

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

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

5 (a)(1) **Initial disclosures.** Except in cases exempt under ~~subdivision (a)(2) and~~
6 ~~except as otherwise stipulated or directed by order, paragraph (a)(3),~~ a party shall,
7 without ~~awaiting~~waiting for a discovery request, provide to other parties:

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

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

12 (a)(1)(A)(ii) each fact witness the party may call in its case-in-chief and, except for
13 an adverse party, a summary of the expected testimony;

14 (a)(1)(B) a copy of, ~~or a description by category and location of,~~ all ~~discoverable~~
15 documents, data compilations, electronically stored information, and tangible things in
16 the possession, ~~custody, or control of the party supporting its claims or defenses, unless~~
17 ~~solely for impeachment;~~ or control of the party that the party may offer in its case-in-
18 chief, except charts, summaries and demonstrative exhibits that have not yet been
19 prepared and must be disclosed in accordance with paragraph (a)(5);

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

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

28 ~~Unless otherwise stipulated by the parties or ordered by the court, the disclosures~~
29 ~~required by subdivision (a)(1) shall be made within 14 days after the meeting of the~~
30 ~~parties under subdivision (f). Unless otherwise stipulated by the parties or ordered by~~

31 ~~the court, a party joined after the meeting of the parties shall make these disclosures~~
32 ~~within 30 days after being served. A party shall make initial disclosures based on the~~
33 ~~information then reasonably available and is not excused from making disclosures~~
34 ~~because the party has not fully completed the investigation of the case or because the~~
35 ~~party challenges the sufficiency of another party's disclosures or because another party~~
36 ~~has not made disclosures.~~

37 ~~(a)(2) Exemptions.~~

38 ~~(a)(2)(A) The requirements of subdivision (a)(1) and subdivision (f) do not apply to~~
39 ~~actions:~~

40 ~~(a)(2)(A)(i) based on contract in which the amount demanded in the pleadings is~~
41 ~~\$20,000 or less;~~

42 ~~(a)(2)(A)(ii)(a)(1)(E) a copy of all documents to which a party refers in its pleadings.~~

43 ~~**(a)(2) Timing of initial disclosures.** The disclosures required by paragraph (a)(1)~~
44 ~~shall be made:~~

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

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

49 ~~**(a)(3) Exemptions.**~~

50 ~~(a)(3)(A) Unless otherwise ordered by the court or agreed to by the parties, the~~
51 ~~requirements of paragraph (a)(1) do not apply to actions:~~

52 ~~(a)(3)(A)(i) for judicial review of adjudicative proceedings or rule making proceedings~~
53 ~~of an administrative agency;~~

54 ~~(a)(23)(A)(iii) governed by Rule 65B or Rule 65C;~~

55 ~~(a)(23)(A)(iv) to enforce an arbitration award;~~

56 ~~(a)(23)(A)(v) for water rights general adjudication under Title 73, Chapter 4; and~~

57 ~~(a)(2)(A)(vi) in which any party not admitted to practice law in Utah is not~~
58 ~~represented by counsel.~~

59 ~~(a)(23)(B) In an exempt action, the matters subject to disclosure under~~
60 ~~subpartparagraph (a)(1) are subject to discovery under subpartparagraph (b).~~

61 (a)(34) **Expert testimony.**

62 **(a)(4)(A) Disclosure of expert testimony.**

63 ~~(a)(3)(A)~~ A party shall ~~disclose to~~, without waiting for a discovery request, provide to
64 the other parties the identity of following information regarding any person who may be
65 used at trial to present evidence under Rules 702, 703, or ~~705~~ of the Utah Rules of
66 Evidence.

67 ~~(a)(3)(B) Unless otherwise stipulated by the parties or ordered by the court, this~~
68 ~~disclosure shall, with respect to a witness and~~ who is retained or specially employed to
69 provide expert testimony in the case or whose duties as an employee of the party
70 regularly involve giving expert testimony, ~~be accompanied by a written report prepared:~~
71 (i) the expert's name and signed by the witness or party. The report shall contain the
72 subject matter on which the expert is expected to testify; the substance of the facts and
73 opinions to which the expert is expected to testify; a summary of the grounds for each
74 opinion; the qualifications of the witness, including a list of all publications authored by
75 the witness within the preceding ten 10 years; the compensation to be paid for the study
76 and testimony; and a listing, and a list of any other cases in which the witness expert has
77 testified as an expert at trial or by deposition within the preceding four years., (ii) a brief
78 summary of the opinions to which the witness is expected to testify, (iii) all data and
79 other information that will be relied upon by the witness in forming those opinions, and
80 (iv) the compensation to be paid for the witness's study and testimony.

81 ~~(a)(3)(C) Unless otherwise stipulated~~ **(a)(4)(B) Limits on expert discovery.** Further
82 discovery may be obtained from an expert witness either by deposition or by written
83 report. A deposition shall not exceed four hours and ~~the parties or ordered by party~~
84 taking the court, deposition shall pay the disclosures expert's reasonable hourly fees for
85 attendance at the deposition. A report shall be signed by the expert and shall contain a
86 complete statement of all opinions the expert will offer at trial and the basis and reasons
87 for them. Such an expert may not testify in a party's case-in-chief concerning any matter
88 not fairly disclosed in the report. The party offering the expert shall pay the costs for the
89 report.

