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- **OUTLINE OF THE NEW UTAH RULES OF CIVIL PROCEDURE**
  - Revised 2 May 2013
  - **By Francis J. Carney**
  - Note: Although I sit on the Rules Committee, I am but one vote among many. Therefore, all comments and opinions in this outline are my own, and not those of the Advisory Committee. Any errors are of course my own-- Frank Carney
  - **Note- The practitioner obviously should be aware that Utah adopted significant changes to the rules of discovery and disclosure in November 2011. There have been several corrective amendments to the "new rules," the most significant of which occurred on April 1, 2013. Therefore, ALWAYS consult the online version of the rules to make sure that you are working with the current version.**
    - http://www.utcourts.gov/resources/rules/urcp/
  - **Note 2- The Rules Committee is issuing answers to "Frequently-Asked Questions" concerning the new rules. These should always be consulted if you have a question.**
    - http://www.utcourts.gov/committees/civproc/faqs_about_disclosure_and_discovery/
- **INTRODUCTION**
  - **Summary of major changes**
    - **A new "proportionality" requirement governs everything- see below.**
    - The disclosure requirements have been significantly expanded.
    - Discovery is divided into "standard" and "extraordinary" discovery
    - Standard discovery is governed by a new tier system
    - Time to complete discovery has been shortened.
    - No more attorney scheduling conferences, and no more mandatory case management orders.
    - Discovery is much more limited, and nearly eliminated for smaller-value cases.
    - Hours for depositions are further limited.
    - Experts- you can depose or you can get a report, but you cannot get both.
    - Attorney communications with experts, and draft reports, and now protected from discovery.
    - Rule 35 (medical examinations) has significantly changed- videotaping is the default

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- **Why these amendments?**
  - Rule 1: the Advisory Committee Note states that "a primary purpose of the 2011 amendments is to give effect to the long-standing but often overlooked directive in Rule 1 that the Rules of Civil Procedure should be construed and applied to achieve 'the just, speedy and inexpensive determination of every action.'"
  - "The amendments serve this purpose by limiting parties to discovery that is proportional to the stakes of the litigation, curbing excessive expert discovery, and requiring the early disclosure of documents, witnesses and evidence that a party intends to offer in its case-in-chief. The committee's purpose is to restore balance to the goals of Rule 1, so that a just resolution is not achieved at the expense of speedy and inexpensive resolutions, and greater access to the justice system can be afforded to all members of society."
- **Brief history of the amendments**
  - These amendments were batted back and forth in the Supreme Court Advisory Committee on Rules of Civil Procedure for more than two years.
  - Substantial assistance was provided by the Institute for the Advancement of the American Legal System in Colorado.
  - The rules, or earlier versions of them, were published for comment twice to the entire bar.
  - Dozens of presentations were given to the bench and the bar.
  - Hundreds of comments from attorneys and judges, as well as non-attorneys, have been received and considered by the Committee.
  - The Supreme Court has been an active participant in monitoring the development of the rules amendments.
- **Frequently-Asked Questions**
  - The Rules Committee is issuing online "FAQs" and answers on the new rules
  - These are not binding on the courts, but should be highly persuasive in any dispute
  - The FAQs are found online at the very bottom of the Courts' Rules website: http://www.utcourts.gov/resources/rules/urcp/
- **Effective Date**
  - The effective date of the new rules is **November 1st, 2011**. (See FAQ on point)
  - The amendments are effective only for cases **filed** on or after the effective date; all matters filed before then are subject to the rules in effect as of October 31, 2011.
  - This was done to avoid rampant confusion for already-filed cases during the switchover to the new disclosure and discovery rules.

- There is some 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. However, the Supreme Court's enabling order makes it clear that the Advisory Committee Note is correct.

- We had similar issues with the adoption of the extensive disclosure amendments in 1999, and all seem to have survived.

- Therefore, at least until the older cases work out of the system, counsel and the courts will be using two sets of rules, depending on whether the claim was filed before November 1, 2011. (Note: keep your old rulebook.)

- This will admittedly be confusing, but the alternative-- applying the new rules to existing cases-- would be far worse.

- **THE AGE OF "PROPORTIONALITY" ARRIVES**

  - **The biggest change from existing practice: a "proportionality" test is now to be used on all discovery, and the burden of proving is *on the party seeking discovery*. Rule 26(b)(3).**

  - **This "burden switch" is also reflected in Rule 37(b)(2), requiring the *movant* to demonstrate proportionality on a motion to compel.**

  - Under the old Rule 26 (b)(3)(c) there was already a proportionality test (and has been in the federal rules since 1983), but it was rarely enforced, and the party objecting to the discovery had the burden of showing "dis-proportionality."

  - "Proportionality" is defined at length in Rule 26(b)(2) and includes the needs of the case, the amount in controversy, the importance of the issues, the burden of the desired discovery, and other factors. Obviously, it will be developed further through case law, much as the present "relevance" standard was.

  - **The important change is not that "proportionality" has been better defined-- after all, the old Rule 26(b)(3)(c) had most of the present elements in it-- but that the *burden* has shifted to the party seeking discovery to prove proportionality.**

  - This change may be the most significant change since the discovery rules were adopted in Utah more than 50 years ago.

- **PLANNING MEETINGS, DISCOVERY PLANS, CASE MANAGEMENT ORDERS, AND STARTING DISCOVERY**

  - The new rules **eliminate** the requirements for Case Management Orders, Discovery Plans, and Attorney Planning Conferences required under the present Rule 26(f).

