

# Agenda

## Advisory Committee on Rules of Civil Procedure

April 27, 2011  
4:00 to 6:00 p.m.

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

Approval of minutes.	Tab1	Fran Wikstrom
Simplified disclosure and discovery rules.	Tab 2	Fran Wikstrom

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

### **Meeting Schedule**

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 ON THE RULES OF CIVIL PROCEDURE

Wednesday March 23, 2011  
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

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

EXCUSED: David Moore, David W. Scofield, Barbara L. Townsend, Lori Woffinden

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

#### I. APPROVAL OF MINUTES.

Mr. Wikstrom called the meeting to order at 4:00 p.m. Mr. Wikstrom entertained comments from the committee concerning the February 23, 2011 meeting minutes. No comments were made, and a motion for approval of the minutes was duly made, seconded and unanimously approved.

#### II. REPORT FROM CHAIR.

Mr. Wikstrom reported that he and Mr. Shea met with the Supreme Court at the Court's request and shared with the Court the committee's progress on the simplified rules of discovery, including presentations to the Bar and feedback from the Bar and its constituencies, both oral and written. Messrs. Wikstrom and Shea shared their impression that the Court is generally enthusiastic and positive regarding the changes.

#### II. SIMPLIFIED RULES OF DISCOVERY.

The committee reviewed the most recent version of the rules with an eye toward determining whether the current version faithfully captures the committee's progress to date.

The committee discussed whether Rule 26 should mention the availability of third-party subpoenas and whether a prohibition on serving parties with subpoenas should be made express, as other standard discovery mechanisms are available for party discovery. The committee further discussed whether third-party subpoenas should also be limited in terms of number and the discovery time limits. Mr. Slaugh pointed out that the real question is whether a subpoena is

"discovery". If so, subpoenas are subject to discovery cut off dates. The committee discussed that there is case law on this point, ie, subpoenas do constitute discovery, but could nevertheless make the rule express to eliminate confusion. The committee raised possible amendments to make clear that subpoenas are discovery and subject to the discovery time limitations. Judge Pullan suggested adding the actual methods of discovery back into 26(c)(1), because that is the first place that methods of discovery are discussed. The methods will then expressly include subpoenas such that subpoenas are clearly part of discovery and its time limitations. Mr. Wikstrom suggested the language say specifically that discovery includes subpoenas under Rule 45 other than to compel attendance for a hearing or a trial. So moved and seconded. The committee unanimously approved. The committee also noted that Rule 35 medical examination should be included in the definition of "methods of discovery" and should be subject to the discovery time limitations.

The committee engaged in extensive discussion about the budgeting certification requirement in Rule 26(c)(5)(A). Mr. Carney moved that the attorney certify that a discussion with his or her client regarding the discovery budget has occurred, and that extraordinary discovery is necessary and proportional. The motion carried and the committee took up the wordsmithing.

The committee discussed how to address claims involving non-monetary relief and what tier of discovery these claims should fall within. The committee agreed that absent accompanying damage claims in excess of \$300,000, claims for non-monetary relief will be allowed standard discovery as permitted in Tier II.

The committee discussed whether to change the rule governing how depositions are recorded, witnesses are sworn, etc. The central question is whether court reporters are really necessary. Their elimination could result in a significant savings in deposition costs. A motion to remove sub-paragraph (c) of Rule 28 was made and seconded. The motion failed. The committee expressed a willingness to revisit this issue once the simplified rules have been sent out for official comment.

Judge Pullan and Messrs. Shaughnessy and Blanch agreed to draft an Advisory Committee Note on Rule 26 for discussion at the next meeting. Mr. Shaughnessy proposed that they attempt to address the issue regarding the level of detail required in witness summaries as part of the Committee Note, for discussion at the next meeting.

### **III. ADJOURNMENT.**

The meeting adjourned at 6:18 p.m. The next meeting will be held at 4:00 p.m. on Wednesday April 27, 2011.

# Tab 2

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 [statutes](#)  
5 enacted by the Legislature and except as stated in Rule 81. They shall be liberally  
6 construed **and applied** to achieve the just, speedy, and inexpensive determination of  
7 every action. These rules govern all actions brought after they take effect and all further  
8 proceedings in actions then pending. If, in the opinion of the court, applying a rule in an  
9 action pending when the rule takes effect would not be feasible or would be unjust, the  
10 former procedure applies.

11       Advisory Committee Notes

12       A primary purpose of the [2010-2011](#) amendments is to give effect to the long-  
13 standing but often overlooked directive in Rule 1 that the Rules of Civil Procedure  
14 should be construed and applied to achieve "the just, speedy and inexpensive  
15 determination of every action." The amendments serve this purpose by limiting parties  
16 to discovery that is proportional the stakes of the litigation, curbing excessive expert  
17 discovery, and requiring the early disclosure of documents, witnesses and evidence that  
18 a party intends to offer in its case-in-chief. The committee's purpose is to restore  
19 balance to the goals of Rule 1, so that a just resolution is not achieved at the expense of  
20 speedy and inexpensive resolutions, and greater access to the justice system can be  
21 afforded 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 A party who claims damages but does not plead an amount shall plead that their  
9 damages are such as to qualify for a specified tier defined by Rule 26(c)(3).

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

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

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

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

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

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

31 (d) Effect of failure to deny. Statements in a pleading to which a responsive pleading  
32 is required, other than statements of the amount of damage, are admitted if not denied  
33 in the responsive pleading. Statements in a pleading to which no responsive pleading is  
34 required or permitted are deemed denied or avoided.

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

40 (f) Construction of pleadings. All pleadings shall be construed to do substantial  
41 justice.

#### 42 Advisory Committee Notes

43 The [2010-2011](#) amendments remove from Rule 8 prior language requiring a  
44 statement of the party's "claim." Instead, the rule now requires a short and plain  
45 statement of both (1) "facts showing that the party is entitled to relief" and (2) "the legal  
46 theory on which the claim rests." The purpose of this amendment is twofold. First, the  
47 amendment clarifies that parties must give notice of both the facts and the law that  
48 support their claim. The amendment thus reconfirms longstanding case law that courts,  
49 on a Rule 12 motion, will "accept the plaintiff's description of facts alleged in the  
50 complaint to be true, but . . . need not accept extrinsic facts not pleaded nor . . . legal  
51 conclusions in contradiction of the pleaded facts." *Allred v. Cook*, 590 P.2d 318, 319  
52 (Utah 1979). "[M]ere conclusory allegations in a pleading . . . are insufficient . . ."  
53 *Chapman v. Primary Children's Hosp.*, 784 P.2d 1181, 1186 (Utah 1989). Second, by  
54 clarifying that parties should plead facts, this amendment to Rule 8 incentivizes further  
55 and earlier disclosure of facts, consistent with the general approach of Utah's new  
56 "simplified rules" and other changes made by the [2010-2011](#) amendments, including  
57 those to Rule 26's disclosure requirements. To facilitate access to justice, the  
58 committee intends that all pleadings—both complaints and answers—provide more and  
59 earlier notice of the facts alleged with less reliance on discovery. **However, by requiring**  
60 **parties to plead "facts," this amendment expressly does not resurrect any prior**  
61 **requirement of technical or "code" pleading. Nor does the amendment seek to import**