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

91 (a)(4)(C)(i) The party who bears the burden of proof on the issue for which expert
92 testimony is offered shall provide the information required by ~~subdivision~~paragraph
93 ~~(a)(3) shall be made~~(A) within ~~30~~seven days after the ~~expiration~~close of fact discovery
94 ~~as~~. Within seven days thereafter, the party opposing the expert may serve notice
95 electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30,
96 or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the
97 report shall be provided by ~~subdivision (d) or, if the evidence is intended solely to~~
98 ~~contradict or rebut evidence on the same subject matter identified by another party,~~
99 within 28 days after the election is made. If no election is made, then no further
100 discovery of the expert shall be permitted.

101 (a)(4)(C)(ii) The party who does not bear the burden of proof on the issue for which
102 expert testimony is offered shall provide the information required by paragraph (a)(4)(A)
103 within seven days after the later of (i) the date on which the election under paragraph
104 ~~(3)(B), within 60 days after the disclosure made by the other party.~~(a)(4)(C)(i) is due, or
105 (ii) receipt of the written report or the taking of the expert's deposition pursuant to
106 paragraph (a)(4)(C)(i). Within seven days thereafter, the party opposing the expert may
107 serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B)
108 and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall
109 occur, or the report shall be provided, within 28 days after the election is made. If no
110 election is made, then no further discovery of the expert shall be permitted.

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

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

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

123 (a)(5) Pretrial disclosures.

124 (a)(5)(A) A party shall, without waiting for a discovery request, provide to other
125 parties the following information regarding the evidence that it may present at trial other
126 than solely for impeachment.:

127 (a)(45)(A)(i) the name and, if not previously provided, the address and telephone
128 number of each witness, unless solely for impeachment, separately identifying
129 witnesses the party expects to present will call and witnesses the party may call if the
130 need arises.;

131 (a)(4)(B5)(A)(ii) the designation name of witnesses whose testimony is expected to
132 be presented by means of a deposition and, if not taken stenographically, a transcript of
133 the pertinent portions of the a deposition and a copy of the transcript with the proposed
134 testimony designated; and

135 (a)(4)(C) an appropriate identification (a)(5)(A)(iii) a copy of each document or other
136 exhibit, including charts, summaries of other evidence and demonstrative exhibits,
137 unless solely for impeachment, separately identifying those which the party expects
138 to will offer and those which the party may offer if the need arises.;

139 Unless otherwise stipulated (a)(5)(B) Disclosure required by the parties or ordered by
140 the court, the disclosures required by subdivision (a)(4) paragraph (a)(5) shall be made at
141 least 3028 days before trial. Within At least 14 days thereafter, unless a different time is
142 specified by the court before trial, a party may shall serve and file a list disclosing (i) any
143 counter-104 designations of deposition testimony, objections and grounds for the
144 objections to the use under Rule 32(a) of a deposition designated by another party
145 under subparagraph (B) and (ii) any objection, together with the grounds therefor, that
146 may be made to of a deposition and to the admissibility of materials identified under
147 subparagraph (C). Objections not so disclosed, other exhibits. Other than objections
148 under Rules 402 and 403 of the Utah Rules of Evidence, shall be deemed objections not
149 listed are waived unless excused by the court for good cause shown.;

150 ~~(a)(5) Form of disclosures. Unless otherwise stipulated by the parties or ordered by~~
151 ~~the court, all disclosures under paragraphs (1), (3) and (4) shall be made in writing,~~
152 ~~signed and served.~~

153 ~~(a)(6) Methods to discover additional matter. Parties may obtain discovery by one or~~
154 ~~more of the following methods: depositions upon oral examination or written questions;~~
155 ~~written interrogatories; production of documents or things or permission to enter upon~~
156 ~~land or other property, for inspection and other purposes; physical and mental~~
157 ~~examinations; and requests for admission.~~

158 ~~(b) Discovery scope and limits. Unless otherwise limited by order of the court in~~
159 ~~accordance with these rules, the scope of discovery is as follows:~~

160 (b) Discovery scope.

161 (b)(1) **In general.** Parties may ~~obtain discovery regarding~~ discover any matter, not
162 privileged, which is relevant to the ~~subject matter involved in the pending action,~~
163 ~~whether it relates to the~~ claim or defense of any party if the discovery satisfies the
164 standards of proportionality set forth below.

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

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

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

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

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

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

176 (b)(2)(F) the party seeking discovery ~~or to the claim or defense of any other party,~~
177 ~~including the existence, description, nature, custody, condition, and location of any~~
178 ~~books, documents, or other tangible things and the identity and location of persons~~
179 ~~having knowledge of any discoverable matter. It is not ground for objection~~ has not had

180 sufficient opportunity to obtain the information by discovery or otherwise, taking into
181 account the parties' relative access to the information.

