Agenda
Advisory Committee on Rules of Civil Procedure

November 30, 2011
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
Consideration of comments to Rule 26.2, Disclosures in personal injury actions.	Tab 2	Fran Wikstrom
Consideration of comments to Rule 83, Vexatious litigants.	Tab 2	Tim Shea
Reference from Rule 37 to Rule 26	Tab 3	Todd Shaughnessy
Disclosure and discovery blog page	Tab 4	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.

January 25, 2012
February 22, 2012
March 28, 2012
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

October 26, 2011

PRESENT: Francis M. Wikstrom, Chair, David W. Scofield, Trystan B. Smith, Terrie T. McIntosh, Barbara L. Townsend, Honorable David O. Nuffer, Honorable John Baxter, W. Cullen Battle, Honorable Kate Toomey, Francis J. Carney, Jonathan O. Hafen, Honorable Lyle Anderson, James T. Blanch, Robert J. Shelby, Honorable W. Todd Shaughnessy, Honorable Derek P. Pullan, Leslie W. Slaugh

TELEPHONE: David Moore

EXCUSED: Janet Smith, Lori Woffinden

STAFF: Timothy Shea, Sammi V. Anderson, Diane Abegglen

I. APPROVAL OF MINUTES.

Mr. Wikstrom entertained comments from the committee concerning the September 28, 2011 minutes. The committee unanimously approved the minutes.

II. RULE 65(c).

Judge Toomey led a discussion about potential revisions to Rule 65(c), which would address the appointment of pro bono counsel in post-conviction relief cases. Judge Toomey reported some concern by the Appellate Rules committee about citing the statute in the rule. The proposal is to return to the earlier draft of the rule, but strike the citation to the statute in the rule. Mr. Shea explained that the statute exists whether the rule cites to it, and that the statute is too complicated to mirror the language in the rule. Mr. Hafen moved to remove the last sentence, which includes the citation to the statute, and to move that reference to a Committee Note. Mr. Wikstrom discussed the issue related to compensation of counsel appointed in these instances. The committee discussed whether to strike the "pro bono" language from the proposed rule, leaving open the issue of whether counsel asked by the court to represent an indigent petitioner should or would be compensated. Mr. Battle pointed out that the language is not compulsory. It simply gives the court the option to appoint counsel pro bono. Judge Nuffer likes removing the language regarding "pro bono" because it preserves the right of that lawyer to later make a claim for compensation. Judge Shaughnessy pointed out that the committee does not want to create the impression that the judicial branch will somehow be able to assume an obligation to pay counsel to take these cases. The motion was unanimously approved. Mr. Shea then discussed whether the rule should be republished for comment. Because the language has been changed, but the substance of the rule remains exactly the same, the committee decided it was not necessary to republish for comment. The proposed revisions will be sent to the Court for approval.

III. RULES 101 and 108. Motion Practice and Objections before Court Commissioners.

Mr. Shea explained that additional amendments have been proposed by the Executive Committee of the Family Law section and the Board of District Judges. The Board of District Judges recommends that the Court "may" hold a hearing on any objection where a hearing is requested. The Executive Committee of the Family Law Section wants the language to be mandatory, requiring that a hearing "shall" be held. Mr. Slaugh noted that objections are routinely filed and hearings will be requested. The concern remains one of due process. Mr. Wikstrom circled back to the suggestion that the rule state a hearing shall be held "upon request". The committee discussed the impact of temporary orders in domestic cases, specifically involving custody and temporary support orders. Judge Anderson noted that the impact of temporary orders can be minimized by getting to trial as soon as possible and judicial resources are sometimes used inefficiently to hear mini-trials on temporary orders, when a full trial will be required a few months later. The Board of District Court Judges would prefer that the language requiring hearings be discretionary, not mandatory. The Judges feel like Commissioners were designed to weed things out and if a hearing reviewing their decisions is held routinely, the Commissioners really don't serve a purpose. After much discussion, Mr. Wikstrom asked for a motion. Mr. Shea pointed out that custody issues require a hearing upon objection under Rule 108(d)(3). Judge Toomey moved to approve as amended. The committee approved and the revisions were sent to the Court for approval.

IV. RULE 25. SUBSTITUTION OF PARTIES.

Mr. Slaugh introduced and led the discussion, suggesting that the rule be amended to strike "together with notice of hearing" from the language because a non-party cannot give notice of a hearing without the Court's approval. The proposed revisions were prompted by a situation where a party died and the widow filed a substitution of parties. Judge Nuffer suggested amending the rule to require service of the motion motion to substitute and "any notice of hearing" by the movant. The motion was seconded and duly approved. The revisions will be published for comment.

V. RULE 5(d).

Mr. Shea noted that Rule 5(d) should contain a cross-reference to Rule 26(f), not 26(i). The amendment was so moved, seconded and unanimously approved. The committee recommended that this technical revisions be sent to the Court for approval.

VI. SIMPLIFIED DISCOVERY RULES.

A. Rule 26.2.

Messrs. Carney and Smith noted their general impression that the Bar is pleased about the proposed Rule 26.2. Both noted the question of whether Section 321 arbitrations will fall under Tier I. Mr. Carney noted that plaintiffs with potential recovery under uninsured motorists coverage will file under Tier III, not Tier I. Amendment to the uninsured motorist statute could

address this issue. Other concerns include whether you have to disclose all medical providers even when irrelevant to the cause of action. Mr. Burgess also noted concerns, including concerns about the social security number disclosures and some requests for increased disclosures for medical records and bills. In sum, Messrs. Carney and Smith felt 26.2 is ready with some minor tweaking. The committee discussed and agreed to move the next meeting from November 16 to November 30, 2011, so that comments on Rule 26.2, due November 28, can be considered at the next meeting.

B. Public Forum for Questions & Answers.

Mr. Wikstrom raised the issue of a forum to discuss questions and issues raised by members of the Bar regarding the revised rules. Judge Pullan noted a preference that the committee prepare articles, best practices or frequently asked questions and answers, as opposed to a blog. The committee discussed a FAQ section on the committee website and/or Bar Journal article summarizing most frequently asked, recurring issues, together with summary responses. Mr. Smith also suggested publishing decisions interpreting the new rules. Mr. Hafen echoed the suggestion to create a decision bank. Mr. Wikstrom wondered aloud whether the new rules would lend themselves to carefully crafted written opinions or expedited discovery resolution based on short written submissions. Judge Pullan opined that where disco very deadlines are not tolled, most courts would be using teleconferences to get disputes resolved quickly. Judge Shaughnessy noted that the questions raised in the presentations should be catalogued and later answered uniformly by the committee. Mr. Wikstrom asked committee members to forward along questions worthy of consideration and asked Mr. Shea to keep track of those questions.

