

IN THE SUPREME COURT OF THE STATE OF UTAH

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In re: Proposed Amendments  
to Rules 26, 30, 37, and 45  
of the UTAH RULES OF CIVIL PROCEDURE

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**ORDER**

IT IS HEREBY ORDERED that the proposed amendments to Rules 26, 30, 37, and 45 of the Utah Rules of Civil Procedure are adopted and promulgated effective May 1, 2015.

FOR THE COURT:

1-8-15  
Date

  
\_\_\_\_\_  
Matthew B. Durrant  
Chief Justice

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

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

4       **(a)(1) Initial disclosures.** Except in cases exempt under paragraph (a)(3), a party shall, without  
5 waiting for a discovery request, serve on the 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 claims or  
8 defenses, unless solely for impeachment, identifying the subjects of the information; and

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

11           (a)(1)(B) a copy of all documents, data compilations, electronically stored information, and  
12 tangible things in the possession or control of the party that the party may offer in its case-in-  
13 chief, except charts, summaries and demonstrative exhibits that have not yet been prepared and  
14 must be disclosed in accordance with paragraph (a)(5);

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

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

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

21       **(a)(2) Timing of initial disclosures.** The disclosures required by paragraph (a)(1) shall be  
22 served on the other parties:

23           (a)(2)(A) by the plaintiff within 14 days after filing of the first answer to the complaint; and

24           (a)(2)(B) by the defendant within 42 days after filing of the first answer to the complaint or  
25 within 28 days after that defendant's appearance, whichever is later.

26       **(a)(3) Exemptions.**

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

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

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

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

33               (a)(3)(A)(iv) for water rights general adjudication under Title 73, Chapter 4, Determination  
34 of Water Rights.

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

37       **(a)(4) Expert testimony.**

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

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

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

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

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

74 (a)(4)(C)(iii) If the party who bears the burden of proof on an issue wants to designate  
75 rebuttal expert witnesses it shall serve on the other parties the information required by  
76 paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election  
77 under paragraph (a)(4)(C)(ii) is due, or (B) receipt of the written report or the taking of the  
78 expert's deposition pursuant to paragraph (a)(4)(C)(ii). Within seven days thereafter, the party  
79 opposing the expert may serve notice electing either a deposition of the expert pursuant to  
80 paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The  
81 deposition shall occur, or the report shall be served on the other parties, within 28 days after  
82 the election is served on the other parties. If no election is served on the other parties, then  
83 no further discovery of the expert shall be permitted.

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

88 **(a)(4)(E) Summary of non-retained expert testimony.** If a party intends to present  
89 evidence at trial under Rule 702 of the Utah Rules of Evidence from any person other than an  
90 expert witness who is retained or specially employed to provide testimony in the case or a person  
91 whose duties as an employee of the party regularly involve giving expert testimony, that party  
92 must serve on the other parties a written summary of the facts and opinions to which the witness  
93 is expected to testify in accordance with the deadlines set forth in paragraph (a)(4)(C). A  
94 deposition of such a witness may not exceed four hours.

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

96 (a)(5)(A) A party shall, without waiting for a discovery request, serve on the other parties:

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

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

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

106 (a)(5)(B) Disclosure required by paragraph (a)(5) shall be served on the other parties at least  
107 28 days before trial. At least 14 days before trial, a party shall serve and file counter designations  
108 of deposition testimony, objections and grounds for the objections to the use of a deposition and  
109 to the admissibility of exhibits. Other than objections under Rules 402 and 403 of the Utah Rules  
110 of Evidence, objections not listed are waived unless excused by the court for good cause.

111 **(b) Discovery scope.**

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

114 Privileged matters that are not discoverable or admissible in any proceeding of any kind or character  
115 include all information in any form provided during and created specifically as part of a request for an  
116 investigation, the investigation, findings, or conclusions of peer review, care review, or quality  
117 assurance processes of any organization of health care providers as defined in the Utah Health Care  
118 Malpractice Act for the purpose of evaluating care provided to reduce morbidity and mortality or to  
119 improve the quality of medical care, or for the purpose of peer review of the ethics, competence, or  
120 professional conduct of any health care provider.

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

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

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

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

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

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

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

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

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

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

148           **(b)(6) Statement previously made about the action.** A party may obtain without the showing  
149 required in paragraph (b)(5) a statement concerning the action or its subject matter previously made  
150 by that party. Upon request, a person not a party may obtain without the required showing a  
151 statement about the action or its subject matter previously made by that person. If the request is  
152 refused, the person may move for a court order under Rule 37. A statement previously made is (A) a  
153 written statement signed or approved by the person making it, or (B) a stenographic, mechanical,  
154 electronic, or other recording, or a transcription thereof, which is a substantially verbatim recital of an  
155 oral statement by the person making it and contemporaneously recorded.

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

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

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

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

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

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

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

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

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

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

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

182           **(b)(8)(B) Information produced.** If a party produces information that the party claims is  
183 privileged or prepared in anticipation of litigation or for trial, the producing party may notify any  
184 receiving party of the claim and the basis for it. After being notified, a receiving party must

185 promptly return, sequester, or destroy the specified information and any copies it has and may  
 186 not use or disclose the information until the claim is resolved. A receiving party may promptly  
 187 present the information to the court under seal for a determination of the claim. If the receiving  
 188 party disclosed the information before being notified, it must take reasonable steps to retrieve it.  
 189 The producing party must preserve the information until the claim is resolved.

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

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

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

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

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

210 **(c)(5) Limits on standard fact discovery.** Standard fact discovery per side (plaintiffs collectively,  
 211 defendants collectively, and third-party defendants collectively) in each tier is as follows. The days to  
 212 complete standard fact discovery are calculated from the date the first defendant's first disclosure is  
 213 due and do not include expert discovery 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

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

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

220 (c)(6)(B) before the close of standard discovery and after reaching the limits of standard  
 221 discovery imposed by these rules, a ~~motion request~~ for extraordinary discovery ~~setting forth the~~  
 222 ~~reasons why the extraordinary discovery is necessary and proportional under paragraph (b)(2)~~  
 223 ~~and certifying that the party has reviewed and approved a discovery budget and certifying that the~~  
 224 ~~party has in good faith conferred or attempted to confer with the other party in an effort to achieve~~  
 225 ~~a stipulation under Rule 37(a).~~

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

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

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

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

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

240 (d)(5) If a party learns that a disclosure or response is incomplete or incorrect in some important  
 241 way, the party must timely serve on the other parties the additional or correct information if it has not

242        been made known to the other parties. The supplemental disclosure or response must state why the  
243        additional or correct information was not previously provided.

244        **(e) Signing discovery requests, responses, and objections.** Every disclosure, request for  
245        discovery, response to a request for discovery and objection to a request for discovery shall be in writing  
246        and signed by at least one attorney of record or by the party if the party is not represented. The signature  
247        of the attorney or party is a certification under Rule 11. If a request or response is not signed, the  
248        receiving party does not need to take any action with respect to it. If a certification is made in violation of  
249        the rule, the court, upon motion or upon its own initiative, may take any action authorized by Rule 11 or  
250        ~~Rule 37(e), 37(b).~~

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

255        **Advisory Committee Notes**

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

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

277        Subject to the foregoing qualifications, the summary of the witness's expected testimony should be  
278        just that – a summary. The rule does not require prefiled testimony or detailed descriptions of everything

279 a witness might say at trial. On the other hand, it requires more than the broad, conclusory statements  
280 that often were made under the prior version of Rule 26(a)(1)(e.g., “The witness will testify about the  
281 events in question” or “The witness will testify on causation.”). The intent of this requirement is to give the  
282 other side basic information concerning the subjects about which the witness is expected to testify at trial,  
283 so that the other side may determine the witness’s relative importance in the case, whether the witness  
284 should be interviewed or deposed, and whether additional documents or information concerning the  
285 witness should be sought. This information is important because of the other discovery limits contained in  
286 the 2011 amendments, particularly the limits on depositions.

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

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

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

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

313 The time periods for making Rule 26(a)(1) disclosures, and the presumptive deadlines for completing  
314 fact discovery, are keyed to the filing of an answer. If a defendant files a motion to dismiss or other Rule

315 12(b) motion in lieu of an answer, these time periods normally would be not begin to run until that motion  
316 is resolved.