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

185 (b)(4) **Electronically stored information.** A party claiming that the information
186 sought will be inadmissible at the trial if the information sought appears reasonably
187 calculated to lead to the discovery of admissible evidence.

188 (b)(2) A party need not provide discovery of electronically stored information from
189 sources that the party identifies as is not reasonably accessible because of undue
190 burden or cost. The party shall expressly make any claim that the source is not
191 reasonably accessible, describing shall describe the source of the electronically stored
192 information, the nature and extent of the burden, the nature of the information not
193 provided, and any other information that will enable other parties to assess the claim.
194 On motion to compel discovery or for a protective order, the party from whom discovery
195 is sought must show that the information is not reasonably accessible because of undue
196 burden or cost. If that showing is made, the court may order discovery from such
197 sources if the requesting party shows good cause, considering the limitations of
198 subsection (b)(3). The court may specify conditions for the discovery. evaluate the claim.

199 (b)(3) Limitations. The frequency or extent of use of the discovery methods set forth
200 in Subdivision (a)(6) shall be limited by the court if it determines that:

201 (b)(3)(A) the discovery sought is unreasonably cumulative or duplicative, or is
202 obtainable from some other source that is more convenient, less burdensome, or less
203 expensive;

204 (b)(3)(B) the party seeking discovery has had ample opportunity by discovery in the
205 action to obtain the information sought; or

206 (b)(3)(C) the discovery is unduly burdensome or expensive, taking into account the
207 needs of the case, the amount in controversy, limitations on the parties' resources, and
208 the importance of the issues at stake in the litigation. The court may act upon its own
209 initiative after reasonable notice or pursuant to a motion under Subdivision (c).

210 ~~(b)(4)-(b)(5) Trial preparation: Materials. Subject to the provisions of Subdivision~~
211 ~~(b)(5) of this rule, a materials. A~~ party may obtain ~~discovery of otherwise discoverable~~
212 documents and tangible things ~~otherwise discoverable under Subdivision (b)(1) of this~~
213 ~~rule and~~ prepared in anticipation of litigation or for trial by or for another party or by or
214 for that other party's representative (including the party's attorney, consultant, surety,
215 indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has
216 substantial need of the materials ~~in the preparation of the case~~ and that the party is
217 unable without undue hardship to obtain ~~the substantial~~ substantially equivalent ~~of the~~
218 materials by other means. In ordering discovery of such materials ~~when the required~~
219 ~~showing has been made~~, the court shall protect against disclosure of the mental
220 impressions, conclusions, opinions, or legal theories of an attorney or other
221 representative of a party ~~concerning the litigation.~~

222 (b)(6) Statement previously made about the action. A party may obtain without
223 the showing required ~~showing in paragraph (b)(5)~~ a statement concerning the action or
224 its subject matter previously made by that party. Upon request, a person not a party
225 may obtain without the required showing a statement ~~concerning about~~ the action or its
226 subject matter previously made by that person. If the request is refused, the person may
227 move for a court order. ~~The provisions of under~~ Rule 37(a)(4) ~~apply to the award of~~
228 ~~expenses incurred in relation to the motion. For purposes of this paragraph, a A~~
229 statement previously made is (A) a written statement signed or ~~otherwise adopted or~~
230 approved by the person making it, or (B) a stenographic, mechanical,
231 ~~electrical~~ electronic, or other recording, or a transcription thereof, which is a substantially
232 verbatim recital of an oral statement by the person making it and contemporaneously
233 recorded.

234 (b)(~~5~~) Trial preparation: Experts; experts.

235 (b)(~~5~~)(A) ~~A party may depose~~ Trial preparation protection for draft reports or
236 disclosures. Paragraph (b)(5) protects drafts of any ~~person who has been identified as~~
237 ~~an expert whose opinions may be presented at trial. If a report is~~ disclosure required
238 under ~~subdivision (a)(3)(B), paragraph (a)(4), regardless of the form in which the draft is~~
239 recorded.

240 (b)(7)(B) Trial-preparation protection for communications between a party's
241 attorney and expert witnesses. Paragraph (b)(5) protects communications between
242 the party's attorney and any deposition shall be conducted within 60 days after the
243 report is witness required to provide disclosures under paragraph (a)(4), regardless of
244 the form of the communications, except to the extent that the communications:

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

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

248 ~~(b)(5)(B) A party may~~ (b)(7)(B)(iii) identify assumptions that the party's attorney
249 provided and that the expert relied on in forming the opinions to be expressed.