VII. ADJOURNMENT.

The meeting adjourned at 6:00 p.m. The next meeting will be November 30, 2011 at 4:00 p.m. at the Administrative Office of the Courts.

Tab 2

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: November 22, 2011
Re: Rules for comment

The comment period for the following rules has closed, and they are ready for your final recommendations. The comments received to date are attached. I will update the comments if any others are received before the meeting.

(1) Rule Summary

URCP 026.02 Disclosures in personal injury actions. New. Describes special disclosures in personal injury actions.

URCP 083. Vexatious litigants. New. Establishes the standards and procedures for declaring a person to be a vexatious litigant. Establishes management of cases involving vexatious litigants.

Encl. Draft Rules
Comments

Rule 26.2 Disclosures in personal injury actions.

(a) **Scope.** This rule applies to all actions seeking damages arising out of personal physical injuries or physical sickness.

(b) **Plaintiff's additional initial disclosures.** 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 filing of the action, 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.

(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 complaint 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 which caused the injury.

(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 which caused the injury 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 which caused the injury.

(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 which caused the injury or the nature or extent of the injury.

(c)(5) The name of any person or entity not a party to the lawsuit to whom defendant may seek to allocate fault for the event which caused the injury.

Advisory Committee Note

This rule requires disclosure of the key fact elements that are typically requested in initial interrogatories in personal injury actions. The Medicare information disclosure, including Social Security numbers, is designed to facilitate compliance with the requirements for insurers under 42 U.S.C. § 1395y(b)(8)(C). See, Hackley v. Garofano, 2010 WL 3025597 (Conn.Super.) and Seger v. Tank Connection, 2010 WL 1665253 (D.Neb.).

Rule 83. Vexatious litigants.

(a) Definitions.

(a)(1) "Vexatious litigant" means a person, including an attorney acting pro se, who, 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.

(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 litigants 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.

Comments. Rules of Civil Procedure

(1) Rule 26.2. Disclosures in personal injury actions.

The committee has correctly recognized that the revised rules do not adequately address the specific discovery requirements of defending a personal injury case and Rule 26.2 is much-needed step in the right direction.

The committee should keep the Medicare disclosure requirements found in (b)(3). As the committee is aware, Medicare's authority to recover from secondary payers is very broad and there are significant consequences for liability insurance carriers who do not report settlements, including fines and the possibility of having to reimburse Medicare even after the settlement has been paid. In order to give insurance clients an opportunity to take steps to protect their interests (and to facilitate timely settlements), it is reasonable and expedient that personal injury plaintiffs make Medicare disclosures, including disclosure of their social security numbers. The rules adequately address privacy concerns because the disclosures are not filed with the court and do not become public record. I am not aware of any evidence, empirical or anecdotal, to suggest that disclosure of the plaintiff's social security number in this context poses an increased risk for identity theft.

Generally speaking, the disclosures required by paragraph (b) are very typical of the interrogatories that we sent out in every personal injury case we defended prior to the rule changes. The information required by these disclosures is absolutely necessary to defend personal injury cases, even those that will be tried under Tier 1 discovery provisions. A couple modest changes, however, would make them more effective:

1. In (b)(2), change "before the filing of the action," to "before the date of the plaintiff's injury." The amendment is necessary because we have a four-year statute of limitations for personal injury cases. As such, the relevant date for obtaining information about pre-existing conditions is the date of injury, not the date the complaint was filed.

2. In (b)(5), change "preceding the complaint" to "preceding the injury." See comments above.

Posted by Ryan Schriever November 14, 2011 05:23 PM

I certainly understand the privacy concerns of the social security number, but under the new rules, discovery is not sent to the Court so initial disclosures are not a public document and the information can be protected. However, this number is necessary to obtain medical records from some providers and information from some other sources. Also, everything is under one's social now. I could not order cable, and some of the other utlitities in my house without one. A personal injury lawsuit asking for thousands of dollars does create the need for information and the privacy concerns are outweighed by the needs for just and speedy resolution as noted by the committee.

As to past history, five years from filing is not proper. The statute of limitatios is four years for negligence cases. So in some cases, one year of previous history will be provided, and in some cases four or more years will be required. If a state agency is involved, with the one year statute (plus time for a denial), a plaintiff will give three and half years usually. In the medical malpractice cases, three years. In sum, the rule should be five years from the date of injury or disocvery of the injury and treat all plaintiffs the same.

Finally, some have expressed concern about insurance that may have paid wages. First, the collateral source rule applies to the admissbility of the information as a set off, not the discovery of same. Further, there is admissible information from these insurers, including confirmation of time missed, rate of pay, work limitations, prior claims, medical work releases, etc. Finally, some of these insurers (like Workers Compensation) may also be seeking reimbursement from one or more of the parties.

Posted by Kevin Tanner November 11, 2011 09:09 AM

First of all, there are easier ways for defendant's in personal injury actions to get information required by Medicare under the MSRPC. Second, not all personal injury actions will include and insurance company as the payor on a successful claim, thereby making the disclosure of information required under Medicare's rules unnecessary.

It would be better to require Plaintiffs to provide to opposing counsel information showing that either the Plaintiff is not entitled to Medicare benefits, or, in the alternative, if the Plaintiff is entitled to Medicare benefits, then and only would the Plaintiff have to provide information necessary for the Defendant to comply with the MSRPC rules.

Posted by Steve J. November 1, 2011 01:07 PM

Clearly there is no "CMS requirement" that a social security number be disclosed at the outset of litigation. However, insurers have certain reporting requirements imposed on them. Additionally, when settlement is reached, there are additional reporting requirements are imposed -- a fact that no one can deny. If a Plaintiff refuses to provide his or her SSN until settlement (as well as other required information), then that Plaintiff will likely have to wait months or more to receive the settlement funds.

Additionally, where is the actual invasion of privacy? There are multiple comments that have been submitted about an "invasion of privacy," but no specific reasoning given. A party making a legal claim must disclose certain information relevant to that claim -- including certain identifying information necessary to conduct discovery (obtain medical records, etc.) and effect a timely settlement.

Finally, the claim that "Disclosure of these numbers is also unnecessary because the numbers are commonly included on all hospital admission records" rings hollow. Plaintiff's are commonly loathe to willingly disclose any of their relevant medical records.

With the new limits in place, how, pray tell, is a defendant supposed to get these medical records?

