
Subtotal of Time	22.0	40.5	75.3	0.0	4.3	63.8	6.3	20.3	70.3
Prevailing Hourly Rates	200	$ 250	$ 296	$ 200	$ 200	$ 225	$ 58	$ 85	$ 100
Billable Costs	$ 4,400	$ 10,125	$ 22,293	$ -	$ 850	$ 14,344	$ 359	$ 1,721	$ 7,025

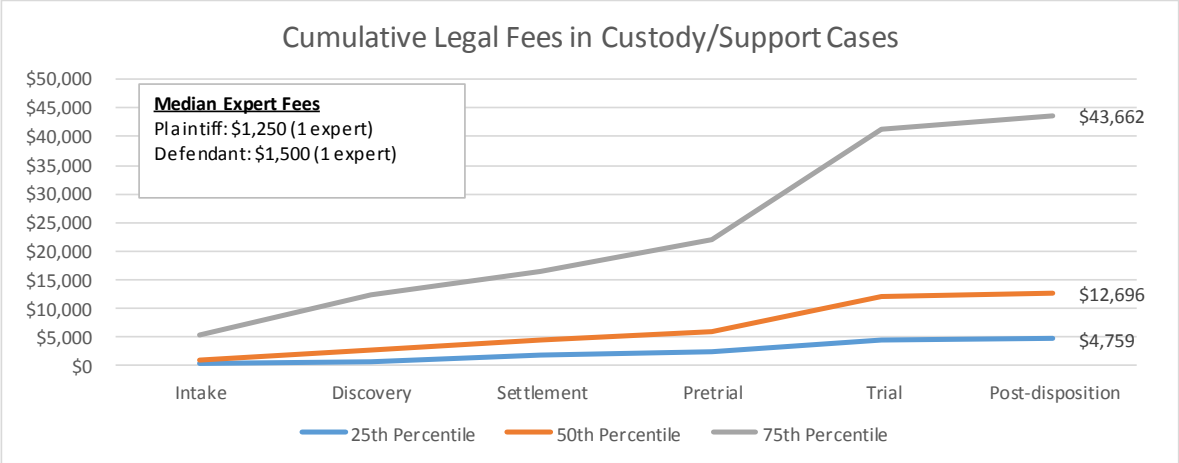
Expert Witnesses

Percentile	**25th**	**50th**	**75th**
Number of plaintiff experts	-	1	1
Plaintiff Expert Fees	$ -	$ 2,500	$ 5,000
Number of defendant experts	-	1	1
Defendant expert fees	$ -	$ 1,500	$ 3,500
Total Expert Costs	$ -	$ 3,250	$ 8,500

Proportion of Time Expended per Litigation Stage

	Total Time					
Percentile	**25th**		**50th**		**75th**	
Intake	2	7.1%	6	9.2%	30	14.2%
Discovery	4	12.4%	10	15.8%	38	18.0%
Settlement	5	17.7%	7	10.8%	18	8.5%
Pretrial	4	14.2%	8	11.5%	25	11.7%
Trial	13	45.1%	32	49.2%	90	43.0%
Post-disposition	1	3.5%	2	3.5%	10	4.5%
Subtotal of Time	28		65		209	

Estimated Costs



Real Property Dispute Cases

Case description

According to the 27 attorneys who responded to questions concerning real property disputes, typical cases have the following characteristics:

- The overwhelming majority of cases are filed in state court (93%) compared to less than one-tenth of cases (7%) filed in federal court;
- Plaintiffs in approximately four-tenths of cases (41%) are individuals, nearly half (44%) are business entities, and the remaining plaintiffs are government entities (7%) or multiple plaintiffs (7%);
- The overwhelming majority of complaints (89%) allege multiple claims and 93% of answers raise multiple defenses;
- The monetary value at issue is less than $50,000 in 15% of cases, between $50,000 and $250,000 in 30% of cases, between $250,000 and $500,000 in 26% of cases; between $500,000 and $1 million in 19% of cases, and more than $1 million in 11% of cases;
- Approximately one-fourth of cases (22%) seek punitive damages;
- The overwhelming majority (82%) of cases involves discovery of electronically stored information (ESI);
- Nine-tenths of cases (88%) employ ADR to resolve the dispute, usually by mediation (83%) or a combination of mediation and arbitration (4%);
- *Daubert* motions are filed in 26% of real property disputes, and motions for summary judgment are filed in 82% of cases;
- More than half (54%) of cases resolve by settlement with most of the remaining cases resolve on the merits by summary judgment (21%), bench trial (11%), or jury trial (6%).

