

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

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

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

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

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

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

14       (a)(1)(B) a copy of, ~~or a description by category and location of,~~ all ~~discoverable~~  
15 ~~documents, data compilations, electronically stored information, and tangible things in~~  
16 ~~the possession, custody, or control of the party supporting its claims or defenses, unless~~  
17 ~~solely for impeachment; or control of the party that the party may offer in its case-in-~~  
18 ~~chief, except charts, summaries and demonstrative exhibits that have not yet been~~  
19 ~~prepared and must be disclosed in accordance with paragraph (a)(4)(C);~~

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

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

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

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

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

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

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

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

43 (a)(2) Exemptions.

44 (a)(2)(A) ~~The~~Unless otherwise ordered by the court or agreed to by the parties, the  
45 requirements of ~~subdivision~~paragraph (a)(1) ~~and subdivision (f)~~ do not apply to actions:

46 ~~(a)(2)(A)(i) based on contract in which the amount demanded in the pleadings is~~  
47 ~~\$20,000 or less;~~

48 ~~(a)(2)(A)(ii)~~(a)(2)(A)(i) for judicial review of adjudicative proceedings or rule making  
49 proceedings of an administrative agency;

50 (a)(2)(A)~~(iii)~~ governed by Rule 65B or Rule 65C;

51 (a)(2)(A)~~(iv)~~ to enforce an arbitration award;

52 (a)(2)(A)~~(v)~~ for water rights general adjudication under Title 73, Chapter 4; ~~and~~

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

55 (a)(2)(B) In an exempt action, the matters subject to disclosure under  
56 ~~subpart~~paragraph (a)(1) are subject to discovery under ~~subpart~~paragraph (b).

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

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

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

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

84 ~~(a)(3)(C) Unless otherwise stipulated by the parties or ordered by the court, the~~  
85 ~~disclosures- Timing for Expert Discovery.~~

86 ~~(a)(3)(C)(i) The party who bears the burden of proof on the issue for which expert~~  
87 ~~testimony is offered shall provide the information~~ required by ~~subdivision paragraph~~  
88 ~~(a)(3) shall be made)(A)~~ within ~~30~~seven days after the ~~expiration~~close of fact discovery  
89 ~~as-. Within seven days thereafter, the party opposing the expert may serve notice~~  
90 ~~electing either a deposition of the expert pursuant to paragraph (a)(3)(B) and Rule 30,~~  
91 ~~or a written report pursuant to paragraph (a)(3)(B). The deposition shall occur, or the~~  
92 ~~report shall be~~ provided by ~~subdivision (d) or, if the evidence is intended solely to~~

93 ~~contradict or rebut evidence on the same subject matter identified, within 28 days after~~  
94 ~~the election is made. If no election is made, then no further discovery of the expert shall~~  
95 ~~be permitted.~~

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

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

111 (a)(3)(D) If a party intends to present evidence at trial under Rules 702, 703, or 705  
112 of the Utah Rules of Evidence from any person other than an expert witness who is  
113 retained or specially employed to provide testimony in the case or a person whose  
114 duties as an employee of the party regularly involve giving expert testimony, that party  
115 must provide a written summary of the facts and opinions to which the witness is  
116 expected to testify in accordance with the deadlines set forth in paragraph (a)(3)(C). A  
117 deposition of such a witness may not exceed four hours.

