

Agenda

Advisory Committee on Rules of Civil Procedure

November 17, 2010
4:00 to 6:00 p.m.

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

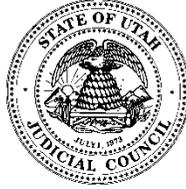
Approval of minutes	Separate Mailing	Fran Wikstrom
Rule 108. Objections to court commissioner's recommendations	Tab 1	Tim Shea
Simplified disclosure and discovery rules	Tab 2	Fran Wikstrom

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

Meeting Schedule

December 15, 2010
January 26, 2011
February 23, 2011
March 23, 2011
April 27, 2011
May 25, 2011
June 22, 2011
September 28, 2011
October 26, 2011
November 16, 2011
January 25, 2012

Tab 1



Administrative Office of the Courts

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

MEMORANDUM

Daniel J. Becker
State Court Administrator
Myron K. March
Deputy Court Administrator

To: Civil Procedures Committee
From: Tim Shea *TS*
Date: November 10, 2010
Re: Objection to commissioner's recommendations

The district court judges are concerned that Rule 108 will flood them with hearings. They approached the Policy and Planning Committee, which drafted the further change on lines 19 and 20 and requests that it be included in the draft that is published for comment.

This issue of when an evidentiary hearing should be required has been difficult, not only because judges and practitioners have significantly different opinions about when evidentiary hearings are appropriate, but also because the rule attempts to codify due process, which is by its nature a flexible concept. The process that one is due depends on the circumstances. A rule can require, as a matter of policy, more process than one might be due under the constitution, but not less.

I think the phrase "genuine issues of material fact" is good shorthand for describing cases in which due process does require a hearing. See *Rupp v. Grantsville City*, 610 P.2d 338, 342 fn 9 (Utah 1980). ("This is not a situation where a bona fide dispute exists concerning the amount due or the liability of the plaintiff for payment.")

At least one Court of Appeals opinion has held that due process requires a hearing on an objection to a commissioner's recommendation when custody was (*Holm v. Smilowitz*, 840 P.2d 157 (Utah Ct App 1992)) and was not (*Wiscombe v. Wiscombe*, 744 P.2d 1024 (Utah Ct. App. 1987)) involved. So, while I agree with the judges that the draft approved for comment last month requires hearings when due process would not, I think limiting the additional phrase to custody is not supported by the caselaw.

Encl. Rule 108

The mission of the Utah judiciary is to provide the people an open, fair,
efficient, and independent system for the advancement of justice under the law.

1 **Rule 108. Objection to court commissioner’s recommendation.**

2 (a) A recommendation of a court commissioner is the order of the court until
3 modified by the court. A party may file a written objection to the recommendation within
4 14 days after the recommendation is made in open court or, if the court commissioner
5 takes the matter under advisement, within 14 days after the minute entry of the
6 recommendation is served. A judge’s counter-signature on the commissioner’s
7 recommendation does not affect the review of an objection.

8 (b) The objection must quote the findings of fact, the conclusions of law, or the part
9 of the recommendation to which the objection is made and state the relief sought. The
10 memorandum in support of the objection must explain succinctly and with particularity
11 why the findings, conclusions, or recommendation are incorrect. The time for filing,
12 length and content of memoranda, affidavits, and request to submit for decision are as
13 stated for motions in Rule 7.

14 (c) If there has been a substantial change of circumstances since the
15 commissioner’s recommendation, the judge may, in the interests of judicial economy,
16 consider new evidence. Otherwise, any evidence, whether by proffer, testimony or
17 exhibit, not presented to the commissioner shall not be presented to the judge.

18 (d) If the parties proffered evidence at the hearing before the commissioner, the
19 judge must hold an evidentiary hearing upon the request of a party [on genuine issues of](#)
20 [material fact relevant to custody](#). If a party does not request an evidentiary hearing, the
21 judge may hold a hearing or review the record of proffered evidence before the
22 commissioner. If the commissioner held an evidentiary hearing, the judge will review the
23 record of evidence before the commissioner.

24 (e) If the judge reviews the record of the evidence or proffered evidence, the judge
25 will affirm the commissioner’s findings of fact if there is any credible evidence to support
26 them. The judge will review conclusions of law for correctness. If the judge holds an
27 evidentiary hearing or is proffered evidence, the judge will independently make findings
28 of fact.

29 (Delete Rule 101(k).)

30

Tab 2

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 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.