Posted by Blake Hill October 25, 2011 03:51 PM

URCP 26.2(b)(3) requiring disclosure of a plaintiffs social security number with initial disclosures should not be adopted. There is no CMS requirement that a social security number be disclosed at the onset of litigation. The SSN reporting requirement for the CMS arises only after a settlement has occurred. The proposed rule change puts the cart before the cart. Because an initial disclosure of the SSN is not required by CMS, any conceived value of an initial disclosure of the SSN is far outweighed by the invasion of privacy that it imposes on the Plaintiff.

Posted by Brandon J. Baxter October 21, 2011 11:08 AM

Rule 26.2 should not be adopted without changes because many of the interrogatories are inapplicable to many cases.

For example:

(b)(1) is likely not applicable in wrongful imprisonment cases;

(b)(2) is irrelevant in birth injury cases;

(b)(4) is irrelevant on its face when no lost income is claimed;

(b)(5) is irrelevant to most cases involving children;

(b)(6) is irrelevant when (b)(1) is irrelevant;

(b)(7) and (c)(3) are irrelevant in almost all slip and fall cases.

(c)(1) and (c)(5) are already required and give no additional infomation to the plaintiff.

If adopted, this rule should be modified to give flexibility in each case. A better rule would be to simply give each side an additional eight interrogatories in all personal injury cases. That way, the sides could tailor the interrogatories to seek information that would be the most beneficial to the case at bar.

If it is not changed, it should be amended to be more fair. The rule gives the defense eight interrogatories and gives the plaintiff only five, three of which give the plaintiff nothing new.

Posted by Nelson Abbott October 21, 2011 10:27 AM

Rule 26.2(b)(4) should not be adopted because it violates the collateral source rule.

For example, if a person is injured in an automobile accident and misses five days of work, that person will frequently take sick days. It could easily be argued that those sick days are "income-replacement benefits."

Under the collateral source rule "[i]f the benefit was a gift to the plaintiff . . . or established for him by law, he should not be deprived of the advantage that it confers. . . so long as they did not come from the defendant or a person acting for him." Mahana v. Onyx Acceptance Corp. 2004 UT 59

Thus, under the collateral source rule, the defendant does not get the benefit of plaintiff's sick pay.

The proposed "standard interrogatory" seeks precisely the information that the collateral source rule prohibits the defendant from introducing at trial.

This begs the question, "why do they need it?"

In my experience as a personal injury attorney, under the current rules this question is rarely asked by defense counsel. If it is asked, I object because it is not likely to lead to admissible information.

Posted by Nelson Abbott October 21, 2011 10:14 AM

URCP 26.2(b)(3) requiring initial disclosure of a SSN should not be adopted.

First, requiring the initial disclosure of a SSN for purposes of reporting to CMS is untimely. An insurance carrier’s duty to report to CMS is not triggered until a settlement has occurred. And, any benefit of early disclosure is greatly outweighed by a plaintiff’s privacy concerns, especially where Plaintiff might still lose at trial. Plus, the argument that early disclosure will “expedite personal injury cases” is incorrect. A plaintiff’s SSN is not relevant to any material fact in a personal injury case. And, any record relevant to the case requiring the plaintiff's identity can be subpoenaed with a plaintiff's full name and date of birth. Thus, requiring the initial disclosure of a SSN is untimely and violates a plaintiff’s legitimate privacy concerns.

Second, requiring the initial disclosure of a SSN, for a plaintiff who is an undocumented immigrant, raises serious ethical questions since it would force plaintiff’s counsel to essentially violate an attorney client communication regarding immigration status. Even if plaintiff’s counsel were to assert a client’s 5th amendment right against self incrimination or move for a protective order on the very narrow issue of SSN, s/he would have essentially violated the client’s communication with respect to immigration status. And, nothing would prevent a chagrined defendant from providing the same court document to ICE for investigation and enforcement. In addition to the ethical violation, this would have a chilling effect on an undocumented immigrant’s access to the courts.

The most logical solution would be to eliminate R 26.2(b)(3) altogether since the risk to plaintiff’s privacy, plaintiff's counsel’s ethical concerns and the actual chilling effect

greatly outweigh any material benefit to expediting the discovery process. A less favorable but alternative solution would be to require initial disclosure of just the plaintiff's Medicare number. Although a Medicare number incorporates a SSN, raising serious privacy concerns for the plaintiff, at a minimum, this alternative solution draws a more focused line between Medicare recipients versus non-recipients instead of documented (e.g., USC, LPR) versus undocumented plaintiffs, thereby avoiding the ethical issue and chilling effect.

Posted by Rick S Lundell October 20, 2011 07:27 PM

URCP 26.02 requires that the SSN be disclosed by plaintiff at the beginning of the case. Defendant does not need the SSN at the beginning of the case and only requires it at the close of the case before disbursements are made. Apart from federal MMSEA directives that make clear that the disclosure is only required after resolution and the chilling effect of some litigants is the issue of privacy. One only needs to be abreast of the news regarding identity theft to understand that the publication of one's SSN is not wise. If this rule is enacted the disclosures should be somehow sealed and assurances made by defendant that dissemination will not be made in any matter not clearly dilineated for the purposes of verifying Medicare / Medicaid coverage and no other purpose. I.E. not to engage in a fishing expedition of insurance databases or other like expeditions.

Posted by George Tait October 17, 2011 03:11 PM

The requirement that plaintiffs disclose social security numbers and HICN (which are essentially social security numbers with an added alpha character) is unnecessary, harmful and countrary to the Federal requirements.

It is unnecessary because if the purpose is to comply with Medicare requirements for payback of medical costs, the purpose is more than adequately met by the existing statutory scheme wherein the plaintiff attorney is liable if a lien goes unpaid. Moreover, the plaintiff attorney is required to obtain and can provide to the liability insurer (which is where this rule change apparently originated) all the information necessary for the insurer to determine whether or not a Medicare lien exists. Finally, although liability insurers apparently read the MMSEA law as rendering them liable for failure to satisfy a Medicare lien, that is a misinterpretation of the law. "[F]ederal law does not mandate that a primary payer (or insurer) make payment directly to Medicare. . . Tomlinson v. Landers 2009 WL 1117399, 5 (M.D.Fla.) (M.D.Fla.,2009) (pointing out that insurers are liable only if the payee of the liability payment does not make proper reimbursement to Medicare)

Disclosure of these numbers is also unnecessary because the numbers are commonly included on all hospital admission records, copies of which the insurer undoubtedly possesses. The disclosure to hospitals (and redisclosure to insurers) is protected by

Federal HIPAA Privacy Rule regulations. No such protection is afforded a mandated disclosure in a civil proceeding.

That lack of protection points up the danger of identify theft. It is a simple matter to obtain voluminous financial and personal information in the digital age, using only the simplest of tools and data. Adding a social security number to the available data obliterates any vestige of privacy and security, all the more so because a social security number is practically impossible to change even when it has been fraudulently used by another.