Time estimates

	Senior Attorney			Junior Attorney			Paralegal		
Percentile	**25th**	**50th**	**75th**	**25th**	**50th**	**75th**	**25th**	**50th**	**75th**
Intake	10.0	10.0	28.8	0.0	5.0	42.5	0.8	2.0	10.0
Discovery	20.0	30.0	96.3	7.8	32.5	60.0	4.0	15.0	20.0
Settlement	10.0	15.0	28.8	0.0	10.0	21.3	0.0	0.5	5.0
Pretrial	16.3	30.0	40.0	8.8	25.0	56.3	0.0	7.5	25.0
Trial	26.3	60.0	95.0	8.8	35.0	78.3	2.8	17.5	50.0
Post-disposition	10.0	10.0	20.0	0.0	10.0	31.3	0.0	3.0	10.0
Subtotal of Time	92.5	155.0	308.8	25.3	117.5	289.5	7.5	45.5	120.0
Prevailing Hourly Rates	250	$ 268	$ 300	$ 183	$ 200	$ 208	$ 75	$ 80	$ 108
Billable Costs	$ 23,125	$ 41,463	$ 92,625	$ 4,608	$ 23,500	$ 60,071	$ 563	$ 3,640	$ 12,900

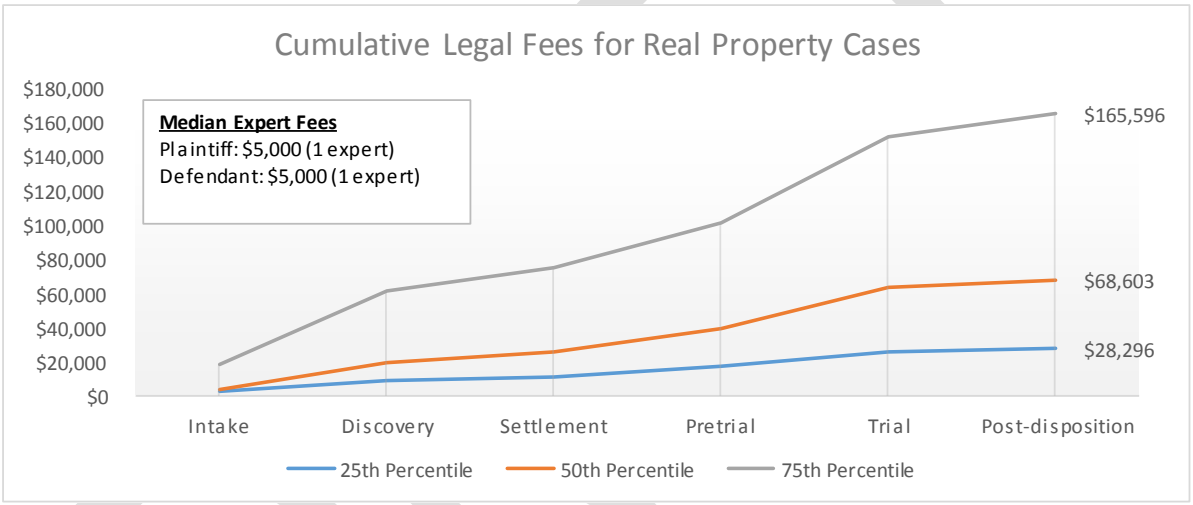
Expert Witnesses

Percentile	**25th**	**50th**	**75th**
Number of plaintiff experts	1	1	2
Plaintiff Expert Fees	$ 2,000	$ 5,000	$ 10,000
Number of defendant experts	1	1	2
Defendant expert fees	$ 2,000	$ 5,000	$ 10,000
Total Expert Costs	$ 4,000	$ 10,000	$ 40,000

Proportion of Time Expended per Litigation Stage

	Total Time					
Percentile	**25th**		**50th**		**75th**	
Intake	11	8.6%	17	5.3%	81	11.3%
Discovery	32	25.3%	78	24.4%	176	24.5%
Settlement	10	8.0%	26	8.0%	55	7.7%
Pretrial	25	20.0%	63	19.7%	121	16.9%
Trial	38	30.1%	113	35.4%	223	31.1%
Post-disposition	10	8.0%	23	7.2%	61	8.5%
Subtotal of Time	125		318		718	

Estimated Costs



Tab 4

Timothy M. Shea
Appellate Court Administrator

Andrea R. Martinez
Clerk of Court

Supreme Court of Utah

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January 21, 2015

To: Civil Rules Committee
From: Tim Shea
Re: Small Claims Rule 14. Offer of judgment.

