Agenda
Advisory Committee on Rules of Civil Procedure

March 28, 2012
4: 00 to 6:00 p.m.

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

Approval of minutes	Tab 1	Fran Wikstrom
HB 235, Offer of judgment in civil cases.	Tab 2	Rep. Ken Ivory
Rule 26.2(d).	Tab 3	Michael Zimmerman
Rule 83. Vexatious litigants.	Tab4	Tim Shea
FAQs	Tab 5	Judge Derek Pullan Frank Carney
Miscellaneous discovery adjustments: Rule 5, Rule 10, Rule 11, Rule 26, Rule 37.	Tab 6	Tim Shea
Rule 58A. Entry of judgment; abstract of judgment. URAP 4. Appeal as of right: when taken.	Tab 7	Tim Shea
SJR 15 amending URCP 26.	Tab 8	Tim Shea

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

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

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

Tab 1

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE OF THE RULES OF CIVIL PROCEDURE

February 22, 2012

PRESENT: Francis M. Wikstrom, Chair, Terrie T. McIntosh, Janet H. Smith, James T. Blanch, Francis J. Carney, Honorable Kate Toomey, Lori Woffinden, Robert J. Shelby, Trystan B. Smith, Professor David Moore, Honorable John L. Baxter, Lincoln L. Davies, Barbara L. Townsend, Jonathan O. Hafen, W. Cullen Battle

EXCUSED: David W. Scofield, Honorable David O. Nuffer, Honorable Todd M. Shaughnessy

PHONE: Honorable Derek P. Pullan, Honorable Lyle R. Anderson

STAFF: Timothy Shea, Diane Abegglen, Sammi Anderson

GUESTS: Bob Wilde

I. APPROVAL OF MINUTES.

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

II. PROPOSED RULE 26.3.

Bob Wilde presented to the committee a proposed Rule 26.3, focusing on employment law. The rule would cover employment cases that include a state law wrongful termination claim. The proposed rule essentially tracks a federal proposal with minor modifications. Mr. Wilde explained that disclosures under Rule 26.3 should in many respects preempt the necessity for a document request, at least as to preliminary matters, and is intended to ensure that discovery can begin in earnest immediately upon receipt of disclosures. The committee questioned whether the number of employment cases litigated in state court warrant the proposed specialty rule. Judge Pullan raised an additional concern about whether subsections (c)(2) or (c)(3) of the proposed 26.3 conflict with the sanctions and proportionality provisions contained in Rule 26. The committee agreed that the procedures called for in the specialty rules must not differ from the provisions in Rule 26 and the other rules. They need to be harmonized. Mr. Wikstrom also raised concerns about the potential for proposed Rule 26.3 superseding, rather than supplementing, Rule 26(a)(1). Jan Smith agreed to head up a subcommittee to discuss with Bob Wilde and the employment law section whether proposed Rule 26.3 can be brought into

conformity with the format of Rule 26 and specialty rules 26.1 and 26.2. Jon Hafen and Sammi Anderson agreed to serve on the subcommittee.

III. FREQUENTLY ASKED QUESTIONS.

Judge Pullan and Mr. Frank Carney have compiled a list of frequently asked questions about the simplified rules of discovery and have prepared proposed answers to many of these. The committee reviewed the first ten proposed questions and considered responses to each.

Question 1 – With regard to the effective date of the new rules, the committee voted in favor of the proposed response to Question 1.

Question 2 – With regard to the question of who will keep track of the standard discovery deadlines, the committee discussed the proposed response at length. Ms. McIntosh suggested that the burden be placed on both counsel and parties (in case of pro se matters). Mr. Carney suggested moving the last paragraph to the beginning, front loading the notion that the trial court is supposed to provide a reminder of deadlines. However, Judge Anderson expressed concern that the primary obligation remain on counsel and that the proposed response not create the misimpression that the court can be trusted and relied upon exclusively to shoulder this burden. Judge Toomey noted that not all cases are currently being handled in this fashion and that issues could arise if counsel's e-mail address is not current with the Utah State Bar. Judge Anderson expressed concern that parties could argue that their time had not run if they did not receive notice. Ms. Smith suggested amending the second paragraph to say "While the new rules contemplate increased judicial case management, the ultimate burden falls on counsel and the parties." Judge Toomey suggested inserting a section addressing what the court will actually do now. Mr. Carney agreed to revise the response.

Question 3 – Concerning the issue of what damages are considered in arriving at the damage amount for purposes of the tier level, Mr. Smith raised an issue he has encountered where the plaintiff is naming a minimum damage amount but then claiming some unspecified amount beyond that. It is therefore unclear what tier the plaintiff is pleading into. The committee discussed a hypothetical to put into a Q & A format to state that such a pleading would be defective. Mr. Smith agreed to prepare this. The committee otherwise unanimously voted in favor of the response to question 3.

Question 4 – With respect to the question of whether the tier designation is based on damages claimed by plaintiff only, or on damages claimed by all parties, the committee voted unanimously in favor of the proposed response.

Question 5 – As to the question of what happens if a party is not permitted to state an amount of damages in its pleading or simply wants to plead reasonable damages, Mr. Hafen moved to amend Rule 10 to require tier designation in the caption as

suggested in Mr. Shea's memorandum circulated in advance of the meeting. Otherwise, the pleading will be defective and the clerk will reject it. The complaint will be considered lodged for purposes of the statute of limitations, but if the defective pleading is not followed with a pleading that conforms to Rule 10 as amended, the case will be dismissed. The motion was seconded and approved by the committee unanimously. Mr. Hafen agreed to revise the response to Question No. 5 to conform to the proposed amendment to Rule 10.

Question 6 – With regard to whether interrogatories or other discovery may be served with a party's initial disclosures, the committee approved the proposed response to Question No. 6, subject to a minor formatting change suggested by Mr. Shelby.

Question 7 – Regarding clarification as to "that party" under Rule 26(c)(2), the committee suggested grammatical changes and revisions to make the language of the response gender neutral. The committee voted in favor of the response as amended.

Question 8 – Concerning the question of whether the new discovery rules place any limits on third-party subpoenas, Mr. Carney proposed amending the response to note that subpoenas are limited by concepts such as proportionality, relevance, etc. While subpoenas are not numerically limited, the parties must still abide by the other discovery rules.

Question 9 – As to whether co-defendants or third-party defendants with conflicts between them are required to share their standard discovery allotment, Judge Toomey suggested amending the last sentence of the response to state that conflicts may warrant a request for extraordinary discovery "at an appropriate time." The committee also suggested changing the words "significant conflicts" in the response to read "substantial controversy." The committee also changed the question in that respect. The question and response is now targeted to co-defendants or third-party defendants with "substantial controversies" between them. The committee voted in favor of the response as amended.

Question 10 – With respect to the question of what happens to the discovery deadlines if new parties are added, the committee proposed grammatical changes and revisions to make the response gender neutral. Mr. Wikstrom suggested adding "at the appropriate time" to the end of the last sentence. Mr. Blanch suggested removing the word "fact" as a modifier of discovery in the first and last paragraph. Mr. Carney proposed removing the word "sometime" from the second paragraph. The committee voted to approve as amended.

Mr. Wikstrom announced that the committee would start with Number 11 on the proposed list of Frequently Asked Questions at the next meeting.

IV. SMALL CLAIMS SUBCOMMITTEE.

Mr. Wikstrom noted that the Supreme Court has asked the committee to review some concerns about the rules governing small claims proceedings. Mr. Wikstrom asked Judge Baxter to chair the subcommittee and mentioned that Mr. Slaugh had served as a small claims court judge. Judge Baxter stated he would approach potential members and come back to the committee with the subcommittee's proposed composition. Mr. Shea briefly addressed the issues the Supreme Court would like the committee to review and consider, which include most immediately questions regarding service.

V. ISSUES IDENTIFIED DURING STATEWIDE WORKSHOPS.

Mr. Shea led a discussion regarding suggested revisions to the new simplified rules that were received from court clerks and judges during a series of workshops conducted by the Administrative Office of the Courts for judges and clerks.