  - The court can still order a planning conference under Rule 16 if it wants to, but there is no longer any *requirement* for the attorneys to hold a planning conference, and there is no need to prepare a case management order.

- This means that actions can go forward almost as they did before the 1999 amendments-- you can start discovery as soon as you serve your Initial Disclosures; you do not need to confer with opposing counsel first, or get a case management order signed.

- **PLEADINGS AND LIMITATIONS ON RECOVERY**

  - The standard for pleading under Rule 8 remains "notice pleading." Rule 8 is **unchanged** in this regard. The Committee's desire in earlier versions of the rule to require more fact-intensive pleading, although not to the level of Twombley or Iqbal, was rejected by the Supreme Court. (*Note- this was the only part of the proposed rules that was rejected by the Court*)

  - The new Rule 8(a) now requires a party who seeks damages to either plead a damages amount or plead that damages are such to qualify for one of the three "tiers" specified under Rule 26(c)(3).

  - The August 2012 proposed amendment to Rule 10(a)(1) would require a party to designate the discovery tier in the case caption. (This is already a wise practice.)

  - **Important- under Rule 8(a), a party may not recover more than the monetary limit of tier 1 or tier 2 if its pleading makes the claim fall within those tiers.**

    - This is the trade-off for strict limitations on discovery.

    - Note- this is a change from the version of the rules circulated for comment. Many comments complained of the possibility of "bait-'n-switch" tier pleading, and the Committee was persuaded to change the rule to make the tier choice binding on damages.

    - For example, if a plaintiff's complaint states that it falls within Tier 1-- $50,000 or less--and the jury awards $75,000, the plaintiff can only recover $50,000, and has *waived* any recovery beyond that.

  - See also amended Rule 54(c): *"Except as to a party against whom a judgment is entered by default, **and except as provided in Rule 8(a)**, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."*

  - Motions to amend under Rule 15(a) can be made to get into a higher tier.

  - Possible questions

    - What happens when a counterclaim is asserted that puts the case into a higher tier? Does plaintiff have to amend to recover under the new tier???? (As of September 2012, this question is under consideration by the Committee as a "FAQ".)

    - Who decides the tier? In other words, suppose a plaintiff pleads the case as a Tier 3 case, when it's obvious that damages can't reach that much. Can defendant object and ask for it to be put into a lower tier? Answer- no. The tier level is determined by the plaintiff's demand, or the counterclaim, and they are presumed to be made in good faith per Rule 11.The Committee does not anticipate preliminary battles over the tier level. (This is the subject of an upcoming FAQ)

- What about attorneys' fees? Answer- this is very tricky, as you are not going to know the amount of the fees at the time you file the complaint. Also, sometimes under a contract claim, fees are considered "damages," and sometimes, in other cases, fees are considered as a costs element. Best answer-- if there is a possibily of fees being awarded, plead into a higher tier.

- Is the jury advised of the tier limits? Answer- undecided, but probably not. The rules do not specify, and opinions differ in the Committee. Most see this as like a damages cap, for which the jury is not advised. The rule says nothing one way or the other. An FAQ is in process.

- May a plaintiff argue for a verdict in excess of the tier limits? Answer- undecided. The rules do not specify, and opinions differ in the Committee. There are good arguments both ways.

- This tier damages limitiation may prove very tricky on auto cases with underinsured motorist coverage when a plaintiff wants to plead the case into Tier 1, but not waive the UIM coverage above $50,000. (Full discussion is outside the scope of this outline.)

- What if without being asked to do so, a jury awards over the tier limit, say $75,000 on a Tier 1 claim? May the plaintiff move under Rule 15(b) to amend to conform to the evidence? Answer- no. Rule 8(a) makes it clear that a plaintiff has waived any amount over the tier limit alleged.

INITIAL DISCLOSURES

Content of Initial Disclosures- Rule 26(a)(1)

- Same as before:
  - Information on persons having discoverable information supporting the claim.
  - A computation of damages.
  - Insurance policies.
- New requirements:
  - Identity of fact witnesses that may be called at trial.
  - A **summary** of expected testimony of those witnesses.
    - "[T]he summary of the witness's expected testimony should be just that--a summary. The rule does not require prefiled testimony or detailed descriptions of everything a witness might say at trial. On the other hand, it requires more than the broad, conclusory statements that often were made under the prior version of [the rule]." Committee Note.
  - Produce trial exhibits that may be used (not just identification).
  - Produce a copy of all documents to which a party refers in its pleadings (not just identification).
  - Computation of damages must now include a **copy** of all discoverable documents or evidentiary material on which the computation is based.

