

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)(3), 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, except for
11 an adverse party, a summary of 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 that
15 have not yet been prepared and must be disclosed in accordance with paragraph (a)(5);

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

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

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

23 (a)(2) **Timing of initial disclosures.** The disclosures required by paragraph (a)(1)
24 shall be made:

25 (a)(2)(A) by the plaintiff within 14 days after service of the first answer to the
26 complaint; and

27 (a)(2)(B) by the defendant within 28 days after the plaintiff's first disclosure or after
28 that defendant's appearance, whichever is later.

29 (a)(3) **Exemptions.**

30 (a)(3)(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)(3)(A)(i) for judicial review of adjudicative proceedings or rule making proceedings
33 of an administrative agency;

34 (a)(3)(A)(ii) governed by Rule 65B or Rule 65C;

35 (a)(3)(A)(iii) to enforce an arbitration award;

36 (a)(3)(A)(iv) for water rights general adjudication under Title 73, Chapter 4.

37 (a)(3)(B) In an exempt action, the matters subject to disclosure under paragraph
38 (a)(1) are subject to discovery under paragraph (b).

39 (a)(4) **Expert testimony.**

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

52 (a)(4)(B) **Limits on expert discovery.** Further discovery may be obtained from an
53 expert witness either by deposition or by written report. A deposition shall not exceed
54 four hours and the party taking the deposition shall pay the expert's reasonable hourly
55 fees for attendance at the deposition. A report shall be signed by the expert and shall
56 contain a complete statement of all opinions the expert will offer at trial and the basis
57 and reasons for them. Such an expert may not testify in a party's case-in-chief
58 concerning any matter not fairly disclosed in the report. The party offering the expert
59 shall pay the costs for the report.

60 (a)(4)(C) **Timing for expert discovery.**

61 (a)(4)(C)(i) The party who bears the burden of proof on the issue for which expert
62 testimony is offered shall provide the information required by paragraph (a)(4)(A) within
63 seven days after the close of fact discovery. Within seven days thereafter, the party
64 opposing the expert may serve notice electing either a deposition of the expert pursuant
65 to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B).
66 The deposition shall occur, or the report shall be provided, within 28 days after the
67 election is made. If no election is made, then no further discovery of the expert shall be
68 permitted.

69 (a)(4)(C)(ii) The party who does not bear the burden of proof on the issue for which
70 expert testimony is offered shall provide the information required by paragraph (a)(4)(A)
71 within seven days after the later of (i) the date on which the election under paragraph
72 (a)(4)(C)(i) is due, or (ii) receipt of the written report or the taking of the expert's
73 deposition pursuant to paragraph (a)(4)(C)(i). Within seven days thereafter, the party
74 opposing the expert may serve notice electing either a deposition of the expert pursuant
75 to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B).
76 The deposition shall occur, or the report shall be provided, within 28 days after the
77 election is made. If no election is made, then no further discovery of the expert shall be
78 permitted.

79 (a)(4)(D) **Multiparty actions.** In multiparty actions, all parties opposing the expert
80 must agree on either a report or a deposition. If all parties opposing the expert do not
81 agree, then further discovery of the expert may be obtained only by deposition pursuant
82 to paragraph (a)(4)(B) and Rule 30.

83 (a)(4)(E) **Summary of non-retained expert testimony.** If a party intends to present
84 evidence at trial under Rules 702, 703, or of the Utah Rules of Evidence from any
85 person other than an expert witness who is retained or specially employed to provide
86 testimony in the case or a person whose duties as an employee of the party regularly
87 involve giving expert testimony, that party must provide a written summary of the facts
88 and opinions to which the witness is expected to testify in accordance with the

89 deadlines set forth in paragraph (a)(4)(C). A deposition of such a witness may not
90 exceed four hours.

91 (a)(5) **Pretrial disclosures.**

92 (a)(5)(A) A party shall, without waiting for a discovery request, provide to other
93 parties:

94 (a)(5)(A)(i) the name and, if not previously provided, the address and telephone
95 number of each witness, unless solely for impeachment, separately identifying
96 witnesses the party will call and witnesses the party may call;

97 (a)(5)(A)(ii) the name of witnesses whose testimony is expected to be presented by
98 transcript of a deposition and a copy of the transcript with the proposed testimony
99 designated; and

100 (a)(5)(A)(iii) a copy of each exhibit, including charts, summaries and demonstrative
101 exhibits, unless solely for impeachment, separately identifying those which the party will
102 offer and those which the party may offer.