250 (b)(7)(C) Expert employed only for trial preparation. Ordinarily, a party may not,
251 by interrogatories or otherwise, discover facts known or opinions held by an expert who
252 has been retained or specially employed by another party in anticipation of litigation or
253 preparation to prepare for trial and who is not expected to be called as a witness at trial,
254 only as provided in Rule 35(b) or upon a showing of exceptional circumstances under
255 which it is impracticable for the A party seeking discovery to obtain facts or opinions on
256 the same subject by other means. may do so only:

257 ~~(b)(5)(C) Unless manifest injustice would result,~~

258 ~~(b)(5)(C)(i) The court shall require that the party seeking discovery pay the expert a~~
259 ~~reasonable fee for time spent in responding to discovery under Subdivision (b)(5) of this~~
260 ~~rule; and as provided in Rule 35(b); or~~

261 ~~(b)(5)(C)(ii) With respect to discovery obtained under Subdivision (b)(5)(A) of this~~
262 ~~rule the court may require, and with respect to discovery obtained under Subdivision~~
263 ~~(b)(5)(B) of this rule the court shall require, the party seeking discovery to pay the other~~
264 ~~party a fair portion of the fees and expenses reasonably incurred by the latter party in~~
265 ~~obtaining facts and opinions from the expert.~~

266 ~~(b)(6)(b)(7)(C)(ii) on showing exceptional circumstances under which it is~~
267 ~~impracticable for the party to obtain facts or opinions on the same subject by other~~
268 ~~means.~~

269 (b)(8) Claims of ~~Privilege~~**privilege** or ~~Protection~~**protection** of Trial Preparation
270 Materials.~~trial preparation materials.~~

271 (b)(~~68~~)(A) **Information withheld.** ~~When~~If a party withholds ~~information otherwise~~
272 ~~discoverable under these rules~~ information by claiming that it is privileged or ~~subject to~~
273 ~~protection as trial preparation material~~prepared in anticipation of litigation or for trial, the
274 party shall make the claim expressly and shall describe the nature of the documents,
275 communications, or things not produced ~~or disclosed~~ in a manner that, without revealing
276 ~~the~~ information itself ~~privileged or protected~~, will enable other parties to ~~assess the~~
277 ~~applicability of~~evaluate the ~~privilege or protection claim.~~

278 (b)(~~68~~)(B) **Information produced.** If a party produces information that the party
279 claims is ~~produced~~privileged or prepared in ~~discovery that is subject to a~~
280 ~~claim~~anticipation of ~~privilege~~litigation or ~~of protection as for~~ trial preparation material, the
281 ~~party making~~, the claim producing party may notify any receiving party ~~that received the~~
282 ~~information~~ of the claim and the basis for it. After being notified, a receiving party must
283 promptly return, sequester, or destroy the specified information and any copies it has
284 and may not use or disclose the information until the claim is resolved. A receiving party
285 may promptly present the information to the court under seal for a determination of the
286 claim. If the receiving party disclosed the information before being notified, it must take
287 reasonable steps to retrieve it. The producing party must preserve the information until
288 the claim is resolved.

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

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

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

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

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

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

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

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

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

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

315 ~~(d)~~ **(c) Methods, sequence and timing of discovery; tiers; limits on standard**
316 **discovery; extraordinary discovery.**

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

322 **(c)(2) Sequence and timing of discovery.** ~~Except for cases exempt under~~
323 ~~subdivision (a)(2), except as authorized under these rules, or unless otherwise~~
324 ~~stipulated by the parties or ordered by the court, a party may not seek discovery from~~
325 ~~any source before the parties have met and conferred as required by subdivision (f).~~
326 ~~Unless otherwise stipulated by the parties or ordered by the court, fact discovery shall~~
327 ~~be completed within 240 days after the first answer is filed. Unless the court upon~~

328 ~~motion, for the convenience of parties and witnesses and in the interests of justice,~~
 329 ~~orders otherwise, methods~~Methods of discovery may be used in any sequence, and the
 330 fact that a party is conducting discovery, ~~whether by deposition or otherwise,~~ shall not
 331 ~~operate to~~ delay any other party's discovery.

332 ~~(e) Supplementation of responses. A party who has made a~~ Except for cases exempt
 333 under paragraph (a)(3), a party may not seek discovery from any source before that
 334 party's initial disclosure under subdivision (a) or responded to a request for discovery
 335 with a response is under a duty to supplement the disclosure or response to include
 336 information thereafter acquired if ordered by the court or in the following
 337 circumstances: obligations are satisfied.

338 ~~(e)(c)(3)~~ **Definition of tiers for standard discovery.** Actions claiming \$50,000 or
 339 less in damages are permitted standard discovery as described for Tier 1)A. Actions
 340 claiming more than \$50,000 and less than \$300,000 in damages are permitted standard
 341 discovery as described for Tier 2. Actions claiming \$300,000 or more in damages are
 342 permitted standard discovery as described for Tier 3. Absent an accompanying damage
 343 claim for more than \$300,000, actions claiming non-monetary relief are permitted
 344 standard discovery as described for Tier 2.