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

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

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

350 Within seven days after this disclosure, the party opposing the retained expert may elect either a  
351 deposition or a written report from the expert. A deposition is limited to four hours, which is not included in

352 the deposition hours under Rule 26(c)(5), and the party taking it must pay the expert's hourly fee for  
353 attending the deposition. If a party elects a written report, the expert must provide a signed report  
354 containing a complete statement of all opinions the expert will express and the basis and reasons for  
355 them. The intent is not to require a verbatim transcript of exactly what the expert will say at trial; instead  
356 the expert must fairly disclose the substance of and basis for each opinion the expert will offer. The expert  
357 may not testify in a party's case in chief concerning any matter that is not fairly disclosed in the report. To  
358 achieve the goal of making reports a reliable substitute for depositions, courts are expected to enforce  
359 this requirement. If a party elects a deposition, rather than a report, it is up to the party to ask the  
360 necessary questions to "lock in" the expert's testimony. But the expert is expected to be fully prepared on  
361 all aspects of his/her trial testimony at the time of the deposition and may not leave the door open for  
362 additional testimony by qualifying answers to deposition questions.

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

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

374 There are a number of difficulties inherent in disclosing expert testimony that may be offered from fact  
375 witnesses. First, there is often not a clear line between fact and expert testimony. Many fact witnesses  
376 have scientific, technical or other specialized knowledge, and their testimony about the events in question  
377 often will cross into the area of expert testimony. The rules are not intended to erect artificial barriers to  
378 the admissibility of such testimony. Second, many of these fact witnesses will not be within the control of  
379 the party who plans to call them at trial. These witnesses may not be cooperative, and may not be willing  
380 to discuss opinions they have with counsel. Where this is the case, disclosures will necessarily be more  
381 limited. On the other hand, consistent with the overall purpose of the 2011 amendments, a party should  
382 receive advance notice if their opponent will solicit expert opinions from a particular witness so they can  
383 plan their case accordingly. In an effort to strike an appropriate balance, the rules require that such  
384 witnesses be identified and the information about their anticipated testimony should include that which is  
385 required under Rule 26(a)(1)(A)(ii), which should include any opinion testimony that a party expects to  
386 elicit from them at trial. If a party has disclosed possible opinion testimony in its Rule 26(a)(1)(A)(ii)  
387 disclosures, that party is not required to prepare a separate Rule ~~26(a)(3)(D)~~ 26(a)(4)(E) disclosure for the  
388 witness. And if that disclosure is made in advance of the witness's deposition, those opinions should be

389 explored in the deposition and not in a separate expert deposition. Otherwise, the timing for disclosure of  
390 non-retained expert opinions is the same as that for retained experts under Rule 26(a)(4)(C) and depends  
391 on whether the party has the burden of proof or is responding to another expert. Rules ~~26(a)(3)(D)~~  
392 26(a)(4)(E) and 26(a)(1)(A)(ii) are not intended to elevate form over substance – all they require is that a  
393 party fairly inform its opponent that opinion testimony may be offered from a particular witness. And  
394 because a party who expects to offer this testimony normally cannot compel such a witness to prepare a  
395 written report, further discovery must be done by interview or by deposition.

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

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

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

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

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

422 The 2011 amendments establish three tiers of standard discovery in Rule 26(c). Ideally, rules of  
423 procedure should be crafted to promote predictability for litigants. Rules should limit the need to resort to  
424 judicial oversight. Tiered standard discovery seeks to achieve these ends. The “one-size-fits-all” system is

425 rejected. Tiered discovery signals to judges, attorneys, and parties the amount of discovery which by rule  
426 is deemed proportional for cases with different amounts in controversy.

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

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

439 Rule 26(c) provides for three separate "tiers" of limited, "standard" discovery that are presumed to be  
440 proportional to the amount and issues in controversy in the action, and that the parties may conduct as a  
441 matter of right. An aggregation of all damages sought by all parties in an action dictates the applicable tier  
442 of standard discovery, whether such damages are sought by way of a complaint, counterclaim, or  
443 otherwise. The tiers of standard discovery are set forth in a chart that is embedded in the body of the rule  
444 itself. "Tier 1" describes a minimal amount of standard discovery that is presumed proportional for cases  
445 involving damages of \$50,000 or less. "Tier 2" sets forth larger limits on standard discovery that are  
446 applicable in cases involving damages above \$50,000 but less than \$300,000. Finally, "Tier 3" prescribes  
447 still greater standard discovery for actions involving damages in excess of \$300,000. Deposition hours  
448 are charged to a side for the time spent asking questions of the witness. In a particular deposition, one  
449 side may use two hours while the other side uses only 30 minutes. The tiers also provide presumptive  
450 limitations on the time within which standard discovery should be completed, which limitations similarly  
451 increase with the amount of damages at issue. ~~Discovery motions~~ A statement of discovery issues will not  
452 toll the period. Parties are expected to be reasonable and accomplish as much as they can during  
453 standard discovery. ~~The motions~~ A statement of discovery issues may result in additional discovery and  
454 sanctions at the expense of a party who unreasonably fails to respond or otherwise frustrates discovery.  
455 After the expiration of the applicable time limitation, a case is presumed to be ready for trial. Actions for  
456 non-monetary relief, such as injunctive relief, are subject to the standard discovery limitations of Tier 2,  
457 absent an accompanying monetary claim of \$300,000 or more, in which case Tier 3 applies. The  
458 committee determined these standard discovery limitations based on the expectation that for the majority  
459 of cases filed in the Utah State Courts, the magnitude of available discovery and applicable time  
460 parameters available under the three-tiered system should be sufficient for cases involving the respective  
461 amounts of damages.

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

473 The second method to obtain additional discovery is by ~~motion~~ a statement of discovery issues. The  
474 committee recognizes there will be some cases in which additional discovery is appropriate, but the  
475 parties cannot agree to the scope of such additional discovery. These may include, among other  
476 categories, large and factually complex cases and cases in which there is a significant disparity in the  
477 parties' access to information, such that one party legitimately has a greater need than the other party for  
478 additional discovery in order to prepare properly for trial. To prevent a party from taking advantage of this  
479 situation, the 2011 amendments allow any party to ~~move the Court for~~ request additional discovery. As  
480 with stipulations for extraordinary discovery, a party ~~filing a motion for~~ requesting extraordinary discovery  
481 should do so before the close of the standard discovery time limit, but only after the ~~moving~~ party has  
482 reached the limits for that type of standard discovery available to it under the rule. By taking advantage of  
483 this discovery, counsel should be better equipped to articulate for the court what additional discovery is  
484 needed and why. The requesting party ~~making such a motion~~ must demonstrate that the additional  
485 discovery is proportional and certify that the party has reviewed and approved a discovery budget. The  
486 burden to show the need for additional discovery, and to demonstrate relevance and proportionality,  
487 always falls on the party seeking additional discovery. However, cases in which such additional discovery  
488 is appropriate do exist, and it is important for courts to recognize they can and should permit additional  
489 discovery in appropriate cases, commensurate with the complexity and magnitude of the dispute.

490 **Protective order language moved to Rule 37.** The 2011 amendments delete in its entirety the prior  
491 language of Rule 26(c) governing motions for protective orders. The substance of that language is now  
492 found in Rule 37. The committee determined it was preferable to cover ~~motions~~ requests for an order to  
493 compel, ~~motions~~ for a protective orders, and ~~motions for discovery~~ sanctions in a single rule, rather than  
494 two separate rules. ~~Accordingly, Rule 37 now governs these motions and orders.~~

495 **Consequences of failure to disclose.** Rule 26(d). If a party fails to disclose or to supplement timely  
496 its discovery responses, that party cannot use the undisclosed witness, document, or material at any  
497 hearing or trial, absent proof that non-disclosure was harmless or justified by good cause. More complete  
498 disclosures increase the likelihood that the case will be resolved justly, speedily, and inexpensively. Not

499 being able to use evidence that a party fails properly to disclose provides a powerful incentive to make  
500 complete disclosures. This is true only if trial courts hold parties to this standard. Accordingly, although a  
501 trial court retains discretion to determine how properly to address this issue in a given case, the usual and  
502 expected result should be exclusion of the evidence.