I have been encouraged to pursue this proposed rule one more time.

Addressing two of the points made at the May meeting. The rule's proponent would not have qualified to receive payment of costs under existing rules because the proponent did not prevail. The proponent's objective is to qualify for payment of costs incurred after an offer if the judgment (adjusted award) is not more favorable than the offer.

In the proponent's particular circumstance, the offeree was a municipality. In URCP 54(d), costs can be imposed on the "state of Utah, its officers and agencies … only to the extent permitted by law." I do not know whether a municipality would be considered an "agency" of the state. Municipalities are "political subdivisions" of the state. Section 10-1-201. The phrase "agency of the state" appears to be critical; governmental units that are not state agencies can be held liable for costs. Lyon v. Burton, 2000 UT 55, 5 P 3rd 616 (Order Modifying Opinion on Denial of Rehearing June 30, 2000).

Because of my uncertainty about whether a municipality is an agency of the state, I do not know whether, under this rule, an offeror's costs incurred after an offer could be imposed on a municipality. As drafted, Rule 14 does not distinguish between government and non-government parties; nor should it. This rule alone may be sufficient to establish the policy being sought. If not, the proponent would have to seek legislation to authorize costs against municipalities and counties.

This draft of the rule has been amended from the previous draft to remove the requirement that the offer be made after the original judgment. That provision was included at the request of the Board of Justice Court Judges, but a qualifying offer after the judgment makes no sense. An offer after the judgment is simply negotiation to satisfy the judgment for less than the full amount.

And I have added a note to the effect that the filing fee for the trial de novo is a cost occurring after the offer, but, to avoid liability for costs, the creditor-offeree's judgment after trial de novo only has to be more favorable than the offer. The creditor does not have to improve upon the original judgment in order to avoid liability for costs. I believe this is the result of the rule itself, but I've included it out of an abundance of caution.

copy: Rick Schwermer

Rule 14. Settlement offers.

(a) Unless otherwise specified, an offer made under this rule is an offer to resolve all claims in the action between the parties to the date of the offer, including costs, interest and, if attorney fees are permitted by law or contract, attorney fees.

(b) If the adjusted award is not more favorable than the offer, the offeror is not liable for costs, prejudgment interest or attorney fees incurred by the offeree after the offer, and the offeree must pay the offeror's costs incurred after the offer. The court may suspend the application of this rule to prevent manifest injustice.

(c) An offer made under this rule must:

(c)(1) be in writing;

(c)(2) expressly refer to this rule;

(c)(3) be made more than 10 days before trial;

(c)(4) remain open for at least 10 days; and

(c)(5) be served on the offeree under Rule 5 of the Rules of Civil Procedure.

(d) Acceptance of the offer must be in writing and served on the offeror under Rule 5 of the Rules of Civil Procedure. Upon acceptance, either party may file the offer and acceptance with a proposed judgment.

(e) "Adjusted award" means the amount awarded by the judge and, unless excluded by the offer, the offeree's costs and interest incurred before the offer, and, if attorney fees are permitted by law or contract and not excluded by the offer, the offeree's reasonable attorney fees incurred before the offer. If the offeree's attorney fees are subject to a contingency fee agreement, the court shall determine a reasonable attorney fee for the period preceding the offer.

(f) The offeror’s costs includes the filing fee and other costs for an appeal to a trial de novo.

Advisory Committee Notes

The filing fee for the trial de novo is a cost occurring after the offer, but, to avoid liability for costs, the judgment creditor-offeree’s judgment after trial de novo only has to be more favorable than the offer. The judgment creditor does not have to improve upon the original judgment in order to avoid liability for costs.