Finally, this rule change is contrary to the recent change in the online docketing system in the Federal courts, which now requires any user to attest to redaction of social security numbers and other private information upon every system login. Adopting this Rule would return Utah to the period before the Information Age, when people could rely for their privacy upon difficulty of obtaining private information. This proposed rule change is a giant step into the past.

Posted by Clark Newhall October 11, 2011 03:52 PM

Proposed Rule 26.2 addresses many of the concerns we had in applying the new discovery rules to personal injury claims. The new rules should not go into effect until Rule 26.2 is also effective. Is there any way to make certain that the rules all go into effect at the same time -- either by speeding up the approval process for Rule 26.2, or delaying the effective date of the new discovery rules? If not, there will be a period of time where discovery in personal injury cases will be problematic and unnecessarily contentious.

Posted by Barry Lawrence October 10, 2011 01:24 PM

URCP 026.02(b)(3) should not be adopted. The rule requires the plaintiff to give his/her social security number or HICN number prior to resolution. There are several reasons this disclosure should not be required.

1) The federal statute does not require disclosure prior to trial or settlement. Section 111 of the MMSEA reads, "TIMING- Information shall be submitted under subparagraph (A)(ii) within a time specified by the Secretary after the claim is resolved through a settlement, judgment, award, or other payment." Both cases cited in the comment admit as much. The Seger court stated, "[a]lthough the Extension Act does not require this information be submitted to CMS until after a final settlement or judgment is issued, there is no harm to the plaintiffs in providing the information sooner." The Hackley case involved a dispute that arose post settlement.

2) Early disclosure will harm some plaintiffs. Some of those reasons are:

a) If the plaintiff loses the case, the disclosure will have been unnecessary. The unecessary disclosure of a social security number and date of birth to a third party is risky to the plaintiff. The plaintiff becomes vulnerable to identity theft.

b) The requirement will have a chilling effect on access to the court for non-U.S. Citizens. Some people who reside in this country do not have social security numbers. In Utah, many of them are minorities. Many of those people also lack a HICN number. To require them to disclose a social security number, or lack of such number, in a required court document will discourage at least some of them from accessing the court system. Some may be worried about deportation or other negative ramification that may result by being forced to disclose this type of information in a court document. This requirement will have the effect of closing the court house doors to those seeking personal injury damages that do not have social security numbers.

It may be argued that because they will eventually be forced to disclose the information, requiring it early is not harmful. I disagree. In my experience, the plaintiff can approach medicare prior to payment of a judgment or settlement and obtain a letter stating that the person is not eligible. This does not require disclosure/non-disclosure of a lack of social security number in an official court document.

3) The requirement is one sided. The plaintiff has a similar interest in obtaining the social security number of a defendant. If the plaintiff gets a judgment, the plaintiff should file a judgment information statement. That document asks for the defendant's social security number.

For these reasons, the proposed rule should not be adopted.

Posted by Nelson Abbott October 10, 2011 11:51 AM

I am in favor of the proposed Rule 26.02. It would expedite personal injury cases, especially automobile accident litigation. These proposed disclosures would expedite discovery as parties would not have to use their few interrogatories and requests for production to obtain basic information about the injury claims. The disclosure requirements proposed are very similar to the requirements for Uninsured and Underinsured Motorist claim arbitrations under 31A-22-305 and -305.3. These basic disclosures are relevant to every personal injury action. By including these among the required initial disclosures, the parties can consider settlement possibilities quickly. Discovery will then proceed on issues particular to the case. This will prevent parties from having to issue interrogatories for basic information common to every personal injury action.

Posted by Kathryn Tunacik Smith October 10, 2011 10:30 AM

This is a comment to proposed Rule 26.2 dealing with disclosures in personal injury actions . As a general comment, I like the rule and feel that similar such rules should be

enacted for family law cases, malpractice cases, and other types of civil litigation. In this rule, however, I do have concerns about privileges and the following proposed disclosures:

(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 filing of the action, including the name, address, approximate dates of treatment, and a general description of the reason for the treatment.

While I understand that this information is often sought, it also causes unnecessary litigation involving privilege issues. While privileges are waived as a matter of law for injuries at issues, making proposed Rule 26.2(b)(1) appropriate, I believe that Rule 26.2(b)(2) should be further limited to treatments to the same area as injured in the present litigation. For example, if a plaintiff is claiming injury to the back and neck, a defendant is entitled to know if there have been prior injuries to the back and neck for which treatment was sought, however, how can it be justified if the plaintiff was treated for post traumatic syndrome or stress for being rape?

It would be nice to trust lawyers to avoid this area, however, any lawyer who has ever had a client in these kinds of situations, knows that the very disclosure of this kind of event and treatment harms the client when it has no relevance to the present litigation. Many states require the court or the court's appointee to inspect such records and determine relevancy or the lack there of, before any records are turned over.

There may be a better solution, but the problem is real. How do we provide all parties with the information they need and are entitled to receive while protecting privileged information that has nothing to do with the present litigation. Perhaps the rule should or could read:

(b)(2) A list of all other health care providers who treated or examined the plaintiff for (add: "similar types of injuries or injuries in the same area as the injuries in this case") (strike our " any reason") in the 5 years before the filing of the action, including the name, address, approximate dates of treatment, and a general description of the reason for the treatment (add: "and the area treated").

Charles Robert Collins

On behalf of the Litigation Division of the Attorney General's Office, we are pleased to see proposed Rule 26.2, which governs initial disclosures in personal injury actions. That Rule appears to resolve many of the concerns that we have had relating to the new discovery rules that go into effect on November 1st. We view the new rules to be incomplete and problematic without this new Rule. Is there anything that can be done to make sure the new rules do not go into effect without Rule 26.2 -- by either speeding up the approval process for Rule 26.2, or delaying the effective date of the new rules until Rule 26.2 is also effective? If not, there will be a period of time in which the new

rules will mandate an incomplete discovery scheme, which might result in unnecessary contention and confusion. Thanks for your consideration.

Barry Lawrence

Assistant Utah Attorney General

(2) Rule 83. Vexatious litigants.

The vexatious litigant is, in my experience, pro se. My concern with the proposed rule is that it is too cumbersome, and provides too many loopholes, to offer any meaningful relief to those defendants who have to deal with such litigants. Those vexatious litigants with whom I have had to deal do not care what the rules say. Judges are often reluctant to take decisive action against them, both because they rarely know the history of the litigant, and because they feel constrained by the somewhat contradictory rulings from the appellate courts regarding the degree of flexibility with which they arenrequired to treat the pro se litigant. I think judges are legitimately concerned with the constitutional implications of limiting a party's access to the courts, even though the vexatious litigant does not seem to share that same concern for the rights of their unfortunate opponents.