503 **Legislative Note**

504

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

2       **(a) When depositions may be taken; when leave required.** A party may depose a party or witness  
3 by oral questions. A witness may not be deposed more than once in standard discovery. An expert who  
4 has prepared a report disclosed under Rule 26(a)(4)(B) may not be deposed.

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

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

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

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

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

30          (b)(5) A deposition may be taken by remote electronic means. A deposition taken by remote  
31      electronic means is considered to be taken at the place where the witness is located.

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

37 make such a designation. The person so designated shall testify as to matters known or reasonably  
38 available to the organization.

39 **(c) Examination and cross-examination; objections.**

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

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

49 **(d) Limits.** During standard discovery, oral questioning of a nonparty shall not exceed four hours, and  
50 oral questioning of a party shall not exceed seven hours.

51 **(e) Submission to witness; changes; signing.** Within 28 days after being notified by the officer that  
52 the transcript or recording is available, a witness may sign a statement of changes to the form or  
53 substance of the transcript or recording and the reasons for the changes. The officer shall append any  
54 changes timely made by the witness.

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

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

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

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

71 **(g) Failure to attend or to serve subpoena; expenses.** If the party giving the notice of a deposition  
72 fails to attend or fails to serve a subpoena upon a witness who fails to attend, and another party attends

73 in person or by attorney, the court may order the party giving the notice to pay to the other party the  
74 reasonable costs, expenses and attorney fees incurred.

75 **(h) Deposition in action pending in another state.** Any party to an action in another state may take  
76 the deposition of any person within this state in the same manner and subject to the same conditions and  
77 limitations as if such action were pending in this state. Notice of the deposition shall be filed with the clerk  
78 of the court of the county in which the person whose deposition is to be taken resides or is to be served.  
79 Matters required to be submitted to the court shall be submitted to the court in the county where the  
80 deposition is being taken.

81 **(i) Stipulations regarding deposition procedures.** The parties may by written stipulation provide  
82 that depositions may be taken before any person, at any time or place, upon any notice, and in any  
83 manner and when so taken may be used like other depositions.

84

1 **Rule 37. ~~Discovery and disclosure motions~~ Statement of discovery issues; Sanctions; Failure**  
2 **to admit, to attend deposition or to preserve evidence.**

3 **~~(a) Motion for order compelling disclosure or discovery.~~**

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

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

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

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

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

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

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

18 ~~(a)(3) The moving party must attach a copy of the request for discovery, the disclosure, or the~~  
19 ~~response at issue. The moving party must also attach a certification that the moving party has in good~~  
20 ~~faith conferred or attempted to confer with the other affected parties in an effort to secure the~~  
21 ~~disclosure or discovery without court action and that the discovery being sought is proportional under~~  
22 ~~Rule 26(b)(2).~~

23 **~~(b) Motion for protective order.~~**

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

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

31 **(a) Statement of discovery issues.**

32 (a)(1) A party or the person from whom discovery is sought may request that the judge enter an  
33 order regarding any discovery issue, including:

34 (a)(1)(A) failure to disclose under Rule 26;

35 (a)(1)(B) extraordinary discovery under Rule 26;

36 (a)(1)(C) a subpoena under Rule 45;

37 (a)(1)(D) protection from discovery; or

38 (a)(1)(E) compelling discovery from a party who fails to make full and complete discovery.

39 **(a)(2) Statement of discovery issues length and content.** The statement of discovery issues  
40 must be no more than 4 pages, not including permitted attachments, and must include in the following  
41 order:

42 (a)(2)(A) the relief sought and the grounds for the relief sought stated succinctly and with  
43 particularity;

44 (a)(2)(B) a certification that the requesting party has in good faith conferred or attempted to  
45 confer with the other affected parties in person or by telephone in an effort to resolve the dispute  
46 without court action;

47 (a)(2)(C) a statement regarding proportionality under Rule 26(b)(2); and

48 (a)(2)(D) if the statement requests extraordinary discovery, a statement certifying that the  
49 party has reviewed and approved a discovery budget.

50 **(a)(3) Objection length and content.** No more than 7 days after the statement is filed, any other  
51 party may file an objection to the statement of discovery issues. The objection must be no more than  
52 4 pages, not including permitted attachments, and must address the issues raised in the statement.

53 **(a)(4) Permitted attachments.** The party filing the statement must attach to the statement only a  
54 copy of the disclosure, request for discovery or the response at issue.

55 **(a)(5) Proposed order.** Each party must file a proposed order concurrently with its statement or  
56 objection.

57 **(a)(6) Decision.** Upon filing of the objection or expiration of the time to do so, either party may  
58 and the party filing the statement must file a Request to Submit for Decision under Rule 7(g). The  
59 court will promptly:

60 (a)(6)(A) decide the issues on the pleadings and papers;

61 (a)(6)(B) conduct a hearing by telephone conference or other electronic communication; or

62 (a)(6)(C) order additional briefing and establish a briefing schedule.

63 **(e)-(a)(7) Orders.** The court may ~~make~~ enter orders regarding disclosure or discovery or to protect a  
64 party or person from discovery being conducted in bad faith or from annoyance, embarrassment,  
65 oppression, or undue burden or expense, or to achieve proportionality under Rule 26(b)(2), including one  
66 or more of the following:

67 ~~(e)(4)-(a)(7)(A)~~ (a)(7)(A) that the discovery not be had or that additional discovery be had;

68 ~~(e)(2)-(a)(7)(B)~~ (a)(7)(B) that the discovery may be had only on specified terms and conditions,  
69 including a designation of the time or place;

70 ~~(e)(3)-(a)(7)(C)~~ (a)(7)(C) that the discovery may be had only by a method of discovery other than that  
71 selected by the party seeking discovery;

72 ~~(e)(4)-(a)(7)(D)~~ (a)(7)(D) that certain matters not be inquired into, or that the scope of the discovery be  
73 limited to certain matters;

74 ~~(e)(5)-(a)(7)(E)~~ that discovery be conducted with no one present except persons designated  
75 by the court;

76 ~~(e)(6)-(a)(7)(F)~~ that a deposition after being sealed be opened only by order of the court;

77 ~~(e)(7)-(a)(7)(G)~~ that a trade secret or other confidential information not be disclosed or be  
78 disclosed only in a designated way;

79 ~~(e)(8)-(a)(7)(H)~~ that the parties simultaneously ~~file~~ deliver specified documents or information  
80 enclosed in sealed envelopes to be opened as directed by the court;

81 ~~(e)(9)-(a)(7)(I)~~ that a question about a statement or opinion of fact or the application of law to  
82 fact not be answered until after designated discovery has been completed or until a pretrial  
83 conference or other later time; ~~or~~

84 ~~(e)(10)-(a)(7)(J)~~ that the costs, expenses and attorney fees of discovery be allocated among  
85 the parties as justice requires; ~~or~~

86 ~~(e)(11) If a protective order terminates a deposition, it shall be resumed only upon the order of~~  
87 ~~the court in which the action is pending.~~

88 ~~(d) Expenses and sanctions for motions. If the motion to compel or for a protective order is~~  
89 ~~granted or denied, or if a party provides disclosure or discovery or withdraws a disclosure or~~  
90 ~~discovery request after a motion is filed, the court may order the party, witness or attorney to pay~~  
91 ~~(a)(7)(K) that a party pay the reasonable costs, expenses and attorney fees incurred on account~~  
92 ~~of the motion statement of discovery issues if the relief requested is granted or denied, or if a~~  
93 ~~party provides discovery or withdraws a discovery request after a statement of discovery issues is~~  
94 ~~filed and if the court finds that the party, witness, or attorney did not act in good faith or asserted a~~  
95 ~~position that was not substantially justified. A motion to compel or for a protective order does not~~  
96 ~~suspend or toll the time to complete standard discovery.~~

97 **(a)(8) Request for sanctions prohibited.** A statement of discovery issues or an objection may  
98 include a request for costs, expenses and attorney fees but not a request for sanctions.

99 **(a)(9) Statement of discovery issues does not toll discovery time.** A statement of discovery  
100 issues does not suspend or toll the time to complete standard discovery.

