Agenda
Advisory Committee on Rules of Civil Procedure

May 23, 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
Rule 26.2. Disclosures in personal injury actions.	Tab 2	Frank Carney Trystan Smith Michael Zimmerman
Rule 25. Substitution of parties.	Tab 3	Leslie Slaugh
Rule of Small Claims Procedure 3	Tab 4	Judge John Baxter
Rule 105. Shortening 90 day waiting period in domestic matters.	Tab 5	Tim Shea
FAQs	Tab 6	Fran Wikstrom
Priority of pending topics	Tab 7	Fran Wikstrom

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

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

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

Tab 1

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

April 25, 2012

PRESENT: Francis M. Wikstrom, Chair, W. Cullen Battle, James T. Blanch, Francis J. Carney, Professor Lincoln L. Davies, Steve Marsden, Terrie T. McIntosh, Honorable David O. Nuffer, Robert J. Shelby, Leslie Slaugh

EXCUSED: Honorable Lyle R. Anderson, Sammi Anderson, Jonathan O. Hafen, Honorable Derek P. Pullan, Janet H. Smith, Trystan B. Smith, Honorable Kate Toomey, Barbara L. Townsend

PHONE: David W. Scofield, Lori Woffinden

STAFF: Diane Abegglen, Timothy Shea

GUESTS: Rep. Ken Ivory, Phillip Favro

Judge Nuffer introduced Mr. Favro, who is following the Utah discovery experiment and will be writing an article with Judge Pullan.

I. Approval of minutes.

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

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

Rep. Ivory said that he had proposed HB 235 in the 2012 general session to try to create a tool to help settle cases. He said that business groups generally supported the legislation, but that attorney groups did not. He said that including the obligation to pay the offeror's attorney fees, if the offeree does not improve upon an offer creates a powerful incentive to settle. He said that HB 235 was based on a Nevada statute, and that he is working to simplify the language. He said that Nevada lawyers use the statute to weed out non-meritorious cases. He said that authorizing attorney fees seemed to be substantive, although the process by which offers are made is procedural.

Mr. Carney said that this committee had worked with Rep. Dougal some years ago to develop the current Rule 68. He said that insurance defense attorneys at that time had opposed including an attorney fee provision because plaintiffs often did not have the assets with which to pay a defendant's attorney fees.

Mr. Slaugh asked, if the amended bill is limited to commercial litigation, why not simply let the parties contract for attorney fees? Rep. Ivory said that many small business owners wrongly assume that the loser has to pay the winner's attorney fees, so there might not be an attorney fee provision in the contract.

Mr. Carney asked, how does this help a small business claim? Rep. Ivory said that the parties are in control of the offers and both parties will have to size up the case. He said that if a party's offer is rejected, the offeror will have more latitude in future negotiations.

Ms. McIntosh asked, has Nevada studied the effects of their statute? Rep. Ivory said that there has been no statistical analysis, but that anecdotal evidence is supportive.

Mr. Blanch said that the federal approach has Congress deciding whether, in a particular statutory cause of action, the term "costs" includes attorney fees. Then the rules of procedure describe the recovery of costs.

Mr. Favro said that California has a statute similar to the Nevada policy and that including attorney fees does create a strong incentive to settle when served with an offer.

Mr Wikstrom said that when the committee worked with Rep. Dougal to draft Rule 68, the committee concluded that the Supreme Court does not have the authority to authorize attorney fees. Similar to the federal model, Rule 68 includes recovery of attorney fees for failure to improve upon an offer, but only if some other law establishes the right to attorney fees. He said the legislature could establish whether there is a right to recover attorney fees, and the court rule could govern the process.

Mr. Carney said that the substantive provision should include the right to recover expert witness fees as well as attorney fees. Mr. Carney will work with Rep. Ivory.

III. Rule 83. Vexatious litigants.

Mr. Wikstrom reported that he and Judge Toomey and Mr. Shea had met with the Supreme Court to recommend adoption of Rule 83. The Court has approved the rule with two further changes. Instead of reporting a vexatious litigant to the Judicial Council, the clerk will report it to the Administrative Office of the Courts. And, in the definition of a vexatious litigant, the Court has changed five wins to two wins against 5 loses.

IV. Rule 26.2(d).

Discussion was deferred to the next meeting due to the absence of Mr. Zimmerman and Mr. Smith.

V. Initial disclosure deadlines. Rule 26.

Mr. Blanch suggested a change to Rule 26 so the deadlines are more certain. Actual deadline dates may vary by as much as 14 days from the courtesy notice from the court, depending on how quickly the plaintiff serves its initial disclosures. His proposed change would add up to 14days to the time in which the defendant has to serve its initial disclosures, but the delay seems modest and the added certainty is important.

Mr. Wikstrom treated Blanch's proposal as a motion, which was seconded by Mr. Battle. The committee voted all in favor.