Tab 5

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January 21, 2015

To: Civil Rules Committee
From: Tim Shea
Re: Service by email or fax

Introduction

The Supreme Court has asked that we reconsider Rule 5 in light of the comments to our proposal about the methods of service: specifically, service by email or fax. Please refer to paragraph (b)(3) of the attached rule. If our proposal were to be adopted, the paragraph would read:

> (b)(3) Methods of service. A paper is served under this rule by:
>
> (b)(3)(A) submitting it for electronic filing if the person being served has an electronic filing account;
>
> (b)(3)(B) emailing it to the email address provided by the person or to the email address on file with the Utah State Bar, if the person has agreed to accept service by email or has an electronic filing account;
>
> (b)(3)(C) mailing it to the person's last known address;
>
> (b)(3)(D) handing it to the person;
>
> (b)(3)(E) leaving it at the person's office with a person in charge or, if no one is in charge, leaving it in a receptacle intended for receiving deliveries or in a conspicuous place; or
>
> (b)(3)(F) leaving it at the person's dwelling house or usual place of abode with a person of suitable age and discretion who resides there.

The comments to Rule 5 relevant to this issue also are attached. One attorney favors our proposal that documents may be served among lawyers by email without first obtaining the lawyer's agreement. Two attorneys opposed the proposal.

Those opposed are of the opinion that an email might be sent to the wrong address, be caught in a spam filter or otherwise not come to the attention of the person being served. The person known to us only as "Superman" includes some additional reasons. Superman also opposes eliminating service by agreed-upon fax.

After discussing the issues, the committee concluded that email is such a common method of communication that requiring an agreement is out of date. Similarly, since attaching files to an email has become so simple, service by fax also is out of date. Regarding the latter, the committee took the position that, if the parties want to agree to service by fax, they may do so.

Service by fax

In reviewing our recommendations, the Supreme Court noted that there is no provision for service being effective if done by a method agreed to but not authorized. One option is to add a line to the effect: “any other method agreed to in writing by the parties.” The agreement would have to be mutual; the receiving party could not impose a method on the sending party. There was some discussion of whether an agreement would bind the parties to only that method of serving papers or whether the agreement simply creates an option that the sender could ignore.

This seems an overly complex method of accommodating a decreasing number of people who want to send or receive papers by fax. The requirement that a person agree in advance was motivated by the fear that fax was too new, too unreliable, did not produce clear copies, might not print because no one refilled the paper, etc. How far we have come. Now the concern is that fax is too old.

If accommodation is needed, then I recommend that we simply continue to include agreed-upon fax as an approved method of service. Probably the number of papers being served by leaving them at the person’s usual place of abode with a person of suitable age and discretion or in a receptacle at the office also is decreasing, but the rule continues to recognize those methods as valid. If a person says fax is OK, then no harm is done.

Service by email

The question of whether service by email should require an advance agreement is essentially the same question as with fax, but with a potentially higher price tag. Superman aside, probably most lawyers would agree to service by email because they see the advantage of a reciprocal agreement. But the lawyer who does not agree imposes on the sender the expense of delivery by mail or other courier, which is much more than just the cost of a *Forever* stamp.

The economics of service by fax are different simply because, in all probability, most senders would not chose fax as the preferred delivery method.

The options appear to be opt-in (the current rule) or opt-out (permitted unless the person says “no”) or leave the method of delivery to the sender’s discretion (the committee’s proposal).

I recommend against the middle option. I favor the committee’s proposal, but I believe that a rule people are used to is better than changing the rule in a way that does not modernize the process.

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

(a) ~~Service:~~ When service is required.

(a)(1) Papers that must be served. Except as otherwise provided in these rules or as otherwise directed by the court, the following papers must be served on every party:

(a)(1)(A) ~~every~~ a judgment~~,~~;

(a)(1)(B) ~~every~~ an order ~~required by its terms to~~ that states it must be served~~,~~;

(a)(1)(C) ~~every~~ a pleading ~~subsequent to~~ after the original complaint~~,~~;

(a)(1)(D) ~~every~~ a paper relating to disclosure or discovery~~,~~;

(a)(1)(E) ~~every written motion~~ a paper filed with the court other than ~~one~~ a motion that may be heard ex parte~~,~~; and

(a)(1)(F) ~~every~~ a written notice, appearance, demand, offer of judgment, ~~and~~ or similar paper ~~shall be served upon each of the parties~~.

