**PROPOSED RULES GOVERNING CIVIL DISCOVERY**

**by**

**The Utah Supreme Court Advisory Committee on the Rules of Civil Procedure**

## Background

For many years the Civil Rules Committee has been concerned with the increased expansion and cost of discovery and the impact of this on our civil justice system. Rule 1 states that the rules "shall be liberally construed to secure the just, speedy, and inexpensive determination of every action." The discovery rules may have contributed to "just" results in the sense that they provide parties of sufficient means with the ability to discover all facts relevant to the litigation, but modern, expansive discovery has had a decidedly negative impact on the "speedy" and "inexpensive" resolution of civil disputes. Current civil discovery practice fosters one of the goals of Rule 1 at the expense of the other two.

Discovery has become the focus and the most expensive part of modern litigation. Discovery is viewed also as a primary contributor to delay.

The committee's observations have been borne out by recent empirical research. A 2008 survey of the most experienced trial lawyers in the country conducted by the American College of Trial Lawyers Task Force on Civil Discovery and the Institute for the Advancement of the American Legal System at Denver University found that our civil justice system takes too long and costs too much. Discovery was seen as the primary problem. *See*, AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT (2009). These results were corroborated by similar surveys conducted by the Litigation Section of the ABA and the National Employment Lawyers Association. More than 80% of the respondents in the ACTL, ABA, and NELA surveys said that they or their firms turned down cases because the amount at issue did not justify the expense. The most commonly cited amount-in-controversy threshold, below which a case cannot be economically handled, was $100,000.

These surveys were directed to the federal discovery rules, which are virtually the same as the Utah Rules. Indeed, during the past 30 years or more, the Utah Rules have evolved to be increasingly consistent with the federal rules and their amendments. It was perceived that consistency with the federal rules, along with the extensive case-law interpreting them, would provide a positive benefit. The federal discovery rules are now being seriously questioned as well, but the committee has come to question the very premise upon which Utah adopted those rules. The federal rules were designed for complex cases with large amounts in controversy that typify the federal system. The vast majority of cases filed in Utah courts are not those types of cases. As a result, our state civil justice system has become unavailable to many people because they cannot afford it.

The concepts underlying the federal discovery rules were sound when they were first adopted—a time before copy machines, computers, and massive electronic data storage. Electronic information is expanding at a staggering rate. Discovery has become the most expensive part of civil litigation and, unless changes are made, discovery will continue to become more problematic as the amount of electronic information expands.

Another problem of our modern world is the need for expert witnesses. As science and technology expand, so does the need for expert witnesses to explain them. Consequently, expert discovery has become an increasingly integral part of litigation and a very expensive part of discovery.

The committee has spent the last three years studying these problems and drafting a new set of discovery rules designed to achieve all three goals of Rule 1. The changes are fundamental and will require a change of mind-set by judges, lawyers, and litigants. Specifically, the change in mind-set is *away* from a system in which discovery is the predominant aspect of litigation (in which every party has a right or obligation to incur or bear the cost of almost any request for discovery) and *toward* a system in which each request for discovery must be justified by its proponent, and the focus is on moving quickly and efficiently to the disposition of the merits of the case (through settlement, summary judgment, or trial).

**Proportionality Is the Key Principle Underlying the Proposed Discovery Rules**

Under the existing rules, the scope of discovery is governed by "relevance" or the "likelihood to lead to discovery of admissible evidence." UT.R.CIV.P. 26(b)(1). As the information pool expands, so expands the universe of discoverable information.

Proportionality will govern the scope of discovery under the proposed rules. Simply stated, it means that the cost of discovery should be proportional to what is at stake in the litigation. The concept of proportionality is not new. It has existed since 1987 (not as "proportionality" *per se*) in Rule 26(b)(3) ("The frequency or extent of the use of the discovery methods … shall be limited by the court if it determines that: … (C) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.") But proportionality has been largely overlooked by all of us who have operated for decades under the principle that a party who has relevant information must produce it. Under the proposed rules, proportionality will become the controlling factor for all discovery.

Proportionality exists if the following standards are met:

1. the likely benefits of the proposed discovery outweigh the burden or expense;
2. the discovery is consistent with the overall case management and will further the just, speedy and inexpensive determination of the case;
3. the discovery is reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues;
4. the discovery is not unreasonably cumulative or duplicative;
5. the information cannot be obtained from another source that is more convenient, less burdensome or less expensive; and
6. the party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties' relative access to the information.

The second significant change in the proposed rules involves the burden of demonstrating entitlement to discovery. In the past, the operative presumption has been that a party is entitled

to discovery within the broad parameters of relevance unless the other party can persuade a court to the contrary. Under the proposed rules, this presumption would be changed to require the party seeking discovery to demonstrate, in every case, that the requested discovery is relevant ***and*** proportional with respect to the amount and issues in controversy.

Another concept that existed in theory, but was rarely used, is cost-shifting. Presently the recipient of the discovery request bears the cost of producing the information. Under the proposed rules, a court may require the requesting party to pay some or all of the costs of producing the information to achieve proportionality.

**Disclosures**

The proposed rules seek to reduce discovery costs by requiring each party to produce, at a very early stage and without a discovery request, all of the documents and physical evidence the party may offer in its case-in-chief and the names of all witnesses the party may call in its case-in-chief with a description of expected testimony. The duty is a continuing one, and disclosures must be supplemented as new evidence and witnesses become known. The penalty for failure to make timely disclosure is that the evidence may not be used in the party's case-in-chief. These proposed new disclosures are in addition to the disclosures presently required under Rule 26.

Disclosure is staggered. Since the plaintiff controls when it brings the action, plaintiffs are required to make to make their disclosures within 14 days after service of the first answer. A defendant is required to make its disclosures within 28 days after the plaintiff's first disclosure or after that defendant's appearance, whichever is later.

The purpose of early disclosure is to get each party to "lay on the table" the evidence it expects to use to prove its claims or defenses. The opposing party will then be better able to evaluate the case and to decide what further discovery is necessary. If parties anticipate wanting to use evidence at trial, they will be liberal in disclosing it because of the penalty for failure to do so. The goal of the proposed new disclosure rules is to prevent "sandbagging."

**Standard Discovery**

After initial disclosures are made, each party may engage in what the proposed rules term "standard discovery." Since each party will automatically receive disclosures of what the opponent expects to use in its case-in-chief, it is expected that standard discovery will be used to find those documents and other evidence that are harmful, rather than helpful, to the opponent's case.

Standard discovery is limited. Each party may take up to 16 hours of depositions, with the proviso that a deposition of a party may not exceed seven hours and a deposition of any other witness may not exceed four hours. The number of interrogatories is limited to 15, and requests for production, and requests for admission are also limited to 25 each.

The expectation is that, for most state cases, standard discovery and the required disclosures will be more than adequate. A presumptive time limit of 150 days is imposed. After 150 days of discovery, the case will be presumed ready for trial.

**Extraordinary Discovery**

The committee recognizes that there will be some cases for which standard discovery is not sufficient or appropriate. For those cases, the proposed rules provide two avenues to obtain additional discovery. The first is by stipulation. The parties may stipulate to as much additional

discovery as they desire PROVIDED that they stipulate that the additional discovery is proportional to what is at stake in the litigation and EACH party certifies that it has reviewed and approved a discovery budget for the additional discovery. If these conditions are met, then the court will not second-guess the parties and their counsel and must approve the stipulation. But it is not sufficient for the lawyers to get together and agree to millions of dollars of additional discovery. Each lawyer must also privately discuss the cost of the additional discovery with the client, and the client must certify that a discovery budget has been reviewed and approved.

The second means of obtaining additional discovery is by motion. The committee anticipates there will be cases in which there is a significant disparity between the parties' resources or access to information. To prevent a party from taking advantage in this situation, the proposed rules allow any party to move for additional discovery. Counsel must demonstrate that the additional discovery is proportional and the client must certify that the it has reviewed and approved a discovery budget.

Whether by motion or stipulation, the parties will not be "shooting in the dark" because they will have received the mandatory continuing disclosures from the other party and will have had the opportunity to conduct standard discovery. This should allow them both to better focus any requests for additional discovery and to better demonstrate proportionality.

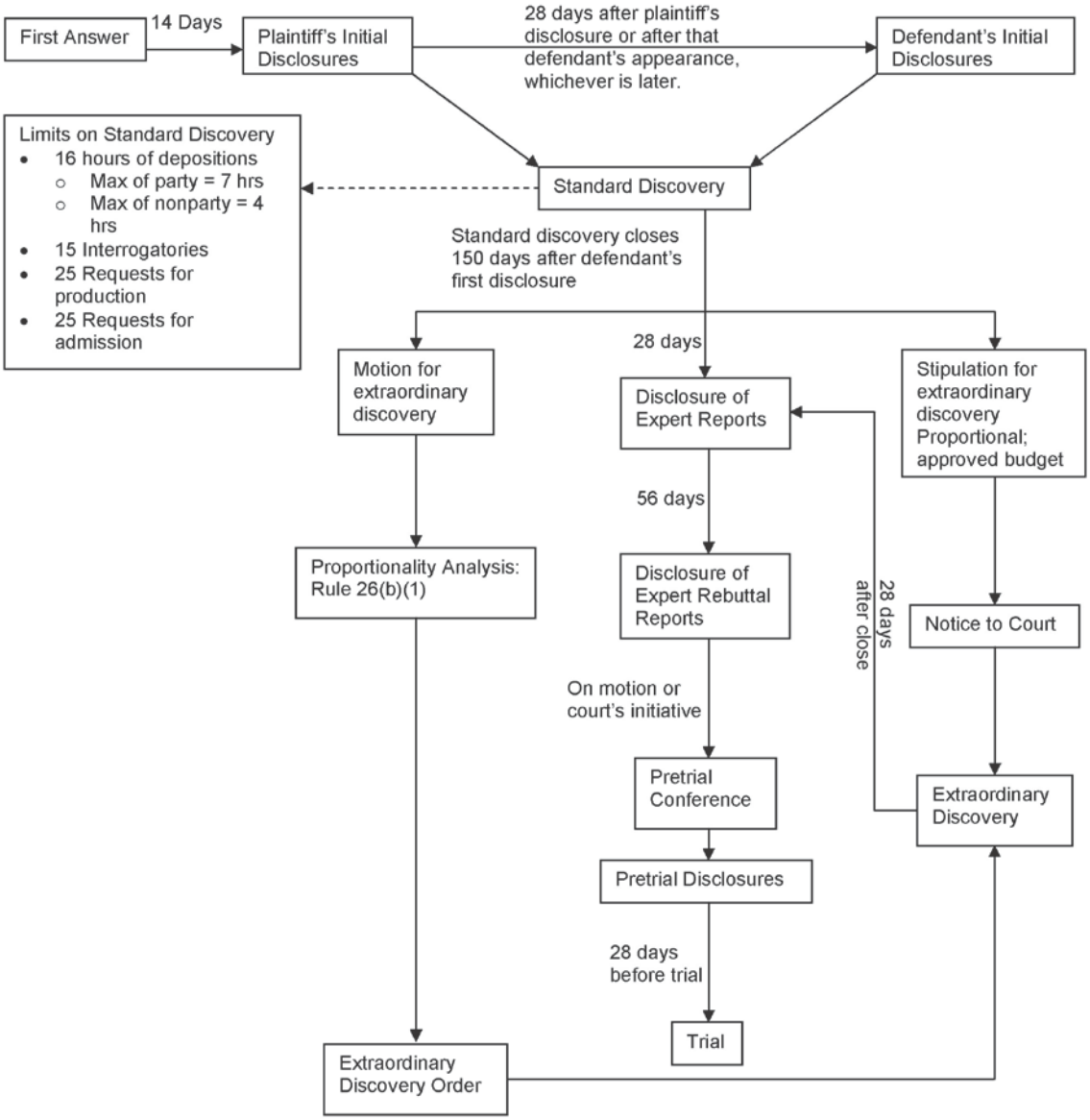
**Expert Discovery**

Expert discovery has become an ever-increasing component of discovery cost. If an expert's testimony is limited to what is fairly disclosed in the required expert disclosure, then there should be no need to take the expert's deposition. So the proposed rules do just that. Depositions of retained experts are not allowed in the proposed rules, but the expert cannot testify beyond what is fairly disclosed in the report. This will allow the opposing party to prepare knowing that the expert will not be able to offer surprise testimony at trial.

**Disclosure and Discovery Flowsheet**

The following chart demonstrates how disclosure and discovery will proceed under the proposed rules.