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

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

<u>Tier</u>	<u>Amount of Damages</u>	<u>Total Fact Deposition Hours</u>	<u>Rule 33 Interrogatories including all discrete subparts</u>	<u>Rule 34 Requests for Production</u>	<u>Rule 36 Requests for Admission</u>	<u>Days to Complete Standard Fact Discovery</u>
<u>1</u>	<u>\$50,000 or</u>	<u>3</u>	<u>0</u>	<u>5</u>	<u>5</u>	<u>120</u>

	<u>less</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>

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

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

360 (c)(6)(B) before the close of standard discovery and after reaching the limits of
 361 standard discovery imposed by these rules, a motion for extraordinary discovery setting
 362 forth the reasons why the extraordinary discovery is necessary and proportional under
 363 paragraph (b)(2) and certifying that the party has reviewed and approved a discovery
 364 budget and certifying that the party has in good faith conferred or attempted to confer
 365 with the other party in an effort to achieve a stipulation.

366 (d) **Requirements for disclosure or response; disclosure or response by an**
 367 **organization; failure to disclose; initial and supplemental disclosures and**
 368 **responses.**

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

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

376 (d)(3) A party is not excused from making disclosures or responses because the
377 party has not completed investigating the case or because the party challenges the
378 sufficiency of another party's disclosures or responses or because another party has not
379 made disclosures or responses.

380 (d)(4) If a party fails to disclose or to supplement timely a disclosure or response to
381 discovery, that party may not use the undisclosed witness, document or material at
382 appropriate intervals disclosures under subdivision (a) if the any hearing or trial unless
383 the failure is harmless or the party shows good cause for the failure.

384 (d)(5) If a party learns that in some material respect the information disclosed a
385 disclosure or response is incomplete or incorrect and if in some important way, the party
386 must timely provide the additional or corrective information has not otherwise been
387 made known to the other parties during the discovery process or in writing. With respect
388 to testimony of an expert from whom a report is required under subdivision (a)(3)(B) the
389 duty extends both to correct information contained in the report and to information
390 provided through a deposition of the expert if it has not been made known to the other
391 parties. The supplemental disclosure or response must state why the additional or
392 correct information was not previously provided.

393 (e)(2) A party is under a duty seasonably to amend a prior response to an
394 interrogatory, request for production, or request for admission if the party learns that the
395 response is in some material respect incomplete or incorrect and if the additional or
396 corrective information has not otherwise been made known to the other parties during
397 the discovery process or in writing.

398 (f) Discovery and scheduling conference.

399 The following applies to all cases not exempt under subdivision (a)(2), except as
400 otherwise stipulated or directed by order.

401 (f)(1) The parties shall, as soon as practicable after commencement of the action,
402 meet in person or by telephone to discuss the nature and basis of their claims and
403 defenses, to discuss the possibilities for settlement of the action, to make or arrange for
404 the disclosures required by subdivision (a)(1), to discuss any issues relating to
405 preserving discoverable information and to develop a stipulated discovery plan.

406 ~~Plaintiff's counsel shall schedule the meeting. The attorneys of record shall be present~~
407 ~~at the meeting and shall attempt in good faith to agree upon the discovery plan.~~

408 ~~(f)(2) The plan shall include:~~

409 ~~(f)(2)(A) what changes should be made in the timing, form, or requirement for~~
410 ~~disclosures under subdivision (a), including a statement as to when disclosures under~~
411 ~~subdivision (a)(1) were made or will be made;~~

412 ~~(f)(2)(B) the subjects on which discovery may be needed, when discovery should be~~
413 ~~completed, whether discovery should be conducted in phases and whether discovery~~
414 ~~should be limited to particular issues;~~

415 ~~(f)(2)(C) any issues relating to preservation, disclosure or discovery of electronically~~
416 ~~stored information, including the form or forms in which it should be produced;~~

417 ~~(f)(2)(D) any issues relating to claims of privilege or of protection as trial preparation~~
418 ~~material, including - if the parties agree on a procedure to assert such claims after~~
419 ~~production - whether to ask the court to include their agreement in an order;~~

420 ~~(f)(2)(E) what changes should be made in the limitations on discovery imposed~~
421 ~~under these rules, and what other limitations should be imposed;~~

422 ~~(f)(2)(F) the deadline for filing the description of the factual and legal basis for~~
423 ~~allocating fault to a non-party and the identity of the non-party; and~~

424 ~~(f)(2)(G) any other orders that should be entered by the court.~~

425 ~~(f)(3) Plaintiff's counsel shall submit to the court within 14 days after the meeting and~~
426 ~~in any event no more than 60 days after the first answer is filed a proposed form of~~
427 ~~order in conformity with the parties' stipulated discovery plan. The proposed form of~~
428 ~~order shall also include each of the subjects listed in Rule 16(b)(1)-(8), except that the~~
429 ~~date or dates for pretrial conferences, final pretrial conference and trial shall be~~
430 ~~scheduled with the court or may be deferred until the close of discovery. If the parties~~
431 ~~are unable to agree to the terms of a discovery plan or any part thereof, the plaintiff~~
432 ~~shall and any party may move the court for entry of a discovery order on any topic on~~
433 ~~which the parties are unable to agree. Unless otherwise ordered by the court, the~~
434 ~~presumptions established by these rules shall govern any subject not included within~~
435 ~~the parties' stipulated discovery plan.~~

