

# Agenda

## Advisory Committee on Rules of Civil Procedure

December 15, 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.	Tab1	Fran Wikstrom
Rule 55. Implementation of <i>Arbrogast v. River Crossings</i> , 2010 UT 40.	Tab 2	Tim Shea
Rules for areas of practice	Tab 3	Cullen Battle
Simplified disclosure and discovery rules	Tab 4	Fran Wikstrom

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

### Meeting Schedule

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

## MINUTES

### UTAH SUPREME COURT ADVISORY COMMITTEE OF THE RULES OF CIVIL PROCEDURE

Wednesday, November 17, 2010  
Administrative Office of the Courts

PRESENT: Francis M. Wikstrom, Francis J. Carney, Honorable Kate Toomey, Terrie T. McIntosh, Barbara L. Townsend, David W. Scofield, Trystan B. Smith, Honorable Derek Pullan, Lincoln L. Davies, James T. Blanch, W. Cullen Battle, Todd M. Shaughnessy, Jonathan O. Hafen, Leslie W. Slauch, Robert J. Shelby, Janet H. Smith

PHONE: David H. Moore

EXCUSED: Steve Marsden, Lori Woffinden, Honorable David O. Nuffer

STAFF: Timothy M. Shea, Sammi V. Anderson

GUESTS: Diane Abegglen, Appellate Court Administrator

#### **I. APPROVAL OF MINUTES.**

Mr. Wikstrom called the meeting to order at 4:00 p.m., and entertained comments from the committee concerning the October 27, 2010 minutes. No comments were made and Mr. Wikstrom asked for a motion that the minutes be approved. The motion was duly made and seconded, and approved.

#### **II. RULE 108. OBJECTIONS TO COURT COMMISSIONER'S RECOMMENDATIONS.**

Mr. Shea explained that three groups now looking at this proposed change: this committee, the Policy and Planning Committee and the Board of District Court Judges. Mr. Shea recommended tabling the issue until further information is forthcoming. Judge Toomey made a motion consistent with Mr. Shea's recommendation. The motion was seconded and unanimously approved.

#### **III. SIMPLIFIED RULES OF DISCOVERY.**

The committee continued to discuss the feedback, comments and concerns that have been received from the Bar, judiciary and other constituencies in response to the proposed simplified rules. Mr. Wikstrom again circulated a list of the issues identified through the comment process that require further discussion, analysis and resolution. Mr. Davies introduced a preliminary proposal for a two-track system. The committee discussed this proposal, as well as a panoply of

other related issues, at length. Mr. Wikstrom asked that committee members come prepared to continue the discussion at the next meeting.

#### **IV. ADJOURNMENT.**

The meeting was adjourned at 5:33 p.m. The next meeting will be held at 4:00 p.m. on Wednesday, December 15, 2010, at the Administrative Office of the Courts.

# Tab 2



## Administrative Office of the Courts

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

### MEMORANDUM

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

**To:** Civil Procedures Committee  
**From:** Tim Shea *TS*  
**Date:** December 9, 2010  
**Re:** Implementation of Arbrogast v. River Crossings, 2010 UT 40.

In his concurring opinion in Arbrogast v. River Crossings, 2010 UT 40, Justice Durrant suggested incorporating Standard 16 of the Standards of Professionalism and Civility into the Rules of Civil Procedure. ¶50. The objective would be to reduce the number of default judgments and “advance the general policy of resolving disputes on their merits.” ¶47. Although denominated a concurring opinion, Justice Durrant was joined by Chief Justice Durham and Justice Parrish, forming a majority of the court.

Standard 16 states: “Lawyers shall not cause the entry of a default without first notifying other counsel whose identity is known, unless their clients' legitimate rights could be adversely affected.” I believe that a lawyer-represented defendant should not have any advantages over a self-represented defendant, nor should a self-represented plaintiff be able to avoid a step required of a lawyer-represented plaintiff. Thus I have drafted the amendment to extend to all civil cases, not just those in which both parties are represented by an attorney.