62 any heightened pleading requirement, ~~including such as~~ interpretations of the Federal  
63 Rules of Civil Procedure~~United States Supreme Court's decisions~~ in *Bell Atlantic Corp.*  
64 *v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), ~~as~~  
65 ~~mandating which mandate~~ a heightened standard of “plausibility” pleading under the  
66 Federal Rules ~~of Civil Procedure~~. Rather, the longstanding “liberal” standard of notice  
67 pleading remains in effect in Utah. E.g., *Canfield v. Layton City*, 2005 UT 60, ¶ 14, 122  
68 P.3d 622. *Accord*, Adam N. Steinman, The Pleading Problem, 62 Stanford L. Rev. 1293  
69 (2010).  
70

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 [mediation or other ADR processes for](#) 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) Trial settings. Unless an order sets the trial date, any party may and the plaintiff  
22 shall, at the close of all discovery, certify to the court that [disclosures and discovery are](#)  
23 [complete, that there are no pending motions, that mediation or other ADR processes](#)  
24 [have been completed or excused and that](#) the case is ready for trial. The court shall  
25 schedule the trial as soon as mutually convenient to the court and parties. The court  
26 shall notify parties of the trial date and of any final pretrial conference.

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

31 (d) Sanctions. If a party or a party's attorney fails to obey an order, if a party or a  
32 party's attorney fails to attend a conference, if a party or a party's attorney is  
33 substantially unprepared to participate in a conference, or if a party or a party's attorney  
34 fails to participate in good faith, the court, upon motion or its own initiative, may take any  
35 action authorized by Rule 37(e).

36 Advisory Committee Notes

37

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, except charts, summaries and demonstrative exhibits,  
15 which have not yet been prepared and must be disclosed in accordance with paragraph  
16 (a)(4)(C);

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

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

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

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

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

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

29       (a)(2) Exemptions.

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

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

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

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

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

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

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

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

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

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

61 (a)(3)(A) Expert Testimony. A party shall, without waiting for a discovery request,  
62 provide to the other parties the following information regarding any person who may be

63 used at trial to present evidence under Rules 702, 703, or 705 of the Utah Rules of  
64 Evidence and who is retained or specially employed to provide expert testimony in the  
65 case or whose duties as an employee of the party regularly involve giving expert  
66 testimony: (i) the expert's name and qualifications, including a list of all publications  
67 authored within the preceding 10 years, and a list of any other cases in which the expert  
68 has testified as an expert at trial or by deposition within the preceding four years, (ii) a  
69 brief summary of the opinions to which the witness is expected to testify, (iii) all data  
70 and other information that will be relied upon by the witness in forming those opinions,  
71 and (iv) the compensation to be paid for the witnesses' study and testimony.

72 (a)(3)(B) Limits on Expert Discovery. Further discovery may be obtained from an  
73 expert witness either by deposition or by written report. A deposition shall not exceed  
74 four hours and the party taking the deposition shall pay the expert's reasonable hourly  
75 fees for attendance at the deposition. A report shall be signed by the expert and shall  
76 contain a complete statement of all opinions the expert will offer at trial and the basis  
77 and reasons for them. Such an expert may not testify in a party's case-in-chief  
78 concerning any matter not fairly disclosed in the report. The party offering the expert  
79 shall pay the costs for the report.

80 (a)(3)(C) Timing for Expert Discovery.

81 (a)(3)(C)(i) The party who bears the burden of proof on the issue for which expert  
82 testimony is offered shall provide the information required by paragraph (a)(3)(A) within  
83 seven days after the close of fact discovery. Within seven days thereafter, the party  
84 opposing the expert may serve notice electing either a deposition of the expert pursuant  
85 to paragraph (a)(3)(B) and Rule 30, or a written report pursuant to paragraph (a)(3)(B).  
86 The deposition shall occur, or the report shall be provided, within 28 days after the  
87 election is made. If no election is made, then no further discovery of the expert shall be  
88 permitted.

89 (a)(3)(C)(ii) The party who does not bear the burden of proof on the issue for which  
90 expert testimony is offered shall provide the information required by paragraph (a)(3)(A)  
91 within seven days after the later of (i) the date on which the election under paragraph  
92 (a)(3)(C)(i) is due, or (ii) receipt of the written report or the taking of the expert's  
93 deposition pursuant to paragraph (a)(3)(C)(i). Within seven days thereafter, the party

94 opposing the expert may serve notice electing either a deposition of the expert pursuant  
95 to paragraph (a)(3)(B) and Rule 30, or a written report pursuant to paragraph (a)(3)(B).  
96 The deposition shall occur, or the report shall be provided, within 28 days after the  
97 election is made. If no election is made, then no further discovery of the expert shall be  
98 permitted.

99 (a)(3)(C)(iii) In multiparty actions, all parties opposing the expert must agree on  
100 either a report or a deposition. If all parties opposing the expert do not agree, then  
101 further discovery of the expert may be obtained only by deposition pursuant to  
102 paragraph (a)(3)(B) and Rule 30.

103 (a)(3)(D) If a party intends to present evidence at trial under Rules 702, 703, or 705  
104 of the Utah Rules of Evidence from any person other than an expert witness who is  
105 retained or specially employed to provide testimony in the case or a person whose  
106 duties as an employee of the party regularly involve giving expert testimony, that party  
107 must provide a written summary of the facts and opinions to which the witness is  
108 expected to testify in accordance with the deadlines set forth in paragraph (a)(3)(C). A  
109 deposition of such a witness may not exceed four hours and must be taken within 28  
110 days after the expert witness is disclosed.

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

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

116 (a)(4)(B) the name of witnesses whose testimony is expected to be presented by  
117 transcript of a deposition and a copy of the transcript with the proposed testimony  
118 designated; and

119 (a)(4)(C) ~~identification a copy~~ of each exhibit, including charts, ~~summaries of other~~  
120 evidence and demonstrative exhibits, unless solely for impeachment, separately  
121 identifying those which the party will offer and those which the party may offer.

122 (a)(4)(D) Disclosure required by paragraph (a)(4) shall be made at least 28 days  
123 before trial. At least 14 days before trial, a party shall serve and file counter-  
124 designations of deposition testimony, objections and grounds for the objections to the

125 use of a deposition and to the admissibility of exhibits. Other than objections under  
126 Rules 402 and 403 of the Utah Rules of Evidence, objections not listed are waived  
127 unless excused by the court for good cause.

128 (b) Discovery scope.

129 (b)(1) In general. Parties may discover any matter, not privileged, which is relevant  
130 to the claim or defense of any party if the discovery satisfies the standards of  
131 proportionality set forth below.