## Disclosure and Discovery under Proposed Rules



**Rule 1. General provisions.**

~~(a)~~ Scope of rules. These rules ~~shall~~ govern the procedure in the courts of the state of Utah in all actions~~, suits, and proceedings~~ of a civil nature, whether cognizable at law or in equity, and in all ~~special~~ statutory proceedings, except as governed by other rules promulgated by this court or enacted by the Legislature and except as stated in Rule 81. They shall be liberally construed and applied to ~~secure~~achieve the just, speedy, and inexpensive determination of every action. These rules govern all actions brought after they take effect and all further proceedings in actions then pending. If, in the opinion of the court, applying a rule in an action pending when the rule takes effect would not be feasible or would be unjust, the former procedure applies.

~~(b) Effective date. These rules shall take effect on January 1, 1950; and thereafter all laws in conflict therewith shall be of no further force or effect. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.~~

**Rule 8. General rules of pleadings.**

(a) Claims for relief. ~~A pleading which sets forth a claim for relief, whether an~~ An original claim, counterclaim, cross-claim or third-party claim~~,~~ shall contain ~~(1)~~ a simple, short and plain:

(a)(1) statement of ~~the claim~~facts showing that the ~~pleader~~party is entitled to relief;

(a)(2) statement of the legal theory on which the claim rests; and ~~(2)~~

(a)(3) demand for judgment for ~~the~~specified relief ~~to which he deems himself entitled.~~. Relief in the alternative or of several different types may be demanded.

(b) Defenses; form of denials. A party shall state in simple, short and plain terms ~~his~~any defenses to each claim asserted and shall admit or deny the ~~averments upon which~~ statements in the ~~adverse~~claim. A party ~~relies. If he is~~ without knowledge or information sufficient to form a belief ~~as to~~about the truth of ~~an averment, he~~a statement shall so state, and this has the effect of a denial. Denials shall fairly meet the substance of the ~~averments~~statements denied. ~~When a pleader intends in good faith to~~ A party may deny ~~only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only~~ all of the ~~remainder. Unless the pleader intends~~statements in ~~good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, he may do so~~a claim by general denial ~~subject to the obligations set forth in Rule 11~~. A party may specify the statement or part of a statement that is admitted and deny the rest. A party may specify the statement or part of a statement that is denied and admit the rest.

(c) Affirmative defenses. ~~In pleading to~~An affirmative defense shall contain a ~~preceding pleading, a~~simple, short and plain:

(c)(1) statement of facts establishing the affirmative defense;

(c)(2) statement of the legal theory on which the defense rests; and

(c)(3) a demand for relief.

A party shall set forth affirmatively in a responsive pleading accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in

bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. ~~When~~If a party ~~has~~ mistakenly ~~designated~~designates a defense as a counterclaim or a counterclaim as a defense, the court, on terms, ~~if justice so requires, shall~~may treat the pleadings as if ~~there~~the defense or counterclaim had been ~~a proper designation~~properly designated.

(d) Effect of failure to deny. ~~Averments~~Statements in a pleading to which a responsive pleading is required, other than ~~those as to~~statements of the amount of damage, are admitted ~~when~~if not denied in the responsive pleading. ~~Averments~~Statements in a pleading to which no responsive pleading is required or permitted ~~shall be taken as~~are deemed denied or avoided.

(e) ~~Pleading to be concise and direct; consistency.~~

~~(e)(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.~~

~~(e)(2)~~Consistency. A party may ~~set forth two or more statements of~~state a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. ~~When two or more~~If statements are made in the alternative and one of them ~~if made independently would be~~is sufficient, the pleading is not made insufficient by the insufficiency of ~~one or more of the~~an alternative ~~statements.~~statement. A party may ~~also~~ state ~~as many separate~~ legal and equitable claims or legal and equitable defenses ~~as he has~~ regardless of consistency ~~and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.~~.

(f) Construction of pleadings. All pleadings shall be ~~so~~ construed ~~as~~ to do substantial justice.

Advisory Committee Notes

The 2010 amendments remove from Rule 8 prior language requiring a statement of the party's "claim." Instead, the rule now requires a short and plain statement of both (1) "facts showing that the party is entitled to relief" and (2) "the legal theory on which the claim rests." The purpose of this amendment is twofold. First, the amendment clarifies

that parties must give notice of both the facts and the law that support their claim. The amendment thus reconfirms longstanding case law that courts, on a Rule 12 motion, will "accept the plaintiff's description of facts alleged in the complaint to be true, but . . . need not accept extrinsic facts not pleaded nor . . . legal conclusions in contradiction of the pleaded facts." Allred v. Cook, 590 P.2d 318, 319 (Utah 1979). "[M]ere conclusory allegations in a pleading . . . are insufficient . . . ." Chapman v. Primary Children's Hosp., 784 P.2d 1181, 1186 (Utah 1989). Second, by clarifying that parties should plead facts, this amendment to Rule 8 incentivizes further and earlier disclosure of facts, consistent with the general approach of Utah's new "simplified rules" and other changes made by the 2010 amendments, including those to Rule 26's disclosure requirements. To facilitate access to justice, the committee intends that all pleadings—both complaints and defenses—provide more and earlier notice of the facts alleged with less reliance on discovery. However, by requiring parties to plead "facts," this amendment expressly does not resurrect any prior requirement of technical or "code" pleading. Nor does the amendment seek to import any heightened pleading requirement, including interpretations of the United States Supreme Court's decisions in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009), as mandating a heightened standard of "plausibility" pleading under the Federal Rules of Civil Procedure. Rather, the longstanding "liberal" standard of notice pleading remains in effect in Utah. E.g., Canfield v. Layton City, 2005 UT 60, ¶ 14, 122 P.3d 622. Accord Adam N. Steinman, The Pleading Problem, 62 Stanford L. Rev. 1293 (2010).

**Rule 16. Pretrial conferences~~, scheduling, and management conferences~~.**

(a) Pretrial conferences. ~~In any action, the~~ The court, in its discretion or upon motion ~~of a party~~, may direct the attorneys ~~for~~and, when appropriate, the parties ~~and any unrepresented parties~~ to appear ~~before it for a conference or conferences before trial~~ for such purposes as:

(a)(1) expediting the disposition of the action;

(a)(2) establishing early and continuing control so that the case will not be protracted for lack of management;

(a)(3) discouraging wasteful pretrial activities;

(a)(4) improving the quality of the trial through more thorough preparation;

(a)(5) facilitating the settlement of the case; ~~and~~

(a)(6) considering all matters as may aid in the disposition of the case~~.~~;

~~(b) Scheduling and management conference and orders. In any action, in addition to any other pretrial conferences that may be scheduled, the court, upon its own motion or upon the motion of a party, may conduct a scheduling and management conference. The attorneys and unrepresented parties shall appear at the scheduling and management conference in person or by remote electronic means. Regardless whether a scheduling and management conference is held, on motion of a party the court shall enter a scheduling order that governs the time:~~

~~(b)(1) to join other parties and to amend the pleadings;~~

~~(b)(2)~~(a)(7) establishing the time to join other parties and to amend the pleadings;

(a)(8) establishing the time to file motions; ~~and~~

~~(b)(3)~~(a)(9) establishing the time to complete discovery~~.~~;

~~The scheduling order may also include:~~

~~(b)(4) modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted;~~

~~(b)(5~~(a)(10) extending fact discovery;

(a)(11) the date ~~or dates for conferences before trial, a~~ for pretrial and final pretrial ~~conference,~~conferences and trial; ~~and~~

(~~b)(6~~a)(12) provisions for preservation, disclosure or discovery of electronically stored information;

(~~b)(7~~a)(13) any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production; and

(~~b)(8~~a)(14) any other ~~matters~~ appropriate ~~in the circumstances of the case~~matters.

(b) Unless ~~the~~an order sets the ~~date of~~ trial date, any party may and the plaintiff shall, at the close of all discovery, certify to the court that the case is ready for trial. The court shall schedule the trial as soon as mutually convenient to the court and parties. The court shall notify parties of the ~~date of~~ trial date and of any final pretrial conference.

(c) Final pretrial conferences. The court, in its discretion or upon motion, may direct the attorneys and, when appropriate, the parties to appear for such purposes as settlement ~~conferences. In any action where a final pretrial~~and trial management. The conference ~~has been ordered, it~~ shall be held as close to the time of trial as reasonable under the circumstances. ~~The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties, and the attorneys attending the pretrial, unless waived by the court, shall have available, either in person or by telephone, the appropriate parties who have authority to make binding decisions regarding settlement.~~

(d) Sanctions. If a party or a party's attorney fails to obey ~~a scheduling or pretrial~~an order, if ~~no appearance is made on behalf of~~ a party ~~at a scheduling~~ or ~~pretrial~~a party's attorney fails to attend a conference, if a party or a party's attorney is substantially unprepared to participate in ~~the~~a conference, or if a party or a party's attorney fails to participate in good faith, the court, upon motion or its own initiative, may take any action authorized by Rule 37(b)(2).

**Rule 26. General provisions governing disclosure and discovery.**

(a) ~~Required disclosures; Discovery methods~~Disclosure. This rule applies unless changed or supplemented by a rule governing disclosure and discovery in a practice area.

(a)(1) Initial disclosures. Except in cases exempt under ~~subdivision~~paragraph (a)(2~~)~~ ~~and except as otherwise stipulated or directed by order,~~), a party shall, without ~~awaiting~~waiting for a discovery request, provide to other parties:

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

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

(a)(1)(A)(ii) each fact witness the party may call in its case in chief and a summary of the expected testimony.

(a)(1)(B) a copy of~~, or a description by category and location of,~~ all ~~discoverable~~ documents, data compilations, electronically stored information, and tangible things in the possession~~, custody,~~ or control of the party ~~supporting~~that the party may offer in its ~~claims or defenses, unless solely for impeachment~~case in chief;

(a)(1)(C) a computation of any ~~category of~~ damages claimed ~~by the disclosing party, making available for inspection~~ and ~~copying as under Rule 34~~ a copy of all discoverable documents or ~~other~~ evidentiary material on which such computation is based, including materials ~~bearing on~~about the nature and extent of injuries suffered; ~~and~~

(a)(1)(D) ~~for inspection and copying as under Rule 34~~ a copy of any ~~insurance~~ agreement under which any person ~~carrying on an insurance business~~ may be liable to satisfy part or all of a judgment ~~which may be entered in the case~~ or to indemnify or reimburse for payments made to satisfy the judgment~~.~~; and

~~Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(1) shall be made within 14 days after the meeting of the parties under subdivision (f). Unless otherwise stipulated by the parties or ordered by the court, a party joined after the meeting of the parties shall make these disclosures within 30 days after being served. A party shall make initial disclosures based on the information then reasonably available and is not excused from making disclosures~~

32 because the party has not fully completed the investigation of the case or because the
33 party challenges the sufficiency of another party's disclosures or because another party
34 has not made disclosures.
35 (a)(1)(E) a copy of all documents to which a party refers in its pleadings.
36 (a)(1)(F) The disclosures required by paragraph (a)(1) shall be made:
37 (a)(1)(F)(i) by the plaintiff within 14 days after service of the first answer to the
38 complaint; and
39 (a)(1)(F)(ii) by the defendant within 28 days after the plaintiff's first disclosure or after
40 that defendant's appearance, whichever is later.
41 (a)(2) Exemptions.
42 (a)(2)(A) TheUnless otherwise ordered by the court or agreed to by the parties, the
43 requirements of subdivisionparagraph (a)(1) and subdivision (f) do not apply to actions:
44 (a)(2)(A)(i) based on contract in which the amount demanded in the pleadings is
45 $20,000 or less;
46 (a)(2)(A)(ii(a)(2)(A)(i) for judicial review of adjudicative proceedings or rule making
47 proceedings of an administrative agency;
48 (a)(2)(A)(iiiii) governed by Rule 65B or Rule 65C;
49 (a)(2)(A)(iviii) to enforce an arbitration award;
50 (a)(2)(A)(viv) for water rights general adjudication under Title 73, Chapter 4; and
51 (a)(2)(A)(vi) in which any party not admitted to practice law in Utah is not
52 represented by counsel.
53 (a)(2)(B) In an exempt action, the matters subject to disclosure under
54 subpartparagraph (a)(1) are subject to discovery under subpartparagraph (b).
55 (a)(3) Disclosure of expert testimony.
56 (a)(3)(A) A party shall disclose, without waiting for a discovery request, provide to
57 other parties the identitya copy of a written report of any person who may be used at
58 trial to present evidence under Rules 702, 703, or 705 of the Utah Rules of Evidence.
59 (a)(3)(B) Unless otherwise stipulated by the parties or ordered by the court, this
60 disclosure shall, with respect to a witness and who is retained or specially employed to
61 provide expert testimony in the case or whose duties as an employee of the party
62 regularly involve giving expert testimony, be accompanied by a written report prepared

~~and signed by the witness or party.~~. The report shall be signed by the expert and contain ~~the subject matter on which the expert is expected to testify; the substance of the facts and~~ : a complete statement of all opinions ~~to which the expert is expected to testify; a summary of the grounds~~the witness will express and the basis and reasons for ~~each opinion~~them; the data or other information relied upon by the witness in forming them; any exhibits that will be used to summarize or support them; the qualifications of the ~~witness~~expert, including a list of all publications authored ~~by the witness~~ within the preceding ten years; the compensation to be paid for the study and testimony; and a ~~listing~~list of any other cases in which the ~~witness~~expert has testified as an expert at trial or by deposition within the preceding four years. Such an expert may not testify in a party's case-in-chief concerning any matter not fairly disclosed in the report.