103 (a)(5)(B) Disclosure required by paragraph (a)(5) shall be made at least 28 days
104 before trial. At least 14 days before trial, a party shall serve and file counter-104
105 designations of deposition testimony, objections and grounds for the objections to the
106 use of a deposition and to the admissibility of exhibits. Other than objections under
107 Rules and of the Utah Rules of Evidence, objections not listed are waived unless
108 excused by the court for good cause.

109 (b) **Discovery scope.**

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

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

114 (b)(2)(A) the discovery is reasonable, considering the needs of the case, the amount
115 in controversy, the complexity of the case, the parties' resources, the importance of the
116 issues, and the importance of the discovery in resolving the issues;

117 (b)(2)(B) the likely benefits of the proposed discovery outweigh the burden or
118 expense;

119 (b)(2)(C) the discovery is consistent with the overall case management and will
120 further the just, speedy and inexpensive determination of the case;

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

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

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

127 (b)(3) **Burden.** The party seeking discovery always has the burden of showing
128 proportionality and relevance. To ensure proportionality, the court may enter orders
129 under Rule 37.

130 (b)(4) **Electronically stored information.** A party claiming that electronically stored
131 information is not reasonably accessible because of undue burden or cost shall
132 describe the source of the electronically stored information, the nature and extent of the
133 burden, the nature of the information not provided, and any other information that will
134 enable other parties to evaluate the claim.

135 (b)(5) **Trial preparation materials.** A party may obtain otherwise discoverable
136 documents and tangible things prepared in anticipation of litigation or for trial by or for
137 another party or by or for that other party's representative (including the party's attorney,
138 consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party
139 seeking discovery has substantial need of the materials and that the party is unable
140 without undue hardship to obtain substantially equivalent materials by other means. In
141 ordering discovery of such materials, the court shall protect against disclosure of the
142 mental impressions, conclusions, opinions, or legal theories of an attorney or other
143 representative of a party.

144 (b)(6) **Statement previously made about the action.** A party may obtain without
145 the showing required in paragraph (b)(5) a statement concerning the action or its
146 subject matter previously made by that party. Upon request, a person not a party may
147 obtain without the required showing a statement about the action or its subject matter
148 previously made by that person. If the request is refused, the person may move for a

149 court order under Rule 37. A statement previously made is (A) a written statement
150 signed or approved by the person making it, or (B) a stenographic, mechanical,
151 electronic, or other recording, or a transcription thereof, which is a substantially verbatim
152 recital of an oral statement by the person making it and contemporaneously recorded.

153 (b)(7) **Trial preparation; experts.**

154 (b)(7)(A) **Trial-preparation protection for draft reports or disclosures.** Paragraph
155 (b)(5) protects drafts of any report or disclosure required under paragraph (a)(4),
156 regardless of the form in which the draft is recorded.

157 (b)(7)(B) **Trial-preparation protection for communications between a party's**
158 **attorney and expert witnesses.** Paragraph (b)(5) protects communications between
159 the party's attorney and any witness required to provide disclosures under paragraph
160 (a)(4), regardless of the form of the communications, except to the extent that the
161 communications:

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

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

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

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

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

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

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

176 (b)(8)(A) **Information withheld.** If a party withholds discoverable information by
177 claiming that it is privileged or prepared in anticipation of litigation or for trial, the party
178 shall make the claim expressly and shall describe the nature of the documents,

179 communications, or things not produced in a manner that, without revealing the
180 information itself, will enable other parties to evaluate the claim.

181 (b)(8)(B) **Information produced.** If a party produces information that the party
182 claims is privileged or prepared in anticipation of litigation or for trial, the producing party
183 may notify any receiving party of the claim and the basis for it. After being notified, a
184 receiving party must promptly return, sequester, or destroy the specified information and
185 any copies it has and may not use or disclose the information until the claim is resolved.
186 A receiving party may promptly present the information to the court under seal for a
187 determination of the claim. If the receiving party disclosed the information before being
188 notified, it must take reasonable steps to retrieve it. The producing party must preserve
189 the information until the claim is resolved.

190 (c) **Methods, sequence and timing of discovery; tiers; limits on standard**
191 **discovery; extraordinary discovery.**

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

197 (c)(2) **Sequence and timing of discovery.** Methods of discovery may be used in
198 any sequence, and the fact that a party is conducting discovery shall not delay any
199 other party's discovery. Except for cases exempt under paragraph (a)(3), a party may
200 not seek discovery from any source before that party's initial disclosure obligations are
201 satisfied.