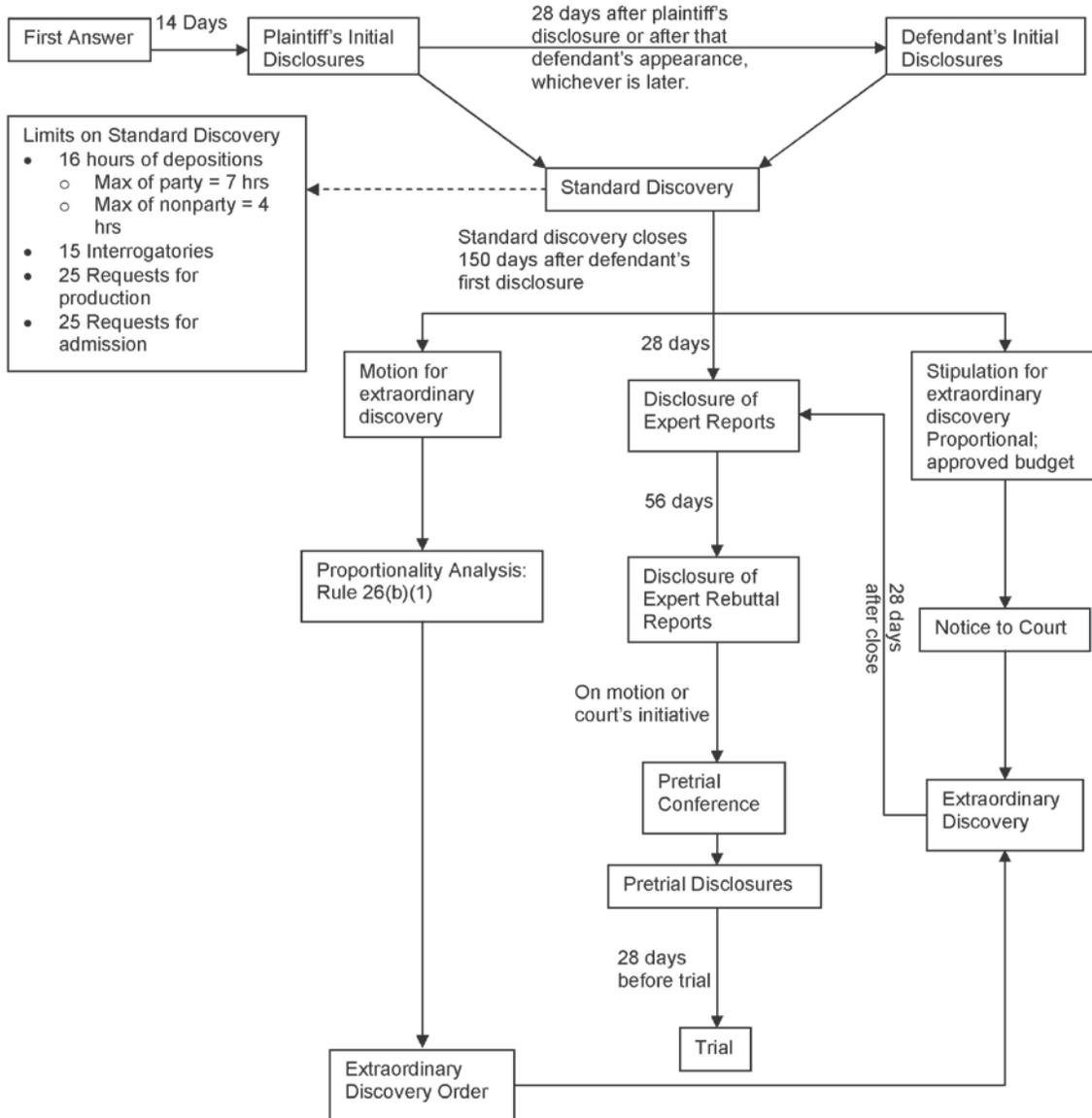
Expert Discovery

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



1 **Rule 1. General provisions.**

2 Scope of rules. These rules govern the procedure in the courts of the state of Utah in
3 all actions of a civil nature, whether cognizable at law or in equity, and in all statutory
4 proceedings, except as governed by other rules promulgated by this court or enacted by
5 the Legislature and except as stated in Rule 81. They shall be liberally construed and
6 applied to achieve the just, speedy, and inexpensive determination of every action.

7 These rules govern all actions brought after they take effect and all further proceedings
8 in actions then pending. If, in the opinion of the court, applying a rule in an action
9 pending when the rule takes effect would not be feasible or would be unjust, the former
10 procedure applies.

11

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

2 (a) Claims for relief. An original claim, counterclaim, cross-claim or third-party claim
3 shall contain a simple, short and plain:

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

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

6 (a)(3) demand for judgment for specified relief. Relief in the alternative or of several
7 different types may be demanded.

8 (b) Defenses; form of denials. A party shall state in simple, short and plain terms any
9 defenses to each claim asserted and shall admit or deny the statements in the claim. A
10 party without knowledge or information sufficient to form a belief about the truth of a
11 statement shall so state, and this has the effect of a denial. Denials shall fairly meet the
12 substance of the statements denied. A party may deny all of the statements in a claim
13 by general denial. A party may specify the statement or part of a statement that is
14 admitted and deny the rest. A party may specify the statement or part of a statement
15 that is denied and admit the rest.

16 (c) Affirmative defenses. An affirmative defense shall contain a simple, short and
17 plain:

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

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

20 (c)(3) a demand for relief.

21 A party shall set forth affirmatively in a responsive pleading accord and satisfaction,
22 arbitration and award, assumption of risk, contributory negligence, discharge in
23 bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow
24 servant, laches, license, payment, release, res judicata, statute of frauds, statute of
25 limitations, waiver, and any other matter constituting an avoidance or affirmative
26 defense. If a party mistakenly designates a defense as a counterclaim or a counterclaim
27 as a defense, the court, on terms, may treat the pleadings as if the defense or
28 counterclaim had been properly designated.

29 (d) Effect of failure to deny. Statements in a pleading to which a responsive pleading
30 is required, other than statements of the amount of damage, are admitted if not denied

31 in the responsive pleading. Statements in a pleading to which no responsive pleading is
32 required or permitted are deemed denied or avoided.

33 (e) Consistency. A party may state a claim or defense alternately or hypothetically,
34 either in one count or defense or in separate counts or defenses. If statements are
35 made in the alternative and one of them is sufficient, the pleading is not made
36 insufficient by the insufficiency of an alternative statement. A party may state legal and
37 equitable claims or legal and equitable defenses regardless of consistency.

38 (f) Construction of pleadings. All pleadings shall be construed to do substantial
39 justice.

40 Advisory Committee Notes

41 The 2010 amendments remove from Rule 8 prior language requiring a statement of
42 the party’s “claim.” Instead, the rule now requires a short and plain statement of both (1)
43 “facts showing that the party is entitled to relief” and (2) “the legal theory on which the
44 claim rests.” The purpose of this amendment is twofold. First, the amendment clarifies
45 that parties must give notice of both the facts and the law that support their claim. The
46 amendment thus reconfirms longstanding case law that courts, on a Rule 12 motion, will
47 “accept the plaintiff’s description of facts alleged in the complaint to be true, but . . .
48 need not accept extrinsic facts not pleaded nor . . . legal conclusions in contradiction of
49 the pleaded facts.” *Allred v. Cook*, 590 P.2d 318, 319 (Utah 1979). “[M]ere conclusory
50 allegations in a pleading . . . are insufficient . . .” *Chapman v. Primary Children’s Hosp.*,
51 784 P.2d 1181, 1186 (Utah 1989). Second, by clarifying that parties should plead facts,
52 this amendment to Rule 8 incentivizes further and earlier disclosure of facts, consistent
53 with the general approach of Utah’s new “simplified rules” and other changes made by
54 the 2010 amendments, including those to Rule 26’s disclosure requirements. To
55 facilitate access to justice, the committee intends that all pleadings—both complaints
56 and defenses—provide more and earlier notice of the facts alleged with less reliance on
57 discovery. However, by requiring parties to plead “facts,” this amendment expressly
58 does not resurrect any prior requirement of technical or “code” pleading. Nor does the
59 amendment seek to import any heightened pleading requirement, including
60 interpretations of the United States Supreme Court’s decisions in *Bell Atlantic Corp. v.*
61 *Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), as

62 mandating a heightened standard of “plausibility” pleading under the Federal Rules of
63 Civil Procedure. Rather, the longstanding “liberal” standard of notice pleading remains
64 in effect in Utah. E.g., *Canfield v. Layton City*, 2005 UT 60, ¶ 14, 122 P.3d 622. Accord
65 Adam N. Steinman, *The Pleading Problem*, 62 *Stanford L. Rev.* 1293 (2010).