(a)(3)(~~C) Unless otherwise stipulated by~~ B) If the ~~parties or ordered by the court, the disclosures~~expert witness is not required ~~by subdivision (~~to provide a written report, the party shall disclose the subject matter on which the witness is expected to present evidence under Rule of Evidence 702, 703 or 705 and a summary of the facts and opinions to which the witness is expected to testify.

(a)(3)(C) Disclosure required by paragraph (a)(3) shall be made within ~~30~~28 days after the expiration of fact discovery as provided by ~~subdivision (d~~paragraph (c) or, if the evidence is intended solely to contradict ~~or rebut~~ evidence ~~on the same subject matter identified by another party~~ under paragraph (a)(3)(~~B~~A), within ~~60~~56 days after ~~the~~ disclosure ~~made~~ by the other party.

(a)(4) Pretrial disclosures. A party shall, without waiting for a discovery request, provide to other parties ~~the following information regarding the evidence that it may present at trial other than solely for impeachment~~:

(a)(4)(A) the name and, if not previously provided, the address and telephone number of each witness, unless solely for impeachment, separately identifying witnesses the party ~~expects to present~~ will call and witnesses the party may call ~~if the need arises~~;

(a)(4)(B) the ~~designation~~name of witnesses whose testimony is expected to be presented by ~~means~~transcript of a deposition and~~, if not taken stenographically,~~ a ~~transcript~~copy of the ~~pertinent portions of the deposition testimony~~transcript; and

94 (a)(4)(C) ~~an appropriate~~ identification of each ~~document or other~~ exhibit, including
95 summaries of other evidence, unless solely for impeachment, separately identifying
96 those which the party ~~expects to~~ will offer and those which the party may offer ~~if the~~
97 ~~need arises.~~.
98 ~~Unless otherwise stipulated by the parties or ordered by the court, the~~
99 ~~disclosures~~(a)(4)(D) Disclosure required by ~~subdivision~~paragraph (a)(4) shall be made
100 at least ~~30~~28 days before trial. ~~Within~~At least 14 days ~~thereafter, unless a different time~~
101 ~~is specified by the court~~before trial, a party ~~may~~ shall serve and file ~~a list disclosing (i)~~
102 ~~any~~ objections and grounds for the objections to the use ~~under Rule 32(a) of a~~
103 ~~deposition designated by another party under subparagraph (B) and (ii) any objection,~~
104 ~~together with the grounds therefor, that may be made~~ of a deposition and to the
105 admissibility of ~~materials identified under subparagraph (C). Objections not so~~
106 ~~disclosed, other~~exhibits. Other than objections under Rules 402 and 403 of the Utah
107 Rules of Evidence, ~~shall be deemed~~objections not listed are waived unless excused by
108 the court for good cause ~~shown.~~
109 ~~(a)(5) Form of disclosures. Unless otherwise stipulated by the parties or ordered by~~
110 ~~the court, all disclosures under paragraphs (1), (3) and (4) shall be made in writing,~~
111 ~~signed and served.~~
112 ~~(a)(6) Methods to discover additional matter. Parties may obtain discovery by one or~~
113 ~~more of the following methods: depositions upon oral examination or written questions;~~
114 ~~written interrogatories; production of documents or things or permission to enter upon~~
115 ~~land or other property, for inspection and other purposes; physical and mental~~
116 ~~examinations; and requests for admission~~.
117 (b) Discovery scope ~~and limits. Unless otherwise limited by order of the court in~~
118 ~~accordance with these rules, the scope of discovery is as follows:~~.
119 (b)(1) In general. Parties may ~~obtain discovery regarding~~ discover any matter, not
120 privileged, which is relevant to the ~~subject matter involved in the pending action,~~
121 ~~whether it relates to the~~ claim or defense of ~~the party seeking discovery or to the claim~~
122 ~~or defense of any other party, including the existence, description, nature, custody,~~
123 ~~condition, and location of any books, documents, or other tangible things and the~~
124 ~~identity and location of persons having knowledge of any discoverable matter. It is not~~

125 ~~ground for objection that the information sought will be inadmissible at the trial if the~~
126 ~~information sought appears reasonably calculated to lead to~~any party if the discovery
127 satisfies the standards of proportionality set forth below. Discovery and discovery
128 requests are proportional if:
129 (b)(1)(A) the likely benefits of the proposed discovery outweigh the burden or
130 expense;
131 (b)(1)(B) the discovery is consistent with the overall case management and will
132 further the just, speedy and inexpensive determination of the case;
133 (b)(1)(C) the discovery ~~of admissible evidence.~~
134 ~~(b)(2) A party need not provide~~is reasonable, considering the needs of the case, the
135 amount in controversy, the complexity of the case, the parties' resources, the
136 importance of the issues, and the importance of the discovery ~~of~~ in resolving the issues;
137 (b)(1)(D) the discovery is not unreasonably cumulative or duplicative;
138 (b)(1)(E) the information cannot be obtained from another source that is more
139 convenient, less burdensome or less expensive; and
140 (b)(1)(F) the party seeking discovery has not had sufficient opportunity to obtain the
141 information by discovery or otherwise, taking into account the parties' relative access to
142 the information.
143 (b)(2) The party seeking discovery has the burden of showing proportionality. To
144 ensure proportionality, the court may enter orders under Rule 37.
145 (b)(3) A party claiming that electronically stored information ~~from sources that the~~
146 ~~party identifies as~~is not reasonably accessible because of undue burden or cost~~. The~~
147 ~~party shall expressly make any claim that the source is not reasonably accessible,~~
148 ~~describing~~ shall describe the source of the electronically stored information, the nature
149 and extent of the burden, the nature of the information not provided, and any other
150 information that will enable other parties to ~~assess the claim. On motion to compel~~
151 ~~discovery or for a protective order, the party from whom discovery is sought must show~~
152 ~~that the information is not reasonably accessible because of undue burden or cost. If~~
153 ~~that showing is made, the court may order discovery from such sources if the requesting~~
154 ~~party shows good cause, considering the limitations of subsection (b)(3). The court may~~
155 ~~specify conditions for the discovery.~~evaluate the claim.

156 ~~(b)(3) Limitations. The frequency or extent of use of the discovery methods set forth~~
157 ~~in Subdivision (a)(6) shall be limited by the court if it determines that:~~
158 ~~(b)(3)(A) the discovery sought is unreasonably cumulative or duplicative, or is~~
159 ~~obtainable from some other source that is more convenient, less burdensome, or less~~
160 ~~expensive;~~
161 ~~(b)(3)(B) the party seeking discovery has had ample opportunity by discovery in the~~
162 ~~action to obtain the information sought; or~~
163 ~~(b)(3)(C) the discovery is unduly burdensome or expensive, taking into account the~~
164 ~~needs of the case, the amount in controversy, limitations on the parties' resources, and~~
165 ~~the importance of the issues at stake in the litigation. The court may act upon its own~~
166 ~~initiative after reasonable notice or pursuant to a motion under Subdivision (c).~~
167 (b)(4) Trial preparation~~: Materials. Subject to the provisions of Subdivision (b)(5) of~~
168 ~~this rule, a~~ materials. A party may obtain ~~discovery of~~ otherwise discoverable
169 documents and tangible things~~ otherwise discoverable under Subdivision (b)(1) of this~~
170 ~~rule and~~ prepared in anticipation of litigation or for trial by or for another party or by or
171 for that other party's representative (including the party's attorney, consultant, surety,
172 indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has
173 substantial need of the materials ~~in the preparation of the case~~ and that the party is
174 unable without undue hardship to obtain ~~the substantial~~substantially equivalent ~~of the~~
175 materials by other means. In ordering discovery of such materials~~ when the required~~
176 ~~showing has been made~~, the court shall protect against disclosure of the mental
177 impressions, conclusions, opinions, or legal theories of an attorney or other
178 representative of a party~~ concerning the litigation~~.
179 (b)(5) Statement previously made about the action. A party may obtain without the
180 showing required ~~showing~~in paragraph (b)(4) a statement concerning the action or its
181 subject matter previously made by that party. Upon request, a person not a party may
182 obtain without the required showing a statement ~~concerning~~about the action or its
183 subject matter previously made by that person. If the request is refused, the person may
184 move for a court order~~. The provisions of~~ under Rule 37~~(a)(4) apply to the award of~~
185 ~~expenses incurred in relation to the motion. For purposes of this paragraph, a~~. A
186 statement previously made is (A) a written statement signed~~ or otherwise adopted~~ or

187 approved by the person making it, or (B) a stenographic, mechanical, electrical, or other
188 recording, or a transcription thereof, which is a substantially verbatim recital of an oral
189 statement by the person making it and contemporaneously recorded.
190 ~~(b)(5) Trial preparation: Experts.~~
191 ~~(b)(5)(A) A party may depose any person who has been identified as an expert~~
192 ~~whose opinions may be presented at trial. If a report is required under subdivision~~
193 ~~(a)(3)(B), any deposition shall be conducted within 60 days after the report is provided.~~
194 ~~(b)(5)(B) A party may discover facts known or opinions held by an expert who has~~
195 ~~been retained or specially employed by another party in anticipation of litigation or~~
196 ~~preparation for trial and who is not expected to be called as a witness at trial, only as~~
197 ~~provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is~~
198 ~~impracticable for the party seeking discovery to obtain facts or opinions on the same~~
199 ~~subject by other means.~~
200 ~~(b)(5)(C) Unless manifest injustice would result,~~
201 ~~(b)(5)(C)(i) The court shall require that the party seeking discovery pay the expert a~~
202 ~~reasonable fee for time spent in responding to discovery under Subdivision (b)(5) of this~~
203 ~~rule; and~~
204 ~~(b)(5)(C)(ii) With respect to discovery obtained under Subdivision (b)(5)(A) of this~~
205 ~~rule the court may require, and with respect to discovery obtained under Subdivision~~
206 ~~(b)(5)(B) of this rule the court shall require, the party seeking discovery to pay the other~~
207 ~~party a fair portion of the fees and expenses reasonably incurred by the latter party in~~
208 ~~obtaining facts and opinions from the expert.~~
209 (b)(6) Claims of Privilege or Protection of Trial Preparation Materials.
210 (b)(6)(A) Information withheld. ~~When~~If a party withholds ~~information otherwise~~
211 discoverable ~~under these rules~~ information by claiming that it is privileged or ~~subject to~~
212 ~~protection as~~prepared in anticipation of litigation or for trial ~~preparation material~~, the
213 party shall make the claim expressly and shall describe the nature of the documents,
214 communications, or things not produced ~~or disclosed~~ in a manner that, without revealing
215 the information itself ~~privileged or protected~~, will enable other parties to ~~assess the~~
216 ~~applicability of~~evaluate the ~~privilege or protection~~claim.

(b)(6)(B) Information produced. If a party produces information that the party claims is ~~produced~~privileged or prepared in ~~discovery that is subject to a claim~~anticipation of ~~privilege~~litigation or ~~of protection as~~ for trial~~-preparation material, the party making~~, the ~~claim~~producing party may notify any receiving party~~ that received the information~~ of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

~~(c) Protective orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:~~

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

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

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

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

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

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

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

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

~~If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.~~

~~(d) Sequence and timing of discovery. Except for cases exempt under subdivision (a)(2), except as authorized under these rules, or unless otherwise stipulated by the parties or ordered by the court, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f). Unless otherwise stipulated by the parties or ordered by the court, fact discovery~~ (c) Sequence and timing of discovery.