436 ~~(f)(4) Any party may request a scheduling and management conference or order~~
437 ~~under Rule 16(b).~~

438 ~~(f)(5) A party joined after the meeting of the parties is bound by the stipulated~~
439 ~~discovery plan and discovery order, unless the court orders on stipulation or motion a~~
440 ~~modification of the discovery plan and order. The stipulation or motion shall be filed~~
441 ~~within a reasonable time after joinder.~~

442 ~~(g)(e) **Signing of discovery requests, responses, and objections.** Every~~
443 ~~disclosure, request for discovery or, response or to a request for discovery and objection~~
444 ~~thereto made by to a party request for discovery shall be in writing and signed by at least~~
445 ~~one attorney of record or by the party if the party is not represented, whose address~~
446 ~~shall be stated. The signature of the attorney or party constitutes a certification that the~~
447 ~~person has read the request, response, or objection and that to the best of the person's~~
448 ~~knowledge, information, and belief formed after reasonable inquiry it is: (1) consistent~~
449 ~~with these rules and warranted by existing law or a good faith argument for the~~
450 ~~extension, modification, or reversal of existing law; (2) not interposed for any improper~~
451 ~~purpose, such as to harass or to cause unnecessary delay or needless increase in the~~
452 ~~cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given~~
453 ~~the needs of the case, the discovery already had in the case, the amount in controversy,~~
454 ~~and the importance of the issues at stake in the litigation. If a request, response, or~~
455 ~~objection is is a certification under Rule 11. If a request or response is not signed, it~~
456 ~~shall be stricken unless it is signed promptly after the omission is called to the attention~~
457 ~~of the party making the request, response, or objection, and a party shall not be~~
458 ~~obligated the receiving party does not need to take any action with respect to it until it is~~
459 ~~signed.~~

460 ~~If a certification is made in violation of the rule, the court, upon motion or upon its~~
461 ~~own initiative, shall impose upon the person who made the certification, the party on~~
462 ~~whose behalf the request, response, or objection is made, or both, an appropriate~~
463 ~~sanction, which may include an order to pay the amount of the reasonable expenses~~
464 ~~incurred because of the violation, including a reasonable attorney fee. may take any~~
465 ~~action authorized by Rule 11 or Rule 37(e).~~

466 ~~(h) Deposition where action pending in another state. Any party to an action or~~
467 ~~proceeding in another state may take the deposition of any person within this state, in~~
468 ~~the same manner and subject to the same conditions and limitations as if such action or~~
469 ~~proceeding were pending in this state, provided that in order to obtain a subpoena the~~
470 ~~notice of the taking of such deposition shall be filed with the clerk of the court of the~~
471 ~~county in which the person whose deposition is to be taken resides or is to be served,~~
472 ~~and provided further that all matters arising during the taking of such deposition which~~
473 (f) Filing. Except as required by these rules are required to be submitted to the court
474 shall be submitted to the court in the county where the deposition is being taken.

475 ~~(i) Filing.~~

476 ~~(i)(1) Unless otherwise or~~ ordered by the court, a party shall not file ~~disclosures or~~
477 ~~requests with the court a disclosure, a request~~ for discovery ~~with the court or a response~~
478 ~~to a request for discovery~~, but shall file only the ~~original~~ certificate of service stating that
479 the ~~disclosures or requests for discovery have been served on the other parties and the~~
480 ~~date of service. Unless otherwise ordered by the court, a party shall not file a response~~
481 ~~to a request for discovery with the court, but shall file only the original certificate of~~
482 ~~service stating that the disclosure, request for discovery or~~ response has been served on
483 the other parties and the date of service. ~~Except as provided in Rule 30(f)(1), Rule 32 or~~
484 ~~unless otherwise ordered by the court, depositions shall not be filed with the court.~~

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

488 ~~Advisory Committee Notes~~

489 **Advisory Committee Notes**

490 **Disclosure requirements and timing.** Rule 26(a)(1). The 2011 amendments seek
491 to reduce discovery costs by requiring each party to produce, at an early stage in the
492 case, and without a discovery request, all of the documents and physical evidence the
493 party may offer in its case-in-chief and the names of witnesses the party may call in its
494 case-in-chief, with a description of their expected testimony. In this respect, the
495 amendments build on the initial disclosure requirements of the prior rules. In addition to

496 the disclosures required by the prior version of Rule 26(a)(1), a party must disclose
497 each fact witness the party may call in its case-in-chief and a summary of the witness's
498 expected testimony, a copy of all documents the party may offer in its case-in-chief, and
499 all documents to which a party refers in its pleadings.