101 **(e) Failure to comply with order(b) Motion for sanctions.**

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

105 ~~(e)(2) Sanctions by court in which action is pending. Unless the court finds that the failure was~~  
106 ~~substantially justified, the court, in which the action is pending upon motion, may impose appropriate~~  
107 ~~sanctions for the failure to follow its orders, including the following:~~

108 ~~(e)(2)(A)-(b)(1)~~ deem the matter or any other designated facts to be established in accordance  
109 with the claim or defense of the party obtaining the order;

110 ~~(e)(2)(B)-(b)(2)~~ prohibit the disobedient party from supporting or opposing designated claims or  
111 defenses or from introducing designated matters into evidence;

112 ~~(e)(2)(C)-(b)(3)~~ stay further proceedings until the order is obeyed;

113 ~~(e)(2)(D)-(b)(4)~~ dismiss all or part of the action, strike all or part of the pleadings, or render  
114 judgment by default on all or part of the action;

115 ~~(e)(2)(E)-(b)(5)~~ order the party or the attorney to pay the reasonable costs, expenses, including  
116 and attorney fees, caused by the failure;

117 ~~(e)(2)(F)-(b)(6)~~ treat the failure to obey an order, other than an order to submit to a physical or  
118 mental examination, as contempt of court; and

119 ~~(e)(2)(G)-(b)(7)~~ instruct the jury regarding an adverse inference.

120 **~~(f) Expenses-(c) Motion for costs, expenses and attorney fees on failure to admit.~~** If a party fails  
121 to admit the genuineness of ~~any a~~ document or the truth of ~~any a~~ matter as requested under Rule 36, and  
122 if the party requesting the admissions proves the genuineness of the document or the truth of the matter,  
123 the party requesting the admissions may ~~apply to the court~~ file a motion for an order requiring the other  
124 party to pay the reasonable costs, expenses and attorney fees incurred in making that proof, ~~including~~  
125 ~~reasonable attorney fees~~. The court ~~shall make~~ must enter the order unless it finds that:

126 ~~(f)(1)-(c)(1)~~ the request was held objectionable pursuant to Rule 36(a);

127 ~~(f)(2)-(c)(2)~~ the admission sought was of no substantial importance;

128 ~~(f)(3)-(c)(3)~~ there were reasonable grounds to believe that the party failing to admit might prevail  
129 on the matter;

130 ~~(f)(4)-(c)(4)~~ that the request ~~is~~ was not proportional under Rule 26(b)(2); or

131 ~~(f)(5)-(c)(5)~~ there were other good reasons for the failure to admit.

132 **~~(g) Failure-(d) Motion for sanctions for failure of party to attend at own deposition.~~** ~~The court on~~  
133 ~~motion may take any action authorized by paragraph (e)(2) if~~ If a party or an officer, director, or managing  
134 agent of a party or a person designated under Rule 30(b)(6) ~~or 31(a)~~ to testify on behalf of a party fails to  
135 appear before the officer taking the deposition, after ~~proper~~ service of the notice, any other party may file  
136 a motion for sanctions under paragraph (b). The failure to ~~act described in this paragraph~~ appear may not  
137 be excused on the ground that the discovery sought is objectionable unless the party failing to ~~act~~ appear  
138 has ~~applied for a protective order~~ filed a statement of discovery issues under paragraph ~~(b)~~ (a).

139 **~~(h) Failure to disclose.~~** ~~If a party fails to disclose a witness, document or other material, or to amend~~  
140 ~~a prior response to discovery as required by Rule 26(d), that party shall not be permitted to use the~~  
141 ~~witness, document or other material at any hearing unless the failure to disclose is harmless or the party~~  
142 ~~shows good cause for the failure to disclose. In addition to or in lieu of this sanction, the court on motion~~  
143 ~~may take any action authorized by paragraph (e)(2).~~

144 **~~(i)-(e) Failure to preserve evidence.~~** Nothing in this rule limits the inherent power of the court to take  
145 any action authorized by paragraph ~~(e)(2)~~ (b) if a party destroys, conceals, alters, tampers with or fails to  
146 preserve a document, tangible item, electronic data or other evidence in violation of a duty. Absent

147 exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to  
148 provide electronically stored information lost as a result of the routine, good-faith operation of an  
149 electronic information system.

150 **Advisory Committee Notes**

151 [Add to existing notes]

152 2015 Amendments.

153 Paragraph (a) adopts the expedited procedures for statements of discovery issues formerly found in  
154 Rule 4-502 of the Code of Judicial Administration. Statements of discovery issues replace discovery  
155 motions, and paragraph (a) governs unless the judge orders otherwise.

156 Former paragraph (a)(2), which directed a motion for a discovery order against a nonparty witness to  
157 be filed in the judicial district where the subpoena was served or deposition was to be taken, has been  
158 deleted. A statement of discovery issues related to a nonparty must be filed in the court in which the  
159 action is pending.

160 Former paragraph (h), which prohibited a party from using at a hearing information not disclosed as  
161 required, was deleted because the effect of non-disclosure is adequately governed by Rule 26(d). See  
162 also *The Townhomes At Pointe Meadows Owners Association v. Pointe Meadows Townhomes, LLC*,  
163 2014 UT App 52 ¶14. The process for resolving disclosure issues is included in paragraph (a).

164

1       **Rule 45. Subpoena.**

2       **(a) Form; issuance.**

3           (a)(1) Every subpoena shall:

4               (a)(1)(A) issue from the court in which the action is pending;

5               (a)(1)(B) state the title and case number of the action, the name of the court from which it is  
6 issued, and the name and address of the party or attorney responsible for issuing the subpoena;

7               (a)(1)(C) command each person to whom it is directed

8                     (a)(1)(C)(i) to appear and give testimony at a trial, hearing or deposition, or

9                     (a)(1)(C)(ii) to appear and produce for inspection, copying, testing or sampling  
10 documents, electronically stored information or tangible things in the possession, custody or  
11 control of that person, or

12                    (a)(1)(C)(iii) to copy documents or electronically stored information in the possession,  
13 custody or control of that person and mail or deliver the copies to the party or attorney  
14 responsible for issuing the subpoena before a date certain, or

15                    (a)(1)(C)(iv) to appear and to permit inspection of premises;

16               (a)(1)(D) if an appearance is required, specify the date, time and place for the appearance;  
17 and

18               (a)(1)(E) include a notice to persons served with a subpoena in a form substantially similar to  
19 the court approved subpoena form ~~appended to these rules~~. A subpoena may specify the form or  
20 forms in which electronically stored information is to be produced.

21           (a)(2) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it,  
22 who shall complete it before service. An attorney admitted to practice in Utah may issue and sign a  
23 subpoena as an officer of the court.

24       **(b) Service; fees; prior notice.**

25           (b)(1) A subpoena may be served by any person who is at least 18 years of age and not a party  
26 to the case. Service of a subpoena upon the person to whom it is directed shall be made as provided  
27 in Rule 4(d).

28           (b)(2) If the subpoena commands a person's appearance, the party or attorney responsible for  
29 issuing the subpoena shall tender with the subpoena the fees for one day's attendance and the  
30 mileage allowed by law. When the subpoena is issued on behalf of the United States, or this state, or  
31 any officer or agency of either, fees and mileage need not be tendered.

32           (b)(3) If the subpoena commands a person to copy and mail or deliver documents or  
33 electronically stored information, to produce documents, electronically stored information or tangible  
34 things for inspection, copying, testing or sampling or to permit inspection of premises, the party or  
35 attorney responsible for issuing the subpoena shall serve each party with ~~notice of~~ the subpoena by  
36 delivery or other method of actual notice before serving the subpoena.

37       **(c) Appearance; resident; non-resident.**

38 (c)(1) A person who resides in this state may be required to appear:  
39 (c)(1)(A) at a trial or hearing in the county in which the case is pending; and  
40 (c)(1)(B) at a deposition, or to produce documents, electronically stored information or  
41 tangible things, or to permit inspection of premises only in the county in which the person resides,  
42 is employed, or transacts business in person, or at such other place as the court may order.

43 (c)(2) A person who does not reside in this state but who is served within this state may be  
44 required to appear:

45 (c)(2)(A) at a trial or hearing in the county in which the case is pending; and  
46 (c)(2)(B) at a deposition, or to produce documents, electronically stored information or  
47 tangible things, or to permit inspection of premises only in the county in which the person is  
48 served or at such other place as the court may order.