(c)(1) Standard discovery. Standard discovery as set by the limits established in Rules 30, 33, 34 and 36 shall be completed within ~~240~~150 days after the defendant's first ~~answer is filed. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods~~disclosure is made . Methods of discovery may be used in any sequence, and the fact that a party is conducting discovery~~, whether by deposition or otherwise,~~ shall not ~~operate to~~ delay any other party's discovery. Except for cases exempt under paragraph (a)(2), a party may not seek discovery from any source before that party's initial disclosure obligations are satisfied.

~~(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~~

278 ~~subdivision (a)(3)(B) the duty extends both to information contained in the report and to~~
279 ~~information provided through a deposition of the expert.~~
280 ~~(e)(2) A party is under a duty seasonably to amend a prior response to an~~
281 ~~interrogatory, request for production, or request for admission if the party learns that the~~
282 ~~response is in some material respect incomplete or incorrect and if the additional or~~
283 ~~corrective information has not otherwise been made known to the other parties during~~
284 ~~the discovery process or in writing.~~
285 ~~(f) Discovery and scheduling conference.~~
286 ~~The following applies to all cases not exempt under subdivision (a)(2), except as~~
287 ~~otherwise stipulated or directed by order.~~
288 ~~(f)(1) The parties shall, as soon as practicable after commencement of the action,~~
289 ~~meet in person or by telephone to discuss the nature and basis of their claims and~~
290 ~~defenses, to discuss the possibilities for settlement of the action, to make or arrange for~~
291 ~~the disclosures required by subdivision (a)(1), to discuss any issues relating to~~
292 ~~preserving discoverable information and to develop a stipulated discovery plan.~~
293 ~~Plaintiff's counsel shall schedule the meeting. The attorneys of record shall be present~~
294 ~~at the meeting and shall attempt in good faith to agree upon the discovery plan.~~
295 ~~(f)(2) The plan shall include:~~
296 ~~(f)(2)(A) what changes should be made in the timing, form, or requirement for~~
297 ~~disclosures under subdivision (a), including a statement as to when disclosures under~~
298 ~~subdivision (a)(1) were made or will be made;~~
299 ~~(f)(2)(B) the subjects on which discovery may be needed, when discovery should be~~
300 ~~completed, whether discovery should be conducted in phases and whether discovery~~
301 ~~should be limited to particular issues;~~
302 ~~(f)(2)(C) any issues relating to preservation, disclosure or discovery of electronically~~
303 ~~stored information, including the form or forms in which it should be produced;~~
304 ~~(f)(2)(D) any issues relating to claims of privilege or of protection as trial-preparation~~
305 ~~material, including - if the parties agree on a procedure to assert such claims after~~
306 ~~production - whether to ask the court to include their agreement in an order;~~
307 ~~(f)(2)(E) what changes should be made in the limitations on discovery imposed~~
308 ~~under these rules, and what other limitations should be imposed;~~

309 ~~(f)(2)(F) the deadline for filing the description of the factual and legal basis for~~
310 ~~allocating fault to a non-party and the identity of the non-party; and~~
311 ~~(f)(2)(G) any other orders that should be entered by the court.~~
312 ~~(f)(3) Plaintiff's counsel shall submit to the court within 14 days after the meeting and~~
313 ~~in any event no more than 60 days after the first answer is filed a proposed form of~~
314 ~~order in conformity with the parties' stipulated discovery plan. The proposed form of~~
315 ~~order shall also include each of the subjects listed in Rule 16(b)(1) (8), except that the~~
316 ~~date or dates for pretrial conferences, final pretrial conference and trial shall be~~
317 ~~scheduled with the court or may be deferred until the close of discovery. If the parties~~
318 ~~are unable to agree to the terms of a discovery plan or any part thereof, the plaintiff~~
319 ~~shall and any party may move the court for entry of a discovery order on any topic on~~
320 ~~which the parties are unable to agree. Unless otherwise ordered by the court, the~~
321 ~~presumptions established by these rules shall govern any subject not included within~~
322 ~~the parties' stipulated discovery plan.~~
323 ~~(f)(4) Any party may request a scheduling and management conference or order~~
324 ~~under Rule 16(b).~~
325 ~~(f)(5) A party joined after the meeting of the parties is bound by the stipulated~~
326 ~~discovery plan and discovery order, unless the court orders on stipulation or motion a~~
327 ~~modification of the discovery plan and order. The stipulation or motion shall be filed~~
328 ~~within a reasonable time after joinder.~~
329 ~~(g)~~ (c)(2) Extraordinary discovery. To obtain discovery beyond the limits established
330 in Paragraph (c)(1), a party shall file:
331 (c)(2)(A) before the close of standard discovery, a stipulation of extraordinary
332 discovery and a statement signed by the parties and attorneys that extraordinary
333 discovery is necessary and proportional under paragraph (b)(1) and that each party has
334 reviewed and approved a discovery budget; or
335 (c)(2)(B) before the close of the standard discovery and after reaching the limits of
336 standard discovery imposed by these rules, a motion for extraordinary discovery and a
337 statement signed by the party and attorney that the extraordinary discovery is
338 necessary and proportional under paragraph (b)(1) and that the party has reviewed and
339 approved a discovery budget.

340 (d) Requirements for disclosure or response; disclosure or response by an
341 organization; failure to disclose; initial and supplemental disclosures and responses.
342 (d)(1) A party shall make disclosures and responses to discovery based on the
343 information then known or reasonably available to the party.
344 (d)(2) If the party providing disclosure or responding to discovery is a corporation,
345 partnership, association, or governmental agency, the party shall act through one or
346 more officers, directors, managing agents, or other persons.
347 (d)(3) A party is not excused from making disclosures or responses because the
348 party has not completed investigating the case or because the party challenges the
349 sufficiency of another party's disclosures or responses or because another party has not
350 made disclosures or responses.
351 (d)(4) If a party fails to disclose or to timely supplement a disclosure or response to
352 discovery, that party may not use the undisclosed witness, document or material at any
353 hearing or trial unless the failure is harmless or the party shows good cause for the
354 failure.
355 (d)(5) If a party learns that a disclosure or response is incomplete or incorrect in
356 some important way, the party must timely provide the additional or correct information
357 if it has not been made known to the other parties. The supplemental disclosure or
358 response must state why the additional or correct information was not previously
359 provided.
360 (e) Signing ~~of~~ discovery requests, responses, and objections. Every disclosure,
361 request for discovery ~~or~~, response ~~or~~ to a request for discovery and objection ~~thereto~~
362 ~~made by~~to a ~~party~~request for discovery shall be in writing and signed by at least one
363 attorney of record or by the party if the party is not represented~~, whose address shall be~~
364 ~~stated~~. The signature of the attorney or party ~~constitutes a certification that the person~~
365 ~~has read the request, response, or objection and that to the best of the person's~~
366 ~~knowledge, information, and belief formed after reasonable inquiry it is: (1) consistent~~
367 ~~with these rules and warranted by existing law or a good faith argument for the~~
368 ~~extension, modification, or reversal of existing law; (2) not interposed for any improper~~
369 ~~purpose, such as to harass or to cause unnecessary delay or needless increase in the~~
370 ~~cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given~~

371 ~~the needs of the case, the discovery already had in the case, the amount in controversy,~~
372 ~~and the importance of the issues at stake in the litigation. If a request,~~is a certification
373 under Rule 11. If a request or response~~, or objection~~ is not signed, ~~it shall be stricken~~
374 ~~unless it is signed promptly after~~ the ~~omission is called to the attention of the~~receiving
375 party ~~making the request, response, or objection, and a party shall~~does not ~~be~~
376 ~~obligated~~need to take any action with respect to it ~~until it is signed.~~
377 . If a certification is made in violation of the rule, the court, upon motion or upon its
378 own initiative, ~~shall impose upon the person who made the certification, the party on~~
379 ~~whose behalf the request, response, or objection is made, or both, an appropriate~~
380 ~~sanction, which may include an order to pay the amount of the reasonable expenses~~
381 ~~incurred because of the violation, including a reasonable attorney fee.~~may take any
382 action authorized by Rule 11 or Rule 37(b)(2).
383 ~~(h) Deposition where action pending in another state. Any party to an action or~~
384 ~~proceeding in another state may take the deposition of any person within this state, in~~
385 ~~the same manner and subject to the same conditions and limitations as if such action or~~
386 ~~proceeding were pending in this state, provided that in order to obtain a subpoena the~~
387 ~~notice of the taking of such deposition shall be filed with the clerk of the court of the~~
388 ~~county in which the person whose deposition is to be taken resides or is to be served,~~
389 ~~and provided further that all matters arising during the taking of such deposition which~~
390 (f) Filing. Except as required by ~~the~~these rules ~~are required to be submitted to the court~~
391 ~~shall be submitted to the court in the county where the deposition is being taken.~~
392 ~~(i) Filing.~~
393 ~~(i)(1) Unless otherwise~~or ordered by the court, a party shall not file ~~disclosures or~~
394 ~~requests~~with the court a disclosure, a request for discovery ~~with the court~~or a response
395 to a request for discovery, but shall file only the ~~original~~ certificate of service stating that
396 the ~~disclosures or requests for discovery have been served on the other parties and the~~
397 ~~date of service. Unless otherwise ordered by the court, a party shall not file a response~~
398 ~~to a request for discovery with the court, but shall file only the original certificate of~~
399 ~~service stating that the~~disclosure, request for discovery or response has been served on
400 the other parties and the date of service. ~~Except as provided in Rule 30(f)(1), Rule 32 or~~
401 ~~unless otherwise ordered by the court, depositions shall not be filed with the court.~~

402 ~~(i)(2) A party filing a motion under subdivision (c) or a motion under Rule 37(a) shall~~
403 ~~attach to the motion a copy of the request for discovery or the response which is at~~
404 ~~issue.~~

405 **Advisory Committee Notes**

406 **Disclosure Requirements and Timing. Rule 26(a)(1).** The 2010 amendments seek
407 to reduce discovery costs by requiring each party to produce, at an early stage in the
408 case and without a discovery request, all of the documents and physical evidence the
409 party may offer in its case-in-chief and the names of witnesses the party may call in its
410 case-in-chief with a description of their expected testimony. In this respect, the
411 amendments build on the initial disclosure requirements of the prior rules. In addition to
412 the disclosures required by the prior version of Rule 26(a)(1), a party must disclose
413 each fact witness the party may call in its case-in-chief and a summary of the witness's
414 expected testimony, a copy of all documents the party may offer in its case-in-chief, and
415 all documents to which a party refers in its pleadings. The duty to provide this
416 information is a continuing one, and disclosures must be supplemented as new
417 evidence and witnesses become known. The penalty for failing to make timely
418 disclosures is that the evidence may not be used in the party's case-in-chief.

419 The amendments also change the time for making these required disclosures.
420 Because the plaintiff controls when it brings the action, plaintiffs must make their
421 disclosures within 14 days after service of the first answer. A defendant is required to
422 make its disclosures within 28 days after the plaintiff's first disclosure or after that
423 defendant's appearance, whichever is later. The purpose of early disclosure is to have
424 all parties present the evidence they expect to use to prove their claims or defenses,
425 thereby giving the opposing party the ability to better evaluate the case and determine
426 what additional discovery is necessary.

427 Finally, the 2010 amendments eliminate two categories of actions that previously
428 were exempt from the mandatory disclosure requirements. Specifically, the
429 amendments eliminate the prior exemption for contract actions in which the amount
430 claimed is $20,000 or less, and actions in which any party is proceeding pro se. In the
431 committee's view, these types of actions will benefit from the early disclosure
432 requirements and the overall reduced cost of discovery.

433 **Expert Disclosures and Timing. Rule 26(a)(3).** Expert discovery has become an
434 ever-increasing component of discovery cost. The prior rules sought to eliminate some
435 of these costs by requiring the written disclosure of the expert's opinions and other
436 background information. However, because the expert was not required to sign these
437 disclosures, and because experts often were allowed to deviate from the opinions
438 disclosed, attorneys typically would take the expert's deposition to ensure the expert
439 would not offer any "surprise" testimony at trial, thereby increasing rather than
440 decreasing the overall cost. The 2010 amendments seek to remedy this by requiring
441 more comprehensive written disclosures, making clear that experts will be held to these
442 disclosures, and eliminating expert depositions. In addition to the materials required
443 under the prior rules, the amended rules make clear that an expert must provide a
444 complete statement of all opinions the witness will express and the basis and reasons
445 for them, as well as the data or other information upon which the expert relies in forming
446 the opinions, and exhibits that will be used to summarize or support those opinions.
447 They further provide that an expert may not testify in a party's case-in-chief concerning
448 any matter not "fairly disclosed" in the report. The intent is not to require a verbatim
449 transcript of exactly what the expert will say at trial; instead, the expert must fairly
450 disclose the substance of each opinion the expert will offer.
451 Formal expert reports as described above are required only for experts who are
452 retained or specially employed to provide expert testimony, or whose duties as an
453 employee of the party regularly involve giving expert testimony. For other types of
454 experts, such as treating physicians, police officers, or accident investigators, the party
455 who intends to offer that expert must disclose the subject matter on which the expert is
456 expected to present expert testimony and a summary of the facts and opinions to which
457 the witness is expected to testify.
458 Expert disclosures must be provided within 28 days after expiration of fact discovery,
459 unless the expert is intended solely to contradict evidence presented by another party's
460 expert, in which case it must be disclosed within 56 days after disclosure by the other
461 party.