Mr. Slaugh said that as drafted Rule 26 used "provided" and "made" when the term "served" would be more appropriate. Mr. Shea will make those replacements for the committee to consider.

VI. Definition of damages. FAQ.

Mr. Shea suggested that the FAQ on the definition of damages be amended to read: "To determine the appropriate tier, a party should include in the damage calculation all amounts sought as damages by all parties." He said that during the discussion last month of a party pleading a counterclaim or cross claim, the committee seemed to intend the subsequent tier designation needed to include damages claimed in an earlier pleading. The committee approved the amendment.

VII. FAQs.

The committee considered the question and answer "Monitoring discovery deadlines." The committee will reconsider the answer after reviewing the notice of deadlines that the court sends out.

The committee approved the question and answer "Designating a tier without specified damages." The committee approved the question and answer "Effect of not designating a discovery tier." The committee amended and approved the question and answer "Third-party subpoenas."

The committee considered and approved the first of Mr. Blanch's two suggested questions and answers, which he had circulated by email before the start of the meeting. The committee considered the question and answer "Definition of 'damages' for designation of a discovery tier." Mr. Blanch will integrate this latter topic into the question and answer which the committee had already approved.

The committee considered the question and answer "Length of depositions." Mr. Blanch will redraft this section.

The committee considered the question and answer "Expert discovery—Rebuttal experts." Mr. Carney said that because Rule 26 does not include the timing for a report or deposition of a rebuttal expert, many believe that rebuttal experts are no longer allowed. That was never the committee's intent. Mr. Carney will draft a new section for Rule 26 to include rebuttal experts.

The committee considered the question and answer "Judgment exceeding tier limits" and "Discovery tier limits and the jury." The discussion was to the effect that by designating a discovery tier, a party waived the right to recover damages beyond the upper limit of that tier, but that the waiver should be treated as a statutory cap on damages. Professor Davies will integrate the two sections and redraft the answer in light of the discussion.

VIII. Adjournment.

The meeting adjourned at 6:00 p.m. The next meeting will be held on May 23, 2012 at 4:00 p.m. at the Administrative Office of the Courts.

Tab 2

Rule 26.2 Disclosures in personal injury actions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Advisory Committee Note

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

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

Tab 3

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

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

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: May 16, 2012
Re: Rule 25

Rule 25 has been published for comment and we did not receive any. It is ready for your recommendation to the Supreme Court for final action.

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 25. Substitution of parties.

(a) **Death.**

(a)(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party. The moving party shall serve the motion and~~, together with the~~ any notice of hearing~~,~~ ~~shall be served~~ on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons. Unless the motion for substitution is made not later than ninety days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

(a)(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) **Incompetency.** If a party becomes incompetent, the court upon motion served as provided in Subdivision (a) of this rule may allow the action to be continued by or against his representative.

(c) **Transfer of interest.** In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in Subdivision (a) of this rule.

(d) **Public officers; death or separation from office.** When a public officer is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office, it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an

officer adopts or continues or threatens to adopt or continue the action of his predecessor. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object.

Tab 4

Rule 3. Service of the affidavit and summons.

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

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

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

~~(b) The affidavit must be served at least 30 calendar days before the trial date. Service by mail or commercial courier service is complete on the date the receipt is signed by defendant. If the affidavit is not served within 120 days after filing, the action may be dismissed without prejudice upon the court's own initiative with notice to the plaintiff.~~

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

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

Service of the small claims affidavit and summons shall be as provided in Utah Rule of Civil Procedure 4.

Tab 5

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

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

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: May 16, 2012
Re: Rule 105

Utah Code Section 30-3-18 was amended this year to require extraordinary circumstances for waiving the 90-day waiting period. Rule 105 needs to be amended accordingly.

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 105. Shortening 90 day waiting period in domestic matters.

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

Tab 6

FAQs

(1) Monitoring discovery deadlines.

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

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

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

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

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

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

Answer: No. The rule does not automatically give the plaintiff that right. Although Rules 26(c)(3)-(4) are clear that additional standard discovery will be available in the case due to the higher tier triggered by the later pleading, Rule 8(a) nevertheless states that "a pleading that qualifies for tier 1 or tier 2 discovery shall constitute a waiver of any right to recover damages above the tier limits specified in Rule 26(c)(3), unless the pleading is amended under Rule 15." Although the parties will conduct standard discovery commensurate with a higher tier, Rule 8(a) nevertheless continues to limit the plaintiff's damages if the face of the complaint still specifies the lower tier. The best practice for a plaintiff in this circumstance is to amend the complaint pursuant to Rule 15 to identify the higher tier and claim the right to recover damages commensurate with that tier. Otherwise, the plaintiff may face the unfortunate circumstance of conducting more

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

Already Published:

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

Question: What damages are considered in arriving at the damage amount for purposes of the tier level? For example, what if a party pleads $40,000.00 in compensatory damages and then for such punitive damages as are reasonable? Assuming a tier 1 case, would the jury be limited to awarding $10,000.00 in punitive damages? Do prejudgment interest and attorney's fees count toward the damage amount?