I suggest that the rule be a short, plain statement that vexatious litigants will be liable for sanctions. Armed with that kind of authority, the trial court can then make a determination of how best to deal with the vacations litigant on a case by case basis. The various provisions of the proposed rule would certainly be considerations that would inform a a decision, but putting them all into a rule just makes the rule impractical and, in the end, of little value.

I am mildly concerned that "disproportionate" discovery can be a basis for a conclusion that one is a vexatious litigant. The concept of proportionality, while perhaps laudable, is very plastic and it will likely take some time to define it's contours. It has the potential to become a catch-phrase, like "bad faith", that gets tossed around in ways that are not helpful.

Posted by Phil Ferguson November 12, 2011 07:30 AM

As far as URCP 83 goes, it is unconstitutional considering the following section of the Utah Constitution:

"Article I, Section 11. [Courts open -- Redress of injuries.]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party. "

Posted by Steve J. November 1, 2011 01:07 PM

I am against the way URCP 83 is drafted. It is unconstitutionally overly vague and broad.

What is meant by "claims for relief" .. are they different claims. same claims. same federal statutes. same state statutes. What 'claims'.

What is meant by 'finally determined'? Is that 'finally determined' with an evidentiary hearing? In another court of 'proper subject matter or personal jurisidiction'?

What is meant by "in ANY action"? where, in Utah courts or in federal administrative hearings, where? What kind, under what statutes?

What is 'unmeritorious pleadings'? A pleading can be supported by fact and law, but lose. If that is the definition, then half of all Utah attorneys can be so classified if a Judge simply says 'unmeritorious' three times?

Why three times? Why not one time, or five times, or two times? Does this mean a Court cannot use its contempt powers after one time if the damages are great, or must it wait for the magic three times?

What is meant by 'immaterial'? immaterial to whom?

Rule 11 and 10 cover immaterial or redundant materials.

The Court's inherent powers covers its ability to sanction an individual based on all the surrounding circumstances, or NOT to sanction them. Are the rule writers attempting to take away from the Court's their inherent powers?

And, once an attorney, primarily it will always predictably be small firm or solo attorneys is labeled vexatious by one judge in one case, the clerk disseminates that charge to all the Court's clerks, even if no evidentiary hearing was involved in the initial determination, and without any other Due Process in cite.

The way it is written, one judge in one case can completely destroy an attorney's professional future, by using this rule, with or without the OPC's assistance and do so based on subjectivity, and without any evidentiary hearing or other due process protections. It will kill the 1st amendment as there are no clearly defined ways of using it.

It is time the Bar and the Court stopped doing the cost benefit analysis of what it takes to stifle accessibility to the Courts, shorten dockets, particularly for small firm lawyers, solo lawyers, and the medium income citizens or unpopular litigants or those with complex time consuming cases, who have no recourse to poverty firms, and cannot afford high income lawyers.

Constitutional entitlements and open courts entail the only means by which persons can peacefully resolve issues. This rule creates outcasts based on a single judge's personal opinion. Open court's provision is destroyed because due process protections are not in it.

If judges lack the training, maturity, and knowledge of how to maintain order in their cases without this rule, then what makes anyone sure such a judge can maintain order with it, where so many other rules provide more than ample means of providing Judges with authority to maintain order.

Factually, there are some Court doctrines an attorney may wish to challenge. Are those lacking meritorious substance? Who will challenge judicial doctrines when this rule allows the attorney to lose their license for such a free speech attempt?

This rule is unnecessary, undermines Judge's abilities, is ill defined, overly broad, vague, and conflicts with U.S. Constitutional Due Process and Free Speech standards. It is only going to injure and impair the freedoms and entitlements of the U.S. Constitution for all Utah citizens.

I also agree with Clay Huntsman's perspective below.

Susan Rose Attorney at Law

Posted by susan rose October 12, 2011 05:03 PM

Re Proposed Rule 83:

This is not a problem that can be solved by Rule. It requires legislative action. The import is to limit access to the courts, and so involves the Utah Constitution. Propounding a rule puts the courts in the position of later passing on the Constitutionality of a rule the courts adopted.

Posted by John Bogart October 12, 2011 02:00 PM

Proposed Rule 83 is good start, but does not go far enough. The proposed rule sets up too many loopholes a represented party will have to go through in order to have a pro se litigant declared a vexatious litigant. For example, the requirement of proving how many different times a pro se litigant has filed meaningless motions is too much of a barrier. The district courts should be given greater leeway to determine that a pro se litigant is vexatious and thus be able to impose appropriate sanctions under the circumstances of the case.

Posted by Joseph C. Rust October 11, 2011 02:39 PM

If the Supreme Court insists on chilling the rights of citizens to obtain access to the courts, as guaranteed by the Constitution of Utah, then first it should insist that all secrecy protections afforded to government agencies and corporations be lifted as well--and in full. Do we need more lop-sided legislation from the courts to protect the power structure from full disclosure while penalizing citizen attempts to secure disclosure--a process which often requires several unsuccessful attempts even to find out who the

right party is--regarding the withholding of information regarding toxic waste, political contributions, secret investigations of private citizens, and the like?

Posted by Clay Huntsman October 11, 2011 10:53 AM

URCP 083 Vexatious litigants should expand its definition of "Claim for Relief" to include complaints to the Utah Bar about opposing counsel, administrative hearings i.e. consumer protection, PSC, etc. Often times the vexatious litigant just takes his case to another forum and never stops.

Posted by ML Deamer October 11, 2011 10:32 AM

Rule 83 (a)(1)(A) attempts an entirely objetive standard which may result in unfair determinations for persons (or organizations treated as persons) such as banks, property rental managers, "pay day" small lenders, pawn shops, collection agencies, or others who must frequently litigate. Their record may show that perhaps out of hundreds of suits, that they lost only 5 cases in 7 years. This should not result in a determination that these litigants are "vexatious"

The current text reads:

"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."

I would recommend deleting (a)(1)(A), or perhaps should be edited to include to the effect,

"and has not in the immediately preceding seven years filed an equal or greater number of claims, other than small claim actions, that have been finaly determined in favor of the person.

In other words, a record of 5 wins 5 losses, might still be vexatious, but only if one of the other situations in the remaining clauses exists.

Posted by James Driessen October 10, 2011 10:08 AM

I would like to know where this proposed rule originated. Who is responsible for pushing this rule? Setting a limit of five unsuccessful cases within five years is arbitrary and is very unfair esp. to people who actually have a need to litigate such as builders, lenders and constitutionalists.