462 **Scope of Discovery—Proportionality. Rule 26(b).** Proportionality is the principle
463 governing the scope of discovery. Simply stated, it means that the cost of discovery
464 should be proportional to what is at stake in the litigation.
465 In the past, the scope of discovery was governed by "relevance" or the "likelihood to
466 lead to discovery of admissible evidence." These broad standards may have secured
467 just results by allowing a party to discover all facts relevant to the litigation. However,
468 they did little to advance two equally important objectives of the rules of civil
469 procedure—the speedy and inexpensive resolution of every action. Accordingly, the
470 former standards governing the scope of discovery have been replaced with the
471 proportionality standards in subpart (b)(1).
472 The concept of proportionality is not new. The prior rule permitted the Court to limit
473 discovery methods if it determined that "the discovery was unduly burdensome or
474 expensive, taking into account the needs of the case, the amount in controversy,
475 limitations on the parties' resources, and the importance of the issues at stake in the
476 litigation." The Federal Rules of Civil Procedure contains a similar provision. See Fed.
477 R. Civ. P. 26(b)(2)(C). This method of limiting discovery, however, was rarely invoked
478 either under the Utah or federal rules. But because it embodies the same basic
479 principles as the proportionality standard we now adopt, cases applying Fed. R. Civ. P.
480 26(b)(2)(C) may provide helpful guidance to lawyers and judges.
481 Under the prior rule and the federal rule, the party objecting to the discovery request
482 had the burden of proving that a discovery request was not proportional. The new rule
483 changes the burden of proof. Today, the party seeking discovery beyond the scope of
484 "standard" discovery has the burden of showing that the request is "relevant to the claim
485 or defense of any party" and that the request satisfies the standards of proportionality.
486 The trial court has broad discretion in deciding whether a discovery request is
487 proportional and the standards of proportionality in subpart (b)(1) are intended to guide
488 the exercise of that discretion. Over time, the proper application of these standards will
489 be defined by trial and appellate courts.
490 **Standard and Extraordinary Discovery. Rule 26(c).** As a counterpart to requiring
491 more detailed disclosures under Rule 26(a), the 2010 amendments place new
492 limitations on additional discovery the parties may conduct. Because the committee

493 expects the enhanced disclosure requirements will automatically permit each party to
494 learn the witnesses and evidence the opposing side will offer in its case-in-chief,
495 additional discovery should serve the more limited function of permitting parties to find
496 witnesses, documents, and other evidentiary materials that are harmful, rather than
497 helpful, to the opponent's case.
498 Rule 26(c) provides for limited, "standard" discovery that is presumed to be
499 proportional to the amount and issues in controversy in the action, which the parties
500 may conduct as a matter of right. Standard discovery is limited. Each party may take up
501 to 16 hours of depositions. No deposition of a party may exceed seven hours, and no
502 deposition of a non-party witness may exceed four hours. The number of interrogatories
503 is limited to 15; the number of document requests is limited to 25; and the number of
504 requests for admission is limited to 25. The time for standard discovery is limited to 150
505 days, after which the case is presumed to be ready for trial. The committee determined
506 these limitations based on the observation that the majority of cases filed in the Utah
507 State Courts involve disputes that are relatively modest in magnitude and lack
508 significant factual complexity. Accordingly, the 2010 amendments provide an
509 opportunity for standard discovery that the committee believes should be sufficient for
510 the typical state court case.
511 Despite the expectation that standard discovery should be adequate in the typical
512 case, the 2010 amendments contemplate there will be cases for which standard
513 discovery is not sufficient or appropriate. In such cases, parties may conduct additional
514 discovery that is shown to be consistent with the principle of proportionality. There are
515 two ways to obtain such additional discovery. The first is by stipulation. If the parties can
516 agree additional discovery is necessary, they may stipulate to as much additional
517 discovery as they desire, provided they stipulate the additional discovery is proportional
518 to what is at stake in the litigation and each party certifies that it has reviewed and
519 approved a budget for additional discovery. The certification must confirm that the
520 actual party in question, and not merely counsel, has reviewed and approved the
521 budget. If these conditions are met, the Court will not second-guess the parties and their
522 counsel and must approve the stipulation.

523 The second method to obtain additional discovery is by motion. The committee
524 recognizes there will be cases in which additional discovery is appropriate, but the
525 parties cannot agree to the scope of such additional discovery. These would include,
526 among other categories, large and factually complex cases and cases in which there is
527 a significant disparity in the parties' access to information, such that one party
528 legitimately has a greater need than the other party for additional discovery in order to
529 prepare properly for trial. To prevent a party from taking advantage of this situation, the
530 2010 amendments allow any party to move the Court for additional discovery. The party
531 making such a motion must demonstrate that the additional discovery is proportional
532 and certify that the party has reviewed and approved a discovery budget. The burden to
533 show the need for additional discovery, and to demonstrate proportionality, always falls
534 on the party seeking additional discovery. However, cases in which such additional
535 discovery is appropriate do exist, and it is important for Courts to recognize they can
536 and should permit additional discovery in appropriate cases, commensurate with the
537 complexity and magnitude of the dispute.
538 **Protective Order Language Moved to Rule 37.** The 2010 amendments delete in
539 its entirety the prior language of Rule 26(c) governing motions for protective orders. The
540 substance of that language is now found in Rule 37. The committee determined it was
541 preferable to cover all discovery motions through a single rule, rather than through two
542 separate rules. Accordingly, Rule 37 now governs all discovery motions and orders,
543 including protective orders as well as orders compelling discovery or imposing
544 sanctions.
545 **Consequences of Failure to Disclose. Rule 26(d).** If a party fails to disclose or to
546 supplement timely its discovery responses, that party cannot use the undisclosed
547 witness, document, or material at any hearing or trial, absent proof that non-disclosure
548 was harmless or justified by good cause. More complete disclosures increase the
549 likelihood that the case will be resolved justly, speedily, and inexpensively. Not being
550 able to use evidence that a party fails properly to disclose provides a powerful incentive
551 to make complete disclosures. This is true only if trial courts hold parties to this
552 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.

Proposed Rule 26A was developed by the Family Law Section of the Utah State Bar. It represents the type of discovery or disclosure rule that the advisory committee anticipated when drafting proposed Rule 26(a).

1 **Rule 26A. Disclosure in domestic relations actions.**
2 (a) Scope. This rule applies to domestic relations actions, including divorce,
3 temporary separation, separate maintenance, parentage and modification. This rule
4 does not apply to adoptions, enforcement of prior orders, cohabitant abuse protective
5 orders, child protective orders and civil stalking injunctions.
6 (b) Time for disclosure. Without waiting for a discovery request, petitioner in all
7 domestic relations actions shall disclose to respondent the documents required in this
8 rule within 40 days after service of the petition unless respondent defaults or consents
9 to entry of the decree. The respondent shall disclose to petitioner the documents
10 required in this rule within 40 days after respondent's answer is due.
11 (c) Financial Declaration. Each party shall disclose to all other parties a fully
12 completed court-approved Financial Declaration and attachments. Each party shall
13 attach to the Financial Declaration the following:
14 (c)(1) For every item and amount listed in the Financial Declaration, excluding
15 monthly expenses, the producing party shall attach copies of statements verifying the
16 amounts listed on the Financial Declaration that are reasonably available to the party.
17 (c)(2) For the two tax years before the petition was filed, complete federal and state
18 income tax returns, including Form W-2 and supporting tax schedules and attachments,
19 filed by or on behalf of that party or by or on behalf of any entity in which the party has a
20 majority or controlling interest, including, but not limited to, Form 1099 and Form K-1
21 with respect to that party.
22 (c)(3) Pay stubs and other evidence of all earned and un-earned income for the 12
23 months before the petition was filed.
24 (c)(4) All loan applications and financial statements prepared or used by the party
25 within the 12 months before the petition was filed.
26 (c)(5) Documents verifying the value of all real estate in which the party has an
27 interest, including, but not limited to, the most recent appraisal, tax valuation and
28 refinance documents.

29 (c)(6) All statements for the 3 months before the petition was filed for all financial
30 accounts, including, but not limited to checking, savings, money market funds,
31 certificates of deposit, brokerage, investment, retirement, regardless of whether the
32 account has been closed including those held in that party's name, jointly with another
33 person or entity, or as a trustee or guardian, or in someone else's name on that party's
34 behalf.
35 (c)(7) If the foregoing documents are not reasonably available or are in the
36 possession of the other party, the party disclosing the Financial Declaration shall
37 estimate the amounts entered on the Financial Declaration, the basis for the estimation
38 and an explanation why the documents are not available.
39 (d) Certificate of Service. Each party shall file a Certificate of Service with the court
40 certifying that he or she has provided the Financial Declaration and attachments to the
41 other party in compliance with this rule.
42 (e) Exempted agencies. Agencies of the State of Utah are not subject to these
43 disclosure requirements.
44 (f) Sanctions. Failure to fully disclose all assets and income in the Financial
45 Declaration and attachments may subject the non-disclosing party to sanctions under
46 Rule 37 including an award of non-disclosed assets to the other party, attorney's fees or
47 other sanctions deemed appropriate by the court.
48 (g) Failure of a party to comply with this rule does not preclude any other party from
49 obtaining a default judgment, proceeding with the case, or seeking other relief from the
50 court.
51 (h) Notice of the requirements of this rule shall be served on the Respondent and all
52 joined parties with the initial petition.
53

**Rule 29. Stipulations regarding disclosure and discovery procedure.**

~~Unless the court orders otherwise, the~~The parties may ~~by written stipulation~~

~~(1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and~~

~~(2)~~ modify ~~the procedures provided by~~ these rules for disclosure and discovery~~, except~~ by filing, before the close of standard discovery, a stipulated notice of extraordinary discovery and a statement signed by the parties and lawyers that the extraordinary discovery is necessary and proportional under Rule 26(b)(1) and that ~~stipulations~~each party has reviewed and approved a discovery budget. Stipulations extending the time for or limits of disclosure or discovery require ~~the~~ court approval ~~of the court~~ if ~~they~~the extension would interfere with ~~the time set~~a court order for completion of discovery or with the date of a hearing or trial.

**Rule 30. Depositions upon oral ~~examination~~questions.**

(a) When depositions may be taken; ~~When~~when leave required~~.~~

~~(a)(1) A party may take the testimony of any person, including a party, by~~ ; no deposition ~~upon oral examination without leave of court except as provided in paragraph (2). The attendance of~~of expert witnesses. A party may depose a party or witness by oral questions. A witness may not be ~~compelled by subpoena as provided in Rule 45.~~

~~(a)(2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(3), if the person to be examined is confined in prison or if, without the written stipulation of the parties:~~

~~(a)(2)(A) a proposed deposition would result in~~ deposed more than ~~ten depositions being taken~~once in standard discovery. An expert who has prepared a report disclosed under ~~this rule or Rule 31 by the plaintiffs, or by the defendants, or by third-party defendants;~~

~~(a)(2)(B) the person to be examined already has been deposed in the case; or~~

~~(a)(2)(C) a party seeks to take a deposition before the time specified in Rule 26(d) unless the notice contains a certification, with supporting facts, that the person to be examined is expected to leave the state and will be unavailable for examination unless~~ Rule 26(a)(3) may not be deposed ~~before that time. The party or party's attorney shall sign the notice, and the signature constitutes a certification subject to the sanctions provided by Rule 11~~.

(b) Notice of ~~examination~~deposition; general requirements; special notice; non-stenographic recording; production of documents and things; deposition of organization; deposition by telephone.

(b)(1) ~~A~~ The party ~~desiring to take the deposition of any person upon oral examination~~deposing a witness shall give reasonable notice in writing to every other party ~~to the action~~. The notice shall state the date, time and place for ~~taking~~ the deposition and the name and address of each ~~person to be examined, if known, and, if the~~ witness. If the name of a witness is not known, ~~a general description sufficient~~the notice shall describe the witness sufficiently to identify the person or state the ~~particular~~ class or group to which the person belongs. ~~If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials~~The notice shall

designate any documents and tangible things to be produced ~~as set forth in the subpoena~~by a witness. The notice shall ~~be attached to or included in~~designate the officer who will conduct the ~~notice.~~deposition.