66

1 **Rule 16. Pretrial conferences.**

2 (a) Pretrial conferences. The court, in its discretion or upon motion, may direct the
3 attorneys and, when appropriate, the parties to appear for such purposes as:

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

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

7 (a)(3) discouraging wasteful pretrial activities;

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

9 (a)(5) facilitating the settlement of the case;

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

11 (a)(7) establishing the time to join other parties and to amend the pleadings;

12 (a)(8) establishing the time to file motions;

13 (a)(9) establishing the time to complete discovery;

14 (a)(10) extending fact discovery;

15 (a)(11) the date for pretrial and final pretrial conferences and trial;

16 (a)(12) provisions for preservation, disclosure or discovery of electronically stored
17 information;

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

20 (a)(14) any other appropriate matters.

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

25 (c) Final pretrial conferences. The court, in its discretion or upon motion, may direct
26 the attorneys and, when appropriate, the parties to appear for such purposes as
27 settlement and trial management. The conference shall be held as close to the time of
28 trial as reasonable under the circumstances.

29 (d) Sanctions. If a party or a party's attorney fails to obey an order, if a party or a
30 party's attorney fails to attend a conference, if a party or a party's attorney is
31 substantially unprepared to participate in a conference, or if a party or a party's attorney

32 fails to participate in good faith, the court, upon motion or its own initiative, may take any
33 action authorized by Rule 37(b)(2).

34 Advisory Committee Notes

35

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

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

4 (a)(1) Initial disclosures. Except in cases exempt under paragraph (a)(2), a party
5 shall, without waiting for a discovery request, provide to other parties:

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

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

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

12 (a)(1)(B) a copy of all documents, data compilations, electronically stored
13 information, and tangible things in the possession or control of the party that the party
14 may offer in its case in chief;

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

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

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

22 (a)(1)(F) The disclosures required by paragraph (a)(1) shall be made:

23 (a)(1)(F)(i) by the plaintiff within 14 days after service of the first answer to the
24 complaint; and

25 (a)(1)(F)(ii) by the defendant within 28 days after the plaintiff's first disclosure or after
26 that defendant's appearance, whichever is later.

27 (a)(2) Exemptions.

28 (a)(2)(A) Unless otherwise ordered by the court or agreed to by the parties, the
29 requirements of paragraph (a)(1) do not apply to actions:

30 (a)(2)(A)(i) for judicial review of adjudicative proceedings or rule making proceedings
31 of an administrative agency;

32 (a)(2)(A)(ii) governed by Rule 65B or Rule 65C;

33 (a)(2)(A)(iii) to enforce an arbitration award;

34 (a)(2)(A)(iv) for water rights general adjudication under Title 73, Chapter 4.

35 (a)(2)(B) In an exempt action, the matters subject to disclosure under paragraph
36 (a)(1) are subject to discovery under paragraph (b).

37 (a)(3) Disclosure of expert testimony.

38 (a)(3)(A) A party shall, without waiting for a discovery request, provide to other
39 parties a copy of a written report of any person who may be used at trial to present
40 evidence under Rules 702, 703, or 705 of the Utah Rules of Evidence and who is
41 retained or specially employed to provide expert testimony in the case or whose duties
42 as an employee of the party regularly involve giving expert testimony. The report shall
43 be signed by the expert and contain: a complete statement of all opinions the witness
44 will express and the basis and reasons for them; the data or other information relied
45 upon by the witness in forming them; any exhibits that will be used to summarize or
46 support them; the qualifications of the expert, including a list of all publications authored
47 within the preceding ten years; the compensation to be paid for the study and testimony;
48 and a list of any other cases in which the expert has testified as an expert at trial or by
49 deposition within the preceding four years. Such an expert may not testify in a party's
50 case-in-chief concerning any matter not fairly disclosed in the report.

51 (a)(3)(B) If the expert witness is not required to provide a written report, the party
52 shall disclose the subject matter on which the witness is expected to present evidence
53 under Rule of Evidence 702, 703 or 705 and a summary of the facts and opinions to
54 which the witness is expected to testify.

55 (a)(3)(C) Disclosure required by paragraph (a)(3) shall be made within 28 days after
56 the expiration of fact discovery as provided by paragraph (c) or, if the evidence is
57 intended solely to contradict evidence under paragraph (a)(3)(A), within 56 days after
58 disclosure by the other party.

59 (a)(4) Pretrial disclosures. A party shall, without waiting for a discovery request,
60 provide to other parties:

61 (a)(4)(A) the name and, if not previously provided, the address and telephone
62 number of each witness, unless solely for impeachment, separately identifying
63 witnesses the party will call and witnesses the party may call;

64 (a)(4)(B) the name of witnesses whose testimony is expected to be presented by
65 transcript of a deposition and a copy of the transcript; and

66 (a)(4)(C) identification of each exhibit, including summaries of other evidence, unless
67 solely for impeachment, separately identifying those which the party will offer and those
68 which the party may offer.

69 (a)(4)(D) Disclosure required by paragraph (a)(4) shall be made at least 28 days
70 before trial. At least 14 days before trial, a party shall serve and file objections and
71 grounds for the objections to the use of a deposition and to the admissibility of exhibits.
72 Other than objections under Rules 402 and 403 of the Utah Rules of Evidence,
73 objections not listed are waived unless excused by the court for good cause.

74 (b) Discovery scope.

75 (b)(1) In general. Parties may discover any matter, not privileged, which is relevant
76 to the claim or defense of any party if the discovery satisfies the standards of
77 proportionality set forth below. Discovery and discovery requests are proportional if:

78 (b)(1)(A) the likely benefits of the proposed discovery outweigh the burden or
79 expense;

80 (b)(1)(B) the discovery is consistent with the overall case management and will
81 further the just, speedy and inexpensive determination of the case;

82 (b)(1)(C) the discovery is reasonable, considering the needs of the case, the amount
83 in controversy, the complexity of the case, the parties' resources, the importance of the
84 issues, and the importance of the discovery in resolving the issues;

85 (b)(1)(D) the discovery is not unreasonably cumulative or duplicative;

86 (b)(1)(E) the information cannot be obtained from another source that is more
87 convenient, less burdensome or less expensive; and

88 (b)(1)(F) the party seeking discovery has not had sufficient opportunity to obtain the
89 information by discovery or otherwise, taking into account the parties' relative access to
90 the information.