132 (b)(2) Proportionality. Discovery and discovery requests are proportional if:

133 (b)(2)(A) the likely benefits of the proposed discovery outweigh the burden or  
134 expense;

135 (b)(2)(B) the discovery is consistent with the overall case management and will  
136 further the just, speedy and inexpensive determination of the case;

137 (b)(2)(C) the discovery is reasonable, considering the needs of the case, the amount  
138 in controversy, the complexity of the case, the parties' resources, the importance of the  
139 issues, and the importance of the discovery in resolving the issues;

140 (b)(2)(D) the discovery is not unreasonably cumulative or duplicative;

141 (b)(2)(E) the information cannot be obtained from another source that is more  
142 convenient, less burdensome or less expensive; and

143 (b)(2)(F) the party seeking discovery has not had sufficient opportunity to obtain the  
144 information by discovery or otherwise, taking into account the parties' relative access to  
145 the information.

146 (b)(3) Burden. The party seeking discovery has the burden of showing  
147 proportionality and relevance. To ensure proportionality, the court may enter orders  
148 under Rule 37.

149 (b)(4) Electronically stored information. A party claiming that electronically stored  
150 information is not reasonably accessible because of undue burden or cost shall  
151 describe the source of the electronically stored information, the nature and extent of the  
152 burden, the nature of the information not provided, and any other information that will  
153 enable other parties to evaluate the claim.

154 (b)(5) Trial preparation materials. A party may obtain otherwise discoverable  
155 documents and tangible things prepared in anticipation of litigation or for trial by or for

156 another party or by or for that other party's representative (including the party's attorney,  
157 consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party  
158 seeking discovery has substantial need of the materials and that the party is unable  
159 without undue hardship to obtain substantially equivalent materials by other means. In  
160 ordering discovery of such materials, the court shall protect against disclosure of the  
161 mental impressions, conclusions, opinions, or legal theories of an attorney or other  
162 representative of a party.

163 (b)(6) Statement previously made about the action. A party may obtain without the  
164 showing required in paragraph (b)(5) a statement concerning the action or its subject  
165 matter previously made by that party. Upon request, a person not a party may obtain  
166 without the required showing a statement about the action or its subject matter  
167 previously made by that person. If the request is refused, the person may move for a  
168 court order under Rule 37. A statement previously made is (A) a written statement  
169 signed or approved by the person making it, or (B) a stenographic, mechanical,  
170 ~~electrical~~electronic, or other recording, or a transcription thereof, which is a substantially  
171 verbatim recital of an oral statement by the person making it and contemporaneously  
172 recorded.

173 (b)(7) Trial preparation; experts.

174 (b)(7)(A) Trial-preparation protection for draft reports or disclosures. Paragraph  
175 (b)(5) protects drafts of any report or disclosure required under paragraph (a)(3),  
176 regardless of the form in which the draft is recorded.

177 (b)(7)(B) Trial-preparation protection for communications between a party's attorney  
178 and expert witnesses. Paragraph (b)(5) protects communications between the party's  
179 attorney and any witness required to provide disclosures under paragraph (a)(3),  
180 regardless of the form of the communications, except to the extent that the  
181 communications:

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

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

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

187 (b)(7)(C) Expert employed only for trial preparation. Ordinarily, a party may not, by  
188 interrogatories or otherwise, discover facts known or opinions held by an expert who  
189 has been retained or specially employed by another party in anticipation of litigation or  
190 to prepare for trial and who is not expected to be called as a witness at trial. A party  
191 may do so only:

192 (b)(7)(C)(i) as provided in Rule 35(b); or

193 (b)(7)(C)(ii) on showing exceptional circumstances under which it is impracticable for  
194 the party to obtain facts or opinions on the same subject by other means.

195 (b)(8) Claims of privilege or protection of trial preparation materials.

196 (b)(8)(A) Information withheld. If a party withholds discoverable information by  
197 claiming that it is privileged or prepared in anticipation of litigation or for trial, the party  
198 shall make the claim expressly and shall describe the nature of the documents,  
199 communications, or things not produced in a manner that, without revealing the  
200 information itself, will enable other parties to evaluate the claim.

201 (b)(8)(B) Information produced. If a party produces information that the party claims  
202 is privileged or prepared in anticipation of litigation or for trial, the producing party may  
203 notify any receiving party of the claim and the basis for it. After being notified, a  
204 receiving party must promptly return, sequester, or destroy the specified information and  
205 any copies it has and may not use or disclose the information until the claim is resolved.  
206 A receiving party may promptly present the information to the court under seal for a  
207 determination of the claim. If the receiving party disclosed the information before being  
208 notified, it must take reasonable steps to retrieve it. The producing party must preserve  
209 the information until the claim is resolved.

210 (c) Sequence and timing of discovery; tiers; limits on standard discovery;  
211 extraordinary discovery.

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

218 (c)(1) Methods of discovery; Sequence and timing of discovery.

219 (c)(1) Parties may obtain discovery by one or more of the following methods:  
 220 depositions upon oral examination or written questions; written interrogatories;  
 221 production of documents or things or permission to enter upon land or other property,  
 222 for inspection and other purposes; physical and mental examinations; requests for  
 223 admission; and subpoenas other than for a court hearing or trial.

224 (c)(2) Methods of discovery may be used in any sequence, and the fact that a party  
 225 is conducting discovery shall not delay any other party's discovery. Except for cases  
 226 exempt under paragraph (a)(2), a party may not seek discovery from any source before  
 227 that party's initial disclosure obligations are satisfied.

228 (c)(3) Definition of tiers for standard discovery. Actions claiming \$50,000 or less in  
 229 damages are permitted standard discovery as described for Tier 1. Actions claiming  
 230 more than \$50,000 and less than \$300,000 in damages are permitted standard  
 231 discovery as described for Tier 2. Actions claiming \$300,000 or more in damages are  
 232 permitted standard discovery as described for Tier 3. Absent an accompanying damage  
 233 claim for more than \$300,000, actions claiming non-monetary relief are permitted  
 234 standard discovery as described for Tier 2.

235 (c)(4) Definition of damages. For purposes of determining standard discovery, the  
 236 amount of damages includes the total of all monetary damages sought (without  
 237 duplication for alternative theories) by all parties in all claims for relief in the original  
 238 pleadings, but not including punitive damages.

239 (c)(5) Limits on standard discovery. ~~Methods of discovery may be used in any~~  
 240 ~~sequence, and the fact that a party is conducting discovery shall not delay any other~~  
 241 ~~party's discovery. Except for cases exempt under paragraph (a)(2), a party may not~~  
 242 ~~seek discovery from any source before that party's initial disclosure obligations are~~  
 243 ~~satisfied.~~<sup>(f1)</sup> Standard discovery per side (plaintiffs collectively, defendants collectively,  
 244 and third-party defendants collectively) in each tier is as follows. The days to complete  
 245 standard discovery are calculated from the date the first defendant's first disclosure is  
 246 due and do not include expert discovery under Rule 26(a)(3)(C) and (D).