118 (a)(4) Pretrial disclosures. A party shall, without waiting for a discovery request,  
119 provide to other parties the following information regarding the evidence that it may  
120 present at trial other than solely for impeachment:

121 (a)(4)(A) the name and, if not previously provided, the address and telephone  
122 number of each witness, unless solely for impeachment, separately identifying

123 witnesses the party ~~expects to present will call~~ and witnesses the party may call ~~if the~~  
124 ~~need arises~~;

125 (a)(4)(B) the ~~designation name~~ of witnesses whose testimony is expected to be  
126 presented by ~~mean transcript~~ of a deposition and, ~~if not taken stenographically,~~ a  
127 ~~transcript copy~~ of the ~~pertinent portions of transcript with~~ the ~~deposition proposed~~  
128 testimony ~~designated~~; and

129 (a)(4)(C) ~~an appropriate identification a copy~~ of each ~~document or other~~ exhibit,  
130 including ~~charts,~~ summaries ~~of other evidence and demonstrative exhibits, unless solely~~  
131 ~~for impeachment,~~ separately identifying those which the party ~~expects to will~~ offer and  
132 those which the party may offer ~~if the need arises.~~

133 ~~Unless otherwise stipulated by the parties or ordered by the court, the~~  
134 ~~disclosures(a)(4)(D) Disclosure~~ required by ~~subdivision paragraph~~ (a)(4) shall be made  
135 at least ~~30~~28 days before trial. ~~Within At least~~ 14 days ~~thereafter, unless a different time~~  
136 ~~is specified by the court before trial,~~ a party ~~may shall~~ serve and file ~~a list disclosing (i)~~  
137 ~~any counter-designations of deposition testimony,~~ objections ~~and grounds for the~~  
138 ~~objections~~ to the use ~~under Rule 32(a)~~ of a deposition ~~designated by another party~~  
139 ~~under subparagraph (B) and (ii) any objection, together with the grounds therefor, that~~  
140 ~~may be made and~~ to the admissibility of ~~materials identified under subparagraph (C).~~  
141 ~~Objections not so disclosed, other exhibits. Other~~ than objections under Rules 402 and  
142 403 of the Utah Rules of Evidence, ~~shall be deemed objections not listed are~~ waived  
143 unless excused by the court for good cause ~~shown.~~

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

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

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

154 (b)(1) In general. Parties may ~~obtain discovery regarding discover~~ any matter, not  
155 privileged, which is relevant to the ~~subject matter involved in the pending action,~~  
156 ~~whether it relates to the~~ claim or defense of ~~the party seeking discovery or to the claim~~  
157 ~~or defense of any other party, including the existence, description, nature, custody,~~  
158 ~~condition, and location of any books, documents, or other tangible things and the~~  
159 ~~identity and location of persons having knowledge of any discoverable matter. It is not~~  
160 ~~ground for objection that the information sought will be inadmissible at the trial if the~~  
161 ~~information sought appears reasonably calculated to lead to the~~any party if the  
162 discovery satisfies the standards of proportionality set forth below.

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

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

167 (b)(2)(B) the likely benefits of the proposed discovery ~~of~~ admissible  
168 evidence outweigh the burden or expense;

169 (b)(2) ~~A party need not provide~~ (C) the discovery of is consistent with the overall  
170 case management and will further the just, speedy and inexpensive determination of the  
171 case;

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

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

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

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

181 (b)(4) Electronically stored information. A party claiming that electronically stored  
182 information ~~from sources that the party identifies as is~~ not reasonably accessible  
183 because of undue burden or cost. ~~The party shall expressly make any claim that the~~  
184 ~~source is not reasonably accessible, describing~~ shall describe the source of the

185 electronically stored information, the nature and extent of the burden, the nature of the  
186 information not provided, and any other information that will enable other parties to  
187 ~~assess the claim. On motion to compel discovery or for a protective order, the party~~  
188 ~~from whom discovery is sought must show that the information is not reasonably~~  
189 ~~accessible because of undue burden or cost. If that showing is made, the court may~~  
190 ~~order discovery from such sources if the requesting party shows good cause,~~  
191 ~~considering the limitations of subsection (b)(3). The court may specify conditions for the~~  
192 ~~discovery.~~evaluate the claim.