I recommend that the part of the amendment in parentheses not be adopted, although it is part of the standard. I believe it will raise several questions in which subjective judgments will interfere. (What are legitimate (as opposed to non-legitimate?) rights? How adverse does the effect have to be? How probable does the effect have to be? Who makes that decision?) This amendment in effect defines “imminent” from the Arbrogast opinion as seven days. It directs that the notice has to be in writing, although the Arbrogast opinion suggests that “Notification can be given in any form: a phone call, a letter, an email, or other communication will suffice.” ¶42.

Encl. Rule 55. Default.  
Arbrogast v. River Crossings, 2010 UT 40. (Excerpt)

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 55. Default.**

2       (a) Entry. When a party against whom a judgment for affirmative relief is sought has  
3 failed to plead or otherwise defend as provided by these rules and that fact is made to  
4 appear the clerk shall enter the default of that party. Seven days before requesting entry  
5 of default, the requesting party shall notify the defaulting party in writing that, unless the  
6 party pleads or otherwise defends the action as provided by these rules, entry of a  
7 default judgment is imminent (, unless the requesting party's legitimate rights could be  
8 adversely affected).

9       (b) Judgment. Judgment by default may be entered as follows:

10       (b)(1) By the clerk. Upon request of the plaintiff the clerk shall enter judgment for the  
11 amount claimed and costs against the defendant if :

12       (b)(1)(A) the default of the defendant is for failure to appear ;

13       (b)(1)(B) the defendant is not an infant or incompetent person;

14       (b)(1)(C) the defendant has been personally served pursuant to Rule 4(d)(1); and

15       (b)(1)(D) the claim against the defendant is for a sum certain or for a sum that can  
16 be made certain by computation.

17       (b)(2) By the court. In all other cases the party entitled to a judgment by default shall  
18 apply to the court therefor. If, in order to enable the court to enter judgment or to carry it  
19 into effect, it is necessary to take an account or to determine the amount of damages or  
20 to establish the truth of any averment by evidence or to make an investigation of any  
21 other matter, the court may conduct such hearings or order such references as it deems  
22 necessary and proper.

23       (c) Setting aside default. For good cause shown the court may set aside an entry of  
24 default and, if a judgment by default has been entered, may likewise set it aside in  
25 accordance with Rule 60(b).

26       (d) Plaintiffs, counterclaimants, cross-claimants. The provisions of this rule apply  
27 whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff,  
28 or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by  
29 default is subject to the limitations of Rule 54(c).

30 (e) Judgment against the state or officer or agency thereof. No judgment by default  
31 shall be entered against the state of Utah or against an officer or agency thereof unless  
32 the claimant establishes his claim or right to relief by evidence satisfactory to the court.  
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*This opinion is subject to revision before final  
publication in the Pacific Reporter.*

IN THE SUPREME COURT OF THE STATE OF UTAH

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Arbogast Family Trust,  
Plaintiff and Respondent,

No. 20080699

v.

River Crossings, LLC,  
Defendant and Petitioner.

F I L E D

May 14, 2010

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Fifth District, St. George  
The Honorable Eric A. Ludlow  
No. 60500096

Attorneys: Scott M. Lilja, Nicole M. Deforge, Salt Lake City,  
for plaintiff  
Tyler T. Todd, Chad J. Utley, Shawn T. Farris,  
St. George, for defendant

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On Certiorari to the Utah Court of Appeals

NEHRING, Justice:

**INTRODUCTION**

¶1 This case presents us with the question of what a party must do to “appear” under rule 5(a)(2)(B) of the Utah Rules of Civil Procedure. We hold that the court of appeals correctly determined that a rule 5(a)(2)(B) appearance requires a party to make a formal presentation or submission to the trial court. Because River Crossings failed to make an appearance as required by this rule, we affirm.