91 (b)(2) The party seeking discovery has the burden of showing proportionality. To
92 ensure proportionality, the court may enter orders under Rule 37.

93 (b)(3) A party claiming that electronically stored information is not reasonably
94 accessible because of undue burden or cost shall describe the source of the
95 electronically stored information, the nature and extent of the burden, the nature of the
96 information not provided, and any other information that will enable other parties to
97 evaluate the claim.

98 (b)(4) Trial preparation materials. A party may obtain otherwise discoverable
99 documents and tangible things prepared in anticipation of litigation or for trial by or for
100 another party or by or for that other party's representative (including the party's attorney,
101 consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party
102 seeking discovery has substantial need of the materials and that the party is unable
103 without undue hardship to obtain substantially equivalent materials by other means. In
104 ordering discovery of such materials, the court shall protect against disclosure of the
105 mental impressions, conclusions, opinions, or legal theories of an attorney or other
106 representative of a party.

107 (b)(5) Statement previously made about the action. A party may obtain without the
108 showing required in paragraph (b)(4) a statement concerning the action or its subject
109 matter previously made by that party. Upon request, a person not a party may obtain
110 without the required showing a statement about the action or its subject matter
111 previously made by that person. If the request is refused, the person may move for a
112 court order under Rule 37. A statement previously made is (A) a written statement
113 signed or approved by the person making it, or (B) a stenographic, mechanical,
114 electrical, or other recording, or a transcription thereof, which is a substantially verbatim
115 recital of an oral statement by the person making it and contemporaneously recorded.

116 (b)(6) Claims of Privilege or Protection of Trial Preparation Materials.

117 (b)(6)(A) Information withheld. If a party withholds discoverable information by
118 claiming that it is privileged or prepared in anticipation of litigation or for trial, the party
119 shall make the claim expressly and shall describe the nature of the documents,
120 communications, or things not produced in a manner that, without revealing the
121 information itself, will enable other parties to evaluate the claim.

122 (b)(6)(B) Information produced. If a party produces information that the party claims
123 is privileged or prepared in anticipation of litigation or for trial, the producing party may
124 notify any receiving party of the claim and the basis for it. After being notified, a
125 receiving party must promptly return, sequester, or destroy the specified information and
126 any copies it has and may not use or disclose the information until the claim is resolved.
127 A receiving party may promptly present the information to the court under seal for a
128 determination of the claim. If the receiving party disclosed the information before being
129 notified, it must take reasonable steps to retrieve it. The producing party must preserve
130 the information until the claim is resolved.

131 (c) Sequence and timing of discovery.

132 (c)(1) Standard discovery. Standard discovery as set by the limits established in
133 Rules 30, 33, 34 and 36 shall be completed within 150 days after the defendant's first
134 disclosure is made. Methods of discovery may be used in any sequence, and the fact
135 that a party is conducting discovery shall not delay any other party's discovery. Except
136 for cases exempt under paragraph (a)(2), a party may not seek discovery from any
137 source before that party's initial disclosure obligations are satisfied.

138 (c)(2) Extraordinary discovery. To obtain discovery beyond the limits established in
139 Paragraph (c)(1), a party shall file:

140 (c)(2)(A) before the close of standard discovery, a stipulation of extraordinary
141 discovery and a statement signed by the parties and attorneys that extraordinary
142 discovery is necessary and proportional under paragraph (b)(1) and that each party has
143 reviewed and approved a discovery budget; or

144 (c)(2)(B) before the close of the standard discovery and after reaching the limits of
145 standard discovery imposed by these rules, a motion for extraordinary discovery and a
146 statement signed by the party and attorney that the extraordinary discovery is
147 necessary and proportional under paragraph (b)(1) and that the party has reviewed and
148 approved a discovery budget.

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

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

153 (d)(2) If the party providing disclosure or responding to discovery is a corporation,
154 partnership, association, or governmental agency, the party shall act through one or
155 more officers, directors, managing agents, or other persons.

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

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

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

169 (e) Signing discovery requests, responses, and objections. Every disclosure, request
170 for discovery, response to a request for discovery and objection to a request for
171 discovery shall be in writing and signed by at least one attorney of record or by the party
172 if the party is not represented. The signature of the attorney or party is a certification
173 under Rule 11. If a request or response is not signed, the receiving party does not need
174 to take any action with respect to it. If a certification is made in violation of the rule, the
175 court, upon motion or upon its own initiative, may take any action authorized by Rule 11
176 or Rule 37(b)(2).

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

181 **Advisory Committee Notes**

182 **Disclosure Requirements and Timing. Rule 26(a)(1).** The 2010 amendments seek
183 to reduce discovery costs by requiring each party to produce, at an early stage in the

184 case and without a discovery request, all of the documents and physical evidence the
185 party may offer in its case-in-chief and the names of witnesses the party may call in its
186 case-in-chief with a description of their expected testimony. In this respect, the
187 amendments build on the initial disclosure requirements of the prior rules. In addition to
188 the disclosures required by the prior version of Rule 26(a)(1), a party must disclose
189 each fact witness the party may call in its case-in-chief and a summary of the witness's
190 expected testimony, a copy of all documents the party may offer in its case-in-chief, and
191 all documents to which a party refers in its pleadings. The duty to provide this
192 information is a continuing one, and disclosures must be supplemented as new
193 evidence and witnesses become known. The penalty for failing to make timely
194 disclosures is that the evidence may not be used in the party's case-in-chief.

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

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

209 **Expert Disclosures and Timing. Rule 26(a)(3).** Expert discovery has become an
210 ever-increasing component of discovery cost. The prior rules sought to eliminate some
211 of these costs by requiring the written disclosure of the expert's opinions and other
212 background information. However, because the expert was not required to sign these
213 disclosures, and because experts often were allowed to deviate from the opinions
214 disclosed, attorneys typically would take the expert's deposition to ensure the expert

215 would not offer any “surprise” testimony at trial, thereby increasing rather than
216 decreasing the overall cost. The 2010 amendments seek to remedy this by requiring
217 more comprehensive written disclosures, making clear that experts will be held to these
218 disclosures, and eliminating expert depositions. In addition to the materials required
219 under the prior rules, the amended rules make clear that an expert must provide a
220 complete statement of all opinions the witness will express and the basis and reasons
221 for them, as well as the data or other information upon which the expert relies in forming
222 the opinions, and exhibits that will be used to summarize or support those opinions.
223 They further provide that an expert may not testify in a party’s case-in-chief concerning
224 any matter not “fairly disclosed” in the report. The intent is not to require a verbatim
225 transcript of exactly what the expert will say at trial; instead, the expert must fairly
226 disclose the substance of each opinion the expert will offer.