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- **"Rule of reason" on new requirements for initial disclosures**
  - Trial fact witnesses and exhibits are to be disclosed (somewhat obviously) only to the extent they are then known.
    - See Committee Note: "Not all information will be known at the outset of the case. If discovery is serving its proper purpose, additional witnesses, documents, and other information will be identified. The scope and level of detail required in the [initial disclosures] should be viewed in light of this reality."
  - *Reasonable* disclosure is all that is required: "A party is not required to interview every witness it ultimately may call at trial in order to provide a summary of the witness's expected testimony." See, Committee Note.
- **Supplementation and sanctions**
  - There is (still) a continuing duty to supplement Initial Disclosures.
    - Rule 26(d)(4) and (d)(5) impose a continuing obligation to supplement disclosures
    - No request is necessary.
    - The penalty for failing to do so is that the evidence may not be used at trial unless the failure was harmless or the party shows good cause for not supplementing. This is similar to the old Rule 26(e). See Rules 26(d)(4) and 37(h).
  - The Committee Note **twice** emphasizes the penalty for failure to disclose:
    - "The penalty for failing to make timely disclosures is that the evidence may not be used in the party's case-in-chief. To make the disclosure requirement meaningful, and to discourage sandbagging, parties must know that if they fail to disclose important information that is helpful to their case, they will not be able to use that information at trial. The courts will be expected to enforce them unless the failure is harmless or the party shows good cause for the failure." Committee Note.
    - "Consequences of failure to disclose. Rule 26(d). 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." Committee Note.
- **Rule 26.2 for personal injury actions**
  - Rule 26.2 applies only to personal injury actions and is effective as of 22 December 2011

- Question: Does it apply to PI cases filed before 11/1/11? (The rule does not say, but this has been discussed in committee, and I believe the consensus was that it did **not**.)
- Question: Does it apply to wrongful death claims? Yes, see FAQs.

- In addition to the standard Initial Disclosures, this requires a plaintiff to also:
  - List all healthcare providers seen for the injury at issue;
  - List all other healthcare providers seen in the previous five years;
  - Provide information sufficient for a defendant to query the Medicare database, including SSN;
  - If lost wages are claimed, describe all disability benefits received;
  - If lost wages are claimed, list employers in the past five years;
  - Provide copies of all medical bills;
  - Provide copies of all official investigative reports;
  - Provide copies of all witness statements, except as protected under the work product rule.
- For "sensitive" information, the rule allows a motion for protective order to be filed and such case automatic disclosure is not required
  - Example: a female plaintiff's sexual assault counseling sought in a car crash case
  - Example: prior psychiatric records where only marginally relevant
- Rule 26.2 requires a defendant to also:
  - Provide a statement of the amount of insurance applicable to the claim, including excess and self-retentions;
    - The proposed rule recognizes present practice and requires a defendant only to produce the declaration sheet, not the complete insurance policy, unless the plaintiff requests it.
  - Provide copies of all official investigative reports;
  - Identify persons to whom it wishes to allocate fault (this fixes the "hole" left with the elimination of Case Management Orders);
  - Provide copies of all witness statements, except as protected under the work product rule.

- **Exemptions from Initial Disclosures- Rule 26(a)(3)**
  - Still exempt from Initial Disclosure requirement are:

- Actions for judicial review of admin or rulemaking.
- Actions under 65B (replevin) or 65C (writ of attachment).
- Actions to enforce an arbitration award.
- Actions for water rights adjudication.

- But the exemptions from Initial Disclosures no longer include:
  - Contract actions seeking $20,000 or less.
  - *Pro se* cases.
  - See Committee Note.

- **Timing of Initial Disclosures. Rule 26(a)(2)**
  - Initial disclosures must be served by the plaintiff within **14 days** after service of the first answer to the complaint. (This used to be 14 days after the meeting of the parties under 26(f).)
  - Now, Initial Disclosures by defendants must be served within **28 days** after the initial disclosures of the plaintiff, or the defendant's appearance, whichever is later. ******This is likely to be changed by the September 2012 amendments to being served within 42 days after the service of the first answer to the complaint or within 28 days after that defendant's appearance, whichever is later.******

- **"STANDARD" AND "EXTRAORDINARY" DISCOVERY**
  - **Two kinds of discovery**
    - There is "standard" discovery available to all cases; and "extraordinary" discovery beyond that is available by stipulation or by motion.
    - The rules imply that expert discovery is not a part of "standard" discovery--- at least for calculating discovery timing-- but it is not quite "extraordinary" discovery either. (see below)
    - As to "extraordinary" discovery: if more discovery is needed, the parties have two ways of getting it: by stipulation or by motion.
  - **Stipulations for Extraordinary Discovery**
    - Counsel can extend the deadlines to finish discovery or increase the number of discovery tools allowed. Rule 29.
    - All they have to do is file a "stipulated statement" that extraordinary discovery is necessary and proportional under 26(b)(2) and, if they want something besides more time, that their clients have reviewed and approved a "discovery budget." **NO ORDER IS REQUIRED, AND NO COURT INVOLVEMENT IS NECESSARY.**

- Committee Note to Rule 26: "If the parties can agree additional discovery is necessary, they may stipulate to as much additional discovery as they desire, provided they stipulate the additional discovery is proportional to what is at stake in the litigation and counsel for each party certifies that the party has reviewed and approved a budget for additional discovery. The certification must confirm that the actual party in question, and not merely counsel, has reviewed and approved the budget. Such a stipulation should be filed before the close of the standard discovery time limit, but only after the completion of standard discovery available under the rule. If these conditions are met, the Court will not second-guess the parties and their counsel and **must** approve the stipulation.

- Note- the "discovery budget" does **not** need to produced or filed, or signed by the client. All that is necessary is that counsel certifies that the client has agreed with a discovery budget.

- Note that under the new local rule, CJA 10-1-306, 406, and 206 you must promptly notify the court of any stipulations for extraordinary discovery. (The rule provides a form.)

- **IMPORTANT**- under Rule 29, court "approval" is required **only** if the extension would would interfere with a court order for completion of discovery or with the date of a hearing or trial.

  - Note that in the usual case under the new rules, the trial judge will *not* routinely be setting a date for completion of discovery, as there are no more Case Management Orders.