**BACKGROUND**

¶2 In this opinion, we include only those facts we deem relevant to the specific question presented to us. A more detailed recitation of the facts and proceedings can be found at Arbogast Family Trust v. River Crossings, LLC, 2008 UT App 277, ¶¶ 2-9, 191 P.3d 39.

¶44 Today we affirm the decision and reasoning of the court of appeals and make clear that parties seeking to “appear” under rule 5(a)(2)(B) of the Utah Rules of Civil Procedure must make a formal filing or submission to the court. Although not required by rule 5, we also find the Utah Standards of Professionalism and Civility encourage parties’ attorneys to make some effort at final notification to opposing parties whose identity is known before attempting to enter default judgment.

¶45 Justice Wilkins and Justice Parrish concur in Justice Nehring’s opinion.

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DURRANT, Associate Chief Justice, concurring:

¶46 I concur fully in the majority’s conclusion, but write separately because I would support incorporating the requirements for notice set forth in Utah Standard of Professionalism and Civility 14-301(16) (“Standard 16”) into the Utah Rules of Civil Procedure. I agree with the majority’s conclusion that the plain language of Utah Rule of Civil Procedure 5(a)(2)(B) does not require notice prior to entry of a default judgment if the party in default has failed to formally appear. As the majority’s opinion makes clear, however, requiring formal appearance creates an incongruity between this rule of civil procedure and Standard 16. That standard states that “lawyers shall not cause the entry of a default without first notifying other counsel whose identity is known, unless their clients’ legitimate rights could be adversely affected.”<sup>3</sup> In light of this standard, I would support amending the Utah Rules of Civil Procedure.

¶47 I believe that Standard 16 is superior to the standard set forth at rule 5(a)(2)(B). First, where an attorney knows the identity of opposing counsel, requiring that the attorney notify opposing counsel before causing the entry of a default judgment will presumably lead to fewer default judgments. This will advance the general policy of resolving disputes on their merits.<sup>4</sup> The benefits of this are clear--parties will be afforded “a full opportunity to present their evidence and contentions as to

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<sup>3</sup> Utah Standards of Professionalism and Civility 14-301(16).

<sup>4</sup> See Mason v. Mason, 597 P.2d 1322, 1323 (Utah 1979) (“[C]ourts should be liberal in granting relief against judgments taken by default to the end that controversies may be tried on the merits.”).

disputed issues so [that cases] may be disposed of on substantial rather than upon technical grounds.”<sup>5</sup>

¶48 Second, Standard 16 will likely be easier to administer than the “informal contacts” standard adopted by many jurisdictions. As the majority points out, examining whether a party’s conduct taken as a whole indicates the party’s intent to participate in a lawsuit would be highly fact-intensive and would require case-by-case application.<sup>6</sup> Even given the relative complexity of this standard, it has considerable support. Most jurisdictions that have examined the issue have opted to employ this “informal contacts” rule to promote resolution of cases on their merits.<sup>7</sup> The test set forth in Standard 16 will almost certainly be easier to administer than the test adopted by most jurisdictions because inquiring whether an attorney knew the identity of opposing counsel is simpler than weighing the relative value of an opposing party’s informal conduct as it relates to a lawsuit.

¶49 In short, I believe that incorporating Standard 16 into the Rules of Civil Procedure would give rise to substantial benefits. These benefits would likely outweigh the costs associated with administering it--indeed, most jurisdictions that have considered the question have adopted a more burdensome standard in pursuit of the same benefits.

¶50 The Utah Standards of Professionalism and Civility were enacted to advance “the hallmarks of a learned profession dedicated to public service.”<sup>8</sup> I believe that incorporating Standard 16 into the Utah Rules of Civil Procedure would contribute greatly to this goal. Accordingly, while I agree with the majority, I would support an amendment of the Utah Rules of Civil Procedure that would incorporate the notice requirements set forth in Standard 16, and would refer this issue to our Advisory Committee on the Rules of Civil Procedure for study and recommendation.

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<sup>5</sup> McKean v. Mountain View Mem’l Estates, 411 P.2d 129, 130 (Utah 1966).