227 Formal expert reports as described above are required only for experts who are
228 retained or specially employed to provide expert testimony, or whose duties as an
229 employee of the party regularly involve giving expert testimony. For other types of
230 experts, such as treating physicians, police officers, or accident investigators, the party
231 who intends to offer that expert must disclose the subject matter on which the expert is
232 expected to present expert testimony and a summary of the facts and opinions to which
233 the witness is expected to testify.

234 Expert disclosures must be provided within 28 days after expiration of fact discovery,
235 unless the expert is intended solely to contradict evidence presented by another party’s
236 expert, in which case it must be disclosed within 56 days after disclosure by the other
237 party.

238 **Scope of Discovery—Proportionality. Rule 26(b).** Proportionality is the principle
239 governing the scope of discovery. Simply stated, it means that the cost of discovery
240 should be proportional to what is at stake in the litigation.

241 In the past, the scope of discovery was governed by “relevance” or the “likelihood to
242 lead to discovery of admissible evidence.” These broad standards may have secured
243 just results by allowing a party to discover all facts relevant to the litigation. However,
244 they did little to advance two equally important objectives of the rules of civil
245 procedure—the speedy and inexpensive resolution of every action. Accordingly, the

246 former standards governing the scope of discovery have been replaced with the
247 proportionality standards in subpart (b)(1).

248 The concept of proportionality is not new. The prior rule permitted the Court to limit
249 discovery methods if it determined that “the discovery was unduly burdensome or
250 expensive, taking into account the needs of the case, the amount in controversy,
251 limitations on the parties’ resources, and the importance of the issues at stake in the
252 litigation.” The Federal Rules of Civil Procedure contains a similar provision. See Fed.
253 R. Civ. P. 26(b)(2)(C). This method of limiting discovery, however, was rarely invoked
254 either under the Utah or federal rules. But because it embodies the same basic
255 principles as the proportionality standard we now adopt, cases applying Fed. R. Civ. P.
256 26(b)(2)(C) may provide helpful guidance to lawyers and judges.

257 Under the prior rule and the federal rule, the party objecting to the discovery request
258 had the burden of proving that a discovery request was not proportional. The new rule
259 changes the burden of proof. Today, the party seeking discovery beyond the scope of
260 “standard” discovery has the burden of showing that the request is “relevant to the claim
261 or defense of any party” and that the request satisfies the standards of proportionality.
262 The trial court has broad discretion in deciding whether a discovery request is
263 proportional and the standards of proportionality in subpart (b)(1) are intended to guide
264 the exercise of that discretion. Over time, the proper application of these standards will
265 be defined by trial and appellate courts.

266 **Standard and Extraordinary Discovery. Rule 26(c).** As a counterpart to requiring
267 more detailed disclosures under Rule 26(a), the 2010 amendments place new
268 limitations on additional discovery the parties may conduct. Because the committee
269 expects the enhanced disclosure requirements will automatically permit each party to
270 learn the witnesses and evidence the opposing side will offer in its case-in-chief,
271 additional discovery should serve the more limited function of permitting parties to find
272 witnesses, documents, and other evidentiary materials that are harmful, rather than
273 helpful, to the opponent’s case.

274 Rule 26(c) provides for limited, “standard” discovery that is presumed to be
275 proportional to the amount and issues in controversy in the action, which the parties
276 may conduct as a matter of right. Standard discovery is limited. Each party may take up

277 to 16 hours of depositions. No deposition of a party may exceed seven hours, and no
278 deposition of a non-party witness may exceed four hours. The number of interrogatories
279 is limited to 15; the number of document requests is limited to 25; and the number of
280 requests for admission is limited to 25. The time for standard discovery is limited to 150
281 days, after which the case is presumed to be ready for trial. The committee determined
282 these limitations based on the observation that the majority of cases filed in the Utah
283 State Courts involve disputes that are relatively modest in magnitude and lack
284 significant factual complexity. Accordingly, the 2010 amendments provide an
285 opportunity for standard discovery that the committee believes should be sufficient for
286 the typical state court case.

287 Despite the expectation that standard discovery should be adequate in the typical
288 case, the 2010 amendments contemplate there will be cases for which standard
289 discovery is not sufficient or appropriate. In such cases, parties may conduct additional
290 discovery that is shown to be consistent with the principle of proportionality. There are
291 two ways to obtain such additional discovery. The first is by stipulation. If the parties can
292 agree additional discovery is necessary, they may stipulate to as much additional
293 discovery as they desire, provided they stipulate the additional discovery is proportional
294 to what is at stake in the litigation and each party certifies that it has reviewed and
295 approved a budget for additional discovery. The certification must confirm that the
296 actual party in question, and not merely counsel, has reviewed and approved the
297 budget. If these conditions are met, the Court will not second-guess the parties and their
298 counsel and must approve the stipulation.

299 The second method to obtain additional discovery is by motion. The committee
300 recognizes there will be cases in which additional discovery is appropriate, but the
301 parties cannot agree to the scope of such additional discovery. These would include,
302 among other categories, large and factually complex cases and cases in which there is
303 a significant disparity in the parties' access to information, such that one party
304 legitimately has a greater need than the other party for additional discovery in order to
305 prepare properly for trial. To prevent a party from taking advantage of this situation, the
306 2010 amendments allow any party to move the Court for additional discovery. The party
307 making such a motion must demonstrate that the additional discovery is proportional

308 and certify that the party has reviewed and approved a discovery budget. The burden to
309 show the need for additional discovery, and to demonstrate proportionality, always falls
310 on the party seeking additional discovery. However, cases in which such additional
311 discovery is appropriate do exist, and it is important for Courts to recognize they can
312 and should permit additional discovery in appropriate cases, commensurate with the
313 complexity and magnitude of the dispute.

314 **Protective Order Language Moved to Rule 37.** The 2010 amendments delete in
315 its entirety the prior language of Rule 26(c) governing motions for protective orders. The
316 substance of that language is now found in Rule 37. The committee determined it was
317 preferable to cover all discovery motions through a single rule, rather than through two
318 separate rules. Accordingly, Rule 37 now governs all discovery motions and orders,
319 including protective orders as well as orders compelling discovery or imposing
320 sanctions.