49 **(d) Payment of production or copying costs.** The party or attorney responsible for issuing the  
50 subpoena shall pay the reasonable cost of producing or copying documents, electronically stored  
51 information or tangible things. Upon the request of any other party and the payment of reasonable costs,  
52 the party or attorney responsible for issuing the subpoena shall provide to the requesting party copies of  
53 all documents, electronically stored information or tangible things obtained in response to the subpoena  
54 or shall make the tangible things available for inspection.

55 **(e) Protection of persons subject to subpoenas; objection.**

56 (e)(1) The party or attorney responsible for issuing a subpoena shall take reasonable steps to  
57 avoid imposing an undue burden or expense on the person subject to the subpoena. The court shall  
58 enforce this duty and impose upon the party or attorney in breach of this duty an appropriate  
59 sanction, which may include, but is not limited to, lost earnings and a reasonable attorney fee.

60 (e)(2) A subpoena to copy and mail or deliver documents or electronically stored information, to  
61 produce documents, electronically stored information or tangible things, or to permit inspection of  
62 premises shall comply with Rule 34(a) and (b)(1), except that the person subject to the subpoena  
63 must be allowed at least 14 days after service to comply.

64 (e)(3) The person subject to the subpoena or a non-party affected by the subpoena may object  
65 under Rule 37 if the subpoena:

66 (e)(3)(A) fails to allow reasonable time for compliance;  
67 (e)(3)(B) requires a resident of this state to appear at other than a trial or hearing in a county  
68 in which the person does not reside, is not employed, or does not transact business in person;

69 (e)(3)(C) requires a non-resident of this state to appear at other than a trial or hearing in a  
70 county other than the county in which the person was served;

71 (e)(3)(D) requires the person to disclose privileged or other protected matter and no  
72 exception or waiver applies;

73 (e)(3)(E) requires the person to disclose a trade secret or other confidential research,  
74 development, or commercial information;

75 (e)(3)(F) subjects the person to an undue burden or cost;

76 (e)(3)(G) requires the person to produce electronically stored information in a form or forms to  
77 which the person objects;

78 (e)(3)(H) requires the person to provide electronically stored information from sources that  
79 the person identifies as not reasonably accessible because of undue burden or cost; or

80 (e)(3)(I) requires the person to disclose an unretained expert's opinion or information not  
81 describing specific events or occurrences in dispute and resulting from the expert's study that  
82 was not made at the request of a party.

83 (e)(4)(A) If the person subject to the subpoena or a non-party affected by the subpoena  
84 objects, the objection must be made before the date for compliance.

85 (e)(4)(B) The objection shall be stated in a concise, non-conclusory manner.

86 (e)(4)(C) If the objection is that the information commanded by the subpoena is privileged or  
87 protected and no exception or waiver applies, or requires the person to disclose a trade secret or  
88 other confidential research, development, or commercial information, the objection shall  
89 sufficiently describe the nature of the documents, communications, or things not produced to  
90 enable the party or attorney responsible for issuing the subpoena to contest the objection.

91 (e)(4)(D) If the objection is that the electronically stored information is from sources that are  
92 not reasonably accessible because of undue burden or cost, the person from whom discovery is  
93 sought must show that the information sought is not reasonably accessible because of undue  
94 burden or cost.

95 (e)(4)(E) The objection shall be served on the party or attorney responsible for issuing the  
96 subpoena. The party or attorney responsible for issuing the subpoena shall serve a copy of the  
97 objection on the other parties.

98 (e)(5) If objection is made, or if a party ~~files a motion for requests~~ a protective order, the party or  
99 attorney responsible for issuing the subpoena is not entitled to compliance but may ~~move for request~~  
100 an order to compel compliance under Rule 37(a). The ~~motion objection or request~~ shall be served on  
101 the other parties and on the person subject to the subpoena. An order compelling compliance shall  
102 protect the person subject to or affected by the subpoena from significant expense or harm. The court  
103 may quash or modify the subpoena. If the party or attorney responsible for issuing the subpoena  
104 shows a substantial need for the information that cannot be met without undue hardship, the court  
105 may order compliance upon specified conditions.

106 **(f) Duties in responding to subpoena.**

107 (f)(1) A person commanded to copy and mail or deliver documents or electronically stored  
108 information or to produce documents, electronically stored information or tangible things shall serve  
109 on the party or attorney responsible for issuing the subpoena a declaration under penalty of law  
110 stating in substance:

111 (f)(1)(A) that the declarant has knowledge of the facts contained in the declaration;

112 (f)(1)(B) that the documents, electronically stored information or tangible things copied or  
113 produced are a full and complete response to the subpoena;

114 (f)(1)(C) that the documents, electronically stored information or tangible things are the  
115 originals or that a copy is a true copy of the original; and

116 (f)(1)(D) the reasonable cost of copying or producing the documents, electronically stored  
117 information or tangible things.

118 (f)(2) A person commanded to copy and mail or deliver documents or electronically stored  
119 information or to produce documents, electronically stored information or tangible things shall copy or  
120 produce them as they are kept in the usual course of business or shall organize and label them to  
121 correspond with the categories in the subpoena.

122 (f)(3) If a subpoena does not specify the form or forms for producing electronically stored  
123 information, a person responding to a subpoena must produce the information in the form or forms in  
124 which the person ordinarily maintains it or in a form or forms that are reasonably usable.

125 (f)(4) If the information produced in response to a subpoena is subject to a claim of privilege or of  
126 protection as trial-preparation material, the person making the claim may notify any party who  
127 received the information of the claim and the basis for it. After being notified, the party must promptly  
128 return, sequester, or destroy the specified information and any copies of it and may not use or  
129 disclose the information until the claim is resolved. A receiving party may promptly present the  
130 information to the court under seal for a determination of the claim. If the receiving party disclosed the  
131 information before being notified, it must take reasonable steps to retrieve the information. The  
132 person who produced the information must preserve the information until the claim is resolved.

133 **(g) Contempt.** Failure by any person without adequate excuse to obey a subpoena served upon that  
134 person is punishable as contempt of court.

135 **(h) Procedure when witness evades service or fails to attend.** If a witness evades service of a  
136 subpoena or fails to attend after service of a subpoena, the court may issue a warrant to the sheriff of the  
137 county to arrest the witness and bring the witness before the court.

138 **(i) Procedure when witness is confined in jail.** If the witness is a prisoner, a party may move for an  
139 order to examine the witness in the jail or prison or to produce the witness before the court or officer for  
140 the purpose of being orally examined.

141 **(j) Subpoena unnecessary.** A person present in court or before a judicial officer may be required to  
142 testify in the same manner as if the person were in attendance upon a subpoena.

#### 143 [Advisory Committee Notes](#)

144 ~~To quash a subpoena, a party should file a motion for a protective order under Rule 26 and a non-~~  
145 ~~party affected by the subpoena should file an objection under this rule. The non-party might be the person~~  
146 ~~subpoenaed or might be someone who has an interest in the testimony of the subpoenaed person or in~~  
147 ~~the documents or other materials ordered to be produced. The process to request a protective order is~~  
148 ~~governed by Rule 37(a), Statement of discovery issues.~~

149        The form subpoena formerly part of the Appendix of Forms described in Rule 81 has been replaced  
150 by forms approved by the Board of District Court Judges found on the court website at  
151 <http://www.utcourts.gov/resources/forms/subpoena/>. The website includes information and forms for  
152 domestic subpoenas and subpoenas from other states. Utah has adopted the Uniform Interstate  
153 Depositions and Discovery Act, and the act differentiates between the requirements for a subpoena  
154 issued by a state that also has adopted the uniform act and the requirements for a subpoena issued by a  
155 state that has not.  
156

## COMMENTS

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### (1) RULE 5

Re 5(b): service is effected by e-filing a document, presumably because the court system sends notice and access to a copy to all other counsel. In cases that are not private, filing a paper as private (under seal) will not necessarily generate a notice from the court so other counsel may not be aware of the filing.

Posted by J.Bogart May 12, 2014 11:17 AM

How are we defining "conformed signature"? We need the definition or a reference.

Posted by Knute Rife May 8, 2014 07:39 PM

The proposed change to URCP 005 is long overdue, especially allowing service by email for all documents where the attorney has an e-filing account. This change is strongly supported.

Posted by Michael A. Jensen May 7, 2014 12:42 PM

Some of the proposed changes to RULE 5 are scary at best, and should NOT be changed.