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

195 ~~(b)(3)(A) the discovery sought is unreasonably cumulative or duplicative, or is~~  
196 ~~obtainable from some other source that is more convenient, less burdensome, or less~~  
197 ~~expensive;~~

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

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

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

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

228 (b)(~~57~~) Trial preparation: ~~Experts; experts.~~

229 (b)(~~57~~)(A) ~~A party may depose~~ Trial-preparation protection for draft reports or  
230 disclosures. Paragraph (b)(5) protects drafts of any ~~person who has been identified as~~  
231 ~~an expert whose opinions may be presented at trial. If a report is or disclosure~~ required  
232 under ~~subdivision paragraph (a)(3)(B),~~ regardless of the form in which the draft is  
233 recorded.

234 (b)(7)(B) Trial-preparation protection for communications between a party's attorney  
235 and expert witnesses. Paragraph (b)(5) protects communications between the party's  
236 attorney and any ~~deposition shall be conducted within 60 days after the report is~~ witness  
237 required to provide disclosures under paragraph (a)(3), regardless of the form of the  
238 communications, except to the extent that the communications:

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

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

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

244 (b)(7)(C) Expert employed only for trial preparation. Ordinarily, a party may not, by  
245 interrogatories or otherwise, discover facts known or opinions held by an expert who  
246 has been retained or specially employed by another party in anticipation of litigation or

247 ~~preparation to prepare~~ for trial and who is not expected to be called as a witness at trial;  
248 ~~only as provided in Rule 35(b) or upon a showing of exceptional circumstances under~~  
249 ~~which it is impracticable for the~~ A party ~~seeking discovery to obtain facts or opinions on~~  
250 ~~the same subject by other means.~~ may do so only:

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

252 ~~(b)(57)(C)(i) The court shall require that the party seeking discovery pay the expert a~~  
253 ~~reasonable fee for time spent in responding to discovery under Subdivision (b)(5) of this~~  
254 ~~rule; and~~ as provided in Rule 35(b); or

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

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

263 ~~(b)(8) Claims of Privilege or Protection of Trial Preparation~~  
264 ~~Material trial preparation materials.~~

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

272 ~~(b)(68)(B) Information produced. If a party produces information that the party claims~~  
273 ~~is produced privileged or prepared in discovery that is subject to a claim anticipation of~~  
274 ~~privilege litigation or of protection as for trial preparation material, the party making the~~  
275 ~~claim producing party may notify any receiving party that received the information of the~~  
276 claim and the basis for it. After being notified, a receiving party must promptly return,  
277 sequester, or destroy the specified information and any copies it has and may not use

278 or disclose the information until the claim is resolved. A receiving party may promptly  
279 present the information to the court under seal for a determination of the claim. If the  
280 receiving party disclosed the information before being notified, it must take reasonable  
281 steps to retrieve it. The producing party must preserve the information until the claim is  
282 resolved.

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

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

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

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

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

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

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

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

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

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

309 ~~(d) Sequence and timing of discovery. Except for cases exempt under subdivision~~  
310 ~~(a)(2), except as authorized under these rules, or unless otherwise stipulated by the~~  
311 ~~parties or ordered by the court, a party may not seek discovery from any source before~~  
312 ~~the parties have met and conferred as required by subdivision (f). Unless otherwise~~  
313 ~~stipulated by the parties or ordered by the court, fact discovery shall be completed~~  
314 ~~within 240 days after the first answer is filed. Unless the court upon motion, for the~~  
315 ~~convenience of parties and witnesses and in the interests of justice, orders otherwise, (c)~~  
316 Sequence and timing of discovery; tiers; limits on standard discovery; extraordinary  
317 discovery.

318 (c)(1) Methods of discovery; sequence and timing of discovery.

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

324 (c)(2) Methods of discovery may be used in any sequence, and the fact that a party  
325 is conducting discovery, ~~whether by deposition or otherwise,~~ shall not ~~operate to delay~~  
326 any other party's discovery. Except for cases exempt under paragraph (a)(2), a party  
327 may not seek discovery from any source before that party's initial disclosure obligations  
328 are satisfied.