(a)(2) Serving parties in default. No service ~~need be made on parties~~ is required on a party who is in default except that:

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

(a)(2)(B) a party in default for any reason other than for failure to appear ~~shall~~ must be served ~~with all pleadings and papers~~ as provided in paragraph (a)(1);

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

(a)(3) Service in actions begun by seizing property. ~~In~~ If an action is begun by ~~seizure of~~ seizing property~~, in which~~ and no person is or need be named as defendant, any service required ~~to be made prior to~~ before the filing of an answer, claim or appearance ~~shall~~ must be made upon the person ~~having~~ who had custody or possession of the property ~~at the time of its seizure~~ when it was seized.

(b) ~~Service:~~ How service is made.

(b)(1) Whom to serve. If a party is represented by an attorney, ~~service shall be made~~ a paper served under this rule must be served upon the attorney unless the court orders 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~~ Service must be made upon the attorney and the party if

(b)(1)(A) 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; or

(b)(1)(B) a final judgment has been entered in the action and more than 90 days has elapsed from the date a paper was last served on the attorney.

~~(b)(1)(A)~~ (b)(2) When to serve. If a hearing is scheduled ~~5~~ 7 days or less from the date of service, ~~the~~ a party ~~shall use the method~~ must serve a paper related to the hearing by the method most likely to ~~give prompt actual notice of the hearing~~ be promptly received. Otherwise, ~~a party shall serve a paper under this rule:~~a paper that is filed with the court must be served before or on the same day that it is filed.

(b)(3) Methods of service. A paper is served under this rule by:

~~(b)(1)(A)(i) upon any person with an electronic filing account who is a party or attorney in the case by~~ (b)(3)(A) submitting ~~the paper~~ it for electronic filing if the person being served has an electronic filing account;

~~(b)(1)(A)(ii) by sending it by email to the person's last known email address~~ (b)(3)(B) emailing it to the email address provided by the person or to the email address on file with the Utah State Bar, if ~~that~~ the person has agreed to accept service by email or has an electronic filing account;

~~(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~~ (b)(3)(C) mailing it to the person's last known address;

~~(b)(1)(A)(v) by~~ (b)(3)(D) handing it to the person;

~~(b)(1)(A)(vi) by~~ (b)(3)(E) leaving it at the person's office with a person in charge or, if no one is in charge, leaving it in a receptacle intended for receiving deliveries or in a conspicuous place; or

~~(b)(1)(A)(vii) by~~ (b)(3)(F) leaving it at the person's dwelling house or usual place of abode with a person of suitable age and discretion ~~then residing therein~~ who resides there.

~~(b)(1)(B)~~ (b)(4) When service is effective. Service by mail~~, email or fax~~ or electronic means 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)~~ (b)(5) Who serves. 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)~~ (b)(5)(A) every ~~other pleading or~~ paper required ~~by this rule~~ to be served ~~shall~~ must be served by the party preparing it; and

~~(b)(2)(C)~~ (b)(5)(B) an order or judgment prepared by the court ~~shall~~ will be served by the court.

(c) ~~Service: N~~ Serving numerous defendants. ~~In any~~ If an action ~~in which there is~~ involves an unusually large number of defendants, the court, upon motion or ~~of~~ its own initiative, may order that:

(c)(1) ~~service of the~~ a defendant's pleadings ~~of the defendants~~ and replies ~~thereto need not be made as between~~ to them do not need to be served on the other defendants; ~~and that~~

(c)(2) any cross-claim, counterclaim~~, or matter constituting an~~ avoidance or affirmative defense ~~contained therein shall be~~ in a defendant's pleadings and replies to them are deemed ~~to be~~ denied or avoided by all other parties; ~~and that the~~

(c)(3) filing ~~of any such~~ a defendant's pleadings and ~~service thereof upon~~ serving them on the plaintiff constitutes notice of ~~it~~ them to ~~the~~ all other parties~~.~~; and

(c)(4) ~~A~~ a copy of ~~every such~~ the order ~~shall~~ must 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.~~

~~**(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)**~~ **(d) Certificate of service.** ~~Every pleading, order or~~ A paper required by this rule to be served, including electronically filed papers, ~~shall~~ must 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.