<sup>6</sup> Supra, ¶ 25.

<sup>7</sup> Supra, ¶¶ 25, 27-28.

<sup>8</sup> Utah Standards of Professionalism and Civility pmb1.

¶51 Chief Justice Durham and Justice Parrish concur in Associate Chief Justice Durrant's concurring opinion.

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# Tab 3

## Unlawful Detainer and Changes to the Rules of Discovery

From: Marty Blaustein

To: Cullen Battle

Wednesday, November 03, 2010 11:53 AM

Your presentation yesterday at the Community Legal Center was excellent. I have the following suggestions as they relate to Unlawful Detainer:

1. 78B-6-10 provides procedures for expediting evictions. For example, if a tenant has grounds to defend a cause eviction, the court in (1)(a) shall expedite the proceedings, including resolution of motion and trial.
2. Under (1)(b) the court SHALL begin the trial within 60 days after the day on which the complaint is served, unless the parties agree otherwise.....
3. If a party was to seek discovery, under the 60 day trial demand, Defendant has little opportunity to complete discovery under the 30 day discovery limitation, unless the court is asked to shorten the opposing party response time. This, however, works only if we make an appearance in court and the court grants the shortening at that setting. If a party seeks discovery and desires to shorten the response time by motion, the 10 business day response and five business day reply time, eats into the 60 trial demand, thus making it impossible to then submit discovery short the 60 day trial deadline.
4. One resolution would be to demand Plaintiff, at the time the complaint is filed, initially disclose the factual and or evidentiary basis for the plaintiff seeking eviction. In this way a client could be advised of alleged case merit with tenant promptly seeking evidence to dispute the allegation. The disclosure, for example, would be landlord ledgers demonstrating no rent being paid and or affidavits/police reports demonstrating tenant criminal activity.

# Tab 4

## Disclosure and Discovery Presentations

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Aldon Anderson Inn of Court  
Annual Judicial Conference (9/2010)  
Annual Meeting in Sun Valley (7/2009)  
Ballard Spahr (11/15/2010)  
Board of District Court Judges  
Box Elder County Bar Association (11/2010)  
Cache County Bar Association (10/12/2010)  
Central Utah Bar Association (9/2010)  
Collection Lawyers Section  
Construction Law Section (12/1/2010)  
Davis County District Judges  
Durham Jones & Pinegar (7/15/2010)  
Executive Committee of the Family Law Section  
Fabian & Clendenin (8/25/2010)  
Fall Forum (11/13/2009)  
Fall Forum (11/19/2010)  
Fillmore Spencer  
Jones Waldo (10/17/2010)  
Judicial Council (7/19/202010)  
Litigation Section – Logan (9/10/2010)  
Litigation Section – Provo (9/2010)  
Litigation Section – Salt Lake City  
Parr Brown Gee & Loveless (8/30/2010)  
Parsons Behle & Latimer  
Prince Yeates (11/17/2010)  
Ray Quinney & Nebeker  
Real Estate Section  
Richards Brandt Miller & Nelson (7/12/2010)  
Senior Lawyers Section  
Snow Christensen & Martineau (10/2010)  
Southern Utah Bar Association (12/3/2010)

Third District Judges

Uintah Bar Association (9/2010)

Utah Association for Justice (10/15/2010)

Utah Association for Justice (12/2/2010)

Utah Association for Justice Medical Malpractice Section (10/28/2010)

Utah Attorney General Conference (10/28/2010)

Utah Defense Lawyers Association

Utah Legal Services (11/2/2010)

Wasatch County Bar Association (10/2010)

Weber County District Judges (12/10/2010)

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       Advisory Committee Notes

12       A primary purpose of the 2010 amendments is to give effect to the long-standing but  
13 often overlooked directive in Rule 1 that the Rules of Civil Procedure should be  
14 construed and applied to achieve "the just, speedy and inexpensive determination of  
15 every action." The amendments serve this purpose by limiting parties to discovery that  
16 is proportional the stakes of the litigation, curbing excessive expert discovery, and  
17 requiring the early disclosure of documents, witnesses and evidence that a party  
18 intends to offer in its case-in-chief. The committee's purpose is to restore balance to the  
19 goals of Rule 1, so that a just resolutions are not achieved at the expense of speedy  
20 and inexpensive resolutions, and greater access to the justice system can be afforded  
21 to all members of society.