I am against the change in Rule 5 (b)(2)(A) (now Rule 5 [b][2]) that "a paper that is filed with the court must be served before or on the same day that it is filed". This rule is too general and does not fit every type of situation that may occur. There are times when you cannot serve another party on the same day that you file the document with the Court. What then, what happens? For example, you could be e-filing the documents at 11:58 p.m., with the Court and then dropping the papers in the mail to the other party shortly thereafter at say 12:00 a.m., which would be the next day. As long as the attached certificate of service states the date of service then why do we need such a rule as to require they are filed and served the same day? As another example- it is extremely common for a party to file a motion for temp orders in a family law case at the time the complaint/Petition is filed with the Court, then obtain a hearing date from the Court for that motion. The motion and notice of hearing along with the Complaint/Petition are then all sent out for personal service upon the opposing party. This rule would prohibit such common and efficient practice, which does not make sense. It's hard to see why this rule is being amended at all. Courts are not dumb. They have checks and procedures they follow to figure out if a paper was properly served and if enough time has been given before addressing it. Moreover, if there is a problem, the other party can simply object.

I am against the change in Rule 5 (b)(1)(A)(ii) which allows service upon a person without their consent by email if they have an electronic filing account. It is one thing to have your EFSP send/serve documents to an email address that you have given the EFSP and a completely different thing for an opposing party to send/serve you out of the blue documents directly via an email address, which is believed to be correct. The service of a document by email can only be safely accomplished through receiving the same from the EFSP or when permission is asked from and granted by the receiving party. There are several reasons why. (1) Often the email address that is given by the attorney to the EFSP is different than what is listed with the Bar or known by anyone else. This is because email addresses are subject to being compromised by SPAMMERS after time if the email address is generally given out and used by the public. Often people's email accounts are compromised and all of the email addresses they have stored in their address books are then passed around and used obtained by SPAMMERS or worse virus. So at our office we find that the only way to combat the spamming problem is to give our EFSP an email address that we do not disclose to anyone else and then every so often we have to change the email addresses we generally give out and use with the public. If someone does not have to ask for permission to serve a document to us via email then they might have an old address they are sending the

documents to and we will miss the service (please note that "old" can mean as much as a millisecond). (2) There is no tracking method to determine if the person that was served by email was actually served by email unless the same is done through an EFSP. (3) If the person who is being served was not asked by the servicer if it is okay to be served by email, then that person who is being served would not be aware of such an attempt and would not be looking for the arrival of the email. Conversely, if the person being served was asked if it is okay to serve via email, then if the email does not come then that person has enough awareness of the situation to follow-up on it and ask for it to be resent. That is why the rule that permission be granted existed in the first place, as it provided the necessary checks to insure that service would be received. (4) Updating the email address with the Utah Bar is not an instantaneous event, and takes time (an attorney just the other day told me that he had been trying to get the Bar to update his email address for over 2 weeks now, when explaining to me why the old email address that I had sent an email to had come back to me as being undeliverable). So in the meantime service is going to an old email address, and not being reached by the person, and such could be very costly for the attorney. Even if a change with the bar was instantaneous, there could still be problems. For example, a person looks on the Bar's webpage and sees an email address for an attorney. They then go and insert it into the paperwork they are working on. Meanwhile, unbeknownst to that person, the attorney goes to the Bar's website, and changes his/her email address. The person serving then sends the email out. Service is not received, but yet the Rule would say it was "served". Moreover, there is no way for anyone to know when the email address was changed... there is no tracking log, which also causes problems for everyone.

Bottom line here is that we are setting attorney's up for potential malpractice and at the very least doing a disservice to the people we serve. Service of a document upon another party should be taken VERY, VERY SERIOUSLY and the method employed should have the HIGHEST assurances that it will be received by the intended party. Why would we ever change this or weaken it?

On another note, this change in the rule will place attorneys at a disadvantage to pro se litigants. The pro se person will always be able to serve the attorney via email because the attorney will have an e-filing account, and the attorney will never be able to serve the pro se litigant via email if they don't agree to such. This is especially unfair in the area of discovery, where the documents can be voluminous and the cost to print can be high. The attorney will have to print the documents that are sent to him/her via email by the opposing party, at the attorney's own cost, and the attorney will also have to print the documents that he or she will be sending out to the pro se person at the attorney's own cost.

Rule 5 (b)(1)(B) removes the rule that service by electronic means is not effective if the party making service learns that the attempted service did not reach the person to be served.

WHY? In what circumstance would there ever be a good reason to ignore a return email stating the email was automatically denied by the email service for whatever reason (often for the reason that the email service automatically believed it was SPAM) or not delivered due to an error of some sort?

This is really a good rule to keep, and goes with the comments I wrote above.

Finally, I am against the removal of the ability to serve someone via fax if they agree to such (see Rule 5 [b][1][A][iii]). Why are we messing with this? Someone might not have or want service via email, but they have a fax and are willing to receive it by the same. Why are we taking away options here, especially one that, unlike email (as discussed above), at least has a verifiable confirmation that the document was sent and received by the person at that phone number, on the date and time indicated in the fax confirmation?

Posted by Superman! May 7, 2014 12:30 PM

I don't think it is a good idea to allow people to serve by email without consent. I understand that we must agree to service by email through the electronic filing system, but I prefer to receive discovery materials and other documents through mail, unless I have consented to service by email.

With electronic filing, we are already bombarded with emails and it is too easy for an email to slip through the cracks unless I am expecting, and have agreed, to receive documents through email.

I believe the better rule is to still require consent to receive documents through email.

Posted by Daniel Young May 7, 2014 09:25 AM

Lines 3-4: replace “Except as otherwise provided in these rules or as otherwise directed by the court” with “Unless these rules provide or the court orders otherwise” (avoid passive voice—Garner, 2.3)

Line 6: delete subparagraph (a)(1)(A) as unnecessary and duplicative of Rule 58A(d).

Line 7: either delete subparagraph (a)(1)(B) as unnecessary (the words “unless otherwise directed by the court” in (a)(1) should cover this provision)

Line 8: insert the word “filed” between the words “pleading” and “after”

Line 10: insert a comma after “court” and replace “other than” with “except”

Lines 12-13: delete subparagraph (a)(1)(F) as unnecessary and duplicative of (a)(1)(E).

Lines 16-27: consider replacing with the following for the sake of simplicity:

(a)(2)(A) a party in default for any reason other than for failure to appear must be served as provided in paragraph (a)(1);

(a)(2)(B) a party in default for any reason must be served under Rule 4 with a pleading that asserts a new claim for relief against that party; and

(a)(2)(C) a party in default for any reason must be served under Rule 5(b)(3) with:

(a)(2)(C)(i) notice of any hearing to determine the amount of damages to be entered against the defaulting party;

(a)(2)(C)(ii) notice of entry of judgment under Rule 58A(d);

(a)(2)(C)(iii) other papers as the court directs.

Line 16: replace “as ordered by the court” with “as the court orders” (avoid passive voice—Garner, 2.3)

Line 26: replace “pleadings asserting new or additional claims” with “a pleading that asserts a new claim” (avoid plurals—Garner, 2.1)

Line 39: insert a colon after the word “if”

Lines 44-48: Paragraph (b)(2) mixes up a method of service (method most likely to be promptly received) with the time to serve (must be served before or on the same day that it is filed). The word “otherwise” on line 7 doesn’t apply here, because the first part of the paragraph isn’t an exception—just like other papers, papers served within 7 days of a hearing “must be served before or on the same day that it is filed.” I recommend deleting the words “If a hearing is scheduled 7 days or less from the date of service, a party must serve a paper related to the hearing by the method most likely to be promptly received. Otherwise,” from this paragraph and inserting it into its own paragraph after (b)(3) as explain below.

Line 49: replace “A paper served under this rule may be served by:” with “A paper is served under this rule by:”

Line 64: insert “if the person has no office or the office is closed,” before the word “leaving.” This language is in the federal rule and would prevent a person from serving an attorney at his or her home during business hours.

Line 66: insert as separate subparagraph (b)(3)(#): “delivering it by any other means that the person consented to in writing.”

Line 67: insert as separate paragraph (b)(#): “Service within 7 days of hearing. If a hearing is scheduled 7 days or less from the date of service, a party must serve a paper related to the hearing by the method most likely to be promptly received.”