202 (c)(3) **Definition of tiers for standard discovery.** Actions claiming \$50,000 or less
203 in damages are permitted standard discovery as described for Tier 1. Actions claiming
204 more than \$50,000 and less than \$300,000 in damages are permitted standard
205 discovery as described for Tier 2. Actions claiming \$300,000 or more in damages are
206 permitted standard discovery as described for Tier 3. Absent an accompanying damage
207 claim for more than \$300,000, actions claiming non-monetary relief are permitted
208 standard discovery as described for Tier 2.

209 (c)(4) **Definition of damages.** For purposes of determining standard discovery, the
 210 amount of damages includes the total of all monetary damages sought (without
 211 duplication for alternative theories) by all parties in all claims for relief in the original
 212 pleadings.

213 (c)(5) **Limits on standard fact discovery.** Standard fact discovery per side
 214 (plaintiffs collectively, defendants collectively, and third-party defendants collectively) in
 215 each tier is as follows. The days to complete standard fact discovery are calculated from
 216 the date the first defendant's first disclosure is due and do not include expert discovery
 217 under paragraphs(a)(4)(C) and (D).

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

218 (c)(6) **Extraordinary discovery.** To obtain discovery beyond the limits established in
 219 paragraph (c)(5), a party shall file:

220 (c)(6)(A) before the close of standard discovery and after reaching the limits of
 221 standard discovery imposed by these rules, a stipulated statement that extraordinary
 222 discovery is necessary and proportional under paragraph (b)(2) and that each party has
 223 reviewed and approved a discovery budget; or

224 (c)(6)(B) before the close of standard discovery and after reaching the limits of
 225 standard discovery imposed by these rules, a motion for extraordinary discovery setting
 226 forth the reasons why the extraordinary discovery is necessary and proportional under
 227 paragraph (b)(2) and certifying that the party has reviewed and approved a discovery

228 budget and certifying that the party has in good faith conferred or attempted to confer
229 with the other party in an effort to achieve a stipulation.

230 (d) **Requirements for disclosure or response; disclosure or response by an**
231 **organization; failure to disclose; initial and supplemental disclosures and**
232 **responses.**

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

235 (d)(2) If the party providing disclosure or responding to discovery is a corporation,
236 partnership, association, or governmental agency, the party shall act through one or
237 more officers, directors, managing agents, or other persons, who shall make disclosures
238 and responses to discovery based on the information then known or reasonably
239 available to the party.

240 (d)(3) A party is not excused from making disclosures or responses because the
241 party has not completed investigating the case or because the party challenges the
242 sufficiency of another party's disclosures or responses or because another party has not
243 made disclosures or responses.

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

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

253 (e) **Signing discovery requests, responses, and objections.** Every disclosure,
254 request for discovery, response to a request for discovery and objection to a request for
255 discovery shall be in writing and signed by at least one attorney of record or by the party
256 if the party is not represented. The signature of the attorney or party is a certification
257 under Rule 11. If a request or response is not signed, the receiving party does not need

258 to take any action with respect to it. If a certification is made in violation of the rule, the
259 court, upon motion or upon its own initiative, may take any action authorized by Rule 11
260 or Rule 37(e).

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

265 **Advisory Committee Notes**

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

276 Not all information will be known at the outset of a case. If discovery is serving its
277 proper purpose, additional witnesses, documents, and other information will be
278 identified. The scope and the level of detail required in the initial Rule 26(a)(1)
279 disclosures should be viewed in light of this reality. A party is not required to interview
280 every witness it ultimately may call at trial in order to provide a summary of the witness's
281 expected testimony. As the information becomes known, it should be disclosed. No
282 summaries are required for adverse parties, including management level employees of
283 business entities, because opposing lawyers are unable to interview them and their
284 testimony is available to their own counsel. For uncooperative or hostile witnesses any
285 summary of expected testimony would necessarily be limited to the subject areas the
286 witness is reasonably expected to testify about. For example, defense counsel may be
287 unable to interview a treating physician, so the initial summary may only disclose that

288 the witness will be questioned concerning the plaintiff's diagnosis, treatment and
289 prognosis. After medical records have been obtained, the summary may be expanded
290 or refined.