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) Trial preparation; experts.

117 (b)(6)(A) trial-preparation protection for draft reports or disclosures. Paragraph (b)(4)  
118 protects drafts of any report or disclosure required under paragraph (a)(3), regardless of  
119 the form in which the draft is recorded.

120 (b)(6)(B) trial-preparation protection for communications between a party's attorney  
121 and expert witnesses. Paragraph (b)(4) protects communications between the party's

122 attorney and any witness required to provide a report under paragraph (a)(3)(A),  
123 regardless of the form of the communications, except to the extent that the  
124 communications:

125 (b)(6)(B)(i) relate to compensation for the expert's study or testimony;

126 (b)(6)(B)(ii) identify facts or data that the party's attorney provided and that the  
127 expert considered in forming the opinions to be expressed; or

128 (b)(6)(B)(iii) identify assumptions that the party's attorney provided and that the  
129 expert relied on in forming the opinions to be expressed.

130 (b)(6)(C) Expert employed only for trial preparation. Ordinarily, a party may not, by  
131 interrogatories or otherwise, discover facts known or opinions held by an expert who  
132 has been retained or specially employed by another party in anticipation of litigation or  
133 to prepare for trial and who is not expected to be called as a witness at trial. But a party  
134 may do so only:

135 (b)(6)(C)(i) as provided in Rule 35(b); or

136 (b)(6)(C)(ii) on showing exceptional circumstances under which it is impracticable for  
137 the party to obtain facts or opinions on the same subject by other means.

138 (b)(7) Claims of privilege or protection of trial preparation materials.

139 (b)(7)(A) Information withheld. If a party withholds discoverable information by  
140 claiming that it is privileged or prepared in anticipation of litigation or for trial, the party  
141 shall make the claim expressly and shall describe the nature of the documents,  
142 communications, or things not produced in a manner that, without revealing the  
143 information itself, will enable other parties to evaluate the claim.

144 (b)(7)(B) Information produced. If a party produces information that the party claims  
145 is privileged or prepared in anticipation of litigation or for trial, the producing party may  
146 notify any receiving party of the claim and the basis for it. After being notified, a  
147 receiving party must promptly return, sequester, or destroy the specified information and  
148 any copies it has and may not use or disclose the information until the claim is resolved.  
149 A receiving party may promptly present the information to the court under seal for a  
150 determination of the claim. If the receiving party disclosed the information before being  
151 notified, it must take reasonable steps to retrieve it. The producing party must preserve  
152 the information until the claim is resolved.

153 (c) Sequence and timing of discovery.

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

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

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

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

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

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

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

178 (d)(3) A party is not excused from making disclosures or responses because the  
179 party has not completed investigating the case or because the party challenges the  
180 sufficiency of another party's disclosures or responses or because another party has not  
181 made disclosures or responses.

182 (d)(4) If a party fails to disclose or to timely supplement a disclosure or response to  
183 discovery, that party may not use the undisclosed witness, document or material at any

184 hearing or trial unless the failure is harmless or the party shows good cause for the  
185 failure.