First, court clerks want to be able to e-mail notices to the lawyers on the case. The committee discussed amending Rule 5 to permit courts to e-mail case notices to counsel. Significant discussion ensued regarding courtesy notices that are currently anticipated being sent by the courts regarding scheduling, as well as concerns that those notices may not be concise and/or accurate. The committee discussed the importance of language in the notice indicating that the dates included are an outside date, expressly disclaiming the parties' ability to conclusively rely upon the notice as to deadlines and stating that the actual due date may be earlier than stated in the notice such that counsel and parties need to consult the rules. The committee agreed to amend Rule 5 on this point and Mr. Shea agreed to bring proposed language back to the committee.

Second, it was suggested that the committee amend Rule 10 to require that all attorney contact information included on a pleading match the contact information on file with the Utah State Bar and to require coversheets for counter and cross claims. The coversheets should be used to designate a tier. The committee approved these amendments in concept and Mr. Shea will bring proposed language back to the committee on these revisions.

Third, the committee rejected proposals to default to Tier 1 if no tier is designated in the pleading. The committee also rejected a proposal to amend Rule 26 to state that in motions and stipulations for extraordinary discovery, the client, not the lawyer representing a party, has approved a discovery budget.

Last, the committee discussed a proposed amendment to Rule 26 to reinstate the exemption from disclosure requirements for contract cases with amounts in controversy under $20,000. Mr. Shea explained that the judges are primarily concerned about pro se defendants who may not understand the rules. Courts don't

want to see evidence excluded where a pro se defendants fails to produce with its initial disclosures, for example, a receipt in a debt collection case.

VI. RULE 58A. NOTICE OF JUDGMENT AND HOW IT AFFECTS APPEAL.

Mr. Wikstrom reintroduced the issue of service of notice of judgment and how that affects a party's ability to timely appeal the judgment; specifically, whether a party may be jurisdictionally time-barred from appealing a judgment where the prevailing party failed to serve notice of the entry of the judgment as required by the rules. Mr. Wikstrom stated that perhaps the best way to deal with the issue is by explicitly noting in Rule 60(b) that this may be a basis to set aside the judgment at the trial court level. The concern is that the 30 day window for appealing is generally considered jurisdictional. The committee discussed that the problem may not be solved through electronic filing or notices because the persons not getting notices are typically prisoners or pro se litigants. Mr. Wikstrom also suggested having the appeal time run not from the date of the judgment but from the certificate of service of notice of the judgment. This may require amendment to Appellate Rule 4. Mr. Carney suggested changing the definition of judgment in Rule 58A to change when the judgment is final and having that date triggered by service of the notice of judgment, as opposed to entry by the clerk. Mr. Carney also suggested amending Appellate Rule 4 to state that the appeal time runs not from the date of entry of the judgment, but from the date of service. Mr. Wikstrom proposed tweaking 58A to require service of the judgment but also filing a Notice of Service and proposing a change to Appellate Rule 4 to have the appeal deadline run from the time of service of notice of the judgment.

Mr. Shea summarized the various possibilities to resolve the issue, including amending Rule 60(b), amending the rules to have the 30 day appeal time triggered by the filing of a Notice of Service or creating a 60(b) like process where a party can plead its case to the court as to excusable neglect for failing to meet the appeal deadline. The committee decided to pursue the second alternative and Mr. Shea agreed to return to the committee with some proposed language at the next meeting.

VII. HB 235 – OFFER OF JUDGMENT.

The committee discussed generally the history of proposed amendments affecting the rule governing offers of judgment rule while waiting for Representative Ivory to join the meeting to explain his proposed HB 235. The committee discontinued discussions when Representative Ivory did not join the meeting as previously planned.

VIII. ADJOURNMENT.

The meeting adjourned at 6:04 p.m. The next meeting will be held on March 28, 2012 at 4:00 p.m. at the Administrative Office of the Courts.

Tab 2

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

OFFER OF JUDGMENT IN CIVIL CASES

2012 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Ken Ivory

Senate Sponsor: Aaron Osmond

LONG TITLE

General Description:

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

Highlighted Provisions:

This bill:

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

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

ENACTS:

78B-5-829, Utah Code Annotated 1953

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

H.B. 235

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) the principal amount of the judgment; and

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

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

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

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

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

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

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

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

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

Office of Legislative Research and General Counsel

H.B. 235
OFFER OF JUDGMENT IN CIVIL CASES

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

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

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

This bill:

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

2. *Page 2, Line 30:*

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

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

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

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

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

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

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

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

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

{~~(15)~~} **(16)** No combination of offerees that jointly claim or defend under the same common theory of liability concerning jointly owned property is a group as that term is used in Subsection {~~(14)~~} **(15)** and this Subsection {~~(15)~~} **(16)** . When two or more offerees jointly

claim or defend

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

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

8. *Page 4, Line 91:*

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

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

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

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

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

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

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

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

{~~(25)~~} (26) The fact that an offer is made but not accepted does not preclude a subsequent offer. The service of a subsequent offer does not operate to revoke a prior offer. A party may not be subject to the sanctions of Subsections {~~(28)~~} (29) through {~~(33)~~} (34) for the rejection of a prior offer

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

{~~(27)~~} (28) For apportioned offers to multiple offerees that are conditioned upon the acceptance by all parties to whom the offer was directed, each offeree may serve a separate acceptance of the offer, but if the offer is not accepted by all offerees, no judgment or order of dismissal may be entered pursuant to Subsections {~~(16)~~} (17) through {~~(21)~~} (22) and the

action shall

proceed as to all. Any offeree who fails to accept the offer shall be subject to the sanctions in Subsections {~~(28)~~} (29) through {~~(33)~~} (34) .

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

14. Page 6, Line 167:

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

Renumber all remaining Subsections accordingly

Tab 3

ZJB Zimmerman Jones Booher LLC
Appellate Lawyers

Michael D. Zimmerman
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March 5, 2012

VIA EMAIL

Francis M. Wikstrom
Parsons Behle & Latimer
201 South Main Street, Suite 1800
Salt Lake City, UT 84111

Dear Fran:

As you may know, I have been retained by State Farm Mutual Automobile Insurance Company ("State Farm") to follow changes in the Utah Rules of Civil Procedure. Following the effective date of the recent amendments your Rules Committee proposed, which the Utah Supreme Court adopted, my client noted a change apparently made after the rules went out for public comment that has created some concern. It appears to us that the addition of rule 26.2(d) to the Utah Rules of Civil Procedure, apparently intended to protect Social Security numbers and MHI claim numbers from disclosure, creates a number of unintended results, overlooks existing protections of personal information, conflicts with certain existing Utah administrative rules, and poses serious concerns as to its practical effect, as detailed below. We think that the intended purpose can be served and the unintended consequences avoided by the addition of a simple exception. Let me explain.

As I am sure you are aware, rule 26.2 controls initial disclosures specific to personal injury actions. The rule is intended to require automatic disclosure of certain information that the Rules Committee concluded is especially relevant in all personal injury actions, over and above the usual mandatory initial disclosures of rule 26(a). However, rule 26.2(d) contains a specific restriction on the use of "non-public information disclosed under [rule 26.2]." In full, subpart (d) provides: "All non-public information disclosed under this rule shall be used only for purposes of the action, unless otherwise ordered by the court." (Emphasis added.) Rule 26.2 does not define either "non-public information" or "for purposes of the action." We have reviewed the Rules Committee minutes related to the adoption of this exception. It appears that it was added following public comment raising concerns about the protection of Social Security numbers and Medicare Health Insurance claim numbers that are required to be disclosed under rule 26.2(b)(3). Subpart (d) was intended to keep this information non-public. However, the language used is less clear than it might be, leading to likely unintended consequences.

For instance, rule 26.2(d) prohibits the disclosure of non-public information other than "for purposes of the action." The advisory committee notes state that a driving purpose behind rule 26.2(b)(3)'s requiring the disclosure of Social Security numbers and Medicare Health Insurance information, which the Rules Committee must have considered to be "non-public" information, is to "facilitate compliance with the requirement for insurers under 42 U.S.C. § 1395y(b)(8)(c)." Yet while insurers do have specific obligations under the cited federal law, it is not at all apparent that using non-public information disclosed through rule 26.2 to meet those requirements would constitute use "for purposes of the action." Therefore, the advisory committee notes state that the rule contemplates a use of the information which it seems fairly clear is not "for the purposes of the action." It appears that subpart (d) prohibits precisely what the rule is said to facilitate.