Tier	Amount of Damages	Total Deposition Hours	Rule 33 Interrogatories including all	Rule 34 Requests for Production	Rule 36 Requests for	Days to Complete Standard
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			<u>discrete subparts</u>		<u>Admission</u>	<u>Discovery</u>
<u>1</u>	<u>\$50,000 or less</u>	<u>3</u>	<u>0</u>	<u>5</u>	<u>5</u>	<u>120</u>
<u>2</u>	<u>More than \$50,000 and less than \$300,000 or non-monetary relief</u>	<u>15</u>	<u>10</u>	<u>10</u>	<u>10</u>	<u>180</u>
<u>3</u>	<u>\$300,000 or more</u>	<u>30</u>	<u>20</u>	<u>20</u>	<u>20</u>	<u>210</u>

247 (c)(6) **Extraordinary discovery.** To obtain discovery beyond the limits established in  
 248 Paragraph (c)(5), a party shall file:

249 (c)(6)(A) before the close of standard discovery and after reaching the limits of  
 250 standard discovery imposed by these rules, a stipulation of extraordinary discovery and  
 251 a stipulated statement ~~signed by the parties and attorneys~~ that extraordinary discovery  
 252 is **necessary and proportional** under paragraph (b)(2) and that **each party has reviewed**  
 253 **and approved a discovery budget**; or

254 (c)(6)(B) before the close of standard discovery and after reaching the limits of  
 255 standard discovery imposed by these rules, a **motion for extraordinary discovery** and a  
 256 statement ~~signed by the party and attorney~~ that the extraordinary discovery is  
 257 **necessary and proportional** under paragraph (b)(2), ~~and that~~ **the party has reviewed and**  
 258 **approved a discovery budget, and that the party has in good faith conferred or**  
 259 **attempted to confer with the other party in an effort to achieve a stipulation.**

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

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

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

267 (d)(3) A party is not excused from making disclosures or responses because the  
 268 party has not completed investigating the case or because the party challenges the  
 269 sufficiency of another party's disclosures or responses or because another party has not  
 270 made disclosures or responses.

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

273 hearing or trial unless the failure is harmless or the party shows good cause for the  
274 failure.

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

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

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

## 292 **Advisory Committee Notes**

293 **Disclosure Requirements and Timing. Rule 26(a)(1).** The 2011 amendments seek  
294 to reduce discovery costs by requiring each party to produce, at an early stage in the  
295 case and without a discovery request, all of the documents and physical evidence the  
296 party may offer in its case-in-chief and the names of witnesses the party may call in its  
297 case-in-chief with a description of their expected testimony. In this respect, the  
298 amendments build on the initial disclosure requirements of the prior rules. In addition to  
299 the disclosures required by the prior version of Rule 26(a)(1), a party must disclose  
300 each fact witness the party may call in its case-in-chief and a summary of the witness's  
301 expected testimony, a copy of all documents the party may offer in its case-in-chief, and  
302 all documents to which a party refers in its pleadings. The duty to provide this  
303 information is a continuing one, and disclosures must be supplemented as new

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

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

314 Finally, the 2011 amendments eliminate two categories of actions that previously  
315 were exempt from the mandatory disclosure requirements. Specifically, the  
316 amendments eliminate the prior exemption for contract actions in which the amount  
317 claimed is \$20,000 or less, and actions in which any party is proceeding pro se. In the  
318 committee's view, these types of actions will benefit from the early disclosure  
319 requirements and the overall reduced cost of discovery.

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

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

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

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

349 **Expert Disclosures and Timing. Rule 26(a)(3).** Expert discovery has become an  
350 ever-increasing component of discovery cost. The prior rules sought to eliminate some  
351 of these costs by requiring the written disclosure of the expert’s opinions and other  
352 background information. However, because the expert was not required to sign these  
353 disclosures, and because experts often were allowed to deviate from the opinions  
354 disclosed, attorneys typically would take the expert’s deposition to ensure the expert  
355 would not offer “surprise” testimony at trial, thereby increasing rather than decreasing  
356 the overall cost. The amendments seek to remedy this and other costs associated with  
357 expert discovery by, among other things, allowing a deposition of the expert or a written  
358 report, but not both; in the case of written reports, requiring more comprehensive  
359 disclosures, signed by the expert, and making clear that experts will be held to these  
360 disclosures, all with the goal of making reports a reliable substitute for depositions; and  
361 incorporating a rule that protects from discovery most communications between an  
362 attorney and retained expert. The amendments also address the issue of the “non-  
363 retained” expert. Discovery of expert opinions and testimony is automatic under Rule  
364 26(a)(3) and parties are not required to serve interrogatories or use other discovery  
365 devices to obtain this information.

366 Disclosures of expert testimony are made in sequence, with the party who bears the  
367 burden of proof on the issue for which expert testimony will be offered going first. Within  
368 seven days after the close of fact discovery, that party must disclose: (i) the expert's  
369 curriculum vitae identifying the expert's qualifications, publications, and prior testimony;  
370 (ii) compensation information; (iii) a brief summary of the opinions the expert will offer –  
371 not a lengthy or exhaustive list, but merely notice of the issues the expert will address at  
372 trial; and (iv) a complete copy of the expert's file for the case. The file should include all  
373 of the facts and data that the expert has relied upon in forming the expert's opinions. If  
374 the expert has prepared summaries of data, charts, tables, or similar materials, they  
375 should be included. If the expert has used software programs to make calculations or  
376 otherwise summarize or organize data, that information should be provided in native  
377 form so it can be analyzed and understood. If the expert is relying on depositions or  
378 materials produced in discovery, then a list of the specific materials relied upon is  
379 sufficient. The committee recognizes that experts frequently will prepare demonstrative  
380 exhibits or other aids to illustrate the expert's testimony at trial, and the costs for  
381 preparing these materials can be substantial. For that reason, these types of  
382 demonstrative aids should be disclosed later, as part of the Rule 26(a)(4) pretrial  
383 disclosures when trial appears more likely.

384 Within seven days after this disclosure, the party opposing the expert may elect  
385 either a deposition or a written report from the expert. A deposition is limited to four  
386 hours and the party taking it must pay the expert's hourly fee for attending the  
387 deposition. If a party elects a written report, the expert must provide a signed report  
388 containing a complete statement of all opinions the expert will express and the basis  
389 and reasons for them. The expert may not testify in a party's case in chief concerning  
390 any matter not "fairly disclosed" in the report. The intent is not to require a verbatim  
391 transcript of exactly what the expert will say at trial; instead the expert must fairly  
392 disclose the substance of and basis for each opinion the expert will offer. The report or  
393 deposition must be completed within 28 days after the election is made. After this, the  
394 party who does not bear the burden of proof on the issue for which expert testimony is  
395 offered must make its corresponding disclosures and the opposing party may then elect  
396 either a deposition or a written report. Under the deadlines contained in the rules, expert

397 discovery should take less than three months to complete. However, as with the other  
398 discovery rules, these deadlines can be altered by stipulation of the parties or order of  
399 the court.

400 The amendments also address the issue of testimony from experts other than those  
401 who are retained or specially employed to provide expert testimony, or whose duties as  
402 an employee regularly involve giving expert testimony. For these types of experts, such  
403 as treating physicians, police officers, or accident investigators, the party who intends to  
404 offer that expert must disclose the subject matter on which the expert is expected to  
405 testify and a summary of the facts and opinions to which the witness is expected to  
406 testify. Because a party who expects to offer such testimony cannot compel such a  
407 witness to prepare a written report, further discovery must be done by deposition,  
408 subject to the same limitations as other expert depositions.