329 ~~(e) Supplementation of responses. A party who has made a disclosure under~~  
330 ~~subdivision (a) or responded to a request for discovery with a response is under a duty~~  
331 ~~to supplement the disclosure or response to include information thereafter acquired if~~  
332 ~~ordered by the court or in the following circumstances:~~

333 ~~(e)(1) A party is under a duty to supplement at appropriate intervals disclosures~~  
334 ~~under subdivision (a) if the party learns that in some material respect the information~~  
335 ~~disclosed is incomplete or incorrect and if the additional or corrective information has~~  
336 ~~not otherwise been made known to the other parties during the discovery process or in~~  
337 ~~writing. With respect to testimony of an expert from whom a report is required under~~  
338 ~~subdivision (a)(3)(B) the duty extends both to information contained in the report and to~~  
339 ~~information provided through a deposition of the expert.~~

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

345 ~~(f) Discovery and scheduling conference.~~

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

348 ~~(f)(1) The parties shall, as soon as practicable after commencement of the action,~~  
349 ~~meet in person or by telephone to discuss the nature and basis of their claims and~~  
350 ~~defenses, to discuss the possibilities for settlement of the action, to make or arrange for~~  
351 ~~the disclosures required by subdivision (a)(1), to discuss any issues relating to~~  
352 ~~preserving discoverable information and to develop a stipulated discovery plan.~~  
353 ~~Plaintiff's counsel shall schedule the meeting. The attorneys of record shall be present~~  
354 ~~at the meeting and shall attempt in good faith to agree upon the discovery plan.~~

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

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

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

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

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

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

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

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

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

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

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

389 ~~(g) (c)(3) Definition of tiers for standard discovery. Actions claiming \$50,000 or less~~  
390 ~~in damages are permitted standard discovery as described for Tier 1. Actions claiming~~  
391 ~~more than \$50,000 and less than \$300,000 in damages are permitted standard~~  
392 ~~discovery as described for Tier 2. Actions claiming \$300,000 or more in damages are~~  
393 ~~permitted standard discovery as described for Tier 3. Absent an accompanying damage~~  
394 ~~claim for more than \$300,000, actions claiming non-monetary relief are permitted~~  
395 ~~standard discovery as described for Tier 2.~~

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

400 ~~(c)(5) Limits on standard fact discovery. Standard fact discovery per side (plaintiffs~~  
401 ~~collectively, defendants collectively, and third-party defendants collectively) in each tier~~

402 is as follows. The days to complete standard fact discovery are calculated from the date  
 403 the first defendant's first disclosure is due and do not include expert discovery under  
 404 Rule 26(a)(3)(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

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

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

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

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

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

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

424 (d)(3) A party is not excused from making disclosures or responses because the  
 425 party has not completed investigating the case or because the party challenges the

426 sufficiency of another party's disclosures or responses or because another party has not  
427 made disclosures or responses.

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

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

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

455 . If a certification is made in violation of the rule, the court, upon motion or upon its  
456 own initiative, shall impose upon the person who made the certification, the party on

457 ~~whose behalf the request, response, or objection is made, or both, an appropriate~~  
458 ~~sanction, which may include an order to pay the amount of the reasonable expenses~~  
459 ~~incurred because of the violation, including a reasonable attorney fee. may take any~~  
460 ~~action authorized by Rule 11 or Rule 37(e).~~

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

470 ~~(i) Filing.~~

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

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

### 483 **Advisory Committee Notes**

484 Disclosure Requirements and Timing. Rule 26(a)(1). The 2011 amendments seek to  
485 reduce discovery costs by requiring each party to produce, at an early stage in the case,  
486 and without a discovery request, all of the documents and physical evidence the party  
487 may offer in its case-in-chief and the names of witnesses the party may call in its case-

488 in-chief, with a description of their expected testimony. In this respect, the amendments  
489 build on the initial disclosure requirements of the prior rules. In addition to the  
490 disclosures required by the prior version of Rule 26(a)(1), a party must disclose each  
491 fact witness the party may call in its case-in-chief and a summary of the witness's  
492 expected testimony, a copy of all documents the party may offer in its case-in-chief, and  
493 all documents to which a party refers in its pleadings.