These constraints and restrictions are very onerous. Why aren't lawyers subject to the same constraints? Labeling lawyers as vexatious litigants might actually result in a broad public benefit.

What does the phrase "have been finally determined against the person" means? What if they dismiss at the last minute after having run someone through the ringer for two years? Are they off the hook?

I think this is a really bad rule which is poorly drafted and which is designed to force people to hire lawyers instead of exercising their constitutional rights to litigate and have access to the courts.

We all need to know who proposed this rule in order to fairly evaluate whether it has merit. Anonymous rule enactment is dangerous. People and groups seeking to abuse the public through court rules need to be identified.

I think we all know that tax protester types will be the primary victims of this rule.

Posted by robert breeze October 9, 2011 04:24 PM

1. I think the Supreme Court should take a hard look at the constitutionality of the "pre-filing order" concept. We all know people we would like this applied to, but I'm not sure that it would pass the constitutionality test as now written.

2. The term "prefiling order" should be defined in section (a). I had to read the whole rule before I could figure out what it was.

Posted by Neil Crist October 9, 2011 01:20 PM

Most recent post: November 14, 2011 05:23 PM

Tab 3

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: November 22, 2011
Re: Rule 26 reference in Rule 37

It appears that the reference in Rule 37(h) to Rule 26(d)(1) and Rule 26(d)(4) may be in error. The current references are excerpted below. The former references are attached.

Rule 37. Discovery and disclosure motions; Sanctions.

(h) Failure to disclose. If a party fails to disclose a witness, document or other material as required by Rule 26(a) or Rule 26(d)(1), or to amend a prior response to discovery as required by Rule 26(d)(4), 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).

Rule 26. General provisions governing disclosure and discovery.

(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.

court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(b)(2) *Sanctions by court in which action is pending.* If a party fails to obey an order entered under Rule 16(b) or 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 obey an order to provide or permit discovery, including an order made under Subdivision (a) of this rule or Rule 35, unless the court finds that the failure was substantially justified, the court in which the action is pending may take such action in regard to the failure as are just, including the following:

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

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

(b)(2)(C) strike pleadings or parts thereof, stay further proceedings until the order is obeyed, dismiss the action or proceeding or any part thereof, or render judgment by default against the disobedient party;

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

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

(b)(2)(F) instruct the jury regarding an adverse inference.

(c) *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 thereafter 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 (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) *Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.* 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 (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court on motion may take any action authorized by Subdivision (b)(2).

The failure to act described in this subdivision 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 as provided by Rule 26(c).

(e) *Failure to participate in the framing of a discovery plan.* If a party or attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court on motion may take any action authorized by Subdivision (b)(2).

former 37

(f) *Failure to disclose.* If a party fails to disclose a witness, document or other material as required by Rule 26(a) or Rules 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), 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 Subdivision (b)(2).

conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) *Supplementation of responses.* A party who has made a disclosure under Subdivision (a) or responded to a request for discovery with a response is under a duty to supplement the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(e)(1) A party is under a duty to supplement at appropriate intervals disclosures under Subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under Subdivision (a)(3)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert.

(e)(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) *Discovery and scheduling conference.*

The following applies to all cases not exempt under Subdivision (a)(2), except as otherwise stipulated or directed by order.

(f)(1) The parties shall, as soon as practicable after commencement of the action, meet in person or by telephone to discuss the nature and basis of their claims and defenses, to discuss the possibilities for settlement of the action, to make or arrange for the disclosures required by Subdivision (a)(1), to discuss any issues relating to preserving discoverable information and to develop a stipulated discovery plan. Plaintiff's counsel shall schedule the meeting. The attorneys of record shall be present at the meeting and shall attempt in good faith to agree upon the discovery plan.

(f)(2) The plan shall include:

(f)(2)(A) what changes should be made in the timing, form, or requirement for disclosures under Subdivision (a), including a statement as to when disclosures under Subdivision (a)(1) were made or will be made;

(f)(2)(B) the subjects on which discovery may be needed, when discovery should be completed, whether discovery should be conducted in phases and whether discovery should be limited to particular issues;

(f)(2)(C) any issues relating to preservation, disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(f)(2)(D) any issues relating to claims of privilege or of protection as trial-preparation material, including — if the parties agree on a procedure to assert such claims after production — whether to ask the court to include their agreement in an order;

(f)(2)(E) what changes should be made in the limitations on discovery imposed under these rules, and what other limitations should be imposed;

(f)(2)(F) the deadline for filing the description of the factual and legal basis for allocating fault to a non-party and the identity of the non-party; and

(f)(2)(G) any other orders that should be entered by the court.

(f)(3) Plaintiff's counsel shall submit to the court within 14 days after the meeting and in any event no more than 60 days after the first answer is filed a proposed form of order in conformity with the parties' stipulated discovery plan. The proposed form of order shall also include each of the subjects listed in Rule 16(b)(1)-(8), except that the date or dates for pretrial conferences, final pretrial conference and trial shall be scheduled with the court or may be deferred until the close of discovery. If the parties are unable to agree to the terms of a discovery plan or any part thereof, the plaintiff shall and any party may move the court for entry of a discovery order on any topic on which the

Tab 4

Questions:

Under the 2011 Amendments, if a party moves to exclude evidence or testimony that was either not disclosed in the other party's Rule 26(a) disclosures, or was not disclosed timely, is the party requesting exclusion still required to make a showing of wilfulness, bad faith, fault or persistent dilatory tactics?

Under the 2011 Amendments, if a party moves to exclude an expert witness, or the opinions of an expert witness, that were not timely disclosed, is the party requesting exclusion still required to show wilfulness, bad faith, fault or persistent dilatory tactics?

Answer:

No. The trial court continues to have broad discretion in these matters, but a party seeking exclusion of evidence or testimony under Rule 26(d)(4) is not required to show, and the trial court does not need to find, wilfulness, bad faith, fault or persistent dilatory tactics on the part of the non-complying party.

Rule 26(d)(4) states: "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." Likewise, Rule 37(h) states: "If a party fails to disclose a witness, document or other material as required by Rule 26(a) ... 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."

Expert witnesses must be disclosed pursuant to Rule 26(a)(4)(A) and if they are not, the standard in Rules 26(d) and 37(h) applies. If the expert is required to prepare a written report, Rule 26(a)(4)(B) states: "A report ... shall contain a complete statement of all opinions the expert will offer 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."