409 Finally, the amendments include a new Rule 26(b)(7) that protects from discovery  
410 draft expert reports and, with limited exception, communications between an attorney  
411 and an expert. These changes are modeled after the recent changes to the Federal  
412 Rules of Civil Procedure and are intended to address the unnecessary and costly  
413 procedures that often were employed in order to protect such information from  
414 discovery, and to reduce “satellite litigation” over such issues.

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

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

425 The concept of proportionality is not new. The prior rule permitted the Court to limit  
426 discovery methods if it determined that “the discovery was unduly burdensome or  
427 expensive, taking into account the needs of the case, the amount in controversy,

428 limitations on the parties' resources, and the importance of the issues at stake in the  
429 litigation." The Federal Rules of Civil Procedure contains a similar provision. See Fed.  
430 R. Civ. P. 26(b)(2)(C). This method of limiting discovery, however, was rarely invoked  
431 either under the Utah or federal rules. But because it embodies the same basic  
432 principles as the proportionality standard we now adopt, cases applying Fed. R. Civ. P.  
433 26(b)(2)(C) may provide helpful guidance to lawyers and judges.

434 Under the prior rule and the federal rule, the party objecting to the discovery request  
435 had the burden of proving that a discovery request was not proportional. The new rule  
436 changes the burden of proof. Today, the party seeking discovery beyond the scope of  
437 "standard" discovery has the burden of showing that the request is "relevant to the claim  
438 or defense of any party" and that the request satisfies the standards of proportionality.  
439 The trial court has broad discretion in deciding whether a discovery request is  
440 proportional and the standards of proportionality in subpart (b)(1) are intended to guide  
441 the exercise of that discretion. Over time, the proper application of these standards will  
442 be defined by trial and appellate courts.

443 **Standard and Extraordinary Discovery. Rule 26(c).** As a counterpart to requiring  
444 more detailed disclosures under Rule 26(a), the 2011 amendments place new  
445 limitations on additional discovery the parties may conduct. Because the committee  
446 expects the enhanced disclosure requirements will automatically permit each party to  
447 learn the witnesses and evidence the opposing side will offer in its case-in-chief,  
448 additional discovery should serve the more limited function of permitting parties to find  
449 witnesses, documents, and other evidentiary materials that are harmful, rather than  
450 helpful, to the opponent's case.

451 Rule 26(c) provides for limited, "standard" discovery that is presumed to be  
452 proportional to the amount and issues in controversy in the action, which the parties  
453 may conduct as a matter of right. Standard discovery is limited. Each party may take up  
454 to 16 hours of depositions. No deposition of a party may exceed seven hours, and no  
455 deposition of a non-party witness may exceed four hours. The number of interrogatories  
456 is limited to 15; the number of document requests is limited to 25; and the number of  
457 requests for admission is limited to 25. The time for standard discovery is limited to 150  
458 days, after which the case is presumed to be ready for trial. The committee determined

459 these limitations based on the observation that the majority of cases filed in the Utah  
460 State Courts involve disputes that are relatively modest in magnitude and lack  
461 significant factual complexity. Accordingly, the 2011 amendments provide an  
462 opportunity for standard discovery that the committee believes should be sufficient for  
463 the typical state court case.

464 Despite the expectation that standard discovery should be adequate in the typical  
465 case, the 2011 amendments contemplate there will be cases for which standard  
466 discovery is not sufficient or appropriate. In such cases, parties may conduct additional  
467 discovery that is shown to be consistent with the principle of proportionality. There are  
468 two ways to obtain such additional discovery. The first is by stipulation. If the parties can  
469 agree additional discovery is necessary, they may stipulate to as much additional  
470 discovery as they desire, provided they stipulate the additional discovery is proportional  
471 to what is at stake in the litigation and each party certifies that it has reviewed and  
472 approved a budget for additional discovery. The certification must confirm that the  
473 actual party in question, and not merely counsel, has reviewed and approved the  
474 budget. If these conditions are met, the Court will not second-guess the parties and their  
475 counsel and must approve the stipulation.

476 The second method to obtain additional discovery is by motion. The committee  
477 recognizes there will be cases in which additional discovery is appropriate, but the  
478 parties cannot agree to the scope of such additional discovery. These would include,  
479 among other categories, large and factually complex cases and cases in which there is  
480 a significant disparity in the parties' access to information, such that one party  
481 legitimately has a greater need than the other party for additional discovery in order to  
482 prepare properly for trial. To prevent a party from taking advantage of this situation, the  
483 [2010-2011](#) amendments allow any party to move the Court for additional discovery. The  
484 party making such a motion must demonstrate that the additional discovery is  
485 proportional and certify that the party has reviewed and approved a discovery budget.  
486 The burden to show the need for additional discovery, and to demonstrate  
487 proportionality, always falls on the party seeking additional discovery. However, cases  
488 in which such additional discovery is appropriate do exist, and it is important for Courts

489 to recognize they can and should permit additional discovery in appropriate cases,  
490 commensurate with the complexity and magnitude of the dispute.

491 **Protective Order Language Moved to Rule 37.** The 2011 amendments delete in  
492 its entirety the prior language of Rule 26(c) governing motions for protective orders. The  
493 substance of that language is now found in Rule 37. The committee determined it was  
494 preferable to cover all discovery motions through a single rule, rather than through two  
495 separate rules. Accordingly, Rule 37 now governs all discovery motions and orders,  
496 including protective orders as well as orders compelling discovery or imposing  
497 sanctions.

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

508

## Advisory Committee Notes

Disclosure Requirements and Timing. Rule 26(a)(1). The 2011 amendments seek to reduce discovery costs by requiring each party to produce, at an early stage in the case, and without a discovery request, all of the documents and physical evidence the party may offer in its case-in-chief and the names of witnesses the party may call in its case-in-chief, with a description of their expected testimony. In this respect, the amendments build on the initial disclosure requirements of the prior rules. In addition to the disclosures required by the prior version of Rule 26(a)(1), a party must disclose each fact witness the party may call in its case-in-chief and a summary of the witness's expected testimony, a copy of all documents the party may offer in its case-in-chief, and all documents to which a party refers in its pleadings. ~~The duty to provide this~~

Not all information will be known at the outset of a case. If discovery is serving its proper purpose, additional witnesses, documents, and other information will be obtained. The scope and the level of detail required in the initial Rule 26(a)(1) disclosures should be viewed in light of this reality. A party, for example, is not required to interview every witness it ultimately may call at trial in order to provide a summary of the witness's expected testimony. For witnesses outside a party's control, it is expected that less information would be known at the beginning of a case and therefore any summary of their expected testimony would necessarily be limited to what the witness is reasonably expected to testify about. Additionally, the summary of the witness's expected testimony should be just that – a summary. The rule does not require prefiled testimony or detailed descriptions of everything a witness might say at trial. On the other hand, it requires more than the the broad, conclusory statements that often were made under the prior version of Rule 26(a)(1) (e.g., "The witness will testify about the events in question" or "The witness will testify on causation."). The intent of this requirement is to give the other side basic information that can be used to determine the subjects about which the witness is expected to testify at trial, to determine the witness's relative importance to disputed issues in the case, and to enable the opposing party to determine if the witness is someone who should be interviewed (if not a party) or deposed, or from whom additional information otherwise should be obtained. This information is important because of the other discovery limits contained in the 2011 amendments, particularly the limits on depositions. Likewise, the documents that should be provided as part of the Rule 26(a)(1) disclosures are those that a party reasonably believes it may use at trial, understanding that not all documents will be available at the outset of a case. In this regard, it is important to remember that the duty to provide documents and witness information is a continuing one, and disclosures must be promptly supplemented as new evidence and witnesses become known– as the case progresses.