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

519 be promptly supplemented as new evidence and witnesses become known as the case  
520 progresses.

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

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

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

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

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

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

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

575 Disclosures of expert testimony are made in sequence, with the party who bears the  
576 burden of proof on the issue for which expert testimony will be offered going first. Within  
577 seven days after the close of fact discovery, that party must disclose: (i) the expert's  
578 curriculum vitae identifying the expert's qualifications, publications, and prior testimony;  
579 (ii) compensation information; (iii) a brief summary of the opinions the expert will offer;

580 and (iv) a complete copy of the expert's file for the case. The file should include all of  
581 the facts and data that the expert has relied upon in forming the expert's opinions. If the  
582 expert has prepared summaries of data, spreadsheets, charts, tables, or similar  
583 materials, they should be included. If the expert has used software programs to make  
584 calculations or otherwise summarize or organize data, that information and underlying  
585 formulas should be provided in native form so it can be analyzed and understood. To  
586 the extent the expert is relying on depositions or materials produced in discovery, then a  
587 list of the specific materials relied upon is sufficient. The committee recognizes that  
588 experts frequently will prepare demonstrative exhibits or other aids to illustrate the  
589 expert's testimony at trial, and the costs for preparing these materials can be  
590 substantial. For that reason, these types of demonstrative aids may be prepared and  
591 disclosed later, as part of the Rule 26(a)(4) pretrial disclosures when trial is imminent.

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

608 The report or deposition must be completed within 28 days after the election is  
609 made. After this, the party who does not bear the burden of proof on the issue for which  
610 expert testimony is offered must make its corresponding disclosures and the opposing

611 party may then elect either a deposition or a written report. Under the deadlines  
612 contained in the rules, expert discovery should take less than three months to complete.  
613 However, as with the other discovery rules, these deadlines can be altered by  
614 stipulation of the parties or order of the court.

615 The amendments also address the issue of testimony from experts other than those  
616 who are retained or specially employed to provide expert testimony, or whose duties as  
617 an employee regularly involve giving expert testimony, such as treating physicians,  
618 police officers, or accident investigators. This issue was addressed by the Supreme  
619 Court in Drew v. Lee, 2011 UT 15, wherein the court held that reports under the prior  
620 version of Rule 26(a)(3) are not required for treating physicians.

621 There are a number of difficulties inherent in disclosing expert testimony that may be  
622 offered from fact witnesses. First, there is often not a clear line between fact and expert  
623 testimony. Many fact witnesses have scientific, technical or other specialized  
624 knowledge, and their testimony about the events in question often will cross into the  
625 area of expert testimony. The rules are not intended to erect artificial barriers to the  
626 admissibility of such testimony. Second, many of these fact witnesses will not be within  
627 the control of the party who plans to call them at trial. These witnesses may not be  
628 cooperative, and may not be willing to discuss opinions they have with counsel. Where  
629 this is the case, disclosures will necessarily be more limited. On the other hand,  
630 consistent with the overall purpose of the 2011 amendments, a party should receive  
631 advance notice if their opponent will solicit expert opinions from a particular witness so  
632 they can plan their case accordingly. In an effort to strike an appropriate balance, the  
633 rules require that such witnesses be identified and the information about their  
634 anticipated testimony should include that which is required under Rule 26(a)(1)(A)(ii)  
635 which should include any opinion testimony that a party expects to elicit from them at  
636 trial. If a party has disclosed possible opinion testimony in its Rule 26(a)(1)(A)(ii)  
637 disclosures, that party is not required to prepare a separate Rule 26(a)(3)(D) disclosure  
638 for the witness. And if that disclosure is made in advance of the witness's deposition,  
639 those opinions should be explored in the deposition and not in a separate expert  
640 deposition. Rule 26(a)(3)(D) and 26(a)(1)(A)(ii) are not intended to elevate form over  
641 substance – all they require is that a party fairly inform its opponent that opinion

642 testimony may be offered from a particular witness. And because a party who expects  
643 to offer this testimony normally cannot compel such a witness to prepare a written  
644 report, further discovery must be done by interview or by deposition.