291 Subject to the foregoing qualifications, the summary of the witness's expected
292 testimony should be just that – a summary. The rule does not require prefiled testimony
293 or detailed descriptions of everything a witness might say at trial. On the other hand, it
294 requires more than the broad, conclusory statements that often were made under the
295 prior version of Rule 26(a)(1)(e.g., "The witness will testify about the events in question"
296 or "The witness will testify on causation."). The intent of this requirement is to give the
297 other side basic information concerning the subjects about which the witness is
298 expected to testify at trial, so that the other side may determine the witness's relative
299 importance in the case, whether the witness should be interviewed or deposed, and
300 whether additional documents or information concerning the witness should be sought.
301 This information is important because of the other discovery limits contained in the 2011
302 amendments, particularly the limits on depositions.

303 Likewise, the documents that should be provided as part of the Rule 26(a)(1)
304 disclosures are those that a party reasonably believes it may use at trial, understanding
305 that not all documents will be available at the outset of a case. In this regard, it is
306 important to remember that the duty to provide documents and witness information is a
307 continuing one, and disclosures must be promptly supplemented as new evidence and
308 witnesses become known as the case progresses.

309 The amendments also require parties to provide more information about damages
310 early in the case. Too often, the subject of damages is deferred until late in the case.
311 Early disclosure of damages information is important. Among other things, it is a critical
312 factor in determining proportionality. The committee recognizes that damages often
313 require additional discovery, and typically are the subject of expert testimony. The Rule
314 is not intended to require expert disclosures at the outset of a case. At the same time,
315 the subject of damages should not simply be deferred until expert discovery. Parties
316 should make a good faith attempt to compute damages to the extent it is possible to do

317 so and must in any event provide all discoverable information on the subject, including
318 materials related to the nature and extent of the damages.

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

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

333 The time periods for making Rule 26(a)(1) disclosures, and the presumptive
334 deadlines for completing fact discovery, are keyed to the filing of an answer. If a
335 defendant files a motion to dismiss or other Rule 12(b) motion in lieu of an answer,
336 these time periods normally would be not begin to run until that motion is resolved.

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

343 **Expert disclosures and timing.** Rule 26(a)(3). Expert discovery has become an
344 ever-increasing component of discovery cost. The prior rules sought to eliminate some
345 of these costs by requiring the written disclosure of the expert's opinions and other
346 background information. However, because the expert was not required to sign these

347 disclosures, and because experts often were allowed to deviate from the opinions
348 disclosed, attorneys typically would take the expert's deposition to ensure the expert
349 would not offer "surprise" testimony at trial, thereby increasing rather than decreasing
350 the overall cost. The amendments seek to remedy this and other costs associated with
351 expert discovery by, among other things, allowing the opponent to choose either a
352 deposition of the expert or a written report, but not both; in the case of written reports,
353 requiring more comprehensive disclosures, signed by the expert, and making clear that
354 experts will not be allowed to testify beyond what is fairly disclosed in a report, all with
355 the goal of making reports a reliable substitute for depositions; and incorporating a rule
356 that protects from discovery most communications between an attorney and retained
357 expert. Discovery of expert opinions and testimony is automatic under Rule 26(a)(3) and
358 parties are not required to serve interrogatories or use other discovery devices to obtain
359 this information.

360 Disclosures of expert testimony are made in sequence, with the party who bears the
361 burden of proof on the issue for which expert testimony will be offered going first. Within
362 seven days after the close of fact discovery, that party must disclose: (i) the expert's
363 curriculum vitae identifying the expert's qualifications, publications, and prior testimony;
364 (ii) compensation information; (iii) a brief summary of the opinions the expert will offer;
365 and (iv) a complete copy of the expert's file for the case. The file should include all of
366 the facts and data that the expert has relied upon in forming the expert's opinions. If the
367 expert has prepared summaries of data, spreadsheets, charts, tables, or similar
368 materials, they should be included. If the expert has used software programs to make
369 calculations or otherwise summarize or organize data, that information and underlying
370 formulas should be provided in native form so it can be analyzed and understood. To
371 the extent the expert is relying on depositions or materials produced in discovery, then a
372 list of the specific materials relied upon is sufficient. The committee recognizes that
373 experts frequently will prepare demonstrative exhibits or other aids to illustrate the
374 expert's testimony at trial, and the costs for preparing these materials can be
375 substantial. For that reason, these types of demonstrative aids may be prepared and
376 disclosed later, as part of the Rule 26(a)(4) pretrial disclosures when trial is imminent.