321 **Consequences of Failure to Disclose. Rule 26(d).** If a party fails to disclose or to
322 supplement timely its discovery responses, that party cannot use the undisclosed
323 witness, document, or material at any hearing or trial, absent proof that non-disclosure
324 was harmless or justified by good cause. More complete disclosures increase the
325 likelihood that the case will be resolved justly, speedily, and inexpensively. Not being
326 able to use evidence that a party fails properly to disclose provides a powerful incentive
327 to make complete disclosures. This is true only if trial courts hold parties to this
328 standard. Accordingly, although a trial court retains discretion to determine how properly
329 to address this issue in a given case, the usual and expected result should be exclusion
330 of the evidence.

331

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

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

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

9

1 **Rule 30. Depositions upon oral questions.**

2 (a) When depositions may be taken; when leave required; no deposition of expert
3 witnesses. A party may depose a party or witness by oral questions. A witness may not
4 be deposed more than once in standard discovery. **An expert who has prepared a**
5 **report disclosed under Rule 26(a)(3) may not be deposed.**

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

9 (b)(1) The party deposing a witness shall give reasonable notice in writing to every
10 other party. The notice shall state the date, time and place for the deposition and the
11 name and address of each witness. If the name of a witness is not known, the notice
12 shall describe the witness sufficiently to identify the person or state the class or group to
13 which the person belongs. The notice shall designate any documents and tangible
14 things to be produced by a witness. The notice shall designate the officer who will
15 conduct the deposition.

16 (b)(2) The notice shall designate the method by which the deposition will be
17 recorded. With prior notice to the officer, witness and other parties, any party may
18 designate a recording method in addition to the method designated in the notice.
19 Depositions may be recorded by sound, sound-and-visual, or stenographic means, and
20 the party designating the recording method shall bear the cost of the recording. The
21 appearance or demeanor of witnesses or attorneys shall not be distorted through
22 recording techniques.

23 (b)(3) A deposition shall be conducted before an officer appointed or designated
24 under Rule 28 and shall begin with a statement on the record by the officer that includes
25 (A) the officer's name and business address; (B) the date, time and place of the
26 deposition; (C) the name of the witness; (D) the administration of the oath or affirmation
27 to the witness; and (E) an identification of all persons present. If the deposition is
28 recorded other than stenographically, the officer shall repeat items (A) through (C) at
29 the beginning of each unit of the recording medium. At the end of the deposition, the
30 officer shall state on the record that the deposition is complete and shall state any
31 stipulations.

32 (b)(4) The notice to a party witness may be accompanied by a request under Rule
33 34 for the production of documents and tangible things at the deposition. The procedure
34 of Rule 34 shall apply to the request. The attendance of a nonparty witness may be
35 compelled by subpoena under Rule 45. Documents and tangible things to be produced
36 shall be stated in the subpoena.

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

40 (b)(6) A party may name as the witness a corporation, a partnership, an association,
41 or a governmental agency, describe with reasonable particularity the matters on which
42 questioning is requested, and direct the organization to designate one or more officers,
43 directors, managing agents, or other persons to testify on its behalf. The organization
44 shall state, for each person designated, the matters on which the person will testify. A
45 subpoena shall advise a nonparty organization of its duty to make such a designation.

46 (c) Examination and cross-examination; objections.

47 (c)(1) Questioning of witnesses may proceed as permitted at the trial under the Utah
48 Rules of Evidence, except Rules 103 and 615.

49 (c)(2) All objections shall be recorded, but the questioning shall proceed, and the
50 testimony taken subject to the objections. Any objection shall be stated concisely and in
51 a non-argumentative and non-suggestive manner. A person may instruct a witness not
52 to answer only to preserve a privilege, to enforce a limitation on evidence directed by
53 the court, or to present a motion for a protective order under Rule 26(c). Upon demand
54 of the objecting party or witness, the deposition shall be suspended for the time
55 necessary to make a motion. The party taking the deposition may complete or adjourn
56 the deposition before moving for an order to compel discovery under Rule 37.

57 (d) Limits. During standard discovery, each side (plaintiffs collectively, defendants
58 collectively, and third-party defendants collectively) is limited to 16 hours of deposition
59 by oral questioning. Oral questioning of a nonparty shall not exceed four hours, and oral
60 questioning of a party shall not exceed seven hours.

61 (e) Submission to witness; changes; signing. Within 28 days after being notified by
62 the officer that the transcript or recording is available, a witness may sign a statement of

63 changes to the form or substance of the transcript or recording and the reasons for the
64 changes. The officer shall append any changes timely made by the witness.

65 (f) Record of deposition; certification and delivery by officer; exhibits; copies.

66 (f)(1) The officer shall record the deposition or direct another person present to
67 record the deposition. The officer shall sign a certificate, to accompany the record, that
68 the witness was under oath or affirmation and that the record is a true record of the
69 deposition. The officer shall keep a copy of the record. The officer shall securely seal
70 the record endorsed with the title of the action and marked "Deposition of (name). Do
71 not open." and shall promptly send the sealed record to the attorney or the party who
72 designated the recording method. An attorney or party receiving the record shall store it
73 under conditions that will protect it against loss, destruction, tampering, or deterioration.

74 (f)(2) Every party may inspect and copy documents and things produced for
75 inspection and must have a fair opportunity to compare copies and originals. Upon the
76 request of a party, documents and things produced for inspection shall be marked for
77 identification and added to the record. If the witness wants to retain the originals, that
78 person shall offer the originals to be copied, marked for identification and added to the
79 record.

80 (f)(3) Upon payment of reasonable charges, the officer shall furnish a copy of the
81 record to any party or to the witness. An official transcript of a recording made by non-
82 stenographic means shall be prepared under Utah Rule of Appellate Procedure 11(e).

83 (g) Failure to attend or to serve subpoena; expenses. If the party giving the notice of
84 a deposition fails to attend or fails to serve a subpoena upon a witness who fails to
85 attend, and another party attends in person or by attorney, the court may order the party
86 giving the notice to pay to the other party the reasonable costs, expenses and attorney
87 fees incurred.

88 (h) Deposition in action pending in another state. Any party to an action in another
89 state may take the deposition of any person within this state in the same manner and
90 subject to the same conditions and limitations as if such action were pending in this
91 state. Notice of the deposition shall be filed with the clerk of the court of the county in
92 which the person whose deposition is to be taken resides or is to be served. Matters

93 required to be submitted to the court shall be submitted to the court in the county where
94 the deposition is being taken.