(e) Filing. Except as provided in Rule 7(f) and Rule 26(f), all papers after the complaint that are required to be served must be filed with the court. Parties with an electronic filing account must file a paper electronically. A party without an electronic filing account may file a paper by delivering it to the clerk of the court or to a judge of the court. Filing is complete upon the earliest of acceptance by the electronic filing system, the clerk of court or the judge.

(f) Filing an affidavit or declaration. If a person files an affidavit or declaration, the filer may:

(f)(1) electronically file the original affidavit with a notary acknowledgment as provided by Utah Code Section 46-1-16(7);

(f)(2) electronically file a scanned image of the affidavit or declaration;

(f)(3) electronically file the affidavit or declaration with a conformed signature; or

(f)(4) if the filer does not have an electronic filing account, present the original affidavit or declaration to the clerk of the court, and the clerk will electronically file a scanned image and return the original to the filer.

The filer must keep an original affidavit or declaration of anyone other than the filer safe and available for inspection upon request until the action is concluded, including any appeal or until the time in which to appeal has expired.

~~(g) **Service by the court.** The court may serve papers by email on a party to the email address provided by the party or on an attorney to the email address on file with the Utah State Bar.~~

Advisory Committee Notes

~~Rule 5(d) is amended to give the trial court the option, either on an ad hoc basis or by local rule, of ordering that discovery papers, depositions, written interrogatories, document requests, requests for~~

~~admission, and answers and responses need not be filed unless required for specific use in the case. The committee is of the view that a local rule of the district courts on the subject should be encouraged.~~

The 1999 amendment to subdivision (b)(1)(B) does not authorize the court to conduct a hearing with less than 5 days notice, but rather specifies the manner of service of the notice when the court otherwise has that authority.

2001 amendments

Paragraph (b)(1)(A) has been changed to allow service by means other than U.S. Mail and hand delivery if consented to in writing by the person to be served, i.e. the attorney of the party. Electronic means include facsimile transmission, e-mail and other possible electronic means.

While it is not necessary to file the written consent with the court, it would be advisable to have the consent in the form of a stipulation suitable for filing and to file it with the court.

~~Paragraph (b)(1)(B) establishes when service by electronic means, if consented to in writing, is complete. The term "normal business hours" is intended to mean 8:00 a.m. to 5:00 p.m. Monday through Friday, excluding legal holidays. If a fax or e-mail is received after 5:00 p.m., the service is deemed complete on the next business day.~~

Tab 6

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 paper with a notarized, verified or acknowledged signature ~~and~~ is filed, the party ~~electronically files the paper, the signature shall be notarized pursuant to Utah Code Section 46-1-16~~ must comply with Rule 5(f).

(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.

Advisory Committee Notes

Tab 7

Rule 43. Evidence.

(a) Form. In all trials, the testimony of witnesses shall be taken ~~orally~~ in open court, unless otherwise provided by these rules, the Utah Rules of Evidence, or a statute of this state. ~~All evidence shall be admitted which is admissible under the Utah Rules of Evidence or other rules adopted by the Supreme Court.~~ For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

(b) Evidence on motions. When a motion is based on facts not ~~appearing of~~ in the record, the court may hear the matter on affidavits, ~~presented by the respective parties, but the court may direct that the matter be heard wholly or partly on~~ declarations, oral testimony or depositions.

Advisory Committee Note

Federal Rule of Civil Procedure 43 has permitted testimony by contemporaneous transmission since 1996. State court judges have been conducting telephone conferences for many decades. These range from simple scheduling conferences to resolution of discovery disputes to status conferences to pretrial conferences. These conferences tend not to involve testimony, although judges sometimes permit testimony by telephone or more recently by Skype with the consent of the parties. The 2015 amendments are part of a coordinated effort by the Supreme Court and the Judicial Council to authorize a convenient practice that is more frequently needed in an increasingly connected society and to bring a level of quality to that practice suitable for a court record.

This rule, which grants the judge the discretion to permit testimony by contemporaneous transmission, must be read in conjunction with Code of Judicial Administration Rule 4-106, which establishes the standards for contemporaneous transmission. That rule is drafted with the principles that all participants, whether in the courtroom or in another location, are able to see and hear each other; the public is able to see and hear all participants; a lawyer and client are able to communicate confidentially; and there is a verbatim record of the hearing. The technology will be digital cameras, high definition monitors and audio distributed through the courtroom public address system. Participants should not have to huddle around a speakerphone or laptop computer.