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

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

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

### 203 **Advisory Committee Notes**

204 **Disclosure Requirements and Timing. Rule 26(a)(1).** The 2010 amendments seek  
205 to reduce discovery costs by requiring each party to produce, at an early stage in the  
206 case and without a discovery request, all of the documents and physical evidence the  
207 party may offer in its case-in-chief and the names of witnesses the party may call in its  
208 case-in-chief with a description of their expected testimony. In this respect, the  
209 amendments build on the initial disclosure requirements of the prior rules. In addition to  
210 the disclosures required by the prior version of Rule 26(a)(1), a party must disclose  
211 each fact witness the party may call in its case-in-chief and a summary of the witness's  
212 expected testimony, a copy of all documents the party may offer in its case-in-chief, and  
213 all documents to which a party refers in its pleadings. The duty to provide this  
214 information is a continuing one, and disclosures must be supplemented as new

215 evidence and witnesses become known. The penalty for failing to make timely  
216 disclosures is that the evidence may not be used in the party's case-in-chief.

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

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

231 **Expert Disclosures and Timing. Rule 26(a)(3).** Expert discovery has become an  
232 ever-increasing component of discovery cost. The prior rules sought to eliminate some  
233 of these costs by requiring the written disclosure of the expert's opinions and other  
234 background information. However, because the expert was not required to sign these  
235 disclosures, and because experts often were allowed to deviate from the opinions  
236 disclosed, attorneys typically would take the expert's deposition to ensure the expert  
237 would not offer any "surprise" testimony at trial, thereby increasing rather than  
238 decreasing the overall cost. The 2010 amendments seek to remedy this by requiring  
239 more comprehensive written disclosures, making clear that experts will be held to these  
240 disclosures, and eliminating expert depositions. In addition to the materials required  
241 under the prior rules, the amended rules make clear that an expert must provide a  
242 complete statement of all opinions the witness will express and the basis and reasons  
243 for them, as well as the data or other information upon which the expert relies in forming  
244 the opinions, and exhibits that will be used to summarize or support those opinions.  
245 They further provide that an expert may not testify in a party's case-in-chief concerning

246 any matter not “fairly disclosed” in the report. The intent is not to require a verbatim  
247 transcript of exactly what the expert will say at trial; instead, the expert must fairly  
248 disclose the substance of each opinion the expert will offer.

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

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

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

263 In the past, the scope of discovery was governed by “relevance” or the “likelihood to  
264 lead to discovery of admissible evidence.” These broad standards may have secured  
265 just results by allowing a party to discover all facts relevant to the litigation. However,  
266 they did little to advance two equally important objectives of the rules of civil  
267 procedure—the speedy and inexpensive resolution of every action. Accordingly, the  
268 former standards governing the scope of discovery have been replaced with the  
269 proportionality standards in subpart (b)(1).

270 The concept of proportionality is not new. The prior rule permitted the Court to limit  
271 discovery methods if it determined that “the discovery was unduly burdensome or  
272 expensive, taking into account the needs of the case, the amount in controversy,  
273 limitations on the parties’ resources, and the importance of the issues at stake in the  
274 litigation.” The Federal Rules of Civil Procedure contains a similar provision. See Fed.  
275 R. Civ. P. 26(b)(2)(C). This method of limiting discovery, however, was rarely invoked  
276 either under the Utah or federal rules. But because it embodies the same basic

277 principles as the proportionality standard we now adopt, cases applying Fed. R. Civ. P.  
278 26(b)(2)(C) may provide helpful guidance to lawyers and judges.

279 Under the prior rule and the federal rule, the party objecting to the discovery request  
280 had the burden of proving that a discovery request was not proportional. The new rule  
281 changes the burden of proof. Today, the party seeking discovery beyond the scope of  
282 “standard” discovery has the burden of showing that the request is “relevant to the claim  
283 or defense of any party” and that the request satisfies the standards of proportionality.  
284 The trial court has broad discretion in deciding whether a discovery request is  
285 proportional and the standards of proportionality in subpart (b)(1) are intended to guide  
286 the exercise of that discretion. Over time, the proper application of these standards will  
287 be defined by trial and appellate courts.