377 Within seven days after this disclosure, the party opposing the retained expert may
378 elect either a deposition or a written report from the expert. A deposition is limited to four
379 hours, which is not included in the deposition hours under Rule 26(c)(5), and the party
380 taking it must pay the expert's hourly fee for attending the deposition. If a party elects a
381 written report, the expert must provide a signed report containing a complete statement
382 of all opinions the expert will express and the basis and reasons for them. The intent is
383 not to require a verbatim transcript of exactly what the expert will say at trial; instead the
384 expert must fairly disclose the substance of and basis for each opinion the expert will
385 offer. The expert may not testify in a party's case in chief concerning any matter that is
386 not fairly disclosed in the report. To achieve the goal of making reports a reliable
387 substitute for depositions, courts are expected to enforce this requirement. If a party
388 elects a deposition, rather than a report, it is up to the party to ask the necessary
389 questions to "lock in" the expert's testimony. But the expert is expected to be fully
390 prepared on all aspects of his/her trial testimony at the time of the deposition and may
391 not leave the door open for additional testimony by qualifying answers to deposition
392 questions.

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

400 The amendments also address the issue of testimony from non-retained experts,
401 such as treating physicians, police officers, or employees with special expertise, who
402 are not retained or specially employed to provide expert testimony, or whose duties as
403 an employee do not regularly involve giving expert testimony. This issue was addressed
404 by the Supreme Court in *Drew v. Lee*, 2011 UT 15, wherein the court held that reports
405 under the prior version of Rule 26(a)(3) are not required for treating physicians.

406 There are a number of difficulties inherent in disclosing expert testimony that may be
407 offered from fact witnesses. First, there is often not a clear line between fact and expert
408 testimony. Many fact witnesses have scientific, technical or other specialized
409 knowledge, and their testimony about the events in question often will cross into the
410 area of expert testimony. The rules are not intended to erect artificial barriers to the
411 admissibility of such testimony. Second, many of these fact witnesses will not be within
412 the control of the party who plans to call them at trial. These witnesses may not be
413 cooperative, and may not be willing to discuss opinions they have with counsel. Where
414 this is the case, disclosures will necessarily be more limited. On the other hand,
415 consistent with the overall purpose of the 2011 amendments, a party should receive
416 advance notice if their opponent will solicit expert opinions from a particular witness so
417 they can plan their case accordingly. In an effort to strike an appropriate balance, the
418 rules require that such witnesses be identified and the information about their
419 anticipated testimony should include that which is required under Rule 26(a)(1)(A)(ii),
420 which should include any opinion testimony that a party expects to elicit from them at
421 trial. If a party has disclosed possible opinion testimony in its Rule 26(a)(1)(A)(ii)
422 disclosures, that party is not required to prepare a separate Rule 26(a)(3)(D) disclosure
423 for the witness. And if that disclosure is made in advance of the witness's deposition,
424 those opinions should be explored in the deposition and not in a separate expert
425 deposition. Otherwise, the timing for disclosure of non-retained expert opinions is the
426 same as that for retained experts under Rule 26(a)(4)(C) and depends on whether the
427 party has the burden of proof or is responding to another expert. Rule 26(a)(3)(D) and
428 26(a)(1)(A)(ii) are not intended to elevate form over substance – all they require is that a
429 party fairly inform its opponent that opinion testimony may be offered from a particular
430 witness. And because a party who expects to offer this testimony normally cannot
431 compel such a witness to prepare a written report, further discovery must be done by
432 interview or by deposition.

433 Finally, the amendments include a new Rule 26(b)(7) that protects from discovery
434 draft expert reports and, with limited exception, communications between an attorney
435 and an expert. These changes are modeled after the recent changes to the Federal

436 Rules of Civil Procedure and are intended to address the unnecessary and costly
437 procedures that often were employed in order to protect such information from
438 discovery, and to reduce “satellite litigation” over such issues.

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

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

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

456 Under the prior rule, the party objecting to the discovery request had the burden of
457 proving that a discovery request was not proportional. The new rule changes the burden
458 of proof. Today, the party seeking discovery beyond the scope of “standard” discovery
459 has the burden of showing that the request is “relevant to the claim or defense of any
460 party” and that the request satisfies the standards of proportionality. As before, ultimate
461 admissibility is not an appropriate objection to a discovery request so long as the
462 proportionality standard and other requirements are met.

463 The 2011 amendments establish three tiers of standard discovery in Rule 26(c).
464 Ideally, rules of procedure should be crafted to promote predictability for litigants. Rules
465 should limit the need to resort to judicial oversight. Tiered standard discovery seeks to

466 achieve these ends. The “one-size-fits-all” system is rejected. Tiered discovery signals
467 to judges, attorneys, and parties the amount of discovery which by rule is deemed
468 proportional for cases with different amounts in controversy.