Another apparently unintended consequence of subpart (d)'s "for purposes of the action" language is that it may more generally preclude insurers from using non-public information in ways that are otherwise permitted by law or administrative rule. This problem is potentially severe. Insurers are authorized by law and regulation to use non-public personal information for specified insurance functions, such as claim and policyholder servicing efforts, internal auditing functions, ratemaking, underwriting and pricing, fraud investigations, supporting reinsurance claims, and actuarial, scientific, medical and public policy research. By limiting the use of information to the "purposes of this action", the rule would appear to conflict or even override other applicable laws and regulations governing insurance in Utah.

I do not know whether the Rules Committee was aware that the administrative agency rules governing insurers in Utah specifically authorize uses of what may be "non-public" information without regard to whether there is ongoing litigation in which the information may have been disclosed. Yet it appears that rule 26.2(d) would preclude just that use. See, e.g., Utah Admin. R. 590-206-17. These administrative rules reflect what we see as a careful balance among competing interests, including, on the one hand, the privacy interest in personal information that drove the addition of subpart (d) to rule 26.2, and, on the other, the benefits to consumers of lower insurance premiums and more efficient and timely claim handling, and the public's interest in reducing insurance and medical fraud, including Medicare fraud. Insurers doing business in Utah have developed business operations that allow them to efficiently and securely handle tens of thousands of claims and the data associated with them. An example is electronic recording keeping, which is becoming the norm in the industry. We believe an argument may be raised that subpart (d) operates to restrict that claims handling process. To the extent that this argument is successful, it would have serious adverse impacts on the claims handling process, a process that is already designed to comply with applicable privacy laws and to maintain securely private information.

Also, we note that in the context of third-party litigation involving an insured defendant, it is not clear from the language now in subpart (d) that the non–public information provided under rule 26.2 could be passed along to the insurer by counsel retained to defend the insured so

that the insurer can use it for purposes of participating in settlement negotiations or evaluating settlement proposals. If the information cannot be so used, it would impede insurers' legitimate participation in litigation, including settlement of that litigation, something contrary to the efficiency goals of these new rule amendments.

We certainly have no problem with protecting against public disclosure of Social Security numbers and MHI claim numbers, as the Rules Committee intended. But the vagaries of subpart (d) create what appear to us to be unintended problems for insurers, including significant legal concerns. To address these uncertainties, we would propose that the Rules Committee modify rule 26.2(d) to make clear that it does not prevent the use of information disclosed by reason of rule 26.2 where that use is otherwise permissible under law. To that end, we would suggest adding the following underlined language to rule 26.2(d). "All non-public information disclosed under this rule shall be used or disclosed only for the purposes of the action, unless otherwise permitted by law or court order."

I look forward to the opportunity to discuss this proposal with you or the Rules Committee. Please feel free to contact me with any questions or concerns.

Regards,

Michael D. Zimmerman

4829-1676-0590, v. 1

Tab 4

Administrative Office of the Courts

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

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

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: March 20, 2012
Re: Rule 83

The Supreme Court has requested that the committee consider these further changes to Rule 83. The Board of District Court Judges recommends that they be adopted. The rule is ready for your final recommendations to the Supreme Court.

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

Rule 83. Vexatious litigants.

(a) Definitions.

(a)(1) The court may find a person to be a "vexatious litigant" if the person, including an attorney acting pro se, without legal representation, does any of the following:

(a)(1)(A) In the immediately preceding seven years, the person has filed at least five claims for relief, other than small claims actions, that have been finally determined against the person, and the person does not have within that time an equal or greater number of claims, other than small claims, that have been finally determined in that person's favor.

(a)(1)(B) After a claim for relief or an issue of fact or law in the claim has been finally determined, the person two or more additional times re-litigates or attempts to re-litigate the claim, the issue of fact or law, or the validity of the determination against the same party in whose favor the claim or issue was determined.

(a)(1)(C) In any action, the person three or more times does any one or any combination of the following:

(a)(1)(C)(i) files unmeritorious pleadings or other papers,

(a)(1)(C)(ii) files pleadings or other papers that contain redundant, immaterial, impertinent or scandalous matter,

(a)(1)(C)(iii) conducts unnecessary discovery or discovery that is not proportional to what is at stake in the litigation, or

(a)(1)(C)(iv) engages in tactics that are frivolous or solely for the purpose of harassment or delay.

(a)(1)(D) The person purports to represent or to use the procedures of a court other than a court of the United States, a court created by the Constitution of the United States or by Congress under the authority of the Constitution of the United States, a tribal court recognized by the United States, a court created by a state or territory of the United States, or a court created by a foreign nation recognized by the United States.

~~(a)(1)(E) The person has been found to be a vexatious litigant within the preceding seven years.~~

(a)(2) "Claim" and "claim for relief" mean a petition, complaint, counterclaim, cross claim or third-party complaint.

(b) Vexatious litigant orders. The court may, on its own motion or on the motion of any party, enter an order requiring a vexatious litigant to:

(b)(1) furnish security to assure payment of the moving party's reasonable expenses, costs and, if authorized, attorney fees incurred in a pending action;

(b)(2) obtain legal counsel before proceeding in a pending action;

(b)(3) obtain legal counsel before filing any future claim for relief;

(b)(4) abide by a prefiling order requiring the vexatious litigant to obtain leave of the court before filing any paper, pleading, or motion in a pending action;

(b)(5) abide by a prefiling order requiring the vexatious litigant to obtain leave of the court before filing any future claim for relief; or

(b)(6) take any other action reasonably necessary to curb the vexatious litigant's abusive conduct.

(c) Necessary findings and security.

(c)(1) Before entering an order under subparagraph (b), the court must find by clear and convincing evidence that:

(c)(1)(A) the party subject to the order is a vexatious litigant; and

(c)(1)(B) there is no reasonable probability that the vexatious litigant will prevail on the claim.

(c)(2) A preliminary finding that there is no reasonable probability that the vexatious litigant will prevail is not a decision on the ultimate merits of the vexatious litigant's claim.

(c)(3) The court shall identify the amount of the security and the time within which it is to be furnished. If the security is not furnished as ordered, the court shall dismiss the vexatious litigant's claim with prejudice.

(d) Prefiling orders in a pending action.

(d)(1) If a vexatious litigant is subject to a prefiling order in a pending action requiring leave of the court to file any paper, pleading, or motion, the vexatious litigant shall submit any proposed paper, pleading, or motion to the judge assigned to the case and must:

(d)(1)(A) demonstrate that the paper, pleading, or motion is based on a good faith dispute of the facts;

(d)(1)(B) demonstrate that the paper, pleading, or motion is warranted under existing law or a good faith argument for the extension, modification, or reversal of existing law;

(d)(1)(C) include an oath, affirmation or declaration under criminal penalty that the proposed paper, pleading or motion is not filed for the purpose of harassment or delay and contains no redundant, immaterial, impertinent or scandalous matter;

(d)(2) A prefiling order in a pending action shall be effective until a final determination of the action on appeal, unless otherwise ordered by the court.

(d)(3) After a prefiling order has been effective in a pending action for one year, the person subject to the prefiling order may move to have the order vacated. The motion shall be decided by the judge to whom the pending action is assigned. In granting the motion, the judge may impose any other vexatious litigant orders permitted in paragraph (b).

(d)(4) All papers, pleadings, and motions filed by a vexatious litigant subject to a prefiling order under this paragraph (d) shall include a judicial order authorizing the filing and any required security. If the order or security is not included, the clerk or court shall reject the paper, pleading, or motion.

(e) Prefiling orders as to future claims.

(e)(1) A vexatious litigant subject to a prefiling order restricting the filing of future claims shall, before filing, obtain an order authorizing the vexatious litigant to file the claim. The presiding judge of the judicial district in which the claim is to be filed shall decide the application. In granting an application, the presiding judge may impose in

the pending action any of the vexatious litigant orders permitted under paragraph (b).