  - This means that the trial judge **cannot deny** extraordinary discovery if the parties want it, and it does not interfere with a trial/hearing/discovery end date.

- **WARNING**- The "stipulated statement" must be filed **before** the close of standard discovery, but **after** reaching the limits of standard discovery under your tier. Rule 29.

  - The idea behind this is that people should go through standard discovery first before asking for more; it might just be enough.

  - In other words, don't ask for extraordinary discovery at the start of the case.

- **Motions for Extraordinary Discovery- Rule 26(c)(6)(B)**

  - If the parties cannot agree on the need for more time or more discovery, then a party can move for additional discovery.

  - The party must demonstrate that the additional discovery is necessary and proportional. 26(c)(6)(B).

  - Counsel must also provide a certification that the client has reviewed a discovery budget. (You do **not** need to produce the discovery budget, or anything signed by the client for that matter.)

  - Counsel must also certify that s/he has attempted to reach a stipulation with opposing counsel on extraordinary discovery.

  - See, Committee Note: "[C]ases in which such additional discovery is appropriate do exist, and it is important for courts to recognize they can and should permit additional discovery in appropriate cases, commensurate with the complexity and magnitude of the dispute."

- *****Warning and "Gotcha"- The motion for extraordinary discovery must be made after completing standard discovery available to the party, but before the deadline for the close of standard discovery. Rule 26(c)(6)(B).**

- Also note that in Third and Fourth Districts (and likely other districts in the future) you must comply with CJA 10-1-306 (or 406), which requires the parties to "meet and confer" and file an abbreviated "statement" (memorandum). Oppositions must be filed within 5 days, then the matter should be decided within two weeks, the judges tell us.

FACT DISCOVERY

Commencement of discovery

- Fact discovery can begin immediately upon service of your Initial Disclosures.
  - The old Rule 26(d) required a party wait on discovery until it "met and conferred" with its opponent, but it has been removed.
  - New Rule 26(c)(2) simply makes a party wait until its Initial Disclosures are made.
- Initial Disclosures can be served "within 14 days after service of the first answer to the complaint" under 26(a)(2)(A), so they cannot be served **with** the complaint.
  - However, a plaintiff could serve interrogatories (in a Tier 2 or 3 case) with its Initial Disclosures.
  - **So discovery could begin as soon as the first answer is served** (as long as the plaintiff serves its Initial Disclosures with the initial discovery.)
- Rule 26(c)(2): "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."
  - Who is "*that party*"- the party seeking the discovery or the party from who discovery is sought?
  - This was raised in Committee, and a majority felt it was clear enough that the phrase "that party" refers to *the party seeking the discovery*, not the *source* of the discovery.

Case Tiers: Rule 26(c)(3)

- All cases are now split into three tiers for "standard" discovery:
  - Tier 1: Actions claiming $50,000 or less in damages.
  - Tier 2: Actions claiming more than $50,000 and less than $300,000 in damages.
  - Tier 3: Actions claiming $300,000 or more in damages.
- Cases seeking solely non-monetary relief fall automatically into Tier 2.

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- Rule 26(c)(4): "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."
  - Committee Note: "An aggregation of all damages sought by all parties in an action dictates the applicable tier of standard discovery, whether such damages are sought by way of a complaint, counterclaim, or otherwise."
  - So, if a plaintiff claims $40,000 in damages (Tier 1) and defendant counterclaims for $11,000, the action falls into Tier 2, not Tier 1, because the **aggregate** damages claimed are $51,000.
- Questions
  - Is prejudgment interest included in determining the amount of damages?
    - The rule and the note are silent. If you have $45,000 in damages and $10,000 in prejudgment interest, to avoid the "waiver" provision of Rule 8(a) it might be wise to plead as a Tier 2 case.
  - Are punitive damages included in the amount of damages?
    - Yes, there's no exception for punitive damages in 26(c)(2). See FAQ on point.
  - What if a plaintiff claims "$40,000 and such punitive damages as may be reasonable?"
    - The answer is not obvious under Rule 26, and the comment does not address it. But, see the FAQ.
    - **But** Rule 8(a) will pose a real problem for a plaintiff who pleads its case as a Tier 1 case, and also asks for "reasonable" punitive damages-- it will probably be stuck with punitive damages not greater than the tier level, $50,000, under the "waiver" provision of Rule 8(a).
  - 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"?
    - Under Rule 8(a), you still have to plead that your damages qualify for either Tier 1, 2, or 3.

- **Standard discovery for tiers**
  - Note- Under Rule 26(c)(5) the days to complete standard discovery are calculated from the date the first defendant's first disclosure is due, and do not include expert discovery.
  - Tier 1: Actions claiming $50,000 or less in damages:
    - **3** hours of fact witness depositions.
    - **0** interrogatories.

- **5** requests for production.
- **5** request for admissions.
- **120 days** to complete standard discovery.