95

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

2 (a) A party may depose a party or witness by written questions. Rules 30 and 45
3 apply to depositions upon written questions, except insofar as by their nature they are
4 clearly inapplicable.

5 (b) A party taking a deposition using written questions shall serve on the parties a
6 notice which includes the name or description and address of the deponent, the name
7 or descriptive title of the officer before whom the deposition will be taken, and the
8 questions to be asked.

9 (c) Within 14 days after the questions are served, a party may serve cross
10 questions. Within 7 days after being served with cross questions, a party may serve
11 redirect questions. Within 7 days after being served with redirect questions, a party may
12 serve re-cross questions.

13 (d) A copy of the notice and copies of all questions served shall be delivered by the
14 party taking the deposition to the designated officer who shall proceed promptly to ask
15 the questions and prepare a record of the responses.

16 (e) During standard discovery, a deposition by written questioning shall not
17 cumulatively exceed 15 questions, including discrete subparts, by the plaintiffs
18 collectively, by the defendants collectively or by third-party defendants collectively.
19

1 **Rule 33. Interrogatories to parties.**

2 (a) Availability; procedures for use. During standard discovery, any party may serve
3 upon any other party up to 15 written interrogatories, including all discrete subparts.

4 (b) Answers and objections. The responding party shall serve a written response
5 within 28 days after service of the interrogatories. The responding party shall restate the
6 interrogatory before responding to it. Each interrogatory shall be answered separately
7 and fully in writing under oath or affirmation, unless it is objected to. If an interrogatory is
8 objected to, the party shall state the reasons for the objection. Any reason not stated is
9 waived unless excused by the court for good cause. An interrogatory is not
10 objectionable merely because an answer involves an opinion or argument that relates to
11 fact or the application of law to fact. The party shall answer any part of an interrogatory
12 that is not objectionable.

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

15 (d) Option to produce business records. If the answer to an interrogatory may be
16 found by inspecting the answering party's business records, including electronically
17 stored information, and the burden of finding the answer is substantially the same for
18 both parties, the answering party may identify the records from which the answer may
19 be found. The answering party must give the asking party reasonable opportunity to
20 inspect the records and to make copies, compilations, or summaries. The answering
21 party must identify the records in sufficient detail to permit the asking party to locate and
22 to identify them as readily as the answering party.

23

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

3 (a) Scope.

4 (a)(1) Any party may serve on any other party a request to produce and permit the
5 requesting party to inspect, copy, test or sample any designated discoverable
6 documents, electronically stored information or tangible things (including writings,
7 drawings, graphs, charts, photographs, sound recordings, images, and other data or
8 data compilations stored in any medium from which information can be obtained,
9 translated, if necessary, by the respondent into reasonably usable form) in the
10 possession or control of the responding party .

11 (a)(2) Any party may serve on any other party a request to permit entry upon
12 designated property in the possession or control of the responding party for the purpose
13 of inspecting, measuring, surveying, photographing, testing, or sampling the property or
14 any designated discoverable object or operation on the property.

15 (b) Procedure and limitations.

16 (b)(1) The request shall identify the items to be inspected by individual item or by
17 category, and describe each item and category with reasonable particularity. During
18 standard discovery, the request shall not cumulatively include more than 25 distinct
19 items or categories of items. The request shall specify a reasonable date, time, place,
20 and manner of making the inspection and performing the related acts. The request may
21 specify the form or forms in which electronically stored information is to be produced.

22 (b)(2) The responding party shall serve a written response within 28 days after
23 service of the request. The responding party shall restate the request before responding
24 to it. The response shall state, with respect to each item or category, that inspection and
25 related acts will be permitted as requested, or that the request is objected to. If the party
26 objects to a request, the party must state the reasons for the objection. Any reason not
27 stated is waived unless excused by the court for good cause. The party shall identify
28 and permit inspection of any part of a request that is not objectionable. If the party
29 objects to the requested form or forms for producing electronically stored information --
30 or if no form was specified in the request -- the responding party must state the form or
31 forms it intends to use.

32 (c) Form of documents and electronically stored information.

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

36 (c)(2) If a request does not specify the form or forms for producing electronically
37 stored information, a responding party must produce the information in a form or forms
38 in which it is ordinarily maintained or in a form or forms that are reasonably usable.

39 (c)(3) A party need not produce the same electronically stored information in more
40 than one form.

41

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

2 (a) Order for examination. When the mental or physical condition or attribute of a
3 party or of a person in the custody or control of a party is in controversy, the court may
4 order the party to submit to a physical or mental examination by a suitably licensed or
5 certified examiner or to produce for examination the person in the party's custody or
6 control. The order may be made only on motion for good cause shown. All papers
7 related to the motion and notice of any hearing shall be served on a nonparty to be
8 examined. The order shall specify the time, place, manner, conditions, and scope of the
9 examination and the person by whom the examination is to be made. **The person being**
10 **examined may record the examination by audio or video means unless the party**
11 **requesting the examination shows that the recording would unduly interfere with the**
12 **examination.**

13 (b) Report. The party requesting the examination shall disclose a detailed written
14 report of the examiner, setting out the examiner's findings, including results of all tests
15 made, diagnoses and conclusions. **If the party requesting the examination wishes to call**
16 **the examiner as a witness, the party shall disclose an expert report as required by Rule**
17 **26(a)(3).**

18 (c) Sanctions. If a party or a person in the custody or under the legal control of a
19 party fails to obey an order entered under paragraph (a), the court on motion may take
20 any action authorized by Rule 37(c)(2), except that the failure cannot be treated as
21 contempt of court.

22 **Advisory Committee Notes**

23 Rule 35 has been substantially revised. Few rules have generated such an
24 extensive motions practice and disputes as the previous version of Rule 35. The battles
25 typically raged over the production of reports of prior examinations by the examining
26 physician, and whether the examination could be recorded or witnessed by a third party.

27 It is also doubtful that any rule under consideration for change has been as
28 thoroughly studied as Rule 35. A subcommittee of the advisory committee has spent
29 several years collecting information from both sides of the personal-injury bar and from
30 the trial courts. While no rule amendment will please everyone, the committee is of the
31 opinion that making recording the default for medical examinations, and removing the

32 requirement for automatic production of prior reports, will best resolve the issues that
33 have bedeviled the trial courts and counsel.