(e)(2) To obtain an order under paragraph (e)(1), the vexatious litigant's application must:

(e)(2)(A) demonstrate that the claim is based on a good faith dispute of the facts;

(e)(2)(B) demonstrate that the claim is warranted under existing law or a good faith argument for the extension, modification, or reversal of existing law;

(e)(2)(C) include an oath, affirmation, or declaration under criminal penalty that the proposed claim is not filed for the purpose of harassment or delay and contains no redundant, immaterial, impertinent or scandalous matter;

(e)(2)(D) include a copy of the proposed petition, complaint, counterclaim, cross-claim, or third party complaint; and

(e)(2)(E) include the court name and case number of all claims that the applicant has filed against each party within the preceding seven years and the disposition of each claim.

(e)(3) A prefiling order limiting the filing of future claims is effective indefinitely unless the court orders a shorter period.

(e)(4) After five years a person subject to a pre-filing order limiting the filing of future claims may file a motion to vacate the order. The motion shall be filed in the same judicial district from which the order entered and be decided by the presiding judge of that district.

(e)(5) A claim filed by a vexatious litigant subject to a prefiling order under this paragraph (e) shall include an order authorizing the filing and any required security. If the order or security is not included, the clerk of court shall reject the filing.

(f) Notice of vexatious litigant orders.

(f)(1) The clerks of court shall notify the Judicial Council that a pre-filing order has been entered or vacated.

(f)(2) The Judicial Council shall disseminate to the clerks of court a list of vexatious litigants subject to a prefiling order.

(g) Statute of limitations or time for filing tolled. Any applicable statute of limitations or time in which the person is required to take any action is tolled until 7 days after notice of the decision on the motion or application for authorization to file.

(h) Contempt sanctions. Disobedience by a vexatious litigant of a pre-filing order may be punished as contempt of court.

(i) Other authority. This rule does not affect the authority of the court under other statutes and rules or the inherent authority of the court.

Tab 5

FAQs

(1) Monitoring discovery deadlines.

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

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

Answer: Counsel and unrepresented parties must track discovery deadlines. Failure to act timely under the new rules is not without consequence. See, for example:

- URCP 26(d)(4) (party who fails to disclose or supplement disclosures timely cannot use the undisclosed witness, document, or material at any hearing or trial unless the failure is harmless or the party shows good cause for the failure).
- URCP 26(c)(6) (party who fails to file a timely motion or stipulation for extraordinary discovery cannot obtain discovery beyond standard discovery limits).
- URCP 26(a)(4)(C)(i)(ii) (if a party fails to elect timely an expert deposition or written report, no further discovery of the expert is permitted).

The new rules contemplate increased judicial case management. The Administrative Office of the Courts is creating a notice of presumptive deadlines to be sent to the parties in each case. The notice assumes no extensions of time for extraordinary discovery or otherwise, and therefore may not be accurate. Judges will track discovery deadlines and use existing procedures to deal with cases which have no activity after discovery deadlines expire. These procedures include, but are not limited to, scheduling conferences, final pretrial conferences, and orders to show cause for dismissal. However, notwithstanding these judicial efforts, the parties themselves bear the ultimate responsibility to track and meet deadlines imposed under the new rules.

(2) Designating a tier without specified damages.

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

Answer: "A party who claims damages but does not plead an amount shall plead that their damages are such as to qualify for a specified tier defined by Rule 26(c)(3)." URCP 8(a).

Jon will redraft

(3) Effect of not designating a discovery tier

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

Answer: Parties should anticipate the value of all their claims for relief and damage calculations, and plead in to the appropriate tier. In the above example, if a party claims economic and non-economic damages and seeks an award of $50,000 or more, she should designate an appropriate tier or specify the damages sought for economic and non-economic damages.

(4) Third-party subpoenas.

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

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

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

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

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

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

> Already Published:
>
> **Definition of “damages” for designation of a discovery tier.**
>
> **Question:** What damages are considered in arriving at the damage amount for purposes of the tier level? For example, what if a party pleads $40,000.00 in compensatory damages and then for such punitive damages as are reasonable? Assuming a tier 1 case, would the jury be limited to awarding $10,000.00 in punitive damages? Do prejudgment interest and attorney's fees count toward the damage amount?
>
> **Answer:** "For purposes of determining standard discovery, the amount of damages includes the total of all monetary damages sought (without duplication for alternative theories) by all parties in all claims for relief in the original pleadings." URCP 26(c)(4). "A party who claims damages but does not plead an amount shall plead that their damages are such as to qualify for a specified tier defined by Rule 26(c)(3)." URCP 8(a).

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

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

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

Answer: "For purposes of determining standard discovery, the amount of damages includes the total of all monetary damages sought (without duplication for alternative theories) by all parties in all claims for relief in the original pleadings." URCP 26(c)(4).

(6) Length of Depositions.

Question:

Answer: Rule 30(d): "(d) Limits. During standard discovery, oral questioning of a nonparty shall not exceed four hours, and oral questioning of a party shall not exceed seven hours." The Committee Note to Rule 26 says that "deposition hours are charged to a side for the time spent asking questions of the witness. In a particular deposition, one side may use two hours while the other side uses only 30 minutes." Does this mean that a deposition of a nonparty, such as a treating physician, could take eight hours? (Four hours by defense counsel, and four hours by plaintiff's counsel.) Or is it only four hours total?

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

(7) Reaching the limits of standard discovery.

Question: What does "reaching the limits of standard discovery" mean?

Rule 29 says that the parties may stipulate for additional discovery "before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules." Suppose I am in a tier 3 case, and have used up all of my deposition time, but not my interrogatories or my requests for production. Does this really mean I have to use those up as well before I can stipulate or move for additional discovery? I guess that it means "discovery of the same type for which I want more;" in other words, I shouldn't be asking for more interrogatories until I have used up all those available to me. Am I right?

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

(8) Extraordinary discovery order.

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

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

(9) Expert discovery—Stipulations.

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

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

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

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

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

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

(11) Expert discovery—Designating experts.

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

Can an expert be designated early; i.e., before the close of standard discovery? If so, what happens with the other side's deadlines?

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

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

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

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

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

(13) Expert discovery—Rebuttal experts.

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

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

Within seven days thereafter, the defendant needs to serve an election of either a deposition or report. These depositions or reports are to be completed within 28 days. Then, within seven days of getting the report or taking the deposition, defendant must designate its own contravening experts.

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

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

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

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

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

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

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

Answer:

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

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

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

(16) Expert discovery—Length of expert depositions.

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

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

(17) Expert discovery—Discovery between aligned parties.

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

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

(18) Judgment exceeding tier limits.

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

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

Question: What if a jury awards in excess of the tier limits? May a motion to amend to conform to the evidence be made at that point? What if without being asked to do so, a jury awards over the tier limit, say $75,000 on a Tier 1 claim? May the plaintiff move under Rule 15(b) to amend to conform to the evidence?

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

case into tier 1, prevent the defense from conducting the discovery befitting a larger claim, and then recover an amount in excess of the tier limit.

(19) Partial motions to dismiss and deadlines.

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

Answer: No. As under the rules applicable to cases filed before November 1, 2011, there is no automatic stay unless a motion to dismiss is filed as to all claims for relief. As the Committee Note states, "the time periods for making Rule 26(a)(1) disclosures, and the presumptive deadlines for completing fact discovery, are keyed to the filing of an answer. If a defendant files a motion to dismiss or other Rule 12(b) motion in lieu of an answer, these time periods normally would be not begin to run until that motion is resolved."

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

(20) Discovery tier limits and the jury.

Question: Is the jury told about the tier limits?

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

(21) Subpoena for medical examiner reports.

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

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

(22) Special practice rules.

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

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

(23) Special practice rules—Wrongful death claims.

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

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

(24) Special practice rules—Effective date.

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

Answer:

(25) Special practice rules—Divorce modification.

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

Answer:

Tab 6

Administrative Office of the Courts

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

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

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: March 20, 2012
Re: Miscellaneous rule amendments

Rule 5. Requires a certificate of service appended to each document that has to be served. (The committee has already approved this amendment.) Permits the court to serve documents by email. (The committee agreed with this concept at the February meeting.)

Rule 10. Requires designation of the discovery tier category in the caption of a claim. Requires a court-approved coversheet for counterclaims and cross claims as well as complaints. Requires that a lawyer's contact information on a paper be the same as on file with the Utah State Bar. (The committee agreed with these concepts at the February meeting.)