Line 68: replace “complete” with “effective” (it matches the heading)

Line 68: as indicated in the minutes, the committee inserted at the end of this sentence “Service by other means is effective upon delivery.”

Lines 71-77: (b)(5)(A) as unnecessary—this goes without saying based on (a)(1). The word “preparing” is problematic—it only really applies to proposed orders and judgments. It also calls into question whether a party must serve both a proposed order it prepared, and then serve it again after it was signed by the court. Consider changing (b)(5) as follows:

(b)(5) Service by the court. Unless the court directs otherwise, an order, judgment, or other paper filed by the court will be served by the court.

Line 75: replace “preparing” with “filing”

Line 76: replace “prepared” with “filed”

Line 76: replace “an order or judgment” with “an order, judgment, or other paper” (notices are routinely prepared and filed by the court)

Line 89: paragraph (c)(4) should not be grouped with (c)(1)-(3). Under the current version of the state rules and the federal rules, the language of (c)(4) states that a copy of an order directing parties the method of serving numerous defendants must be served on the parties as the court directs, not that the court may order that a copy of the order must be served on the parties. I would recommend revising the structure as follows: (c)—title only; the text of (c) into (c)(1); (c)(1)-(3) into (c)(1)(A)-(C); (c)(4) into (c)(2).

Lines 102-03: replace “all papers after the complaint that are required to be served” with “a paper after the complaint that is required to be served” (avoid plurals—Garner, 2.1)

Line 103: replace “Parties” with “A party” (avoid plurals—Garner, 2.1)

Line 105: delete “of the court” as unnecessary

Lines 105-06: delete “of the court” as unnecessary, insert who agrees to accept it for filing” after the word “judge”

Line 110: replace “the original affidavit with a notary acknowledgement” with “an electronically signed and acknowledged affidavit”

Line 111: replace “46-1-16(7)” with “46-4-205”

Line 114: replace “e-filing” with electronic filing”

Line 115: replace “clerk of the court, and the clerk will” with “clerk, who will”

Lines 117-19: This is a dangling section. I would recommend revising the structure of (f) as follows: (f)—title only; the text of (f) into (f)(1); (f)(1)-(4) into (f)(1)(A)-(d); lines 117-19 into (f)(2).

Lines 118-19: replace “, including any appeal or until the time in which to appeal has expired” with “and the time for appeal has expired or any appeal has terminated”

Lines 132-139: consider deleting as outdated.

Line 144: add the following explanatory notes:

2014 Amendments

Former subparagraph (b)(1)(A) was amended to allow service by email upon e-filers without the requirement of written consent. While e-filers could be electronically served with papers filed with the court, there was no equivalent means to electronically serve papers not filed with the court, such as discovery papers or proposed orders. The committee concluded that as e-filers already received notice of e-filed documents by email, the risk of e-filers failing to notice that they had been served with documents was small enough to tip the scales in favor of allowing parties the convenience of serving parties with discovery documents and proposed orders by email.

Former subparagraph (b)(1)(A) was also amended to remove explicit reference to service by fax. A party is still allowed to be served by a method not mentioned in these rules provided the party consents to the method of service in writing. While it is not necessary to file a written consent to a method of service with the court, a party may do so if it wishes.

Former subparagraph (b)(1)(B) was amended to remove the provision that service by electronic means is not effective if the party making service leads that the attempted service did not reach the person to be served. The committee concluded that rather than dealing with the consequences of retroactively invalidating service, the better course would be to treat a paper as served when sent and allow the district courts to deal with any problems with receiving notice on a case-by-case basis, much like they have done with service by mail. Despite the change, parties and attorneys are obliged upon learning that a party did not receive the served paper to promptly resend a paper by an alternate means of service.

Subdivision (f) was added to address the question of how to electronically file an affidavit or declaration of a person other than the e-filer. A conforming notary acknowledgement must contain the information listed in Utah Code Section 46-1-16(7) in or next to the notary's signature block.

The language throughout has been amended and reorganized to make the rule more easily understood.

Posted by Nathan Whittaker May 2, 2014 11:10 AM

## **(2) RULE 26**

My concern is that the proposed change to Rule 26 will limit the discretion of the judge to allow additional discovery. The reference to Rule 37 will require some type of misconduct or non-disclosure by the non-moving party. There are situations when additional discovery is necessary despite full disclosure by the adverse party. I see no benefit in taking the discretion away from the judge to allow additional discovery if he or she is convinced the circumstances warrant it.

Posted by Ryan Schriever June 25, 2014 09:24 AM

## **(3) RULE 30**

We received no comments.

## **(4) RULE 37**

With the proposed change to URCP Rule 37, does this eliminate motions for protective orders all together. This would necessitate an amendment to Rule 45(e)(5) which permits a party to file a motion for protective order after being served with notice of a subpoena. Of course, as I currently read Rule 4-502, this amendment to Rule 45(e)(5) is already necessary.

Posted by Mark Dahl May 20, 2014 04:04 PM

Multiple comments about Proposed Rule 37:

1. Is the Discovery Statement truly intended only for responding parties? The Proposed Rule 37(a)(1) states that "A party or the person FROM WHOM DISCOVERY IS SOUGHT may request ...." But what if

the person “from whom discovery is sought” is the party engaging in improper conduct? What if the responding party is not providing responses, or gives incomplete or evasive responses, or gives disingenuous objections. Can the person who seeks the discovery file a discovery statement? If not, what is the requesting party’s recourse, a standard motion? If a requesting party can also use the Discovery Statement, revise the rule to so indicate.

2. Is the Discovery Statement an additional tool that can be used, or a mandatory initial mechanism to solve “any discovery dispute”? Proposed Rule 37(a)(1) states a party “may” request an order about “any discovery dispute”. But will this be enforced as the party “must” use this rule? I seem to recall that local rule version of this rule made it a mandatory pre-requisite before another discovery motion could be filed.

3. Are Discovery Statements to be used for requesting extra discovery? Adv. Comm. Note 1 states that “Statements of discovery issues replace discovery motions.” Are they intended to replace all discovery motions or only certain enumerated motions? If this is only truly intended to replace a subset of discovery motions, please clarify.

4. In Proposed Rule 37(a)(3), the use of 7 days is a bit confusing. I’ve never seen a 7 day time limit. The only time I’ve seen deadlines using multiples of 7 is when it’s been more than 10 days, i.e., 14, 28, etc. With a 7 day deadline, presumably the intervening weekends and holidays are not counted per Rule 6(a). This would capture two weekends if the statement is filed on Thursday or Friday. Is that intended?

5. I’m confused by Proposed Rule 37(a)(4). It states that “unless other attachments are required by law, the party filing the statement must attach to the statement only a copy of the request for discovery or the response at issue.” But with this being a new procedure, where else in the law might other attachments be required? And if something else is required, then does that mean that filing the request or response is no longer required? I recommend: (a) make it explicit here what attachments are required; and (b) if a copy of the request or response is always required, include that in a separate sentence, not the conditional sentence that starts with an “unless.”

6. I’m confused by Proposed Rule 37(a)(7). Is this intended to be an exhaustive list of what the court can order in response to Discovery Statements, or is it just a suggestive list? If it is an exhaustive list, then what is to be understood by Proposed Rule 37(a)(1)’s statement that Discovery Statement can be used for “any discovery dispute”? Can it be used for a dispute that does not require one of the enumerated orders currently in (a)(7)(A)-(K)? If the proposed list is not exhaustive, then I recommend adding an “other appropriate matters” option as Proposed Rule 37 (a)(7)(L), i.e., something like Current Rule 16(a)(14). Failure to do so will result in confusion about the court’s authority to issue orders.

7. I’m confused by Proposed Rule 37(a)(8). I’m struggling to understand when costs or fees might be requested in an Discovery Statement unless it is for the type of sanctionable conduct specified in Proposed Rule 37(b)-(e). Can you clarify this in the advisory committee notes?

Posted by Victor Sipos May 13, 2014 09:45 AM

Line 37: Consider changing “the person from whom discovery is sought” to the more indefinite “any person from whom discovery is sought.” This language conforms to Federal Rule 26(c)(1).

Line 38: Consider replacing the word “regarding” to “resolving” as it better describes the purpose of the order.