Rule 43 does not require the judge to permit remote testimony in any circumstance, even if all parties consent, but it does give the judge the authority to permit remote testimony, sometimes even in the face of a party's objection. There are due process limits to remote testimony, and these must be observed in all circumstances. But, absent a due process or other constitutional limit, a reviewing court will generally not find error if remote testimony is within the scope of the rule. See generally, *Constitutional and statutory validity of judicial videoconferencing,* 115 A.L.R.5th 509 (2004) and *Permissibility of testimony by telephone in state trial*, 85 A.L.R.4th 476 (1991).

Testimony by contemporaneous transmission is almost always a second-best option compared to testimony in the courtroom by a witness who is physically present. In that we agree with the 1996 comment to FRCP 43:

> The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.

But we disagree that "ordinarily depositions, including video depositions, provide a superior means of securing the testimony …." Live remote testimony—in which the parties have the opportunity for direct and cross examination and in which the demeanor of a witness is viewed first-hand by the trier of fact—seems far superior to reading or viewing a deposition. We concur instead with the opinion of *Bustillo v. Hilliard*, 16 Fed. Appx. 494 (7th Cir. 2001), in which an inmate was compelled to participate in the trial by videoconference. In the court's words:

> Bustillo participated in the trial; he testified, presented evidence, examined adverse witnesses, looked each juror in the eye, and so on. Jurors saw him (and he, them) in two dimensions rather than three. Nothing in the Constitution or the federal rules gives a prisoner an entitlement to that extra dimension, if for good reasons the district judge concludes that trial can be conducted without it.
>
> Id at 495.

Tab 8

Rule 63. Disability or disqualification of a judge.

(a) **Substitute judge; Prior testimony.** If the judge to whom an action has been assigned is unable to perform the duties required of the court under these rules, then any other judge of that district or any judge assigned pursuant to Judicial Council rule is authorized to perform those duties. The judge to whom the case is assigned may in the exercise of discretion rehear the evidence or some part of it.

(b) **Disqualification.**

(b)(1)(A) A party to any action or the party's attorney may file a motion to disqualify a judge. The motion shall be accompanied by a certificate that the motion is filed in good faith and shall be supported by an affidavit stating facts sufficient to show bias, prejudice or conflict of interest. The motion shall also be accompanied by a request to submit for decision.

(b)(1)(B) The motion shall be filed after commencement of the action, but not later than 21 days after the last of the following:

(b)(1)(B)(i) assignment of the action or hearing to the judge;

(b)(1)(B)(ii) appearance of the party or the party's attorney; or

(b)(1)(B)(iii) the date on which the moving party learns or with the exercise of reasonable diligence should have learned of the grounds upon which the motion is based.

If the last event occurs fewer than 21 days prior to a hearing, the motion shall be filed as soon as practicable.

(b)(1)(C) Signing the motion or affidavit constitutes a certificate under Rule 11 and subjects the party or attorney to the procedures and sanctions of Rule 11. No party may file more than one motion to disqualify in an action, unless the second or subsequent motion is based on circumstances that did not exist at the time of the earlier motion.

(b)(2) The judge against whom the motion and affidavit are directed shall, without further hearing or a response, enter an order granting the motion or certifying the motion and affidavit to a reviewing judge. The judge shall take no further action in the case until the motion is decided. If the judge grants the motion, the order shall direct the presiding judge of the court or, if the court has no presiding judge, the presiding officer of the Judicial Council to assign another judge to the action or hearing. The presiding judge of the court, any judge of the district, any judge of a court of like jurisdiction, or the presiding officer of the Judicial Council may serve as the reviewing judge.

(b)(3)(A) If the reviewing judge finds that the motion and affidavit are timely filed, filed in good faith and legally sufficient, the reviewing judge shall assign another judge to the action or hearing or request the presiding judge or the presiding officer of the Judicial Council to do so.

(b)(3)(B) In determining issues of fact or of law, the reviewing judge may consider any part of the record of the action and may request of the judge who is the subject of the motion ~~and affidavit~~ an affidavit ~~responsive~~ responding to questions posed by the reviewing judge.

(b)(3)(C) The reviewing judge may deny a motion not filed in a timely manner.