The amendments also require parties to provide more information about damages early in the case. Too often, the subject of damages is deferred until

late in the case. Early disclosure of damages information is important. Among other things, it is a critical factor in determining proportionality. The committee recognizes that damages often require additional discovery, and typically are the subject of expert testimony. The Rule is not intended to require expert disclosures at the outset of a case. At the same time, the subject of damages should not simply be deferred until expert discovery. Parties should make a good faith attempt to compute damages to the extent it is possible to do so and must in any event provide all discoverable information on the subject, including materials related to the nature and extent of the damages.

The penalty for failing to make timely disclosures is that the evidence may not be used in the party's case-in-chief. To make the disclosure requirement meaningful, and to discourage sandbagging, parties must know that if they fail to disclose important information that is helpful to their case, they will not be able to use that information at trial. The courts will be expected to enforce them unless the failure is harmless or the party shows good cause for the failure.

The 2011 amendments also change the time for making these required disclosures. Because the plaintiff controls when it brings the action, plaintiffs must make their disclosures within 14 days after service of the first answer. A defendant is required to make its disclosures within 28 days after the plaintiff's first disclosure or after that defendant's appearance, whichever is later. The purpose of early disclosure is to have all parties present the evidence they expect to use to prove their claims or defenses, thereby giving the opposing party the ability to better evaluate the case and determine what additional discovery is necessary and proportional.

The time periods for making Rule 26(a)(1) disclosures, and the presumptive deadlines for completing fact discovery, are keyed to the filing of an answer. If a defendant files a motion to dismiss or other Rule 12(b) motion in lieu of an answer, these time periods normally would be stayed during the pendency of that motion.

Finally, the 2011 amendments eliminate two categories of actions that previously were exempt from the mandatory disclosure requirements. Specifically, the amendments eliminate the prior exemption for contract actions in which the amount claimed is \$20,000 or less, and actions in which any party is proceeding pro se. In the committee's view, these types of actions will benefit from the early disclosure requirements and the overall reduced cost of discovery.

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

deposition to ensure the expert would not offer “surprise” testimony at trial, thereby increasing rather than decreasing the overall cost. The amendments seek to remedy this and other costs associated with expert discovery by, among other things, allowing the opponent to choose either a deposition of the expert or a written report, but not both; in the case of written reports, requiring more comprehensive disclosures, signed by the expert, and making clear that experts will not be held to these disclosures allowed to testify beyond what is fairly disclosed in a report, all with the goal of making reports a reliable substitute for depositions; and incorporating a rule that protects from discovery most communications between an attorney and retained expert. ~~The amendments also address the issue of the “non-retained” expert.~~ Discovery of expert opinions and testimony is automatic under Rule 26(a)(3) and parties are not required to serve interrogatories or use other discovery devices to obtain this information.

The amendments also address the issue of the “non-retained” expert. Their expected testimony must be disclosed and they are subject to depositions similar to a fact witness.

Disclosures of expert testimony are made in sequence, with the party who bears the burden of proof on the issue for which expert testimony will be offered going first. Within seven days after the close of fact discovery, that party must disclose: (i) the expert’s curriculum vitae identifying the expert’s qualifications, publications, and prior testimony; (ii) compensation information; (iii) a brief summary of the opinions the expert will offer ~~— not a lengthy or exhaustive list, but merely notice of the issues the expert will address at trial;~~ and (iv) a complete copy of the expert’s file for the case. The file should include all of the facts and data that the expert has relied upon in forming the expert’s opinions. If the expert has prepared summaries of data, spreadsheets, charts, tables, or similar materials, they should be included. If the expert has used software programs to make calculations or otherwise summarize or organize data, that information and underlying formulas should be provided in native form so it can be analyzed and understood. ~~If~~To the extent the expert is relying on depositions or materials produced in discovery, then a list of the specific materials relied upon is sufficient. The committee recognizes that experts frequently will prepare demonstrative exhibits or other aids to illustrate the expert’s testimony at trial, and the costs for preparing these materials can be substantial. For that reason, these types of demonstrative aids ~~should~~may be prepared and disclosed later, as part of the Rule 26(a)(4) pretrial disclosures when trial ~~appears more likely is~~imminent.

Within seven days after this disclosure, the party opposing the retained expert may elect either a deposition or a written report from the expert. A deposition is limited to four hours, which is not included in the deposition hours under Rule 26(c)(5), and the party taking it must pay the expert’s hourly fee for attending the deposition. If a party elects a written report, the expert must provide a signed report containing a complete statement of all opinions the expert will express and

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

The report or deposition must be completed within 28 days after the election is made. After this, the party who does not bear the burden of proof on the issue for which expert testimony is offered must make its corresponding disclosures and the opposing party may then elect either a deposition or a written report. Under the deadlines contained in the rules, expert discovery should take less than three months to complete. However, as with the other discovery rules, these deadlines can be altered by stipulation of the parties or order of the court.

The amendments also address the issue of testimony from experts other than those who are retained or specially employed to provide expert testimony, or whose duties as an employee regularly involve giving expert testimony. ~~For these types of experts, such as treating physicians, police officers, or accident investigators, the party who intends to offer that expert must disclose the subject matter on which the expert is expected to testify and a summary of the facts and opinions to which the witness is expected to testify. Because.~~ This issue was addressed by the Supreme Court in Drew v. Lee, 2011 UT 15, wherein the court held that reports under the prior version of Rule 26(a)(3) are not required for treating physicians.

There are a number of difficulties inherent in disclosing expert testimony that may be offered from fact witnesses. First, there is often not a clear line between fact and expert testimony. Many fact witnesses have scientific, technical or other specialized knowledge, and their testimony about the events in question often will cross into the area of expert testimony. The rules are not intended to erect artificial barriers to the admissibility of such testimony. Second, many of these fact witnesses will not be within the control of the party who plans to call them at trial. These witnesses may not be cooperative, and may not be willing to discuss opinions they have with counsel. Where this is the case, disclosures will necessarily be more limited. On the other hand, consistent with the overall purpose of the 2011 amendments, a party should receive advance notice if their opponent will solicit expert opinions from a particular witness so they can plan their case accordingly. In an effort to strike an appropriate balance, the rules require that such witnesses be identified and the information about their

anticipated testimony should include that which is required under Rule 26(a)(1)(A)(ii) which should include any opinion testimony that a party expects to elicit from them at trial. If a party has disclosed possible opinion testimony in its Rule 26(a)(1)(A)(ii) disclosures, that party is not required to prepare a separate Rule 26(a)(3)(D) disclosure for the witness. And if that disclosure is made in advance of the witness's deposition, those opinions should be explored in the deposition and not in a separate expert deposition. Rule 26(a)(3)(D) and 26(a)(1)(A)(ii) are not intended to elevate form over substance – all they require is that a party fairly inform its opponent that opinion testimony may be offered from a particular witness. And because a party who expects to offer such this testimony normally cannot compel such a witness to prepare a written report, further discovery must be done by interview or by deposition, subject to the same limitations as other expert depositions.