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

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

483 Rule 26(c) provides for three separate “tiers” of limited, “standard” discovery that are
484 presumed to be proportional to the amount and issues in controversy in the action, and
485 that the parties may conduct as a matter of right. An aggregation of all damages sought
486 by all parties in an action dictates the applicable tier of standard discovery, whether
487 such damages are sought by way of a complaint, counterclaim, or otherwise. The tiers
488 of standard discovery are set forth in a chart that is embedded in the body of the rule
489 itself. “Tier 1” describes a minimal amount of standard discovery that is presumed
490 proportional for cases involving damages of \$50,000 or less. “Tier 2” sets forth larger
491 limits on standard discovery that are applicable in cases involving damages above
492 \$50,000 but less than \$300,000. Finally, “Tier 3” prescribes still greater standard
493 discovery for actions involving damages in excess of \$300,000. Deposition hours are
494 charged to a side for the time spent asking questions of the witness. In a particular
495 deposition, one side may use two hours while the other side uses only 30 minutes. The

496 tiers also provide presumptive limitations on the time within which standard discovery
497 should be completed, which limitations similarly increase with the amount of damages at
498 issue. Discovery motions will not toll the period. Parties are expected to be reasonable
499 and accomplish as much as they can during standard discovery. The motions may result
500 in additional discovery and sanctions at the expense of a party who unreasonably fails
501 to respond or otherwise frustrates discovery. After the expiration of the applicable time
502 limitation, a case is presumed to be ready for trial. Actions for non-monetary relief, such
503 as injunctive relief, are subject to the standard discovery limitations of Tier 2, absent an
504 accompanying monetary claim of \$300,000 or more, in which case Tier 3 applies. The
505 committee determined these standard discovery limitations based on the expectation
506 that for the majority of cases filed in the Utah State Courts, the magnitude of available
507 discovery and applicable time parameters available under the three-tiered system
508 should be sufficient for cases involving the respective amounts of damages.

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

522 The second method to obtain additional discovery is by motion. The committee
523 recognizes there will be some cases in which additional discovery is appropriate, but the
524 parties cannot agree to the scope of such additional discovery. These may include,
525 among other categories, large and factually complex cases and cases in which there is

526 a significant disparity in the parties' access to information, such that one party
527 legitimately has a greater need than the other party for additional discovery in order to
528 prepare properly for trial. To prevent a party from taking advantage of this situation, the
529 2011 amendments allow any party to move the Court for additional discovery. As with
530 stipulations for extraordinary discovery, a party filing a motion for extraordinary
531 discovery should do so before the close of the standard discovery time limit, but only
532 after the moving party has reached the limits for that type of standard discovery
533 available to it under the rule. By taking advantage of this discovery, counsel should be
534 better equipped to articulate for the court what additional discovery is needed and why.
535 The party making such a motion must demonstrate that the additional discovery is
536 proportional and certify that the party has reviewed and approved a discovery budget.
537 The burden to show the need for additional discovery, and to demonstrate relevance
538 and proportionality, always falls on the party seeking additional discovery. However,
539 cases in which such additional discovery is appropriate do exist, and it is important for
540 courts to recognize they can and should permit additional discovery in appropriate
541 cases, commensurate with the complexity and magnitude of the dispute.

542 **Protective order language moved to Rule 37.** The 2011 amendments delete in its
543 entirety the prior language of Rule 26(c) governing motions for protective orders. The
544 substance of that language is now found in Rule 37. The committee determined it was
545 preferable to cover motions to compel, motions for protective orders, and motions for
546 discovery sanctions in a single rule, rather than two separate rules. Accordingly, Rule 37
547 now governs these motions and orders.

548 **Consequences of failure to disclose.** Rule 26(d). If a party fails to disclose or to
549 supplement timely its discovery responses, that party cannot use the undisclosed
550 witness, document, or material at any hearing or trial, absent proof that non-disclosure
551 was harmless or justified by good cause. More complete disclosures increase the
552 likelihood that the case will be resolved justly, speedily, and inexpensively. Not being
553 able to use evidence that a party fails properly to disclose provides a powerful incentive
554 to make complete disclosures. This is true only if trial courts hold parties to this
555 standard. Accordingly, although a trial court retains discretion to determine how properly

Rule 26.

Effective Date: November 1, 2011

556 to address this issue in a given case, the usual and expected result should be exclusion
557 of the evidence.
558