Answer: "For purposes of determining standard discovery, the amount of damages includes the total of all monetary damages sought (without duplication for alternative theories) by all parties in all claims for relief in the original pleadings." URCP 26(c)(4). "A party who claims damages but does not plead an amount shall plead that their damages are such as to qualify for a specified tier defined by Rule 26(c)(3)." URCP 8(a).

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

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

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

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

(3) Length of depositions.

Question: How long may a deposition be? Rule 30(d) states that “oral questioning of a nonparty shall not exceed four hours, and oral questioning of a party shall not exceed seven hours,” but the Committee Note to Rule 26 says that “deposition hours are charged to a side for the time spent asking questions of the witness. In a particular deposition, one side may use two hours while the other side uses only 30 minutes.” Does this mean that a deposition of a nonparty, such as a treating physician, could take

eight hours? (Four hours by defense counsel, and four hours by plaintiff’s counsel.) Or is it only four hours total?

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

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

(4) Effect of premature disclosure of expert witnesses

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

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

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

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

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

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

Question: What if a jury awards an amount in excess of the tier limits? May a motion to amend to conform to the evidence be made at that point?

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

Question: Is the jury told about the tier limits?

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

(6) Reaching the limits of standard discovery.

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

Rule 29 says that the parties may stipulate for additional discovery "before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules." Suppose I am in a tier 3 case, and have used up all of my deposition time, but

not my interrogatories or my requests for production. Does this really mean I have to use those up as well before I can stipulate or move for additional discovery? I guess that it means "discovery of the same type for which I want more;" in other words, I shouldn't be asking for more interrogatories until I have used up all those available to me. Am I right?

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

(7) Extraordinary discovery order.

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

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

(8) Expert discovery—Stipulations.

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

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

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

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

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

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

(10) Expert discovery—Designating experts.

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

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

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

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

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

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

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

(12) Expert discovery—Rebuttal experts.

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

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

Within seven days thereafter, the defendant needs to serve an election of either a deposition or report. These depositions or reports are to be completed within 28 days.

Then, within seven days of getting the report or taking the deposition, defendant must designate its own contravening experts.

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

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

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

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

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

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

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

Answer:

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

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

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

(15) Expert discovery—Length of expert depositions.

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

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

(16) Expert discovery—Discovery between aligned parties.

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

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

(17) Partial motions to dismiss and deadlines.

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

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

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

(18) Discovery tier limits and the jury.

Question: Is the jury told about the tier limits?

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

(19) Subpoena for medical examiner reports.

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

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

(20) Special practice rules.

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

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

(21) Special practice rules—Wrongful death claims.

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

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

(22) Special practice rules—Effective date.

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

Answer:

(23) Special practice rules—Divorce modification.

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

Answer:

(24) Supplementing disclosures

From Todd

Question: How frequently must a party supplement disclosures?

Tab 7

Arbrogast v. River Crossings, 2010 UT 40 Supreme Court suggestion that the Standards of Civility be incorporated in the URCP.	
Follow up discovery amendments based on experience to date. Multiple rules affected.	
Name of family law cases. Former legislator has suggested “In the matter of the marriage of NN and NN.” Etc.	
Post-trial motions: Rules 50, 52, 59, 60. We’ve had this one on the agenda before, but there has been no resolution.	Frank Carney
Rule 101(b) Add: “If service is more than 90 days after the date of entry of the most recent appealable order and no other motion or petition is pending, service of a new matter may not be made through counsel.”	Leslie Slaugh
Rule 11 / Rule 56. Either we need 30 days to respond to summary judgment or we need a shorter safe harbor time.	Bob Wilde
Rule 26.3 Disclosures in employment actions.	Jan Smith; Bob Wilde
Rule 4 or 5. File a copy of the summons with the court	Todd Shaughnessy
Rule 45. Require notice of third party subpoena duces tecum to include the subpoena.	Ed Havas
Rule 63. Response and request to submit for decision are not proper on a motion to disqualify. Incorporate federal grounds for recusal into URCP.	Judicial Conduct Commission David Scofield
Rule 64D. Make writ of continuing garnishment valid until judgment is paid, unless writ from another case is served.	Public request
Rule 68. HB 235, Offer of judgment in civil cases.	Frank Carney; Rep. Ken Ivory
Rule 7. Motion and memorandum in one document	Rich Humpherys
Rule 8 / Rule 55. Effect of failure by Plaintiff to answer counterclaim. One rule says matter is deemed admitted; the other says default judgment is proper.	Public request
Style amendments	Jonathan Hafen