- Tier 2: Actions claiming more than $50,000 and less than $300,000 in damages:
  - **15** hours of fact witness depositions.
  - **10** interrogatories.
  - **10** requests for production.
  - **10** request for admissions.
  - **180 days** to complete standard discovery.
- Tier 3: Actions claiming $300,000 or more in damages:
  - **30** hours of fact witness depositions
  - **20** interrogatories
  - **20** requests for production
  - **20** request for admissions
  - **210 days** to complete standard discovery

- **Important: limitations are per *side* not per *party***
  - Rule 26(c)(5): "Standard fact discovery **per side** (plaintiffs collectively, defendants collectively, and third-party defendants collectively) in each tier is as follows . . ."
  - For example, on a Tier 3 case with four defendants, they get a **total** of 20 interrogatories for all of them, not 20 each. (Present rule splits it per *party*, not per *side.)*
  - Unclear what happens if there is a cross-claim and a legitimate controversy between defendants (as in peremptory challenges)
- **What happens to the discovery deadlines if motions are filed?**
  - Motions, other than motions to dismiss (coming before answering), do **not** toll the running of the standard discovery deadlines.
  - Committee Note to Rule 26: "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."

- Rule 37(d): "A motion to compel or for protective order does not suspend or toll the time to complete standard discovery."
- This "non-tolling for motions rule" was discussed at length in Committee meetings. Nevertheless, the potential for confusion is apparent, although the same problem attends to the 240-day discovery deadline under old Rule 26(d).
- Note: New Local Rule 10-1-306 for the Third District provides a fast track for resolution of discovery disputes within three weeks. It is effective as of 11/17/11 for all pending actions, not just those filed under the new rules

- **What happens to the discovery deadlines if new parties are added?**
  - The rules do not address this- everything is keyed off the **first** answer to the complaint.
  - This is the same as it is under the old version of the rules-- which in Rule 26(d) required all discovery to be completed within 240 days after the first answer is filed.
  - Later-added parties are obviously going to have to either get stipulations to extend time, or file a motion-- just as they did under the old rules.
- **Depositions length**
  - During standard fact discovery, oral questioning of a nonparty is limited to **4 hours** and of a party to **7 hours**. Rule 30(d). (This is *included* in your hours according to the tier the case falls in; that is, if you are a Tier 1 case, you don't get 7 hours to depose the defendant, only 3.)
  - This again is ***per side*** not *per party*.
    - 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.
    - 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."
  - **4/25/12 5:50p THIS IS WRONG**: FJC Note- if I am interpreting the Committee Note correctly, this means that a deposition of a nonparty could last **8 hours**, with the plaintiff getting 4 hours, and the defense side collectively getting 4 hours. And then conceivably a party's deposition could last **14** hours, if his own counsel were for some reason inclined to depose him for 7 hours.

- **EXPERT DISCLOSURES AND DISCOVERY**
  - **Expert Disclosures- Rule 26(a)(4)**
    - As was the case under old Rule 26(a)(3), **all testifying** experts must be disclosed, both retained experts (Rule 26(a)(4)(A)) and non-retained experts (Rule 26 (a)(4)(E)).

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- The broad definition of "expert" is the same as before and is keyed into Evidence Rule 702 as basically anyone using "scientific, technical, or other specialized knowledge." See, Pete v. Youngblood, 2006 UT App 303, 141 P.3d 629 (treating physicians are not retained experts, but they are still "experts" who must be identified under Rule 26.)

- Timing: whoever has the burden of proof on an issue goes first with designating retained experts **7 days** after the close of fact discovery

  - Rule 26(a)(4)(C)(i): "The party who bears the burden of proof on the issue for which expert testimony is offered shall provide the information required by paragraph (a)(4)(A) within seven days after the close of fact discovery."

  - ***WARNING- This means that a defendant raising an affirmative defense that requires expert testimony, such as comparative fault in a medical malpractice case, must also disclose those experts within 7 days after the close of fact discovery-- it cannot wait until the "usual" time to designate its contravening experts if this rule is strictly interpreted.

- For retained experts, under Rule 26(a)(4)(A), you first must provide a disclosure statement of the basic information about the expert:

  - Name and qualifications;

  - All publications within the last ten years;

  - List of testimony in the last four years;

  - Compensation; and,

  - A brief summary of the anticipated opinions, along with all data and other information that was relied upon.

  - This brief summary is **NOT** supposed to be like an expert report. You get that either in the "official" expert report or the deposition.

- Note: there is an apparent inconsistency between the Committee Note (which appears to require production of the expert's file), and the rule (which does not):

  - Rule 26(a)(4): "*A party shall, without waiting for a discovery request, provide to the other parties the following information regarding any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Utah Rules of Evidence and who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony: (i) the expert's name and qualifications, including a list of all publications authored within the preceding 10 years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years, (ii) a brief summary of the opinions to which the witness is expected to testify, (iii) all data and other information that will be relied upon by the witness in forming those opinions, and (iv) the compensation to be paid for the witness's study and testimony*."

- Committee Note: "*[T]hat party must disclose: (i) the expert's curriculum vitae identifying the expert's qualifications, publications, and prior testimony; (ii) compensation information; (iii) a brief summary of the opinions the expert will offer; and (iv)* ***a complete copy of the expert's file for the case****. The file should include all of the facts and data that the expert has relied upon in forming the expert's opinions. If the expert has prepared summaries of data, spreadsheets, charts, tables, or similar materials, they should be included*."

- There may be things in an expert's file which s/he did not rely on in forming opinions, and thus these would not be automatically disclosed. (So it seems a Rule 45 subpoena is still necessary to get an expert's *complete* file. Subject, of course, to the limitations of new Rule 26(b)(7).

- **Further discovery on retained experts- Rule 26(a)(4)(B)**

  - After receiving the designation, the party opposing the expert then has the option of electing either a report or a deposition.

    - If you choose a report, you don't get a deposition, and vice versa.