Rule 11. Deletes a provision that conflicts with Rule 26(e). The effect will be that the signature on disclosures, discovery requests and discovery responses is a certification under Rule 11. (The committee has already approved this amendment.)

Rule 26. Adds to the required initial disclosures any documents, etc. supporting the party's claims or defenses, even if not intended for use in the party's case-in-chief. (There has been some email traffic on this idea, but the committee has not yet discussed it.)

Rule 37. Allows the court to enter sanctions if a motion for a protective order or motion to compel is denied. (The committee has already approved this amendment.) Permits a party to seek an order protecting the party from disclosure. (A committee member suggested this possibility some time ago, but the committee has not yet discussed it.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Advisory Committee Notes

Rule 10. Form of pleadings and other papers.

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

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

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

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

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

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

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

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

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

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

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

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

(i) **Electronic papers.**

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

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

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

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

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

Advisory Committee Notes

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

(a) **Signature.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Advisory Committee Notes

Rule 26. General provisions governing disclosure and discovery.

(a) **Disclosure.** This rule applies unless changed or supplemented by a rule governing disclosure and discovery in a practice area.

(a)(1) **Initial disclosures.** Except in cases exempt under paragraph (a)(3), a party shall, without waiting for a discovery request, provide to other parties:

(a)(1)(A) the name and, if known, the address and telephone number of:

(a)(1)(A)(i) each individual likely to have discoverable information supporting its claims or defenses, unless solely for impeachment, identifying the subjects of the information; and

(a)(1)(A)(ii) each fact witness the party may call in its case-in-chief and, except for an adverse party, a summary of the expected testimony;

(a)(1)(B) a copy of all documents, data compilations, electronically stored information, and tangible things in the possession or control of the party that the party may offer in its case-in-chief, or otherwise supporting its claims or defenses, except charts, summaries and demonstrative exhibits that have not yet been prepared and must be disclosed in accordance with paragraph (a)(5);

(a)(1)(C) a computation of any damages claimed and a copy of all discoverable documents or evidentiary material on which such computation is based, including materials about the nature and extent of injuries suffered;

(a)(1)(D) a copy of any agreement under which any person may be liable to satisfy part or all of a judgment or to indemnify or reimburse for payments made to satisfy the judgment; and

(a)(1)(E) a copy of all documents to which a party refers in its pleadings.

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

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

(a)(2)(B) by the defendant within 28 days after the plaintiff's first disclosure or after that defendant's appearance, whichever is later.

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

(a)(3)(A) Unless otherwise ordered by the court or agreed to by the parties, the requirements of paragraph (a)(1) do not apply to actions:

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

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

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

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

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

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

(a)(4)(A) **Disclosure of expert testimony.** A party shall, without waiting for a discovery request, provide to the other parties the following information regarding any person who may be used at trial to present evidence under Rules 702 of the Utah Rules of Evidence and who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony: (i) the expert's name and qualifications, including a list of all publications authored within the preceding 10 years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years, (ii) a brief summary of the opinions to which the witness is expected to testify, (iii) all data and other information that will be relied upon by the witness in forming those opinions, and (iv) the compensation to be paid for the witness's study and testimony.

(a)(4)(B) **Limits on expert discovery.** Further discovery may be obtained from an expert witness either by deposition or by written report. A deposition shall not exceed four hours and the party taking the deposition shall pay the expert's reasonable hourly fees for attendance at the deposition. A report shall be signed by the expert and shall contain a complete statement of all opinions the expert will offer at trial and the basis and reasons for them. Such an expert may not testify in a party's case-in-chief concerning any matter not fairly disclosed in the report. The party offering the expert shall pay the costs for the report.

(a)(4)(C) **Timing for expert discovery.**

(a)(4)(C)(i) The party who bears the burden of proof on the issue for which expert testimony is offered shall provide the information required by paragraph (a)(4)(A) within seven days after the close of fact discovery. Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be provided, within 28 days after the election is made. If no election is made, then no further discovery of the expert shall be permitted.

(a)(4)(C)(ii) The party who does not bear the burden of proof on the issue for which expert testimony is offered shall provide the information required by paragraph (a)(4)(A) within seven days after the later of (i) the date on which the election under paragraph (a)(4)(C)(i) is due, or (ii) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(i). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be provided, within 28 days after the election is made. If no election is made, then no further discovery of the expert shall be permitted.

(a)(4)(D) **Multiparty actions.** In multiparty actions, all parties opposing the expert must agree on either a report or a deposition. If all parties opposing the expert do not agree, then further discovery of the expert may be obtained only by deposition pursuant to paragraph (a)(4)(B) and Rule 30.

(a)(4)(E) **Summary of non-retained expert testimony.** If a party intends to present evidence at trial under Rules 702 of the Utah Rules of Evidence from any person other than an expert witness who is retained or specially employed to provide testimony in the case or a person whose duties as an employee of the party regularly involve giving expert testimony, that party must provide a written

summary of the facts and opinions to which the witness is expected to testify in accordance with the deadlines set forth in paragraph (a)(4)(C). A deposition of such a witness may not exceed four hours.

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

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

(a)(5)(A)(i) the name and, if not previously provided, the address and telephone number of each witness, unless solely for impeachment, separately identifying witnesses the party will call and witnesses the party may call;

(a)(5)(A)(ii) the name of witnesses whose testimony is expected to be presented by transcript of a deposition and a copy of the transcript with the proposed testimony designated; and

(a)(5)(A)(iii) a copy of each exhibit, including charts, summaries and demonstrative exhibits, unless solely for impeachment, separately identifying those which the party will offer and those which the party may offer.

(a)(5)(B) Disclosure required by paragraph (a)(5) shall be made at least 28 days before trial. At least 14 days before trial, a party shall serve and file counter designations of deposition testimony, objections and grounds for the objections to the use of a deposition and to the admissibility of exhibits. Other than objections under Rules 402 and 403 of the Utah Rules of Evidence, objections not listed are waived unless excused by the court for good cause.

(b) **Discovery scope.**

(b)(1) **In general.** Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below.

(b)(2) **Proportionality.** Discovery and discovery requests are proportional if:

(b)(2)(A) the discovery is reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues;

(b)(2)(B) the likely benefits of the proposed discovery outweigh the burden or expense;

(b)(2)(C) the discovery is consistent with the overall case management and will further the just, speedy and inexpensive determination of the case;

(b)(2)(D) the discovery is not unreasonably cumulative or duplicative;

(b)(2)(E) the information cannot be obtained from another source that is more convenient, less burdensome or less expensive; and

(b)(2)(F) the party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties' relative access to the information.

(b)(3) **Burden.** The party seeking discovery always has the burden of showing proportionality and relevance. To ensure proportionality, the court may enter orders under Rule 37.

(b)(4) **Electronically stored information.** A party claiming that electronically stored information is not reasonably accessible because of undue burden or cost shall describe the source of the electronically stored information, the nature and extent of the burden, the nature of the information not provided, and any other information that will enable other parties to evaluate the claim.

(b)(5) **Trial preparation materials.** A party may obtain otherwise discoverable documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain substantially equivalent materials by other means. In ordering discovery of such materials, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

(b)(6) **Statement previously made about the action.** A party may obtain without the showing required in paragraph (b)(5) a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party

may obtain without the required showing a statement about the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order under Rule 37. A statement previously made is (A) a written statement signed or approved by the person making it, or (B) a stenographic, mechanical, electronic, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(b)(7) **Trial preparation; experts.**

(b)(7)(A) **Trial-preparation protection for draft reports or disclosures.** Paragraph (b)(5) protects drafts of any report or disclosure required under paragraph (a)(4), regardless of the form in which the draft is recorded.

(b)(7)(B) **Trial-preparation protection for communications between a party's attorney and expert witnesses.** Paragraph (b)(5) protects communications between the party's attorney and any witness required to provide disclosures under paragraph (a)(4), regardless of the form of the communications, except to the extent that the communications:

(b)(7)(B)(i) relate to compensation for the expert's study or testimony;

(b)(7)(B)(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(b)(7)(B)(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(b)(7)(C) **Expert employed only for trial preparation.** Ordinarily, a party may not, by interrogatories or otherwise, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. A party may do so only:

(b)(7)(C)(i) as provided in Rule 35(b); or

(b)(7)(C)(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(b)(8) **Claims of privilege or protection of trial preparation materials.**

(b)(8)(A) **Information withheld.** If a party withholds discoverable information by claiming that it is privileged or prepared in anticipation of litigation or for trial, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced in a manner that, without revealing the information itself, will enable other parties to evaluate the claim.