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

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

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

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

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

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

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

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

693 Rule 26(c) provides for three separate “tiers” of limited, “standard” discovery that are  
694 presumed to be proportional to the amount and issues in controversy in the action, and  
695 that the parties may conduct as a matter of right. An aggregation of all damages sought  
696 by all parties in an action dictates the applicable tier of standard discovery, whether  
697 such damages are sought by way of a complaint, counterclaim, or otherwise. The tiers  
698 of standard discovery are set forth in a chart that is embedded in the body of the rule  
699 itself. “Tier 1” describes a minimal amount of standard discovery that is presumed  
700 proportional for cases involving damages of \$50,000 or less. “Tier 2” sets forth larger  
701 limits on standard discovery that are applicable in cases involving damages above  
702 \$50,000 but less than \$300,000. Finally, “Tier 3” prescribes still greater standard  
703 discovery for actions involving damages in excess of \$300,000. The tiers also provide

704 presumptive limitations on the time within which standard discovery should be  
705 completed, which limitations similarly increase with the amount of damages at issue.  
706 After the expiration of the applicable time limitation, a case is presumed to be ready for  
707 trial. Actions for non-monetary relief, such as injunctive relief, are subject to the  
708 standard discovery limitations of Tier 2, absent an accompanying monetary claim of  
709 \$300,000 or more, in which case Tier 3 applies. The committee determined these  
710 standard discovery limitations based on the expectation that for the majority of cases  
711 filed in the Utah State Courts, the magnitude of available discovery and applicable time  
712 parameters available under the three-tiered system should be sufficient for cases  
713 involving the respective amounts of damages.

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

727 The second method to obtain additional discovery is by motion. The committee  
728 recognizes there will be some cases in which additional discovery is appropriate, but the  
729 parties cannot agree to the scope of such additional discovery. These may include,  
730 among other categories, large and factually complex cases and cases in which there is  
731 a significant disparity in the parties' access to information, such that one party  
732 legitimately has a greater need than the other party for additional discovery in order to  
733 prepare properly for trial. To prevent a party from taking advantage of this situation, the  
734 2011 amendments allow any party to move the Court for additional discovery. As with

735 stipulations for extraordinary discovery, a party filing a motion for extraordinary  
736 discovery should do so before the close of the standard discovery time limit, but only  
737 after the moving party has completed the standard discovery available to it under the  
738 rule. By taking advantage of this discovery, counsel should be better equipped to  
739 articulate for the court what additional discovery is needed and why. The party making  
740 such a motion must demonstrate that the additional discovery is proportional and certify  
741 that the party has reviewed and approved a discovery budget. The burden to show the  
742 need for additional discovery, and to demonstrate relevance and proportionality, always  
743 falls on the party seeking additional discovery. However, cases in which such additional  
744 discovery is appropriate do exist, and it is important for courts to recognize they can and  
745 should permit additional discovery in appropriate cases, commensurate with the  
746 complexity and magnitude of the dispute.

747 Protective Order Language Moved to Rule 37. The 2011 amendments delete in its  
748 entirety the prior language of Rule 26(c) governing motions for protective orders. The  
749 substance of that language is now found in Rule 37. The committee determined it was  
750 preferable to cover motions to compel, motions for protective orders, and motions for  
751 discovery sanctions in a single rule, rather than two separate rules. Accordingly, Rule  
752 37 now governs these motions and orders.

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

763