    - If you don't choose one or the other; that is, fail to timely make your election, you get **neither.** (FJC Note- is there an exception for multi-defendant cases? Probably not.)

    - ***In multi-party actions, all parties opposing the expert must agree on either a report or a deposition. If they cannot agree, then they get only a deposition. Rule 26(a)(4)(D). This could be tricky; if multiple parties on the same side cannot agree, they MUST file their own election.

    - **WARNING- If none of the defendants file an election (perhaps because they cannot agree), then the defendants get NO further discovery from the expert, either a deposition or report. The moral is to ALWAYS file an election within 7 days even if there are multiple defendants.**

  - Note: experts may deposed like any other witness-- the original concept of eliminating expert depositions was dropped after the comment period.

  - The election of report or deposition must be "made" (Sept 2012 proposed amendment changes this to "serve on") within 7 days after of the opponent's expert designation. Rule 26(a)(4)(C)(i).

    - **Warning and "gotcha"**: If you fail to elect either a deposition or a report within seven days after designation of the expert, you get **nothing,** i.e. no report or deposition. Rule 26(a)(4)(C)(i): "If no election is made, then no further discovery of the expert shall be permitted."

  - Experts are to be deposed, or reports provided (depending on the election), within **28 days** after the election was made.

  - For opposing experts, under Rule 26(a)(4)(C)(ii) you must disclose them within **7 days** after the **later** of your "election" of a report/deposition from the opposing expert is due or the receipt of the written report or taking the expert's deposition.

- If the plaintiff makes its initial expert disclosure and the defendant doesn't elect either a deposition or a report within 7 days, the defendant doesn't get **either one**.

- Subsection (a)(4)(C)(ii) says when the defendant's initial expert disclosure is due. It says the defendant must provide this "within seven days after the later of (i) the date on which the election under paragraph (a)(4)(C)(i) is due, or (ii) receipt of the written report or taking of the expert's deposition pursuant to paragraph (a)(4)(C)(i).

- If no election is made, you calculate the date the election is due, and the defendant's initial expert disclosure is due 7 days after that.

- In other words, the "later than" language had to be put in to deal with the (hopefully unusual) situation where there is no election made in time, and so that party is not entitled to either a report or a deposition. Without this "later" language, there would not be any trigger for the designation of experts by that party; that is the one who didn't make an election.

- Note- the Committee does not believe that you can move up the defense deadline for disclosing experts even more by designating your experts before the close of fact discovery: Rule 26(a)(4)(C) provides that these disclosures must be made "within seven days **after** the close of fact discovery." The implication is that expert disclosures cannot be made before the close of fact discovery. (There is an FAQ in process on point.)

  - Is there is a possible exception for non-retained experts, who may give mixed fact and expert testimony, and who are supposed to be also disclosed within seven days after the close of fact discovery, but sometimes **may** be disclosed in the Initial Disclosures? The Committee note to Rule 26 states that "*If a party has disclosed opinion testimony in its [initial disclosures], that party is not required to prepared a separate expert disclosure for the witness."*

  - Does that then mean that these non-retained experts need to be deposed (you cannot demand a report) within 28 days? Answer- probably not. The rule does not adddress it, but these mixed fact/expert witnesses probably can be deposed in expert discovery as well as in standard discovery.

- **Rebuttal Experts**

  - The November 2011 rule did not expressly provide for rebuttal expert designations, although I believe that the Committee assumed they would occur. However, to make it clear that rebuttal experts are allowed, a new rule 26(a)(4)(C)(iii) has been proposed and will be considered at the September 2012 meeting.

  - The new rule provides that rebuttal experts are to be designated like other experts; i.e. by designating them within 7 days after the date on which the election is due or receipt of the report or taking deposition, etc.

- **Expert depositions**

  - Expert depositions are limited to **4 hours** per side under Rule 26(a)(4)(B) ("A deposition shall not exceed four 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."

- Rule 26(c)(5) refers to the hour and other limits on *standard* discovery as pertaining to plaintiffs collectively, defendants collectively, and third-party defendants collectively, and the assumption is that applies expert discovery as well.

- This time is not counted toward the hours of standard discovery under Rule 26(c)(5).

- **Expert reports - Rule 26(a)(4)(B).**

  - The report must be signed by the expert and must contain a **complete statement** of all opinions the expert will offer at trial, much like under Federal Rule 26(a)(2)(B)(ii), and unlike under our old rule 26(a), where less is required. Rule 26(a)(4)(B).

  - The Committee Note states that "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 that is 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."

  - There is a substantial body of federal case law that ought to guide the determination of what level of detail is required in an expert report.

- **Non-retained experts- Rule 26 (a)(4)(E)**

  - Rule 26 (a)(4)(E) now follow the recent amendments to the FRCivP 26(a)(2)(C), and requires certain information be provided about non-retained experts, such as treating physicians, police investigators, and the like.

  - This requirement originated from the federal rules change, and had nothing to do with the Supreme Court's coincidental decision in Drew v. Lee, 2011 UT 15 (holding that reports were not required from treating physicians under the earlier version of 26(a)(3).

  - In short, a party must provide a "written summary" of the facts and opinions to which the expert is expected to testify.

  - This must be done on the same deadlines as for retained experts under Rule 26(a)(4)(C)

  - The Committee Note to rule 26 goes to great length to make clear that this summary (like the summary in Initial Disclosures for all fact witnesses) is not intended to be as extensive as an expert report, and that a party may be limited by the unwillingness of the non-retained expert to cooperate:

- "There are a number of difficulties inherent in disclosing expert testimony that may be offered from fact witnesses. First, there is often not a clear line between fact and expert testimony. Many fact witnesses have scientific, technical or other specialized knowledge, and their testimony about the events in question often will cross into the area of expert testimony. The rules are not intended to erect artificial barriers to the admissibility of such testimony.