(b)(8)(B) **Information produced.** If a party produces information that the party claims is privileged or prepared in anticipation of litigation or for trial, the producing party may notify any receiving party of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

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

(c)(1) **Methods of discovery.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; requests for admission; and subpoenas other than for a court hearing or trial.

(c)(2) **Sequence and timing of discovery.** Methods of discovery may be used in any sequence, and the fact that a party is conducting discovery shall not delay any other party's discovery. Except for cases exempt under paragraph (a)(3), a party may not seek discovery from any source before that party’s initial disclosure obligations are satisfied.

(c)(3) **Definition of tiers for standard discovery.** Actions claiming $50,000 or less in damages are permitted standard discovery as described for Tier 1. Actions

claiming more than $50,000 and less than $300,000 in damages are permitted standard discovery as described for Tier 2. Actions claiming $300,000 or more in damages are permitted standard discovery as described for Tier 3. Absent an accompanying damage claim for more than $300,000, actions claiming non-monetary relief are permitted standard discovery as described for Tier 2.

(c)(4) **Definition of damages.** For purposes of determining standard discovery, the amount of damages includes the total of all monetary damages sought (without duplication for alternative theories) by all parties in all claims for relief in the original pleadings.

(c)(5) **Limits on standard fact discovery.** Standard fact discovery per side (plaintiffs collectively, defendants collectively, and third-party defendants collectively) in each tier is as follows. The days to complete standard fact discovery are calculated from the date the first defendant's first disclosure is due and do not include expert discovery under paragraphs(a)(4)(C) and (D).

Tier	Amount of Damages	Total Fact Deposition Hours	Rule 33 Interrogatories including all discrete subparts	Rule 34 Requests for Production	Rule 36 Requests for Admission	Days to Complete Standard Fact Discovery
1	$50,000 or less	3	0	5	5	120
2	More than $50,000 and less than $300,000 or non-monetary relief	15	10	10	10	180
3	$300,000 or more	30	20	20	20	210

(c)(6) **Extraordinary discovery.** To obtain discovery beyond the limits established in paragraph (c)(5), a party shall file:

(c)(6)(A) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a stipulated statement that extraordinary discovery is necessary and proportional under paragraph (b)(2) and that each party has reviewed and approved a discovery budget; or

(c)(6)(B) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a motion for extraordinary discovery setting forth the reasons why the extraordinary discovery is necessary and proportional under paragraph (b)(2) and certifying that the party has reviewed and approved a discovery budget and certifying that the party has in good faith conferred or attempted to confer with the other party in an effort to achieve a stipulation.

(d) **Requirements for disclosure or response; disclosure or response by an organization; failure to disclose; initial and supplemental disclosures and responses.**

(d)(1) A party shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(d)(2) If the party providing disclosure or responding to discovery is a corporation, partnership, association, or governmental agency, the party shall act through one or more officers, directors, managing agents, or other persons, who shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(d)(3) A party is not excused from making disclosures or responses because the party has not completed investigating the case or because the party challenges the sufficiency of another party's disclosures or responses or because another party has not made disclosures or responses.

(d)(4) If a party fails to disclose or to supplement timely a disclosure or response to discovery, that party may not use the undisclosed witness, document or material

at any hearing or trial unless the failure is harmless or the party shows good cause for the failure.

(d)(5) If a party learns that a disclosure or response is incomplete or incorrect in some important way, the party must timely provide the additional or correct information if it has not been made known to the other parties. The supplemental disclosure or response must state why the additional or correct information was not previously provided.

(e) **Signing discovery requests, responses, and objections.** Every disclosure, request for discovery, response to a request for discovery and objection to a request for discovery shall be in writing and signed by at least one attorney of record or by the party if the party is not represented. The signature of the attorney or party is a certification under Rule 11. If a request or response is not signed, the receiving party does not need to take any action with respect to it. If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, may take any action authorized by Rule 11 or Rule 37(e).

(f) **Filing.** Except as required by these rules or ordered by the court, a party shall not file with the court a disclosure, a request for discovery or a response to a request for discovery, but shall file only the certificate of service stating that the disclosure, request for discovery or response has been served on the other parties and the date of service.

Advisory Committee Notes

Rule 37. Discovery and disclosure motions; Sanctions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Advisory Committee Notes

Tab 7

Administrative Office of the Courts

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

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

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: March 20, 2012
Re: How should notice of judgment affect the appeal?

At its last meeting the committee considered three models to address the issue of an appellant losing the opportunity to appeal because notice of the judgment was not timely served as required by Rule 58A(d):

- Amend URCP 60 to allow the appellant to request that the court change the judgment's effective date.
- Start the time to appeal from the date that proof of service of notice of the judgment is filed with the court.
- Create a process by which the appellant can ask the court to extend the time to appeal beyond the time now permitted by URAP 4(e).

The committee selected the second option, and I have drafted amendments to URCP 58A(d) and URAP 4(a) and (b) for you to consider. If approved, the changes to URAP 4 would have to be presented to the appellate rules advisory committee and jointly presented to the supreme court.

In drafting the amendments to URAP 4(a) and (b), I noticed that paragraph (f) already provides a process by which a criminal defendant can ask the trial court to extend the time in which to appeal. The fact that a process already exists in criminal cases was not mentioned in our earlier discussions, so I have assumed that the committee was not aware of it. If you would like to consider that model further, I have also drafted amendments to paragraph (f) that would apply that process to civil cases.

Depending on which course the committee recommends, the amendments to paragraphs (a) and (b) or the amendments to paragraph (f) would be removed. If the committee recommends applying the criminal process to civil cases, the amendments to Rule 58A(d) would be removed.

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

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

Rule 58A. Entry of judgment; abstract of judgment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule 4. Appeal as of right: when taken.

(a) **Appeal from final judgment and order.** In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date ~~of entry of the judgment or order appealed from~~ on which proof of service of the signed copy of the judgment is filed under Rule of Civil Procedure 58A(d). However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date ~~of entry of the judgment or order appealed from~~ on which proof of service of the signed copy of the judgment is filed under Rule of Civil Procedure 58A(d).

(b) **Time for appeal extended by certain motions.**

(b)(1) If a party timely files in the trial court any of the following motions, the time for all parties to appeal from the judgment runs from the ~~entry of the~~ date on which proof of service of the order disposing of the motion is filed under Rule of Civil Procedure 58A(d):

(b)(1)(A) a motion for judgment under Rule 50(b) of the Utah Rules of Civil Procedure;

(b)(1)(B) a motion to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted, under Rule 52(b) of the Utah Rules of Civil Procedure;

(b)(1)(C) a motion to alter or amend the judgment under Rule 59 of the Utah Rules of Civil Procedure;

(b)(1)(D) a motion for a new trial under Rule 59 of the Utah Rules of Civil Procedure; or

(b)(1)(E) a motion for a new trial under Rule 24 of the Utah Rules of Criminal Procedure.

(b)(2) A notice of appeal timely filed ~~after announcement or entry of judgment~~ under Rule (4)(a), but before entry of an order disposing of any motion listed in Rule 4(b), ~~shall be treated as filed after entry of the order and on the day thereof, except~~

~~that such a notice of appeal~~ is effective to appeal only from the underlying judgment.

To appeal from a final order disposing of any motion listed in Rule 4(b), a party must file a notice of appeal or an amended notice of appeal within the time prescribed ~~time measured from the entry of the order~~ by Rule 4(b).

(c) **Filing prior to entry of judgment or order.** A notice of appeal filed after the announcement of a decision, judgment, or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(d) **Additional or cross-appeal.** If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by paragraphs (a) and (b) of this rule, whichever period last expires.