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

296 Rule 26(c) provides for limited, “standard” discovery that is presumed to be  
297 proportional to the amount and issues in controversy in the action, which the parties  
298 may conduct as a matter of right. Standard discovery is limited. Each party may take up  
299 to 16 hours of depositions. No deposition of a party may exceed seven hours, and no  
300 deposition of a non-party witness may exceed four hours. The number of interrogatories  
301 is limited to 15; the number of document requests is limited to 25; and the number of  
302 requests for admission is limited to 25. The time for standard discovery is limited to 150  
303 days, after which the case is presumed to be ready for trial. The committee determined  
304 these limitations based on the observation that the majority of cases filed in the Utah  
305 State Courts involve disputes that are relatively modest in magnitude and lack  
306 significant factual complexity. Accordingly, the 2010 amendments provide an

307 opportunity for standard discovery that the committee believes should be sufficient for  
308 the typical state court case.

309 Despite the expectation that standard discovery should be adequate in the typical  
310 case, the 2010 amendments contemplate there will be cases for which standard  
311 discovery is not sufficient or appropriate. In such cases, parties may conduct additional  
312 discovery that is shown to be consistent with the principle of proportionality. There are  
313 two ways to obtain such additional discovery. The first is by stipulation. If the parties can  
314 agree additional discovery is necessary, they may stipulate to as much additional  
315 discovery as they desire, provided they stipulate the additional discovery is proportional  
316 to what is at stake in the litigation and each party certifies that it has reviewed and  
317 approved a budget for additional discovery. The certification must confirm that the  
318 actual party in question, and not merely counsel, has reviewed and approved the  
319 budget. If these conditions are met, the Court will not second-guess the parties and their  
320 counsel and must approve the stipulation.

321 The second method to obtain additional discovery is by motion. The committee  
322 recognizes there will be cases in which additional discovery is appropriate, but the  
323 parties cannot agree to the scope of such additional discovery. These would include,  
324 among other categories, large and factually complex cases and cases in which there is  
325 a significant disparity in the parties' access to information, such that one party  
326 legitimately has a greater need than the other party for additional discovery in order to  
327 prepare properly for trial. To prevent a party from taking advantage of this situation, the  
328 2010 amendments allow any party to move the Court for additional discovery. The party  
329 making such a motion must demonstrate that the additional discovery is proportional  
330 and certify that the party has reviewed and approved a discovery budget. The burden to  
331 show the need for additional discovery, and to demonstrate proportionality, always falls  
332 on the party seeking additional discovery. However, cases in which such additional  
333 discovery is appropriate do exist, and it is important for Courts to recognize they can  
334 and should permit additional discovery in appropriate cases, commensurate with the  
335 complexity and magnitude of the dispute.

336 **Protective Order Language Moved to Rule 37.** The 2010 amendments delete in  
337 its entirety the prior language of Rule 26(c) governing motions for protective orders. The

338 substance of that language is now found in Rule 37. The committee determined it was  
339 preferable to cover all discovery motions through a single rule, rather than through two  
340 separate rules. Accordingly, Rule 37 now governs all discovery motions and orders,  
341 including protective orders as well as orders compelling discovery or imposing  
342 sanctions.

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

353

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 37. Upon demand of  
54 the objecting party or witness, the deposition shall be suspended for the time necessary  
55 to make a motion. The party taking the deposition may complete or adjourn the  
56 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 answering 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. A party may identify  
17 the part of a matter which is true and deny the rest. A denial shall fairly meet the  
18 substance of the request. Lack of information is not a reason for failure to admit or deny  
19 unless the information known or reasonably available is insufficient to form an  
20 admission or denial. If the truth of a matter is a genuine issue for trial, the answering  
21 party may deny the matter or state the reasons for the failure to admit or deny.

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

26       (c) Effect of admission. Any matter admitted under this rule is conclusively  
27 established unless the court on motion permits withdrawal or amendment of the  
28 admission. The court may permit withdrawal or amendment if the presentation of the  
29 merits of the action will be promoted and withdrawal or amendment will not prejudice  
30 the requesting party. Any admission under this rule is for the purpose of the pending

31 action only. It is not an admission for any other purpose, nor may it be used in any other  
32 action.

33

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