Lines 39–44: the wording of the list needs to be altered to make the phrasing of each of the list items consistent. Also, line 41 may be misread to suggest that a court order is required to obtain a subpoena. Consider amending as follows:

(a)(1)(A) compelling disclosure under Rule 26;

(a)(1)(B) granting extraordinary discovery under Rule 26;

(a)(1)(C) compelling compliance with or quashing a subpoena under Rule 45;

(a)(1)(D) protecting a party from discovery; or

(a)(1)(E) compelling discovery from a party who fails to make full and complete discovery.

Lines 74–99: While paragraph (a)(7) claims to be about orders, the list provided is only about protective orders (except for (K), addressed below). As the authority to make any order resolving discovery is clearly implied in (a)(1), I think all that this paragraph needs to be is an illustrative list of protective orders. Also, the language of the protective order list is outdated; I suggest adopting the updated versions of (a)(7)(A)–(H) that are in Federal Rule 26(c)(1), and updating (I) and (J) to match. Specifically, I would recommend changing these lines as follows:

(a)(7) Protective orders. The court may, for good cause, enter an order to protect a party or person from annoyance, embarrassment, oppression, undue burden or expense, or to achieve proportionality under Rule 26(b)(2), including one or more of the following:

(a)(7)(A) forbidding the disclosure or discovery;

(a)(7)(B) specifying terms, including time and place, for the disclosure or discovery;

(a)(7)(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(a)(7)(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(a)(7)(E) designating the persons who may be present while the discovery is conducted;

(a)(7)(F) requiring that a deposition be sealed and opened only on court order;

(a)(7)(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way;

(a)(7)(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs;

(a)(7)(I) allowing a party to defer its answer to a question about a fact, the application of law to fact, or an opinion about either, until after designated discovery has been completed, a pretrial conference, or other later time; and

(a)(7)(J) allocating the costs, expenses, and attorney fees of discovery among the parties as justice requires.

Lines 105–112: Paragraph (a)(7) combines a list of protective orders with the provision for expenses and attorney fees. While these are all orders, all but one of them are a specific type of order, and the provision for expenses and attorney fees is likely to get lost or ignored as just another type of protective order. I would suggest moving it out into a paragraph (a)(#). Also, the word “costs” is confusing, as it usually refers to taxable costs under Rule 54(d). What I believe the drafters of the federal rule had in mind when they said “reasonable expenses, including attorney fees” was attorney fees and litigation expenses that are not normally taxable under 54(d). Third, the language of this provision only applies to a party paying another party’s expenses and fees—I see no good reason why non-parties should not be subject to this rule or be able to take advantage of it. Finally, the wording of this paragraph is awkward. Specifically, I would recommend changing these lines as follows:

(a)(#) Expenses and attorney fees. The court may order a party, person, or attorney to pay the reasonable expenses and attorney fees incurred by the other party or person on account of the statement of discovery issues if:

(a)(#)(A) the court rules against the party or person in deciding the statement of discovery issues, or the party or person provides the contested discovery or withdraws the contested discovery request after a statement of discovery issues is filed; and

(a)(#)(B) the court finds that the party, witness, or attorney did not act in good faith or asserted a position that was not substantially justified.

Line 114: replace “costs” with “expenses” for the reasons explained above.

Lines 127–138: this is a list of “appropriate sanctions for the failure to follow [the court’s] orders” and therefore is a list of nouns. This is supported by the fact that the main sentence that the list splinters off from already has a main verb, “may impose,” and so all other verbs must be in a non-finite form such as an infinitive, gerund, or participle. Therefore, the form of each item in the list should be in gerund (“[verb]+ing”) form, just as they are in Federal Rule 37(b)(2)(A).

Lines 139–145: This language is awkward and clunky. I would recommend adopting the wording of Federal Rule 37(c)(2), revised as follows:

If a party fails to admit what is requested under Rule 36 and [] the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses and attorney fees incurred in making that proof. The court must so order unless:

Lines 159–160: The phrase “filed a statement of discovery issues under paragraph (a)” is a little vague—consider replacing with “requested protection from discovery under subparagraph (a)(1)(D).”

Lines 183–184: The phrase “related to a nonparty” is vague—consider replacing with “brought by or against a nonparty”

Lines 185 & 189: replace “paragraph” with “subdivision” as per Garner, 3.2.

Line 187: italicize “see also”

Posted by Nathan Whittaker May 11, 2014 03:42 PM

First, the revised Rule 37(a) creates a conflict, or at least confusion, with Rule 26(d)(4). Rule 26 categorizes required disclosures -- governed by Rule 26(a) -- separately from discovery -- governed by Rule 26(b)). However, this distinction disappears in Rule 37. Under 37(a)(1)(a), if a party fails to disclose under Rule 26 (in other words fails to disclose initial disclosures, expert reports, or pretrial disclosures), the prejudiced party would need to file a statement of discovery issues under Rule 37(a) rather than a motion to exclude under Rule 26(d)(4), in order to prevent use of the undisclosed witness, document, or report at any hearing or trial. If the advisory committee intends that motions to exclude based on failure to make required Rule 26 disclosures, including pretrial disclosures, are discovery issues that must be addressed by Rule 37, this intent should be expressed more explicitly.

Second, Rule 37(a)(2) requires that the movant include a certification that the movant conferred or attempted to confer with the other affected parties in an effort to resolve the dispute without court action, as well as file a statement of proportionality under Rule 26(b)(2). In the context of enforcing Rule 26(d)(4), an effort to meet and confer may make sense solely to determine whether the failure to disclose was for good cause. A statement of proportionality does not.

Third, while 37(a)(4) defines required attachments, it fails to define a "permitted attachment" under 37(a)(2) and 37(a)(3). Rule 37(a)(4) should also probably be revised to identify the "disclosure at issue" as a required attachment.

Fourth, while Rule 37(e) allows the court to retain its the inherent authority to deal with spoliation issues, it is not clear whether the procedure for bringing spoliation to the court's attention is a statement of discovery issues under Rule 37(a).

Lastly, Rule 37 fails to state that the 37(a) statement of discovery issues is the sole means for addressing discovery disputes. In contrast, Rule 4-502 makes use of the statement mandatory when it states that "The parties shall do the following before filing with the court any discovery motion ...."

Posted by Karthik Nadesan May 9, 2014 01:53 PM

A statement of discovery issues re a nonparty is filed with the court before which the case is pending even when the nonparty is not within the jurisdiction of that court. That seems odd. This provision of 37 appears to conflict with 45(e)(5) which has the nonparty filing a motion for a protective order -- is that now a statement of discovery issues? It seems burdensome to require a nonparty to come to the forum of the parties to seek protection, or to defend objections. In any event, it would be helpful to get 37 and 45 in line with one another.

Posted by J.Bogart May 7, 2014 03:32 PM

URCP 45(e)(5) should be modified to comport with the changes to URCP 37. The current language in 45(e)(5) refers to a "motion for protective order" and ought to be changed consistent with the language referencing a "Statement of Discovery Issues".

Posted by Michael A. Jensen May 7, 2014 12:53 PM

**(5) RULE 45**

I think that the proposed change to Rule 45(b)(3) is helpful in that it requires prior service of the actual subpoena itself before it is issued. In my experience, I am frequently served with a notice of intent to subpoena from various individuals or entities, but I am still left wanting to know the precise scope of the subpoena.

My concern with this subsection, (Rule 45(b)(3)), is that while it clearly requires "delivery" or "actual notice before serving the subpoena," the rule remains silent on how much notice is appropriate. Some attorneys give 5 days notice; others 10 days; and still others 14 days; but what about instances when less than even 5 days is given? I don't think that the rule is satisfied if notice is given on the eve of issuing the subpoenas, but the rule doesn't necessarily say that either.

I think that it's noteworthy that the local rules for the federal district court here in Utah have addressed this issue by requiring at least 5 days' notice, (8 days if the notice is served by mail), under DUCivR 45-1 when serving subpoenas.

It seems that the recent changes in Utah's rules of civil procedure have been generally aimed at more closely mirroring the federal rules. Wouldn't that goal also be accomplished by including a provision into Utah's rules that addresses how much notice is required before issuing subpoenas? I think it would certainly be helpful.

Posted by Trevor Sanders July 17, 2014 11:18 AM