- Second, many of these fact witnesses will not be within the control of the party who plans to call them at trial. These witnesses may not be cooperative, and may not be willing to discuss opinions they have with counsel. Where this is the case, disclosures will necessarily be more limited. On the other hand, consistent with the overall purpose of the 2011 amendments, a party should receive advance notice if their opponent will solicit expert opinions from a particular witness so they can plan their case accordingly.

- In an effort to strike an appropriate balance, the rules require that such witnesses be identified and the information about their anticipated testimony should include that which is required under Rule 26(a)(1)(A)(ii), which should include any opinion testimony that a party expects to elicit from them at trial. If a party has disclosed possible opinion testimony in its Rule 26(a)(1)(A)(ii) disclosures, that party is not required to prepare a separate Rule 26(a)(3)(D) disclosure for the witness.

- And if that disclosure is made in advance of the witness's deposition, those opinions should be explored in the deposition and not in a separate expert deposition. Otherwise, the timing for disclosure of non-retained expert opinions is the same as that for retained experts under Rule 26(a)(4)(C) and depends on whether the party has the burden of proof or is responding to another expert. Rule 26(a)(3)(D) and 26(a)(1)(A)(ii) are not intended to elevate form over substance – all they require is that a party fairly inform its opponent that opinion testimony may be offered from a particular witness. And because a party who expects to offer this testimony normally cannot compel such a witness to prepare a written report, further discovery must be done by interview or by deposition."

- **Information provided to experts by counsel and draft expert reports- Rule 26(b)(7)(B)**

  - A major change is the adoption of Rule 26(b)(7)(B) protecting from discovery communications between counsel and a retained expert:

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

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

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

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

- This is based on the newly-adopted federal Rule 26(b)(4)(C), effective December 10, 2010. The Advisory Committee Note to the federal rule and the decisions under the new rule can be considered in interpretation of our new Utah rule.
  - Draft expert reports are considered to be excluded from discovery under the new federal rule.
  - All communications with the expert from counsel, with limited exceptions, should also be protected.
- Committee Note: "Finally, the amendments include a new Rule 26(b)(7) that protects from discovery draft expert reports and, with limited exception, communications between an attorney and an expert. These changes are modeled after the recent changes to the Federal Rules of Civil Procedure and are intended to address the unnecessary and costly procedures that often were employed in order to protect such information from discovery, and to reduce “satellite litigation” over such issues.
- The 2010 Federal Rules Advisory Committee to the December, 2010 rule change is lengthy but worth reading.

PRETRIAL DISCLOSURES- Rule 26 (a)(5)

- This is essentially the same as the old Rule 26(a)(4), with minor changes.
- Pretrial disclosures now specifically need to include "charts, summaries, and demonstrative exhibits" that weren't disclosed before.
- Pretrial disclosures are to be made (served) at least 28 days (used to be 30) days before trial
- Objections and counter-designations are now to be served at least 14 days *before trial* (used to be 14 days after the opponent's disclosures).
- As before, failure to object to an exhibit by the 14-day cutoff means you waive the objection, unless it goes to relevance. (*NB- that includes all "foundation" objections, all hearsay objections, etc. to exhibits-- everything except objections under Rules 402 and 403*.)

OTHER CHANGES

Rule 35 exams

- Video or audio recording is now specifically allowed under Rule 35(a): "The person being examined may record the examination by audio or video means unless the party requesting the examination shows that the recording would unduly interfere with the examination."
  - Committee Note: "The Committee has determined that the benefits of recording generally outweigh the downsides in a typical case. The amended rule therefore provides that recording shall be permitted as a matter of course unless the person moving for the examination demonstrates the recording would unduly interfere with the examination."
- A professional videographer is **not** required:

- Committee Note: "Nothing in the rule requires that the recording be conducted by a professional, and it is not the intent of the committee that this extra cost should be necessary. The committee also recognizes that recording may require the presence of a third party to manage the recording equipment, but this must be done without interference and as unobtrusively as possible."

- Note that a professional videographer has never been required for depositions either under Rule 30(b)(2), in effect since 1999.

- Also, the Committee recommends that the word "independent" medical examiner not be used:

  - The parties and the trial court should refrain from the use of the phrase "independent medical examiner," using instead the neutral appellation "medical examiner," "Rule 35 examiner," or the like.

- The requirement for production of prior reports on other examinations has been eliminated:

  - Committee Note: "The former requirement of Rule 35(c) providing for the production of prior reports on other examinees by the examiner was a source of great confusion and controversy. It is the Committee's view that this provision is better eliminated, and in the amended rule there is no longer an automatic requirement for the production of prior reports of other examinations. Medical examiners will be treated as other expert witnesses are treated, with the required disclosure under Rule 26 and the option of a report or a deposition."

  - A plaintiff may still (try) to get those reports through subpoena, subject to the tests of relevance and proportionality

- The Committee Note reinforces the idea medical examinations are not a matter of right (but in fact it is difficult to imagine when one would not be ordered in an injury case.)