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

39 The committee is concerned about the rise of the so-called "professional witness" in
40 the area of medical examinations. This phenomenon is not limited to Utah. See, A
41 World of Hurt: Exams of Injured Workers Fuel Mutual Mistrust, By N. R. Kleinfeld, New
42 York Times, April 4, 2009. The committee recognizes that there is often nothing
43 "independent" about a Rule 35 examiner. Therefore, the trial court should refrain from
44 the use of the phrase "independent medical examiner," using instead the neutral
45 appellation "medical examiner," "Rule 35 examiner," or the like.

46 As noted, a major source of controversy has been requests by plaintiffs' counsel to
47 audio- or video-record examinations. The Committee has determined that the benefits
48 of recording generally outweigh the downsides in a typical case. The new rule therefore
49 provides that recording shall be permitted as a matter of course unless the person
50 moving for the examination demonstrates the recording would unduly interfere with the
51 examination. See, *Boswell v. Schultz*, 173 P.3d 390, 394 (OK 2007) ("A video recording
52 would be a superior method of providing an impartial record of the physical
53 examination.")

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

59 The former requirement of Rule 35(c) providing for the production of prior reports on
60 other examinees by the examiner was a source of great confusion and controversy.
61 This provision does not exist in the federal version of the rule, nor is the Committee
62 aware of any other similar state court rule. After much deliberation and discussion, it is

63 the Committee's view that this provision is better eliminated, and in the new rule there is
64 no longer an automatic requirement for the production of prior reports of other
65 examinations. Medical examiners will be treated as other expert witnesses are treated,
66 with the requirement of a report under Rule 26. The Committee notes that, as with other
67 experts, the use of subpoenas to obtain prior reports remains an option for the
68 practitioner in appropriate circumstances, subject to Rule 26 proportionality standards.
69

1 **Rule 36. Request for admission.**

2 (a) Request for admission. A party may serve upon any other party a written request
3 to admit the truth of any discoverable matter set forth in the request, including the
4 genuineness of any document. The matter must relate to statements or opinions of fact
5 or of the application of law to fact. Each matter shall be separately stated. During
6 standard discovery, a party may not request admission of more than 25 matters. A copy
7 of the document shall be served with the request unless it has already been furnished or
8 made available for inspection and copying. The request shall notify the responding party
9 that the matters will be deemed admitted unless the party responds within 28 days after
10 service of the request.

11 (b) Answer or objection.

12 (b)(1) The matter is admitted unless, within 28 days after service of the request, the
13 responding party serves upon the requesting party a written response.

14 (b)(2) The responding party shall restate the request before responding to it. Unless
15 the answering party objects to a matter, the party must admit or deny the matter or state
16 in detail the reasons why the party cannot truthfully admit or deny. The party shall
17 restate the request before answering. A party may identify the part of a matter which is
18 true and deny the rest. A denial shall fairly meet the substance of the request. Lack of
19 information is not a reason for failure to admit or deny unless the information known or
20 reasonably available is insufficient to form an admission or denial. If the truth of a matter
21 is a genuine issue for trial, the answering party may deny the matter or state the
22 reasons for the failure to admit or deny.

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

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

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

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

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

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

37 (d) Effect of admission. Any matter admitted under this rule is conclusively
38 established unless the court on motion permits withdrawal or amendment of the
39 admission. The court may permit withdrawal or amendment if the presentation of the
40 merits of the action will be promoted and withdrawal or amendment will not prejudice
41 the requesting party. Any admission under this rule is for the purpose of the pending
42 action only. It is not an admission for any other purpose, nor may it be used in any other
43 action.

44

1 **Rule 37. Discovery and disclosure motions; Sanctions.**

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

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

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

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

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

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

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

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

19 (a)(3) The moving party must attach a copy of the request for discovery, the
20 disclosure, or the response at issue. The moving party must also attach a certification
21 that the moving party has in good faith conferred or attempted to confer with the other
22 affected parties in an effort to secure the disclosure or discovery without court action
23 and that the discovery being sought is proportional under Rule 26(b)(1).

24 (b) Motion for protective order.

25 (b)(1) A party or the person from whom discovery is sought may move for an order
26 of protection from discovery. The moving party shall attach to the motion a copy of the
27 request for discovery or the response at issue. The moving party shall also attach a
28 certification that the moving party has in good faith conferred or attempted to confer with
29 other affected parties to resolve the dispute without court action.

30 (b)(2) If the motion raises issues of proportionality under Rule 26(b)(1), the party
31 seeking the discovery has the burden of demonstrating that the information being
32 sought is proportional.

33 (c) Orders. The court may make any order to require disclosure or discovery or to
34 protect a party or person from discovery being conducted in bad faith or from
35 annoyance, embarrassment, oppression, or undue burden or expense, or to achieve
36 proportionality under Rule 26(b)(1), including one or more of the following:

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

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

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

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

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

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

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

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

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

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

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

58 (d) Expenses and sanctions for motions. If the motion to compel or for a protective
59 order is granted, or if a party provides disclosure or discovery or withdraws a disclosure
60 or discovery request after a motion is filed, the court may order the party, witness or

61 attorney to pay the reasonable expenses and attorney fees incurred on account of the
62 motion if the court finds that the party, witness, or attorney did not act in good faith or
63 asserted a position that was not substantially justified.

64 (e) Failure to comply with order.

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

68 (e)(2) Sanctions by court in which action is pending. Unless the court finds that the
69 failure was substantially justified, the court in which the action is pending may take such
70 action in regard to the failure to follow its orders as are just, including the following:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

102 (h) Failure to disclose. If a party fails to disclose a witness, document or other
103 material as required by Rule 26(a) or Rule 26(e)(1), or to amend a prior response to
104 discovery as required by Rule 26(e)(2), that party shall not be permitted to use the
105 witness, document or other material at any hearing unless the failure to disclose is
106 harmless or the party shows good cause for the failure to disclose. In addition to or in
107 lieu of this sanction, the court on motion may take any action authorized by paragraph
108 (e)(2).

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

116 Advisory Committee Notes

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

121 the parallels and distinctions between the two types of motions and to present them in a
122 single rule.

123 Second, the amended Rule 37 incorporates the new Rule 26 standard of
124 "proportionality" as a principal criterion on which motions to compel or for a protective
125 order should be evaluated. As to motions to compel, Rule 37(a)(3) requires that a party
126 moving to compel discovery certify to the court "that the discovery being sought is
127 proportional under Rule 26(b)(1)." Rule 37(b) makes clear that a lack of proportionality
128 may be raised as ground for seeking a protective order, indicating that "the party
129 seeking the discovery has the burden of demonstrating that the information being
130 sought is proportional."

131