(b)(2) The ~~party taking the deposition shall state in the notice~~ notice shall designate the method by which the ~~testimony shall be recorded. Unless the court orders otherwise, it~~deposition will be recorded. With prior notice to the officer, witness and other parties, any party may designate a recording method in addition to the method designated in the notice. Depositions may be recorded by sound, sound-and-visual, or stenographic means, and the party ~~taking~~designating the ~~deposition~~recording method shall bear the cost of the recording. The appearance or demeanor of witnesses or attorneys shall not be distorted through recording techniques.

~~(b)(3) With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders.~~

~~(b)(4) Unless otherwise agreed by the parties, a~~(b)(3) A deposition shall be conducted before an officer appointed or designated under Rule 28 and shall begin with a statement on the record by the officer that includes (A) the officer's name and business address; (B) the date, time and place of the deposition; (C) the name of the ~~deponent~~witness; (D) the administration of the oath or affirmation to the ~~deponent~~witness; and (E) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (A) through (C) at the beginning of each unit of ~~tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques.~~the recording medium. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall ~~set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters~~state any stipulations.

(b)(~~5~~4) The notice to a party ~~deponent~~witness may be accompanied by a request ~~made in compliance with~~under Rule 34 for the production of documents and tangible things at the ~~taking of the~~ deposition. The procedure of Rule 34 shall apply to the

request. The attendance of a nonparty witness may be compelled by subpoena under Rule 45. Documents and tangible things to be produced shall be stated in the subpoena.

(b)(5) A deposition may be taken by remote electronic means. A deposition taken by remote electronic means is considered to be taken at the place where the witness answers questions.

(b)(6) A party may ~~in the notice and in a subpoena~~ name as the ~~deponent a public or private~~witness a corporation, a partnership, an association, or a governmental agency ~~and~~, describe with reasonable particularity the matters on which ~~examination~~questioning is requested~~. In that event,~~, and direct the organization ~~so named shall~~to designate one or more officers, directors, managing agents, or other persons ~~who consent~~ to testify on its behalf ~~and may set forth~~. The organization shall state, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. ~~The persons so designated shall testify as to matters known or reasonably available to the organization. This Subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.~~

~~(b)(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by remote electronic means. For the purposes of this rule and Rules 28(a), 37(b)(1), and 45(d), a deposition taken by remote electronic means is taken at the place where the deponent is to answer questions.~~

(c) Examination and cross-examination; ~~record of examination; oath;~~ objections. ~~Examination and cross-examination~~

(c)(1) Questioning of witnesses may proceed as permitted at the trial under the ~~provisions of the~~ Utah Rules of Evidence, except Rules 103 and 615. ~~The officer before whom the deposition is to be taken shall put the witnesses on oath or affirmation and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness.~~

(c)(2) All objections ~~made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, or to the conduct of any party and any other objection to the proceedings shall be noted by~~

94 ~~the officer upon the record of the deposition~~shall be recorded, but the
95 ~~examination~~questioning shall proceed ~~with~~, and the testimony ~~being~~ taken subject to the
96 objections. ~~In lieu of participating in the oral examination, parties may serve written~~
97 ~~questions in a sealed envelope on the party taking the deposition, and the party taking~~
98 ~~the deposition shall transmit them to the officer, who shall propound them to the witness~~
99 ~~and record the answers verbatim.~~
100 ~~(d) Schedule and duration; motion to terminate or limit examination.~~
101 ~~(d)(1)~~ Any objection ~~to evidence during a deposition~~ shall be stated concisely and in
102 a non-argumentative and non-suggestive manner. A person may instruct a
103 ~~deponent~~witness not to answer only ~~when necessary~~ to preserve a privilege, to enforce
104 a limitation on evidence directed by the court, or to present a motion ~~under paragraph~~
105 ~~(4).~~for a protective order under Rule 26(c). Upon demand of the objecting party or
106 witness, the deposition shall be suspended for the time necessary to make a motion.
107 The party taking the deposition may complete or adjourn the deposition before moving
108 for an order to compel discovery under Rule 37.
109 ~~(d)(2) Unless otherwise authorized by the court or stipulated by the parties, a~~
110 ~~deposition is limited to one day of seven hours. The court must allow additional time~~
111 ~~consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the~~
112 ~~deponent or another person, or other circumstance, impedes or delays the examination.~~
113 ~~(d)(3) If the court finds that any impediment, delay, or other conduct has frustrated~~
114 ~~the fair examination of the deponent, it may impose upon the persons responsible an~~
115 ~~appropriate sanction, including the reasonable costs and attorney fees incurred by any~~
116 ~~parties as a result thereof.~~
117 ~~(d)(4) At any time during the taking of the deposition, on motion of a party or of the~~
118 ~~deponent and upon a showing that the examination is being conducted in bad faith or in~~
119 ~~such manner as unreasonably to annoy, embarrass, or oppress the deponent or party,~~
120 ~~the court in which the action is pending or the court in the district where the deposition is~~
121 ~~being taken may order the officer conducting the examination to cease forthwith from~~
122 ~~taking the deposition, or may limit the scope and manner of the taking of the deposition~~
123 ~~as provided in Rule 26(c). If the order made terminates the examination, it shall be~~
124 ~~resumed thereafter only upon the order of the court in which the action is pending. Upon~~

125 demand of the objecting party or deponent, the taking of the deposition shall be
126 suspended for the time necessary to make a motion for an order. The provisions of Rule
127 37(a)(4) apply to the award of expenses incurred in relation to the motion.
128 (d) Limits. During standard discovery, each side (plaintiffs collectively, defendants
129 collectively, and third-party defendants collectively) is limited to 16 hours of deposition
130 by oral questioning. Oral questioning of a nonparty shall not exceed four hours, and oral
131 questioning of a party shall not exceed seven hours.
132 (e) Submission to witness; changes; signing. If requested by the deponent or a party
133 before completion of the deposition, the deponent shall have 30Within 28 days after
134 being notified by the officer that the transcript or recording is available in which to review
135 , a witness may sign a statement of changes to the form or substance of the transcript
136 or recording and, if there are changes in form or substance, to sign a statement reciting
137 such changes and the reasons given by the deponent for making them. The officer shall
138 indicate in the certificate prescribed by subdivision (f)(1) whether any review was
139 requested and, if so, for the changes. The officer shall append any changes timely
140 made by the deponent during the period allowedwitness.
141 (f) Record of deposition; certification and delivery by officer; exhibits; copies.
142 (f)(1) The transcript or other recording of officer shall record the deposition made in
143 accordance with this rule shall be the record ofor direct another person present to
144 record the deposition. The officer shall sign a certificate, to accompany the record of the
145 deposition, that the witness was duly sworunder oath or affirmation and that the
146 transcript or other recording record is a true record of the testimony given by the
147 witness. Unless otherwise ordered by the court, thedeposition. The officer shall keep a
148 copy of the record. The officer shall securely seal the record of the deposition in an
149 envelope endorsed with the title of the action and marked "Deposition of" (name). Do
150 not open." and shall promptly send the sealed record of the deposition to the attorney
151 who arranged for the transcript or other record to be made. If the party taking the
152 deposition is not represented by an attorney, the record of the deposition shall be sent
153 to the clerk of the court for filing unless otherwise ordered by the court.who designated
154 the recording method. An attorney or party receiving the record of the deposition shall

155 store it under conditions that will protect it against loss, destruction, tampering, or
156 deterioration.
157 (f)(2) ~~Documents~~Every party may inspect and copy documents and things produced
158 for inspection ~~during the examination of the witness shall, upon~~and must have a fair
159 opportunity to compare copies and originals. Upon the request of a party, ~~be~~
160 ~~marked~~documents and things produced for ~~identification and annexed to the record of~~
161 ~~the deposition and may be inspected and copied by any party, except that, if the person~~
162 ~~producing the materials desires to retain them, that person may (A) offer copies~~
163 ~~to~~inspection shall be marked for identification and ~~annexed to the record of the~~
164 ~~deposition and to serve thereafter as originals, if the person affords to all parties fair~~
165 ~~opportunity to verify the copies by comparison with~~ added to the record. If the witness
166 wants to retain the originals, ~~or (B)~~that person shall offer the originals to be ~~marked for~~
167 ~~identification, after giving to each party an opportunity to inspect and copy them, in~~
168 ~~which event the originals may be used in the same manner as if annexed to the record~~
169 ~~of the deposition. Any party may move for an order that the originals be annexed to and~~
170 ~~returned with the record of the deposition to the court, pending final disposition of the~~
171 ~~case~~copied, marked for identification and added to the record.
172 (f)(3) ~~Unless otherwise ordered by the court or agreed by the parties, the officer shall~~
173 ~~retain stenographic notes of any depositions taken stenographically or a copy of the~~
174 ~~recording of any deposition taken by another method. Upon~~ Upon payment of
175 reasonable charges ~~therefor~~, the officer shall furnish a copy of the record ~~of the~~
176 ~~deposition~~ to any party or to the ~~deponent. Any party or the deponent may arrange for a~~
177 ~~transcription to be made from the recording~~ witness. An official transcript of a ~~deposition~~
178 ~~taken~~ recording made by non-stenographic means~~.~~ shall be prepared under Utah Rule
179 of Appellate Procedure 11(e).
180 (g) Failure to attend or to serve subpoena; expenses.
181 ~~(g)(1)~~ If the party giving the notice of ~~the taking of~~ a deposition fails to attend ~~and~~
182 ~~proceed therewith and~~ or fails to serve a subpoena upon a witness who fails to attend,
183 and another party attends in person or by attorney ~~pursuant to the notice~~, the court may
184 order the party giving the notice to pay to ~~such~~ the other party the reasonable costs,

185 expenses and attorney fees incurred ~~by him and his attorney in attending, including~~
186 ~~reasonable attorney's fees~~.
187 ~~(g)(2) If the party giving the notice of the taking of a deposition of a witness fails to~~
188 ~~serve a subpoena upon him and the witness because of such failure does not attend,~~
189 ~~and if another party attends in person or by attorney because he expects the deposition~~
190 ~~of that witness to be taken, the court may order the party giving the notice to pay to~~
191 ~~such other party the reasonable expenses incurred by him and his attorney in attending,~~
192 ~~including reasonable attorney's fees.~~
193 (h) Deposition in action pending in another state. Any party to an action in another
194 state may take the deposition of any person within this state in the same manner and
195 subject to the same conditions and limitations as if such action were pending in this
196 state. Notice of the deposition shall be filed with the clerk of the court of the county in
197 which the person whose deposition is to be taken resides or is to be served. Matters
198 required to be submitted to the court shall be submitted to the court in the county where
199 the deposition is being taken.
200

**Rule 31. Depositions upon written questions.**

(a) ~~Serving questions; notice.~~

~~(a)(1)~~ A party may ~~take the testimony of any person, including~~depose a party~~,~~ or witness by ~~deposition~~ written questions. Rules 30 and 45 apply to depositions upon written questions ~~without leave of court~~, except insofar as ~~provided in paragraph (2). The attendance of witnesses may be compelled~~ by ~~the use of subpoena as provided in Rule 45~~their nature they are clearly inapplicable.

(~~a)(2~~b) A party ~~must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties,~~

~~(a)(2)(A) a proposed deposition would result in more than ten depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by third-party defendants;~~

~~(a)(2)(B) the person to be examined has already been deposed in the case; or~~

~~(a)(2)(C) a party seeks to take a deposition before the time specified in Rule 26(d).~~

~~(a)(3) A party desiring to take a deposition upon~~taking a deposition using written questions shall serve ~~them upon every other party with~~on the parties a notice ~~stating (1)~~which includes the name or description and address of the ~~person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (2)~~deponent, the name or descriptive title ~~and address~~ of the officer before whom the deposition ~~is to~~will be taken~~.~~ ~~A deposition upon written~~ , and the questions ~~may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6).~~to be asked.

(~~a)(4~~c) Within 14 days after the ~~notice and written~~ questions are served, a party may serve cross questions ~~upon all other parties~~. Within 7 days after being served with cross questions, a party may serve redirect questions ~~upon all other parties~~. Within 7 days after being served with redirect questions, a party may serve ~~recross~~re-cross questions ~~upon all other parties. The court may for cause shown enlarge or shorten the time.~~.