Prior to the 2011 Amendments, and under Rule 37, the Supreme Court and the Utah Court of Appeals both ruled that the trial court should not exclude witnesses, evidence or testimony unless the court first finds "on the part of the non-complying party wilfulness, bad faith, ... fault, or persistent dilatory tactics frustrating the judicial process." Welsh v. Hospital Corp. of Utah, 2010 UT App. 171, ¶9; see also Arnold v. Curtis, 846 P.2d 1307, 1309-10 (Utah 1993) (trial court properly excluded expert witness); Dahl v. Harrison, 2011 UT App. 389, ¶18 (trial court properly excluded testimony from expert where non-complying party wilfully delayed moving the case forward).

The 2011 Amendments supplant this standard. Today, the consequence for failure to disclose or untimely disclosure is stated in Rule 26(d)(4) and Rule 37(h). Exclusion is not necessarily automatic, and the non-complying party may avoid it, but the burden of proof is on the non-complying party who must show that the non-disclosure or untimely disclosure was (1)

harmless, or (2) justified by good cause. Id. The committee note explains the reasons why this departure from the prior standard is important:

> If a party fails to disclose or to supplement timely its discovery responses, that party cannot use the undisclosed witness, document, or material at any hearing or trial, absent proof that non-disclosure was harmless or justified by good cause. More complete disclosures increase the likelihood that the case will be resolved justly, speedily, and inexpensively. Not being able to use evidence that a party fails properly to disclose provides a powerful incentive to make complete disclosures. This is true only if trial courts hold parties to this standard. Accordingly, although a trial court retains discretion to determine how properly to address this issue in a given case, ***the usual and expected result should be exclusion of the evidence.***

URCP 26, Advisory Committee Note, Consequences of Failure to Disclose. [Emphasis added].

There is at least one important caveat. If a party elects to take the deposition of an expert, rather than require an expert report, the Rules do not explicitly limit the opinions that the expert can offer at trial. As explained in the committee note:

> If a party elects a written report, the expert must provide a signed report containing a complete statement of all opinions the expert will express and the basis and reasons for them. The intent is not to require a verbatim transcript of exactly what the expert will say at trial; instead the expert must fairly disclose the substance of and basis for each opinion the expert will offer. The expert may not testify in a party's case in chief concerning any matter not fairly disclosed in the report. To achieve the goal of making reports a reliable substitute for depositions, courts are expected to enforce this requirement. ***If a party elects a deposition, rather than a report, it is up to the party to ask the necessary questions to "lock in" the expert's testimony.*** But the expert is expected to be fully prepared on all aspects of his/her trial testimony at the time of the deposition and may not leave the door open for additional testimony by qualifying answers to deposition questions.

URCP 26, Advisory Committee Note, Consequences of Failure to Disclose. [Emphasis added].

Finally, Rule 37(h) also states that "in addition to or in lieu of [exclusion], the court on motion may take any action authorized by paragraph (e)(2)." Rule 37(e) identifies sanctions that a court may impose when a party fails to comply with a court order. Because it is outside the scope of this discussion forum, the committee takes no position on whether a party seeking relief under Rule 37(e) must show wilfulness, bad faith, fault or persistent dilatory tactics. Likewise, if

the case involves a failure to disclose or untimely disclosure, and the party seeks one of the remedies available under Rule 37(e) in addition to or in lieu of exclusion of the evidence, that remedy likely would be subject to the same standard as a claim brought under Rule 37(e) directly. For that reason, the committee takes no position on whether the moving party must show wilfulness, bad faith, fault or persistent dilatory tactics in that context.

Disclosure and Discovery Questions

From Frank

1. There is confusion between the language of Rule 1, "these rules govern all actions brought after they take effect and all further proceedings in actions then pending," and the advisory committee note stating that the amendments are only effective as to cases filed on or after November 1. Why shouldn't Rule 1 prevail over the Committee note? And if it doesn't, why not? Some of these changes would be very useful for cases filed before November 1st, such as the rule on work-product of expert draft reports.

2. Is anybody going to be keeping track of the standard discovery cutoff dates that depend on the case tier? How will this work?

3. What damages are considered in arriving at the damage amount for purposes of the tier level? For example, what if a party pleads for $40,000 in compensatory damages and then for such punitive damages as are reasonable in the premises? Is the jury limited to awarding $10,000 in punitives? What about prejudgment interest? This can be substantial - does that count? What about attorneys fees - do they count?

4. "I think I understand this but I want to be sure: Rule 26(c)(4) says "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." This means that you would add all claims made by a plaintiff and all counterclaims made by a defendant in arriving at the tier. You don't add up only to claims "per side" in other words."

5. What if you are not allowed to state an ad damnum amount (as in medical malpractice claims), or simply want to just plead "reasonable damages"?

6. Can I serve interrogatories or other discovery with my initial disclosures?

7. Rule 26(c)(2) says, "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." I am thinking that the phrase "that party" means the party requesting the discovery, not the party who is the subject of the discovery. Is this correct?

8. The tier chart does not say anything about rule 45 subpoenas. Is there a limitation on those? If not, why not?

9. Rule 26(c)(5) says that "Standard fact discovery per side (plaintiffs collectively, defendants collectively, and third-party defendants collectively) in each tier is as follows . . ." I understand that this means that all defendants my share their 20 interrogatories, for example. but what if there are legitimate controversies between the defendants? What if they have cross-claims asserted? Shouldn't they get their own tier of discovery, just as they may get their own set of peremptory challenges at trial?

10. What happens to the discovery deadlines if new parties are added?

11. Rule 30(d), p. 32: "(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 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?

12. Is an order needed or not for stipulations to extend discovery, or is it just a "stipulated statement"? (If the judge has to approve the stipulation by signing and order, why bother judges with these pro forma orders?)

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

14. 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.)

15. 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 our expert designations filed, and the election deadline runs from then?

16. 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 request 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?

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

18. 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.

19. 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"?

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

21. 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?

22. 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.

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

24. Is the jury advised of the tier limits?

25. 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?

26. 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?

27. 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?

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

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

30. Question: What if a plaintiff pleads only "such damages as a reasonable," and does not make any tier allegation? Does that case then fall automatically into Tier 2?"

Answer: The Committee is of the view that such a complaint is defective, as it does not comply with Rule 8(a). That rule states that "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)." While Rule 26(c)(3) provides that actions claiming non-

monetary relief are permitted standard discovery as described for Tier 2, that rule is inapplicable to claims for unspecified money damages.

From Cullen

1. Rule 8(a). What if a plaintiff pleads into tier 1 and then the defendant's counterclaim bumps the case in to tier 2? Is the plaintiff still limited to tier 1 damages? My initial reaction was no, it's now a tier 2 case, and the plaintiff can recover tier 2 damages. But Rule 8(a) can be read differently: "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." This language seems to focus on what the pleading qualifies for, not what the case qualifies for. Is that what we intended?