(e) **Extension of time to appeal.** The trial court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraphs (a) and (b) of this rule. A motion filed before expiration of the prescribed time may be ex parte unless the trial court otherwise requires. Notice of a motion filed after expiration of the prescribed time shall be given to the other parties in accordance with the rules of practice of the trial court. No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(f) **Motion to reinstate period for filing a direct appeal ~~in criminal cases~~.** Upon a showing that a ~~criminal defendant~~ party was deprived of the right to appeal, the trial court shall reinstate the thirty-day period for filing a direct appeal. A ~~defendant~~ party seeking such reinstatement shall file a written motion in the ~~sentencing~~ trial court and serve the ~~prosecuting entity~~ other parties not in default. If ~~the~~ a criminal defendant is not represented and is indigent, the court shall appoint counsel. The ~~prosecutor shall have 30 days after service of the motion to file a written response. If the prosecutor opposes the motion, the trial court shall set a hearing at which the parties may present evidence~~ trial court shall consider and rule on the motion under Rule of Civil Procedure 7 or Rule of Criminal Procedure 12, as appropriate. If the trial court finds by a preponderance of the evidence that the ~~defendant has demonstrated that he~~ party was deprived of ~~his~~ the

right to appeal, ~~it~~ the trial court shall enter an order reinstating the time for appeal. The ~~defendant's~~ party's notice of appeal must be filed with the clerk of the trial court within 30 days after the date of entry of the order.

Advisory Committee Note:

Subsection (f) was adopted to implement the holding and procedure outlined in Manning v. State, 2005 UT 61, 122 P.3d 628.

Tab 8

JOINT RESOLUTION AMENDING RULES OF CIVIL PROCEDURE ON PEER REVIEW

2012 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Jerry W. Stevenson

House Sponsor: Paul Ray

LONG TITLE

General Description:

This joint resolution amends the Rules of Civil Procedure to include protections against discovery and admission into evidence for privileged matters connected to medical care and peer review.

Highlighted Provisions:

This resolution:

- amends Rule 26 of the Utah Rules of Civil Procedure; and
- establishes additional privileges that protect matters connected to medical care and peer review against discovery and admission into evidence.

Special Clauses:

This resolution provides an immediate effective date.

Utah Rules of Civil Procedure Affected:

AMENDS:

Rule 26, Utah Rules of Civil Procedure

Be it resolved by the Legislature of the state of Utah, two-thirds of all members elected to each of the two houses voting in favor thereof:

As provided in Utah Constitution Article VIII, Section 4, the Legislature may amend rules of procedure and evidence adopted by the Utah Supreme Court upon a two-thirds vote of all members of both houses of the Legislature:

Section 1. **Rule 26**, Utah Rules of Civil Procedure is amended to read:

Rule 26. General provisions governing disclosure and discovery.

(a) Disclosure. This rule applies unless changed or supplemented by a rule governing disclosure and discovery in a practice area.

(a) (1) Initial disclosures. Except in cases exempt under paragraph (a)(3), a party shall, without waiting for a discovery request, provide to other parties:

(a) (1) (A) the name and, if known, the address and telephone number of:

(a) (1) (A) (i) each individual likely to have discoverable information supporting its claims or defenses, unless solely for impeachment, identifying the subjects of the information; and

(a) (1) (A) (ii) each fact witness the party may call in its case-in-chief and, except for an adverse party, a summary of the expected testimony;

(a) (1) (B) a copy of all documents, data compilations, electronically stored information, and tangible things in the possession or control of the party that the party may offer in its case-in-chief, except charts, summaries and demonstrative exhibits that have not yet been prepared and must be disclosed in accordance with paragraph (a)(5);

(a) (1) (C) a computation of any damages claimed and a copy of all discoverable documents or evidentiary material on which such computation is based, including materials about the nature and extent of injuries suffered;

(a) (1) (D) a copy of any agreement under which any person may be liable to satisfy part or all of a judgment or to indemnify or reimburse for payments made to satisfy the judgment; and

(a) (1) (E) a copy of all documents to which a party refers in its pleadings.

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

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

(a) (2) (B) by the defendant within 28 days after the plaintiff's first disclosure or after that defendant's appearance, whichever is later.

(a) (3) Exemptions.

(a) (3) (A) Unless otherwise ordered by the court or agreed to by the parties, the requirements of paragraph (a)(1) do not apply to actions:

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

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

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

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

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

(a) (4) Expert testimony. .

(a) (4) (A) Disclosure of expert testimony. A party shall, without waiting for a discovery request, provide to the other parties the following information regarding any person who may be used at trial to present evidence under Rules 702, 703, or of the Utah Rules of Evidence and who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony: (i) the expert's name and qualifications, including a list of all publications authored within the preceding 10 years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years, (ii) a brief summary of the opinions to which the witness is expected to testify, (iii) all data and other information that will be relied upon by the witness in forming those opinions, and (iv) the compensation to be paid for the witness's study and testimony.

(a) (4) (B) Limits on expert discovery. Further discovery may be obtained from an expert witness either by deposition or by written report. A deposition shall not exceed four hours and the party taking the deposition shall pay the expert's reasonable hourly fees for attendance at the deposition. A report shall be signed by the expert and shall contain a complete statement of all opinions the expert will offer at trial and the basis and reasons for

them. Such an expert may not testify in a party's case-in-chief concerning any matter not fairly disclosed in the report. The party offering the expert shall pay the costs for the report.

(a) (4) (C) Timing for expert discovery.

(a) (4) (C) (i) The party who bears the burden of proof on the issue for which expert testimony is offered shall provide the information required by paragraph (a)(4)(A) within seven days after the close of fact discovery. Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be provided, within 28 days after the election is made. If no election is made, then no further discovery of the expert shall be permitted.

(a) (4) (C) (ii) The party who does not bear the burden of proof on the issue for which expert testimony is offered shall provide the information required by paragraph (a)(4)(A) within seven days after the later of (i) the date on which the election under paragraph (a)(4)(C)(i) is due, or (ii) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(i). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be provided, within 28 days after the election is made. If no election is made, then no further discovery of the expert shall be permitted.

(a) (4) (D) Multiparty actions. In multiparty actions, all parties opposing the expert must agree on either a report or a deposition. If all parties opposing the expert do not agree, then further discovery of the expert may be obtained only by deposition pursuant to paragraph (a)(4)(B) and Rule 30.

(a) (4) (E) Summary of non-retained expert testimony. If a party intends to present evidence at trial under Rules 702, 703, or of the Utah Rules of Evidence from any person other than an expert witness who is retained or specially employed to provide testimony in the case or a person whose duties as an employee of the party regularly involve giving expert testimony, that party must provide a written summary of the facts and opinions to which the witness is

expected to testify in accordance with the deadlines set forth in paragraph (a)(4)(C). A deposition of such a witness may not exceed four hours.

(a) (5) Pretrial disclosures.

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

(a) (5) (A) (i) the name and, if not previously provided, the address and telephone number of each witness, unless solely for impeachment, separately identifying witnesses the party will call and witnesses the party may call;

(a) (5) (A) (ii) the name of witnesses whose testimony is expected to be presented by transcript of a deposition and a copy of the transcript with the proposed testimony designated; and

(a) (5) (A) (iii) a copy of each exhibit, including charts, summaries and demonstrative exhibits, unless solely for impeachment, separately identifying those which the party will offer and those which the party may offer.

(a) (5) (B) Disclosure required by paragraph (a)(5) shall be made at least 28 days before trial. At least 14 days before trial, a party shall serve and file counter designations of deposition testimony, objections and grounds for the objections to the use of a deposition and to the admissibility of exhibits. Other than objections under Rules 402 and 403 of the Utah Rules of Evidence, objections not listed are waived unless excused by the court for good cause.

(b) Discovery scope.

(b) (1) In general. Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below. Privileged matters that are not discoverable or admissible in any proceeding of any kind or character include all information in any form provided during and created specifically as part of a request for an investigation, the investigation, findings, or conclusions of peer review, care review, or quality assurance processes of any organization of health care providers as defined in the Utah Health Care Malpractice Act for the purpose of evaluating care provided to reduce morbidity and mortality or to improve the quality of medical care, or for the

purpose of peer review of the ethics, competence, or professional conduct of any health care provider.

(b) (2) Proportionality. Discovery and discovery requests are proportional if:

(b) (2) (A) the discovery is reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues;

(b) (2) (B) the likely benefits of the proposed discovery outweigh the burden or expense;

(b) (2) (C) the discovery is consistent with the overall case management and will further the just, speedy and inexpensive determination of the case;

(b) (2) (D) the discovery is not unreasonably cumulative or duplicative;

(b) (2) (E) the information cannot be obtained from another source that is more convenient, less burdensome or less expensive; and

(b) (2) (F) the party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties' relative access to the information.