~~(b) Officer to take responses and prepare record.~~(d) A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the ~~officer~~

32 designated ~~in the notice,~~ officer who shall proceed promptly~~, in the manner provided by~~
33 ~~Rule 30(c), (e), and (f), attaching~~ to ~~the deposition the copy of the notice and~~ask the
34 questions ~~received~~and prepare a record of the responses.
35 (e) During standard discovery, a deposition by written questioning shall not
36 cumulatively exceed 15 questions, including discrete subparts, by the plaintiffs
37 collectively, by the defendants collectively or by third-party defendants collectively.
38

**Rule 33. Interrogatories to parties.**

(a) Availability; procedures for use. ~~Without leave of court or written stipulation~~ During standard discovery, any party may serve upon any other party up to 15 written interrogatories, ~~not exceeding 25 in number~~ including all discrete subparts~~, to be answered by the party served or, if the party served is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(3). Without leave of court or written stipulation, interrogatories may not be served before the time specified in Rule 26(d).~~.

(b) Answers and objections.

~~(b)(1)~~ The responding party shall serve a written response within 28 days after service of the interrogatories. The responding party shall restate the interrogatory before responding to it. Each interrogatory shall be answered separately and fully in writing under oath or affirmation, unless it is objected to~~, in which event~~. If an interrogatory is objected to, the ~~objecting~~ party shall state the reasons for the objection ~~and shall answer to the extent the interrogatory is not objectionable.~~

~~(b)(2) The answers are to be signed by the person making them, and the objections signed by the attorney making them.~~

~~(b)(3) The party upon whom the interrogatories have been served shall serve a copy of the answers and objections, if any, within 30 days after the service of the interrogatories. A shorter or longer time may be ordered by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29.~~

~~(b)(4) All grounds for an objection to an interrogatory shall be~~ . Any reason not stated ~~with specificity. Any ground not stated in a timely objection~~ is waived unless ~~the party's failure to object is~~ excused by the court for good cause ~~shown.~~

~~(b)(5) The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.~~

. ~~(c) Scope; use at trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the Rules of Evidence.~~

An interrogatory ~~otherwise proper~~ is not ~~necessarily~~ objectionable merely because an answer ~~to the interrogatory~~ involves an opinion or ~~contention~~argument that relates to fact or the application of law to fact~~, but the court may order~~. The party shall answer any part of an interrogatory that ~~such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.~~is not objectionable.

(c) Scope; use at trial. Interrogatories may relate to any discoverable matter. Answers may be used as permitted by the Rules of Evidence.

(d) Option to produce business records. ~~Where~~If the answer to an interrogatory may be ~~derived or ascertained from~~found by inspecting the answering party's business records, including electronically stored information, ~~of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such business records, including a compilation, abstract, or summary thereof~~ and the burden of ~~deriving or ascertaining~~finding the answer is substantially the same for both parties, the answering party ~~serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify~~may identify the records from which the answer may be ~~derived or ascertained and to afford to the~~found. The answering party must give the asking party ~~serving the interrogatory~~ reasonable opportunity to ~~examine, audit, or~~ inspect ~~such~~the records and to make copies, compilations, ~~abstracts,~~ or summaries. ~~A specification shall be~~ The answering party must identify the records in sufficient detail to permit the ~~interrogating~~asking party to locate and to identify~~,~~ them as readily as ~~can the party served, the records from which the answer may be ascertained~~the answering party.

**Rule 34. Production of documents and things and entry upon land for inspection and other purposes.**

(a) Scope. ~~Any party may serve on any other party a request~~

(a)(1) Any party may serve on any other party a request to produce and permit the ~~party making the request, or someone acting on his behalf,~~requesting party to inspect, copy, test or sample any designated discoverable documents~~ or~~, electronically stored information or tangible things (including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent into reasonably usable form~~), or to inspect, copy, test or sample any designated tangible things which constitute or contain matters within the scope of Rule 26(b) and which are~~) in the possession~~, custody~~ or control of the responding party ~~upon whom the request is served; or~~.

(a)(2) Any party may serve on any other party a request to permit entry upon designated ~~land or other~~ property in the possession or control of the responding party ~~upon whom the request is served~~ for the purpose of ~~inspection and~~inspecting, measuring, surveying, photographing, testing, or sampling the property or any designated discoverable object or operation ~~thereon, within the scope of Rule 26(b).~~on the property.

(b) Procedure and limitations.

(b)(1) The request shall ~~set forth~~identify the items to be inspected~~ either~~ by individual item or by category, and describe each item and category with reasonable particularity. During standard discovery, the request shall not cumulatively include more than 25 distinct items or categories of items. The request shall specify a reasonable date, time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced. ~~Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d).~~

(b)(2) The responding party ~~upon whom the request is served~~ shall serve a written response within ~~30~~28 days after ~~the~~ service of the request. ~~A shorter or longer time may be directed by the court or, in the absence of such an order, agreed~~The responding

party shall restate the request before responding to ~~in writing by the parties, subject to Rule 29~~it. The response shall state, with respect to each item or category, that inspection and related ~~activities~~acts will be permitted as requested, ~~unless~~ or that the request is objected to~~, including an objection to the requested form or forms for producing electronically stored information, stating~~. If the party objects to a request, the party must state the reasons for the objection. ~~If objection~~Any reason not stated is ~~made to part of an item or category,~~waived unless excused by the ~~part~~court for good cause. The party shall ~~be specified~~identify and permit inspection ~~permitted of the remaining parts.~~of any part of a request that is not objectionable. If ~~objection is made~~the party objects to the requested form or forms for producing electronically stored information -- or if no form was specified in the request -- the responding party must state the form or forms it intends to use.~~ The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.~~

~~(b)(3) Unless the parties otherwise agree or the court otherwise orders:~~

~~(b)(3)(~~(c) Form of documents and electronically stored information.

(c)(1) A~~) a~~ party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request~~;~~.

(~~b)(3)(B) if~~c)(2) If a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable~~; and~~.

(~~b~~c)(3~~)(C) a~~) A party need not produce the same electronically stored information in more than one form.

~~(c) Persons not parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.~~

**Rule 35. Physical and mental examination of persons.**

(a) Order for examination. When the mental or physical condition ~~(including the blood group)~~or attribute of a party or of a person in the custody or ~~under the legal~~ control of a party is in controversy, the court ~~in which the action is pending~~ may order the party~~ or person~~ to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or ~~legal~~ control~~, unless the party is unable to produce the person for examination.~~. The order may be made only on motion for good cause shown. All papers related to the motion and ~~upon~~ notice ~~to the person~~ of any hearing shall be served on a nonparty to be examined~~ and to all parties and~~. The order shall specify the time, place, manner, conditions, and scope of the examination and the person ~~or persons~~ by whom ~~it~~ the examination is to be made. 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.

(b) Report~~ of examining physician.~~

~~(b)(1) If requested by a~~ . The party ~~against whom an order is made under Rule 35(a) or the person examined, the party causing~~ requesting the examination ~~to be made~~ shall ~~deliver to the person examined and/or the other party a copy of~~disclose a detailed written report of the examiner, setting out the examiner's findings, including results of all tests made, ~~diagnosis~~diagnoses and conclusions~~, together with like reports of all earlier examinations of the same condition. After delivery the party causing~~. If the party requesting the examination wishes to call the examiner as a witness, the party shall ~~be entitled upon request to receive from the party against whom the order is made a like~~disclose an expert report ~~of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the report cannot be obtained. The court on motion may order delivery of a report on such terms as are just. If an examiner fails or refuses to make a report, the court on motion may take any action authorized by Rule 37(b)(2).~~

~~(b)(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the~~

32 ~~testimony of every other person who has examined or may thereafter examine the party~~
33 ~~in respect of the same mental or physical condition.~~
34 ~~(b~~as required by Rule 26(a)(3~~) This subdivision applies to examinations made by~~
35 ~~agreement of the parties, unless the agreement expressly provides otherwise. This~~
36 ~~subdivision does not preclude discovery of a report of any other examiner or the taking~~
37 ~~of a deposition of an examiner in accordance with the provisions of any other rule.~~).
38 ~~(c) Right of party examined to other medical reports. At the time of making an order~~
39 ~~to submit to an examination under Subdivision (a), the court shall, upon motion of the~~
40 ~~party to be examined, order the party seeking such examination to furnish to the party to~~
41 ~~be examined a report of any examination previously made or medical treatment~~
42 ~~previously given by any examiner employed directly or indirectly by the party seeking~~
43 ~~the order for a physical or mental examination, or at whose instance or request such~~
44 ~~medical examination or treatment has previously been conducted.~~
45 ~~(d) Sanctions.~~
46 ~~(d)(1)~~(c) Sanctions. If a party or a person in the custody or under the legal control of
47 a party fails to obey an order entered under ~~Subdivision~~paragraph (a), the court on
48 motion may take any action authorized by Rule 37(~~b~~c)(2), except that the failure cannot
49 be treated as contempt of court.
50 ~~(d)(2) If a party fails to obey an order entered under Subdivision (c), the court on~~
51 ~~motion may take any action authorized by Rule 37(b)(2).~~
52 Advisory Committee Notes
53 Rule 35 has been substantially revised. Few rules have generated such an
54 extensive motions practice and disputes as the previous version of Rule 35. The battles
55 typically raged over the production of reports of prior examinations by the examining
56 physician, and whether the examination could be recorded or witnessed by a third party.
57 It is also doubtful that any rule under consideration for change has been as
58 thoroughly studied as Rule 35. A subcommittee of the advisory committee has spent
59 several years collecting information from both sides of the personal-injury bar and from
60 the trial courts. While no rule amendment will please everyone, the committee is of the
61 opinion that making recording the default for medical examinations, and removing the

62 requirement for automatic production of prior reports, will best resolve the issues that
63 have bedeviled the trial courts and counsel.
64 The Committee re-emphasizes that a medical examination is not a matter of right,
65 but should only be permitted by the trial court upon a showing of good cause. Rule 35
66 has always provided, and still provides, that the proponent of an examination must
67 demonstrate good cause for the examination. And, as before, the motion and order
68 should detail the specifics of the proposed examination.
69 The committee is concerned about the rise of the so-called "professional witness" in
70 the area of medical examinations. This phenomenon is not limited to Utah. See, A
71 World of Hurt: Exams of Injured Workers Fuel Mutual Mistrust, By N. R. Kleinfield, New
72 York Times, April 4, 2009. The committee recognizes that there is often nothing
73 "independent" about a Rule 35 examiner. Therefore, the trial court should refrain from
74 the use of the phrase "independent medical examiner," using instead the neutral
75 appellation "medical examiner," "Rule 35 examiner," or the like.
76 As noted, a major source of controversy has been requests by plaintiffs' counsel to
77 audio- or video-record examinations. The Committee has determined that the benefits
78 of recording generally outweigh the downsides in a typical case. The new rule therefore
79 provides that recording shall be permitted as a matter of course unless the person
80 moving for the examination demonstrates the recording would unduly interfere with the
81 examination. See, Boswell v. Schultz, 173 P.3d 390, 394 (OK 2007) ("A video recording
82 would be a superior method of providing an impartial record of the physical
83 examination.")
84 Nothing in the rule requires that the recording be conducted by a professional, and it
85 is not the intent of the committee that this extra cost should be necessary. The
86 committee also recognizes that recording may require the presence of a third party to
87 manage the recording equipment, but this must be done without interference and as
88 unobtrusively as possible.
89 The former requirement of Rule 35(c) providing for the production of prior reports on
90 other examinees by the examiner was a source of great confusion and controversy.
91 This provision does not exist in the federal version of the rule, nor is the Committee
92 aware of any other similar state court rule. After much deliberation and discussion, it is

93 the Committee's view that this provision is better eliminated, and in the new rule there is
94 no longer an automatic requirement for the production of prior reports of other
95 examinations. Medical examiners will be treated as other expert witnesses are treated,
96 with the requirement of a report under Rule 26. The Committee notes that, as with other
97 experts, the use of subpoenas to obtain prior reports remains an option for the
98 practitioner in appropriate circumstances, subject to Rule 26 proportionality standards.
99

**Rule 36. Request for admission.**

(a) Request for admission.

~~(a)(1)~~ A party may serve upon any other party a written request ~~for the admission, for purpose of the pending action only, of~~ to admit the truth of any ~~matters within the scope of Rule 26(b)~~ discoverable matter set forth in the request ~~that~~, including the genuineness of any document. The matter must relate to statements or opinions of fact or of the application of law to fact~~, including the genuineness of any documents described in the request. The request for admission shall contain a notice advising the party to whom the request is made that, pursuant to Rule 36, the matters shall be deemed admitted unless said request is responded to within 30 days after service of the request or within such shorter or longer time as the court may allow. Copies of documents~~. Each matter shall be separately stated. During standard discovery, a party may not request admission of more than 25 matters. A copy of the document shall be served with the request unless ~~they have~~it has already been ~~or are otherwise~~ furnished or made available for inspection and copying. ~~Without leave of court or written stipulation, requests for admission may not be served before the time specified in Rule 26(d).~~The request shall notify the responding party that the matters will be deemed admitted unless the party responds within 28 days after service of the request.