Finally, the amendments include a new Rule 26(b)(7) that protects from discovery draft expert reports and, with limited exception, communications between an attorney and an expert. These changes are modeled after the recent changes to the Federal Rules of Civil Procedure and are intended to address the unnecessary and costly procedures that often were employed in order to protect such information from discovery, and to reduce “satellite litigation” over such issues.

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

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

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

Under the prior rule ~~and the federal rule~~, the party objecting to the discovery request had the burden of proving that a discovery request was not proportional. The new rule changes the burden of proof. Today, the party seeking discovery beyond the scope of “standard” discovery has the burden of showing that the request is “relevant to the claim or defense of any party” and that the request satisfies the standards of proportionality.

The 2011 amendments establish three tiers of standard discovery in Rule 26(c). Ideally, rules of procedure should be crafted to promote predictability for litigants. Rules should limit the need to resort to judicial oversight. Tiered standard discovery seeks to achieve these ends. The “one-size-fits-all” system is rejected. Tiered discovery signals to judges, attorneys, and parties the amount of discovery which by rule is deemed proportional for cases with different amounts in controversy.

Any system of rules which permits the facts and circumstances of each case to inform procedure cannot eliminate uncertainty. Ultimately, the trial court has broad discretion in deciding whether a discovery request is proportional and the standards of. The proportionality standards in subpart (b)(4) are intended to guide the exercise of 2) and the discovery tiers in subpart (c) mitigate uncertainty by guiding that discretion. Over time, the The proper application of these the proportionality standards will be defined over time by trial and appellate courts.

Standard and Extraordinary Discovery. Rule 26(c). As a counterpart to requiring more detailed disclosures under Rule 26(a), the 2011 amendments place new limitations on additional discovery the parties may conduct. Because the committee expects the enhanced disclosure requirements will automatically permit each party to learn the witnesses and evidence the opposing side will offer in its case-in-chief, additional discovery should serve the more limited function of permitting parties to find witnesses, documents, and other evidentiary materials that are harmful, rather than helpful, to the opponent’s case.

Rule 26(c) provides for three separate “tiers” of limited, “standard” discovery that is are presumed to be proportional to the amount and issues in controversy in the action, which and that the parties may conduct as a matter of right. Standard discovery is limited. Each party may take up to 16 hours of depositions. No deposition of a party may exceed seven hours, and no deposition of a non-party witness may exceed four hours. The number of interrogatories is limited to 15; the number of document requests is limited to 25; and the number of requests for admission is limited to 25. The time for standard discovery is limited to 150 days, after which the An aggregation of all damages sought by all parties in an action dictates the applicable tier of standard discovery, whether such damages are sought by way of a complaint, counterclaim, or otherwise. The tiers of standard discovery are set forth in a chart that is embedded in the body of the rule itself. “Tier 1” describes a minimal amount of standard discovery that is presumed proportional for cases involving damages of \$50,000 or less. “Tier 2” sets forth

larger limits on standard discovery that are applicable in cases involving damages above \$50,000 but less than \$300,000. Finally, "Tier 3" prescribes still greater standard discovery for actions involving damages in excess of \$300,000. The tiers also provide presumptive limitations on the time within which standard discovery should be completed, which limitations similarly increase with the amount of damages at issue. After the expiration of the applicable time limitation, a case is presumed to be ready for trial. Actions for non-monetary relief, such as injunctive relief, are subject to the standard discovery limitations of Tier 2, absent an accompanying monetary claim of \$300,000 or more, in which case Tier 3 applies. The committee determined these standard discovery limitations based on the observation expectation that for the majority of cases filed in the Utah State Courts involve disputes that are relatively modest in magnitude and lack significant factual complexity. Accordingly, the 2011 amendments provide an opportunity for standard discovery that the committee believes, the magnitude of available discovery and applicable time parameters available under the three-tiered system should be sufficient for the typical state court cases involving the respective amounts of damages.

Despite the expectation that standard discovery according to the applicable tier should be adequate in the typical case, the 2011 amendments contemplate there will be some cases for which standard discovery is not sufficient or appropriate. In such cases, parties may conduct additional discovery that is shown to be consistent with the principle of proportionality. There are two ways to obtain such additional discovery. The first is by stipulation. If the parties can agree additional discovery is necessary, they may stipulate to as much additional discovery as they desire, provided they stipulate the additional discovery is proportional to what is at stake in the litigation and counsel for each party certifies that it the party has reviewed and approved a budget for additional discovery. The certification must confirm that the actual party in question, and not merely counsel, has reviewed and approved the budget. Such a stipulation should be filed before the close of the standard discovery time limit, but only after the completion of standard discovery available under the rule. If these conditions are met, the Court will not second-guess the parties and their counsel and must approve the stipulation.

The second method to obtain additional discovery is by motion. The committee recognizes there will be some cases in which additional discovery is appropriate, but the parties cannot agree to the scope of such additional discovery. These would may include, among other categories, large and factually complex cases and cases in which there is a significant disparity in the parties' access to information, such that one party legitimately has a greater need than the other party for additional discovery in order to prepare properly for trial. To prevent a party from taking advantage of this situation, the 2011 amendments allow any party to move the Court for additional discovery. As with stipulations for extraordinary discovery, a party filing a motion for extraordinary discovery should do so before the close of the standard discovery time limit, but only after the

moving party has completed the standard discovery available to it under the rule. By taking advantage of this discovery, counsel should be better equipped to articulate for the court what additional discovery is needed and why. The party making such a motion must demonstrate that the additional discovery is proportional and certify that the party has reviewed and approved a discovery budget. The burden to show the need for additional discovery, and to demonstrate relevance and proportionality, always falls on the party seeking additional discovery. However, cases in which such additional discovery is appropriate do exist, and it is important for ~~Courts~~courts to recognize they can and should permit additional discovery in appropriate cases, commensurate with the complexity and magnitude of the dispute.

Protective Order Language Moved to Rule 37. The 2011 amendments delete in its entirety the prior language of Rule 26(c) governing motions for protective orders. The substance of that language is now found in Rule 37. The committee determined it was preferable to cover all motions to compel, motions for protective orders, and motions for discovery motions through sanctions in a single rule, rather than ~~through~~ two separate rules. Accordingly, Rule 37 now governs all discovery ~~these~~ motions and orders, ~~including protective orders as well as orders compelling discovery or imposing sanctions.~~

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

Document comparison by Workshare Professional on Monday, April 18, 2011  
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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 and discovery in domestic relations actions.**

2       (a) Scope. This rule applies to the following domestic relations actions, ~~including:~~  
3       divorce, ~~;~~ temporary separation, ~~;~~ separate maintenance, ~~;~~ parentage, custody, child  
4       support; and modification. This rule does not apply to adoptions, enforcement of prior  
5       orders, cohabitant abuse protective orders, child protective orders, ~~and~~ civil stalking  
6       injunctions, or grandparent visitation.