500 Not all information will be known at the outset of a case. If discovery is serving its
501 proper purpose, additional witnesses, documents, and other information will be
502 identified. The scope and the level of detail required in the initial Rule 26(a)(1)
503 disclosures should be viewed in light of this reality. A party is not required to interview
504 every witness it ultimately may call at trial in order to provide a summary of the witness's
505 expected testimony. As the information becomes known, it should be disclosed. No
506 summaries are required for adverse parties, including management level employees of
507 business entities, because opposing lawyers are unable to interview them and their
508 testimony is available to their own counsel. For uncooperative or hostile witnesses any
509 summary of expected testimony would necessarily be limited to the subject areas the
510 witness is reasonably expected to testify about. For example, defense counsel may be
511 unable to interview a treating physician, so the initial summary may only disclose that
512 the witness will be questioned concerning the plaintiff's diagnosis, treatment and
513 prognosis. After medical records have been obtained, the summary may be expanded
514 or refined.

515 Subject to the foregoing qualifications, the summary of the witness's expected
516 testimony should be just that – a summary. The rule does not require prefiled testimony
517 or detailed descriptions of everything a witness might say at trial. On the other hand, it
518 requires more than the broad, conclusory statements that often were made under the
519 prior version of Rule 26(a)(1)(e.g., "The witness will testify about the events in question"
520 or "The witness will testify on causation.")). The intent of this requirement is to give the
521 other side basic information concerning the subjects about which the witness is
522 expected to testify at trial, so that the other side may determine the witness's relative
523 importance in the case, whether the witness should be interviewed or deposed, and
524 whether additional documents or information concerning the witness should be sought.

525 This information is important because of the other discovery limits contained in the 2011
526 amendments, particularly the limits on depositions.

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

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

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

549 The 2011 amendments also change the time for making these required disclosures.
550 Because the plaintiff controls when it brings the action, plaintiffs must make their
551 disclosures within 14 days after service of the first answer. A defendant is required to
552 make its disclosures within 28 days after the plaintiff's first disclosure or after that
553 defendant's appearance, whichever is later. The purpose of early disclosure is to have
554 all parties present the evidence they expect to use to prove their claims or defenses,

555 thereby giving the opposing party the ability to better evaluate the case and determine
556 what additional discovery is necessary and proportional.

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

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

567 **Expert disclosures and timing.** Rule 26(a)(3). Expert discovery has become an
568 ever-increasing component of discovery cost. The prior rules sought to eliminate some
569 of these costs by requiring the written disclosure of the expert's opinions and other
570 background information. However, because the expert was not required to sign these
571 disclosures, and because experts often were allowed to deviate from the opinions
572 disclosed, attorneys typically would take the expert's deposition to ensure the expert
573 would not offer "surprise" testimony at trial, thereby increasing rather than decreasing
574 the overall cost. The amendments seek to remedy this and other costs associated with
575 expert discovery by, among other things, allowing the opponent to choose either a
576 deposition of the expert or a written report, but not both; in the case of written reports,
577 requiring more comprehensive disclosures, signed by the expert, and making clear that
578 experts will not be allowed to testify beyond what is fairly disclosed in a report, all with
579 the goal of making reports a reliable substitute for depositions; and incorporating a rule
580 that protects from discovery most communications between an attorney and retained
581 expert. Discovery of expert opinions and testimony is automatic under Rule 26(a)(3) and
582 parties are not required to serve interrogatories or use other discovery devices to obtain
583 this information.

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

601 Within seven days after this disclosure, the party opposing the retained expert may
602 elect either a deposition or a written report from the expert. A deposition is limited to four
603 hours, which is not included in the deposition hours under Rule 26(c)(5), and the party
604 taking it must pay the expert's hourly fee for attending the deposition. If a party elects a
605 written report, the expert must provide a signed report containing a complete statement
606 of all opinions the expert will express and the basis and reasons for them. The intent is
607 not to require a verbatim transcript of exactly what the expert will say at trial; instead the
608 expert must fairly disclose the substance of and basis for each opinion the expert will
609 offer. The expert may not testify in a party's case in chief concerning any matter that is
610 not fairly disclosed in the report. To achieve the goal of making reports a reliable
611 substitute for depositions, courts are expected to enforce this requirement. If a party
612 elects a deposition, rather than a report, it is up to the party to ask the necessary
613 questions to "lock in" the expert's testimony. But the expert is expected to be fully

614 prepared on all aspects of his/her trial testimony at the time of the deposition and may
615 not leave the door open for additional testimony by qualifying answers to deposition
616 questions.

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

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

630 There are a number of difficulties inherent in disclosing expert testimony that may be
631 offered from fact witnesses. First, there is often not a clear line between fact and expert
632 testimony. Many fact witnesses have scientific, technical or other specialized
633 knowledge, and their testimony about the events in question often will cross into the
634 area of expert testimony. The rules are not intended to erect artificial barriers to the
635 admissibility of such testimony. Second, many of these fact witnesses will not be within
636 the control of the party who plans to call them at trial. These witnesses may not be
637 cooperative, and may not be willing to discuss opinions they have with counsel. Where
638 this is the case, disclosures will necessarily be more limited. On the other hand,
639 consistent with the overall purpose of the 2011 amendments, a party should receive
640 advance notice if their opponent will solicit expert opinions from a particular witness so
641 they can plan their case accordingly. In an effort to strike an appropriate balance, the
642 rules require that such witnesses be identified and the information about their
643 anticipated testimony should include that which is required under Rule 26(a)(1)(A)(ii),