  - Committee Note: "A medical examination is not a matter of right, but should only be permitted by the trial court upon a showing of good cause. Rule 35 has always provided, and still provides, that the proponent of an examination must demonstrate good cause for the examination. And, as before, the motion and order should detail the specifics of the proposed examination."

- **Subpoenas**

  - Note that under the new rules there is no limitation at all on Rule 45 subpoenas for documents- Rule 45 subpoenas are not addressed in the tier limitations for standard discovery

  - However, Rule 26(c)(1), "Methods of discovery," **has** been amended to include "subpoenas other than for a court hearing or trial." (The old Rule 26(a)(6) did not include subpoenas.)

  - Therefore, subpoenas are subject to the proportionality/relevance tests and also to the time limitations on discovery.

- **Date calculations**

Outline

- The Utah Rules of Civil Procedure have not yet switched over to follow the "days are days" approach made to the Federal Rules of Civil Procedure effective December 1, 2009. (This eliminates extra days for mailing, for weekends, etc.) See, Christopher Preston, So Now What is My Deadline? Timing Changes to the Federal Rules, UTAH BAR JOURNAL,Volume 23, No 3 (May/June 2010)

- Rule 6 of the Utah Rules **had** been proposed for a change to mirror the federal changes, but this has been put on hold because of delays in implementation of electronic filing.

- In calculating time, Utah Rule 6 still provides three days for mailing and excludes intermediate weekends for time periods less than 11 days, etc.

- However, the new rules **do** reflect a move to calculate dates in multiples of 7, so deadlines that were previously 30 days will be 28, as for responding to requests for production, requests for admission, and interrogatories.

- **Interrogatories- Rule 33**

  - Interrogatory answers must now restate the question.

  - This used to be a requirement of the civil practice provisions of the Code of Judicial Procedure, but those were eliminated ten years ago.

  - **28** days for answer, not 30.

- **Requests for production- Rule 34.**

  - Requests for production responses must now restate the request before responding. Rule 34(b)(2).

  - **28** days for response, not 30.

- **Requests for admissions- Rule 36.**

  - Request for admissions must now restate the request before admitting or denying. Rule 36(b)(2).

  - **28** days for response, not 30.

- **Comparative fault designations**

  - Rule 9, and the statute, provide that this information should be set forth in a responsive pleading (answer) or in a supplemental notice filed within a reasonable time after the party discovered the basis for the comparative fault allocation.

  - Under old Rule 26(f)(2)(F), the "discovery plan" was also supposed to set a deadline for designation of person testing comparative fault was claimed.

  - Under the new rules, there are no more discovery plans, so there will be no place to put an additional time for designating parties also alleged to be at fault.

- This is now changed by the new Rule 26.2 on personal injury actions, requiring defendants to provide Rule 9(l) information in their initial disclosures
- As before, the court can always allow a fault designation up to 90 days before trial-- IF circumstances warrant it, in accordance with the statute.

- **Motions for protective orders**
  - The protective order language formerly found in Rule 26 (c) has been moved to Rule 37(b).
- **Domestic relations- Rule 26.1.**
  - There is a new rule Rule 26.1 for discovery and disclosures in domestic relations cases.
  - Other speciality practice areas are welcome to propose their own supplemental rules.

NEW LOCAL RULES

- As of 9/12/12, the Second, Third, and Fourth Districts have adopted rules providing for expedited motions hearings on all discovery issues, including motions for extraordinary discovery
- **These local rules apply to ALL cases, not just those filed after 11/1/11.**
- See CJA 10-1-306 and CJA 10-1-406 at http://www.utcourts.gov/resources/rules/ucja/
- This new local rule is intended to eliminate the need for many discovery motions, and also to significantly speed up the turnover for judicial resolution of discovery disputes to a matter of a few weeks.
- You must comply with CJA 10-1-306 (or 406), which requires the parties to "meet and confer" and file an abbreviated "statement" (memorandum). Oppositions must be filed within 5 days, then the matter should be decided within two weeks, the judges tell us.
- There is a rumor that this local rule may be proposed for adoption state wide as part of the URCivP. If so, it will need to go through the usual public comment period.
- I have heard reports that a few judges are delaying ruling on these discovery issues for many weeks. This is entirely contrary to the "bargain"-- we give up normal briefing, and you give us fast turnover on discovery motions in order to comply with the tight deadlines under the new rules.

MODEL TIMELINE (TIER 3 CASE)

- (This is not including extra days for service by mail under Rule 6(e), etc.)
- Day 1- Complaint served on defendant
- Day 21- Answer served (20 days after service)
- Day 37- Plaintiff's initial disclosures due (14 days after service of first answer)

Outline

- Day 66- Defendant's initial disclosures due (28 days after plaintiff's disclosures)
  - Under the September 2012 proposed amendment to Rule 26(a)(2)(B), this will instead be **42 days after the service of the answer**
- Day 277- Close of fact discovery (210 days after defendant's initial disclosures are due)
- Day 285- Plaintiff's experts designations due* (7 days after close of fact discovery)
- Day 293- Defendant's "election" of deposition or report due (7 days after plaintiff's designation)
- Day 322- Plaintiff's expert report provided or deposition taken (Within 28 days after election)
- Day 330- Defendant designates its expert (Within 7 days after receiving report from plaintiff's expert or taking the deposition)
- Day 338- Plaintiff's "election" of deposition or report due (7 days after defendant's designation)
- Day 366- Defendant's expert report provided or deposition taken (Within 28 days after election)
- Under Rule 16(b), certification of readiness is to be filed upon the completion of discovery