Proposed answer: A party can recover damages consistent with the tier the cases ends up in, not the tier called for in the party's initial pleading.

2. Rule 26(a)(4)(C)(i). 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). It comes down to the meaning of "thereafter"? Note: forcing a defendant to elect before fact discovery seems like a bad idea.

Proposed answer: The election is due fourteen days after the close of fact discovery.

Alternative proposed answer: The election is due seven days after the close of fact discovery. (I think I prefer this one.)

3. Rule 26(a)(2). What if the defendant files a 12(b)(6) motion on claims 1 and 2 , and an answer on claims 3 and 4. Are disclosures due immediately on claims 1 and 2, or do they wait for the motion to be resolved. It seems to me that they ought to wait for the motion, or else they should be limited to the answered claims only. But it's hard to read the rule that way. I think this was an issue under the old rules, too.

Proposed answer: Disclosures on claims 3 and 4 are due 14 days after the answer; disclosure on claims 1 and 2 are due 14 days after the resolution of the motion to dismiss.

4. Rule 26(c)(6)(a). When asking for extraordinary discovery, what does "after reaching the limits of standard discovery" mean? Let's say you have a tier 1 case and the only discovery you want to is to ask 5 interrogatories. Can you ask for those interrogatories right off the bat, or do you have to first take a 3 hour deposition and submit 5 requests for production and 5 requests for admission, even though you a had no need or desire for any of that. If the answer is no you don't have to do that, should it follow that by asking for the 5 interrogatories you waive the right to take any further discovery, even if you decide later on you would like to take that 3 hour deposition after all.

Proposed answer: You are required only to exhaust the limits of the type of additional discovery you are seeking. No waiver of other types of standard discovery, but further motions for additional discovery will be viewed with great skepticism.

From Lincoln

How to reconcile the hour limits on depositions in the tiers table from Rule 26 with the language in Rule 30(d) that states "During standard discovery, oral questioning of a nonparty shall not exceed four hours, and oral questioning of a party shall not exceed seven hours."

From Todd and Derek

I agree that the landscape has changed dramatically with the adoption of the new rules. In one critical instance, the rules built in to Rule 26 the consequences for non-compliance, rather than leaving consequence to be imposed as a sanction under Rule 37. Rule 26(d)(4) provides: "If a party fails to disclose or to supplement timely a disclosure or response to discovery, that party may not use the witness, document or material at any hearing or trial unless the failure is harmless or the party shows good cause for the failure."

This strikes me as a markedly different standard. Before, the party moving to exclude undisclosed material had the burden of showing "bad faith" or "persistent dilatory conduct." Today, the burden is on the non-disclosing party to show either (1) the non-disclosure was harmless; or (2) the non-disclosing party had good cause for non-disclosure. The standard is now "No one was hurt" or "I had a good reason" as opposed to "he is wilfully acting in bad faith."

This is the powerful incentive to make complete disclosures that the committee intended. See, Comment Rule 26(d). And the usual and expected result will be exclusion. This Rule 26 sea-change significantly alters the "substantially justified" standard in Rule 37. In summary, I don't think that a showing of bad faith, wilfulness, or persistent dilatory conduct will be required any longer for non-disclosure or untimely disclosure.

Derek

>>> Judge Todd Shaughnessy 11/11/2011 9:13 AM >>>

Fran,

I've got a potential issue from the trial judge's perspective concerning the exclusion of witnesses and testimony that is not timely disclosed, something that I think we all agree is essential to the functioning of the new rules. The issue occurred to me as I reviewed a decision that came out yesterday from the court of appeals on this issue (copy attached). Reviewing the decision may give trial judges pause in doing what I believe the rules expect us to do -- exclude evidence that isn't timely or properly disclosed.

Ultimately, the court upheld the trial judge's exclusion of the expert. However, it does not disavow prior cases from the court of appeals and the supreme court that suggest evidence cannot be excluded unless the trial court first makes a finding of bad faith, wilfulness, or persistent dilatory tactics. The case doesn't address the new rules, and my own view is that the landscape has changed significantly as a result of the new rules. Nevertheless, the court of appeals relied pretty heavily on the fact that there was a scheduling order in place that the plaintiff failed to comply with. Under the new rules, these scheduling orders will no longer exist. I can certainly envision a situation where a party fails to meet the deadlines or requirements of the new rules but that failure doesn't rise to the level of bad faith, wilfulness, or persistent dilatory tactics -- and under the new rules trial judges will no longer have the violation of a court order to rely on.

Here's the long version of the cases on this:

Dungan v. Jones, 615 P.2d 1239 (Utah 1980), reversed trial court's exclusion of experts that were not timely disclosed because (1) the prejudicial effects were severe, (2) the court's order requiring disclosure of experts was never reduced to writing, (3) the matter was tried to the court, not a jury, and (4) the court had means available that were less severe than exclusion.

Arnold v. Curtis, 846 P.2d 1307, 1309-10 (Utah 1993), court pointed out that Dungan was decided prior to the 1987 amendment of Rule 16 which added language allowing for sanctions for failure to comply with court ordered deadlines and "reinforces rule 16's intention to encourage forceful judicial management."

Welsh v. Hospital Corp. of Utah, 2010 UT App. 171, pp 9 -- decided after Arnold v. Curtis --court of appeals said that "before a trial court can impose discovery sanctions under rule 37, the court must find on the part of the noncomplying party willfulness, bad faith, ... fault, or persistent dilatory tactics frustrating the judicial process." Court of appeals held that the trial court erred in not extending deadlines for completion of expert discovery because "[e]xcluding a witness from testifying is ... extreme in nature and ... should be employed only with caution and restraint...."

Dahl v. Harrison, 2011 UT App. 389, pp 18, court of appeals went out of its way to try and limit the holding of Welsh, pointing out that it was an "unusual fact situation" that included "a significant clerical error by a member of the court's staff". At the same time, the court did not abandon the idea that a showing of wilfulness is required: "Here, in contrast, the trial court found that client had wilfully delayed moving the case forward and disobeyed the court's orders." In Dahl, there was a Rule 16 scheduling order in place that the court relied on in finding a "wilful" violation. Those scheduling orders will not exist under the new rules.

To me, the holding is odd when you consider that the court of appeals just a few months ago held that when spoliation is involved, no showing of wilfulness or bad faith is required. That case turned on our committee's amendments to the rules to address

spoliation and ESI issues and the court of appeals said those amendments did away with the "bad faith" requirement.

November 2011, rule changes take effect. Did they supplant the "bad faith" standard? If you're a trial judge, and the conduct doesn't rise to the level of bad faith, do you just extend the deadlines? Allow the discovery? Admit the testimony?