(b) (3) Burden. The party seeking discovery always has the burden of showing proportionality and relevance. To ensure proportionality, the court may enter orders under Rule 37.

(b) (4) Electronically stored information. A party claiming that electronically stored information is not reasonably accessible because of undue burden or cost shall describe the source of the electronically stored information, the nature and extent of the burden, the nature of the information not provided, and any other information that will enable other parties to evaluate the claim.

(b) (5) Trial preparation materials. A party may obtain otherwise discoverable documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has

substantial need of the materials and that the party is unable without undue hardship to obtain substantially equivalent materials by other means. In ordering discovery of such materials, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

(b) (6) Statement previously made about the action. A party may obtain without the showing required in paragraph (b)(5) a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement about the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order under Rule 37. A statement previously made is (A) a written statement signed or approved by the person making it, or (B) a stenographic, mechanical, electronic, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(b) (7) Trial preparation; experts.

(b) (7) (A) Trial-preparation protection for draft reports or disclosures. Paragraph (b)(5) protects drafts of any report or disclosure required under paragraph (a)(4), regardless of the form in which the draft is recorded.

(b) (7) (B) Trial-preparation protection for communications between a party's attorney and expert witnesses. Paragraph (b)(5) protects communications between the party's attorney and any witness required to provide disclosures under paragraph (a)(4), regardless of the form of the communications, except to the extent that the communications:

(b) (7) (B) (i) relate to compensation for the expert's study or testimony;

(b) (7) (B) (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(b) (7) (B) (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(b) (7) (C) Expert employed only for trial preparation. Ordinarily, a party may not, by interrogatories or otherwise, discover facts known or opinions held by an expert who has been

retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. A party may do so only:

(b) (7) (C) (i) as provided in Rule 35(b); or

(b) (7) (C) (ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(b) (8) Claims of privilege or protection of trial preparation materials.

(b) (8) (A) Information withheld. If a party withholds discoverable information by claiming that it is privileged or prepared in anticipation of litigation or for trial, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced in a manner that, without revealing the information itself, will enable other parties to evaluate the claim.

(b) (8) (B) Information produced. If a party produces information that the party claims is privileged or prepared in anticipation of litigation or for trial, the producing party may notify any receiving party of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

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

(c) (1) Methods of discovery. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; requests for admission; and subpoenas other than for a court hearing or trial.

(c) (2) Sequence and timing of discovery. Methods of discovery may be used in any sequence, and the fact that a party is conducting discovery shall not delay any other party's

discovery. Except for cases exempt under paragraph (a)(3), a party may not seek discovery from any source before that party's initial disclosure obligations are satisfied.

(c) (3) Definition of tiers for standard discovery. Actions claiming $50,000 or less in damages are permitted standard discovery as described for Tier 1. Actions claiming more than $50,000 and less than $300,000 in damages are permitted standard discovery as described for Tier 2. Actions claiming $300,000 or more in damages are permitted standard discovery as described for Tier 3. Absent an accompanying damage claim for more than $300,000, actions claiming non-monetary relief are permitted standard discovery as described for Tier 2.

(c) (4) Definition of damages. For purposes of determining standard discovery, the amount of damages includes the total of all monetary damages sought (without duplication for alternative theories) by all parties in all claims for relief in the original pleadings.

(c) (5) Limits on standard fact discovery. Standard fact discovery per side (plaintiffs collectively, defendants collectively, and third-party defendants collectively) in each tier is as follows. The days to complete standard fact discovery are calculated from the date the first defendant's first disclosure is due and do not include expert discovery under paragraphs (a)(4)(C) and (D).

Tier	Amount of Damages	Total Fact Deposition Hours	Rule 33 Interrogatories including all discrete subparts	Rule 34 Requests for Production	Rule 36 Requests for Admission	Days to Complete Standard Fact Discovery
1	$50,000 or less	3	0	5	5	120

244	2	More than $50,000 and less than $300,000 or non-monetary relief	15	10	10	10	180
245	3	$300,000 or more	30	20	20	20	210

246 (c) (6) Extraordinary discovery. To obtain discovery beyond the limits established in
247 paragraph (c)(5), a party shall file:
248 (c) (6) (A) before the close of standard discovery and after reaching the limits of
249 standard discovery imposed by these rules, a stipulated statement that extraordinary discovery
250 is necessary and proportional under paragraph (b)(2) and that each party has reviewed and
251 approved a discovery budget; or
252 (c) (6) (B) before the close of standard discovery and after reaching the limits of
253 standard discovery imposed by these rules, a motion for extraordinary discovery setting forth
254 the reasons why the extraordinary discovery is necessary and proportional under paragraph
255 (b)(2) and certifying that the party has reviewed and approved a discovery budget and
256 certifying that the party has in good faith conferred or attempted to confer with the other party
257 in an effort to achieve a stipulation.
258 (d) Requirements for disclosure or response; disclosure or response by an organization;
259 failure to disclose; initial and supplemental disclosures and responses.
260 (d) (1) A party shall make disclosures and responses to discovery based on the
261 information then known or reasonably available to the party.
262 (d) (2) If the party providing disclosure or responding to discovery is a corporation,
263 partnership, association, or governmental agency, the party shall act through one or more

officers, directors, managing agents, or other persons, who shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(d) (3) A party is not excused from making disclosures or responses because the party has not completed investigating the case or because the party challenges the sufficiency of another party's disclosures or responses or because another party has not made disclosures or responses.

(d) (4) If a party fails to disclose or to supplement timely a disclosure or response to discovery, that party may not use the undisclosed witness, document or material at any hearing or trial unless the failure is harmless or the party shows good cause for the failure.

(d) (5) If a party learns that a disclosure or response is incomplete or incorrect in some important way, the party must timely provide the additional or correct information if it has not been made known to the other parties. The supplemental disclosure or response must state why the additional or correct information was not previously provided.

(e) Signing discovery requests, responses, and objections. Every disclosure, request for discovery, response to a request for discovery and objection to a request for discovery shall be in writing and signed by at least one attorney of record or by the party if the party is not represented. The signature of the attorney or party is a certification under Rule 11. If a request or response is not signed, the receiving party does not need to take any action with respect to it. If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, may take any action authorized by Rule 11 or Rule 37(e).

(f) Filing. Except as required by these rules or ordered by the court, a party shall not file with the court a disclosure, a request for discovery or a response to a request for discovery, but shall file only the certificate of service stating that the disclosure, request for discovery or response has been served on the other parties and the date of service.

Section 2. **Legislative note.**

It is the intent of the Legislature that when the Court Rules are compiled and printed, the following language be added as a Legislative Note.

"**Legislative Note.**

(1) The amended language in paragraph (b)(1) is intended to incorporate long-standing protections against discovery and admission into evidence of privileged matters connected to medical care review and peer review into the Utah Rules of Civil Procedure. These privileges, found in both Utah common law and statute, include Sections 26-25-3, 58-13-4, and 58-13-5, UCA, 1953. The language is intended to ensure the confidentiality of peer review, care review, and quality assurance processes and to ensure that the privilege is limited only to documents and information created specifically as part of the processes. It does not extend to knowledge gained or documents created outside or independent of the processes. The language is not intended to limit the court's existing ability, if it chooses, to review contested documents in camera in order to determine whether the documents fall within the privilege. The language is not intended to alter any existing law, rule, or regulation relating to the confidentiality, admissibility, or disclosure of proceedings before the Utah Division of Occupational and Professional Licensing. The Legislature intends that these privileges apply to all pending and future proceedings governed by court rules, including administrative proceedings regarding licensing and reimbursement.

(2) The Legislature does not intend that the amendments to this rule be construed to change or alter a final order concerning discovery matters entered on or before the effective date of this amendment.

(3) The Legislature intends to give the greatest effect to its amendment, as legally permissible, in matters that are pending on or may arise after the effective date of this amendment, without regard to when the case was filed."

Section 3. **Effective date.**

This resolution takes effect upon approval by a constitutional two-thirds vote of all members elected to each house.