~~(a)(2) Each matter of which an admission is requested shall be separately set forth. The matter~~ (b) Answer or objection.

(b)(1) The matter is admitted unless, within ~~thirty~~28 days after service of the request, ~~or within such shorter or longer time as the court may allow, the party to whom the request is directed~~ the responding party serves upon the ~~party~~ requesting ~~the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth~~party a written response.

(b)(2) The responding party shall restate the request before responding to it. Unless the answering party objects to a matter, the party must admit or deny the matter or state

in detail the reasons why the ~~answering~~ party cannot truthfully admit or deny ~~the matter~~. The party shall restate the request before answering. A party may identify the part of a matter which is true and deny the rest. A denial shall fairly meet the substance of the ~~requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack~~request. Lack of information ~~or knowledge as~~is not a reason for failure to admit or deny unless ~~he states that he has made reasonable inquiry and that~~ the information known or ~~readily obtainable by him~~reasonably available is insufficient to ~~enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents~~ form an admission or denial. If the truth of a matter is a genuine issue for trial, the answering party may ~~not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37(c),~~ deny the matter or ~~set forth~~ state the reasons ~~why he cannot~~ for the failure to admit or deny ~~it~~.

~~(a)(3) The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.~~

~~(b~~(b)(3) If the party objects to a matter, the party shall state the reasons for the objection. Any reason not stated is waived unless excused by the court for good cause. The party shall admit or deny any part of a matter that is not objectionable. It is not grounds for objection that the truth of a matter is a genuine issue for trial.

(c) Sanctions for failure to admit. If a party fails to admit the truth of any discoverable matter set forth in the request, and if the requesting party proves the truth of the matter, the requesting party may move for an order requiring the other party to pay the reasonable expenses of proving the matter, including reasonable attorney fees. The court shall enter the order unless it finds that:

(c)(1) the request was held objectionable;

(c)(2) the admission sought was not substantially important;

(c)(3) the responding party had reason to believe the truth of the matter was a genuine issue for trial; or

(c)(4) there were other good reasons for the failure to admit.

(d) Effect of admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. ~~Subject to the provisions of Rule 16 governing amendment of a pretrial order, the~~The court may permit withdrawal or amendment ~~when~~if the presentation of the merits of the action will be ~~subserved thereby~~promoted and ~~the party who obtained the admission fails to satisfy the court that~~ withdrawal or amendment will not prejudice ~~him in maintaining his action or defense on the merits~~the requesting party. Any admission ~~made by a party~~ under this rule is for the purpose of the pending action only~~ and~~. It is not an admission ~~by him~~ for any other purpose, nor may it be used ~~against him~~ in any other ~~proceeding~~action.

**Rule 37. ~~Failure to make or cooperate in discovery; sanctions~~Discovery and disclosure motions; Sanctions.**

(a) Motion for order compelling ~~discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:~~disclosure or discovery.

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

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

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

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

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

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

(a)(2) Appropriate court. ~~An application for an order to a party~~A motion may be made to the court in which the action is pending, or, on matters relating to a deposition or a document subpoena, to the court in the district where the deposition is being taken~~. An application~~ or where the subpoena was served. A motion for an order to a ~~deponent who is not a party~~nonparty witness shall be made to the court in the district where the deposition is being taken or where the subpoena was served.

(a)(~~2) Motion.~~

~~(a)(2)(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.~~ 3) The ~~motion~~ moving party must ~~include~~attach a copy of the request for discovery, the disclosure, or the response at issue. The moving party must also attach a certification that the ~~movant~~ moving party has in good faith conferred or attempted to confer with the ~~party not making the disclosure~~ other affected parties in an effort to secure the disclosure or discovery without court action~~.~~

31 ~~(a)(2)(B) If a deponent fails to answer a question propounded or submitted~~ and that
32 the discovery being sought is proportional under Rule ~~30 or 31, or a corporation or other~~
33 ~~entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer~~
34 ~~an interrogatory submitted under Rule 33, or if a party, in response to a request for~~
35 ~~inspection submitted under Rule 34, fails to respond that inspection will be permitted as~~
36 ~~requested or fails to permit inspection as requested, the discovering party may move for~~
37 ~~an order compelling an answer, or a designation, or an order compelling inspection in~~
38 ~~accordance with the request. The motion must include a certification that the movant~~
39 ~~has in good faith conferred or attempted to confer with the person or party failing to~~
40 ~~make the discovery in an effort to secure the information or material without court~~
41 ~~action. When taking a deposition on oral examination, the proponent of the question~~
42 ~~may complete or adjourn the examination before applying for an order.~~26(b)(1).
43 ~~(a)(3) Evasive or incomplete disclosure, answer, or response. For purposes of this~~
44 ~~subdivision an evasive or incomplete disclosure, answer, or response is to be treated as~~
45 ~~a failure to disclose, answer, or respond.~~
46 ~~(a)(4)~~ (b) Motion for protective order.
47 (b)(1) A party or the person from whom discovery is sought may move for an order
48 of protection from discovery. The moving party shall attach to the motion a copy of the
49 request for discovery or the response at issue. The moving party shall also attach a
50 certification that the moving party has in good faith conferred or attempted to confer with
51 other affected parties to resolve the dispute without court action.
52 (b)(2) If the motion raises issues of proportionality under Rule 26(b)(1), the party
53 seeking the discovery has the burden of demonstrating that the information being
54 sought is proportional.
55 (c) Orders. The court may make any order to require disclosure or discovery or to
56 protect a party or person from discovery being conducted in bad faith or from
57 annoyance, embarrassment, oppression, or undue burden or expense, or to achieve
58 proportionality under Rule 26(b)(1), including one or more of the following:
59 (c)(1) that the discovery not be had;
60 (c)(2) that the discovery may be had only on specified terms and conditions,
61 including a designation of the time or place;

62 (c)(3) that the discovery may be had only by a method of discovery other than that
63 selected by the party seeking discovery;
64 (c)(4) that certain matters not be inquired into, or that the scope of the discovery be
65 limited to certain matters;
66 (c)(5) that discovery be conducted with no one present except persons designated
67 by the court;
68 (c)(6) that a deposition after being sealed be opened only by order of the court;
69 (c)(7) that a trade secret or other confidential research, development, or commercial
70 information not be disclosed or be disclosed only in a designated way;
71 (c)(8) that the parties simultaneously file specified documents or information
72 enclosed in sealed envelopes to be opened as directed by the court;
73 (c)(9) that a question about a statement or opinion of fact or the application of law to
74 fact not be answered until after designated discovery has been completed or until a
75 pretrial conference or other later time; or
76 (c)(10) that the costs, expenses and attorney fees of discovery be allocated among
77 the parties as justice requires.
78 (c)(11) If a protective order terminates a deposition, it shall be resumed only upon
79 the order of the court in which the action is pending.
80 (d) Expenses and sanctions~~.~~
81 ~~(a)(4)(A)~~ for motions. If the motion to compel or for a protective order is granted, or if
82 ~~the~~a party provides disclosure or ~~requested~~ discovery ~~is provided~~or withdraws a
83 disclosure or discovery request after ~~the~~a motion ~~was~~ is filed, the court ~~shall, after~~
84 ~~opportunity for hearing, require~~may order the party ~~or deponent whose conduct~~
85 ~~necessitated the motion or the party~~, witness or attorney ~~advising such conduct or both~~
86 ~~of them~~ to pay ~~to the moving party~~ the reasonable expenses and attorney fees incurred
87 ~~in obtaining the order, including attorney fees, unless~~ on account of the motion if the
88 court finds that the ~~motion was filed without the movant's first making a~~ party, witness,
89 or attorney did not act in good faith ~~effort to obtain the disclosure or discovery without~~
90 ~~court action, or that the opposing party's nondisclosure, response, or objection was~~ or
91 asserted a position that was not substantially justified~~, or that other circumstances make~~
92 ~~an award of expenses unjust~~.

93 ~~(a)(4)(B) If the motion is denied, the court may enter any protective order authorized~~
94 ~~under Rule 26(c) and shall, after opportunity for hearing, require the moving party or the~~
95 ~~attorney or both of them to pay to the party or deponent who opposed the motion the~~
96 ~~reasonable expenses incurred in opposing the motion, including attorney fees, unless~~
97 ~~the court finds that the making of the motion was substantially justified or that other~~
98 ~~circumstances make an award of expenses unjust.~~
99 ~~(a)(4)(C) If the motion is granted in part and denied in part, the court may enter any~~
100 ~~protective order authorized under Rule 26(c) and may, after opportunity for hearing,~~
101 ~~apportion the reasonable expenses incurred in relation to the motion among the parties~~
102 ~~and persons in a just manner.~~
103 ~~(b)~~ (e) Failure to comply with order.
104 (~~b~~e)(1) Sanctions by court in district where deposition is taken. ~~If a deponent~~
105 ~~fails~~Failure to ~~be sworn or to answer a question after being directed to do so by~~follow an
106 order of the court in the district in which the deposition is being taken~~, the failure may be~~
107 ~~considered a~~ or where the document subpoena was served is contempt of that court.
108 (~~b)(2) Sanctions by court in which action is pending. If a party fails to obey an order~~
109 ~~entered under Rule 16(b) or if a party or an officer, director, or managing agent of a~~
110 ~~party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party~~
111 ~~fails to obey an order to provide or permit discovery, including an order made under~~
112 ~~Subdivision (a) of this rule or Rule 35, , unless~~e)(2) Sanctions by court in which action is
113 pending. Unless the court finds that the failure was substantially justified, the court in
114 which the action is pending may take such action in regard to the failure to follow its
115 orders as are just, including the following:
116 (~~b~~e)(2)(A) deem the matter or any other designated facts to be established ~~for the~~
117 ~~purposes of the action~~ in accordance with the claim or defense of the party obtaining the
118 order;
119 (~~b~~e)(2)(B) prohibit the disobedient party from supporting or opposing designated
120 claims or defenses or from introducing designated matters ~~in~~into evidence;
121 (~~b~~e)(2)(C) ~~strike pleadings or parts thereof,~~ stay further proceedings until the order is
122 obeyed~~,~~;

(e)(2)(D) dismiss all or part of the action, strike all or ~~proceeding or any~~ part ~~thereof~~of the pleadings, or render judgment by default ~~against~~on all or part of the ~~disobedient party~~action;

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

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

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

(~~c~~f) Expenses on failure to admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions ~~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~~f)(1) the request was held objectionable pursuant to Rule 36(a);

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

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

(f)(4) that the request is not proportional under Rule 26(b)(1); or

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

(g) Failure of party to attend at own deposition ~~or serve answers to interrogatories or respond to request for inspection. If~~. The court on motion may take any action authorized by paragraph (e)(2) if a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails ~~(1)~~ to appear before the officer ~~who is to take~~taking 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).~~

notice. The failure to act described in this ~~subdivision~~paragraph may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order ~~as provided by Rule 26(c).~~under paragraph (b).

~~(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).~~

~~(f~~(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(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~~paragraph (e)(2).

(~~g~~i) Failure to preserve evidence. Nothing in this rule limits the inherent power of the court to take any action authorized by ~~Subdivision (b~~paragraph (e)(2) if a party destroys, conceals, alters, tampers with or fails to preserve a document, tangible item, electronic data or other evidence in violation of a duty. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Advisory Committee Notes

The 2010 amendments to Rule 37 make two principal changes. First, the amended Rule 37 consolidates provisions for motions for a protective order (formerly set forth in Rule 26(c)) with provisions for motions to compel. By consolidating the standards for these two motions in a single rule, the Advisory Committee sought to highlight some of the parallels and distinctions between the two types of motions and to present them in a single rule.

185 Second, the amended Rule 37 incorporates the new Rule 26 standard of
186 "proportionality" as a principal criterion on which motions to compel or for a protective
187 order should be evaluated. As to motions to compel, Rule 37(a)(3) requires that a party
188 moving to compel discovery certify to the court "that the discovery being sought is
189 proportional under Rule 26(b)(1)." Rule 37(b) makes clear that a lack of proportionality
190 may be raised as ground for seeking a protective order, indicating that "the party
191 seeking the discovery has the burden of demonstrating that the information being
192 sought is proportional."
193