644 which should include any opinion testimony that a party expects to elicit from them at
645 trial. If a party has disclosed possible opinion testimony in its Rule 26(a)(1)(A)(ii)
646 disclosures, that party is not required to prepare a separate Rule 26(a)(3)(D) disclosure
647 for the witness. And if that disclosure is made in advance of the witness's deposition,
648 those opinions should be explored in the deposition and not in a separate expert
649 deposition. Otherwise, the timing for disclosure of non-retained expert opinions is the
650 same as that for retained experts under Rule 26(a)(4)(C) and depends on whether the
651 party has the burden of proof or is responding to another expert. Rule 26(a)(3)(D) and
652 26(a)(1)(A)(ii) are not intended to elevate form over substance – all they require is that a
653 party fairly inform its opponent that opinion testimony may be offered from a particular
654 witness. And because a party who expects to offer this testimony normally cannot
655 compel such a witness to prepare a written report, further discovery must be done by
656 interview or by deposition.

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

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

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

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

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

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

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

699 **Standard and extraordinary discovery.** Rule 26(c). As a counterpart to requiring
700 more detailed disclosures under Rule 26(a), the 2011 amendments place new
701 limitations on additional discovery the parties may conduct. Because the committee
702 expects the enhanced disclosure requirements will automatically permit each party to

703 learn the witnesses and evidence the opposing side will offer in its case-in-chief,
704 additional discovery should serve the more limited function of permitting parties to find
705 witnesses, documents, and other evidentiary materials that are harmful, rather than
706 helpful, to the opponent's case.

707 Rule 26(c) provides for three separate "tiers" of limited, "standard" discovery that are
708 presumed to be proportional to the amount and issues in controversy in the action, and
709 that the parties may conduct as a matter of right. An aggregation of all damages sought
710 by all parties in an action dictates the applicable tier of standard discovery, whether
711 such damages are sought by way of a complaint, counterclaim, or otherwise. The tiers
712 of standard discovery are set forth in a chart that is embedded in the body of the rule
713 itself. "Tier 1" describes a minimal amount of standard discovery that is presumed
714 proportional for cases involving damages of \$50,000 or less. "Tier 2" sets forth larger
715 limits on standard discovery that are applicable in cases involving damages above
716 \$50,000 but less than \$300,000. Finally, "Tier 3" prescribes still greater standard
717 discovery for actions involving damages in excess of \$300,000. Deposition hours are
718 charged to a side for the time spent asking questions of the witness. In a particular
719 deposition, one side may use two hours while the other side uses only 30 minutes. The
720 tiers also provide presumptive limitations on the time within which standard discovery
721 should be completed, which limitations similarly increase with the amount of damages at
722 issue. Discovery motions will not toll the period. Parties are expected to be reasonable
723 and accomplish as much as they can during standard discovery. The motions may result
724 in additional discovery and sanctions at the expense of a party who unreasonably fails
725 to respond or otherwise frustrates discovery. After the expiration of the applicable time
726 limitation, a case is presumed to be ready for trial. Actions for non-monetary relief, such
727 as injunctive relief, are subject to the standard discovery limitations of Tier 2, absent an
728 accompanying monetary claim of \$300,000 or more, in which case Tier 3 applies. The
729 committee determined these standard discovery limitations based on the expectation
730 that for the majority of cases filed in the Utah State Courts, the magnitude of available
731 discovery and applicable time parameters available under the three-tiered system
732 should be sufficient for cases involving the respective amounts of damages.

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

746 The second method to obtain additional discovery is by motion. The committee
747 recognizes there will be some cases in which additional discovery is appropriate, but the
748 parties cannot agree to the scope of such additional discovery. These may include,
749 among other categories, large and factually complex cases and cases in which there is
750 a significant disparity in the parties' access to information, such that one party
751 legitimately has a greater need than the other party for additional discovery in order to
752 prepare properly for trial. To prevent a party from taking advantage of this situation, the
753 2011 amendments allow any party to move the Court for additional discovery. As with
754 stipulations for extraordinary discovery, a party filing a motion for extraordinary
755 discovery should do so before the close of the standard discovery time limit, but only
756 after the moving party has reached the limits for that type of standard discovery
757 available to it under the rule. By taking advantage of this discovery, counsel should be
758 better equipped to articulate for the court what additional discovery is needed and why.
759 The party making such a motion must demonstrate that the additional discovery is
760 proportional and certify that the party has reviewed and approved a discovery budget.
761 The burden to show the need for additional discovery, and to demonstrate relevance
762 and proportionality, always falls on the party seeking additional discovery. However,

763 cases in which such additional discovery is appropriate do exist, and it is important for
764 courts to recognize they can and should permit additional discovery in appropriate
765 cases, commensurate with the complexity and magnitude of the dispute.

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

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

782