7       (b) Time for disclosure. ~~Without waiting for a discovery request, petitioner~~ In addition  
8       to the disclosures required in Rule 26, in all domestic relations actions, ~~shall disclose to~~  
9       ~~respondent~~ the documents required in this rule ~~within 40 days after service of the~~  
10       ~~petition unless respondent defaults or consents to entry of the decree. The respondent~~  
11       ~~shall disclose to petitioner the documents required in this rule within 40 days after~~  
12       ~~respondent's answer is due~~ shall be disclosed by the petitioner within 14 days after  
13       service of the first answer to the complaint and by the respondent within 28 days after  
14       the petitioner's first disclosure or 28 days after that respondent's appearance, whichever  
15       is later.

16       (c) Financial Declaration. Each party shall disclose to all other parties a fully  
17       completed court-approved Financial Declaration and attachments. Each party shall  
18       attach to the Financial Declaration the following:

19       (c)(1) For every item and amount listed in the Financial Declaration, excluding  
20       monthly expenses, the producing party shall attach copies of statements verifying the  
21       amounts listed on the Financial Declaration that are reasonably available to the party.

22       (c)(2) For the two tax years before the petition was filed, complete federal and state  
23       income tax returns, including Form W-2 and supporting tax schedules and attachments,  
24       filed by or on behalf of that party or by or on behalf of any entity in which the party has a  
25       majority or controlling interest, including, but not limited to, Form 1099 and Form K-1  
26       with respect to that party.

27       (c)(3) Pay stubs and other evidence of all earned and un-earned income for the 12  
28       months before the petition was filed.

29 (c)(4) All loan applications and financial statements prepared or used by the party  
30 within the 12 months before the petition was filed.

31 (c)(5) Documents verifying the value of all real estate in which the party has an  
32 interest, including, but not limited to, the most recent appraisal, tax valuation and  
33 refinance documents.

34 (c)(6) All statements for the 3 months before the petition was filed for all financial  
35 accounts, including, but not limited to checking, savings, money market funds,  
36 certificates of deposit, brokerage, investment, retirement, regardless of whether the  
37 account has been closed including those held in that party's name, jointly with another  
38 person or entity, or as a trustee or guardian, or in someone else's name on that party's  
39 behalf.

40 (c)(7) If the foregoing documents are not reasonably available or are in the  
41 possession of the other party, the party disclosing the Financial Declaration shall  
42 estimate the amounts entered on the Financial Declaration, the basis for the estimation  
43 and an explanation why the documents are not available.

44 (d) Certificate of Service. Each party shall file a Certificate of Service with the court  
45 certifying that he or she has provided the Financial Declaration and attachments to the  
46 other party in compliance with this rule.

47 (e) Exempted agencies. Agencies of the State of Utah are not subject to these  
48 disclosure requirements.

49 (f) Sanctions. Failure to fully disclose all assets and income in the Financial  
50 Declaration and attachments may subject the non-disclosing party to sanctions under  
51 Rule 37 including an award of non-disclosed assets to the other party, attorney's fees or  
52 other sanctions deemed appropriate by the court.

53 (g) Failure of a party to comply with this rule does not preclude any other party from  
54 obtaining a default judgment, proceeding with the case, or seeking other relief from the  
55 court.

56 (h) Notice of the requirements of this rule shall be served on the Respondent and all  
57 joined parties with the initial petition.

58

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

2       (a) The parties may by written stipulation provide that depositions may be taken  
3 before any person, at any time or place, upon any notice, and in any manner and when  
4 so taken may be used like other depositions.

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

13

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)(B) 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 written interrogatories upon any other party, subject to the limits of Rule 26(c)(5) up to  
4 15 written interrogatories, including all discrete subparts. Each interrogatory shall be  
5 separately stated and numbered.

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

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

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

25

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 each~~ request before  
24 responding to it. The response shall state, with respect to each item or category, that  
25 inspection and related acts will be permitted as requested, or that the request is  
26 objected to. If the party objects to a request, the party must state the reasons for the  
27 objection. Any reason not stated is waived unless excused by the court for good cause.  
28 The party shall identify and permit inspection of any part of a request that is not  
29 objectionable. If the party objects to the requested form or forms for producing  
30 electronically stored information -- or if no form was specified in the request -- the  
31 responding party must state the form or 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~~ the examiner as an expert report**  
17 **as required by Rule 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 disclosure~~ under Rule 26 with the option of a report or a  
67 deposition. The Committee notes that, as with other experts, the use of subpoenas to  
68 obtain prior reports remains an option for the practitioner in appropriate circumstances,  
69 subject to Rule 26 proportionality standards.

70

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 and  
6 numbered. ~~During standard discovery, a party may not request admission of more than~~  
7 ~~25 matters.~~ A copy of the document shall be served with the request unless it has  
8 already been furnished or made available for inspection and copying. The request shall  
9 notify the responding party that the matters will be deemed admitted unless the party  
10 responds within 28 days after 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 each~~ request and its number before  
15 responding to it. Unless the answering party objects to a matter, the party must admit or  
16 deny the matter or state in detail the reasons why the party cannot truthfully admit or  
17 deny. A party may identify the part of a matter which is true and deny the rest. A denial  
18 shall fairly meet the substance of the request. Lack of information is not a reason for  
19 failure to admit or deny unless the information known or reasonably available is  
20 insufficient to form an admission or denial. If the truth of a matter is a genuine issue for  
21 trial, the answering party may deny the matter or state the reasons for the failure to  
22 admit or deny.

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

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

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

34

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)(2).

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)(2), 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)(2), 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. A motion to compel or for a  
64 protective order does not suspend or toll the time to complete standard discovery.

65 (e) Failure to comply with order.

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

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

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

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

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

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

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

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

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

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

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

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

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

94 (f)(4) that the request is not proportional under Rule 26(b)(2); or

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

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

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

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

117 Advisory Committee Notes

118 The [2010-2011](#) amendments to Rule 37 make two principal changes. First, the  
119 amended Rule 37 consolidates provisions for motions for a protective order (formerly  
120 set forth in Rule 26(c)) with provisions for motions to compel. By consolidating the  
121 standards for these two motions in a single rule, the Advisory Committee sought to

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

124       Second, the amended Rule 37 incorporates the new Rule 26 standard of  
125 "proportionality" as a principal criterion on which motions to compel or for a protective  
126 order should be evaluated. As to motions to compel, Rule 37(a)(3) requires that a party  
127 moving to compel discovery certify to the court "that the discovery being sought is  
128 proportional under Rule 26(b)(2)." Rule 37(b) makes clear that a lack of proportionality  
129 may be raised as ground for seeking a protective order, indicating that "the party  
130 seeking the discovery has the burden of demonstrating that the information being  
131 sought is proportional."

132