

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

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

4 (a)(1) Initial disclosures. Except in cases exempt under paragraph (a)(2), a party
5 shall, without waiting for a discovery request, provide to other parties:

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

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

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

12 (a)(1)(B) a copy of all documents, data compilations, electronically stored
13 information, and tangible things in the possession or control of the party that the party
14 may offer in its case-in-chief, except charts, summaries and demonstrative exhibits that
15 have not yet been prepared and must be disclosed in accordance with paragraph
16 (a)(4)(C);

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

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

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

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

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

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

29 (a)(2) Exemptions.

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

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

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

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

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

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

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

40 (a)(3)(A) Expert Testimony. A party shall, without waiting for a discovery request,
41 provide to the other parties the following information regarding any person who may be
42 used at trial to present evidence under Rules 702, 703, or 705 of the Utah Rules of
43 Evidence and who is retained or specially employed to provide expert testimony in the
44 case or whose duties as an employee of the party regularly involve giving expert
45 testimony: (i) the expert's name and qualifications, including a list of all publications
46 authored within the preceding 10 years, and a list of any other cases in which the expert
47 has testified as an expert at trial or by deposition within the preceding four years, (ii) a
48 brief summary of the opinions to which the witness is expected to testify, (iii) all data
49 and other information that will be relied upon by the witness in forming those opinions,
50 and (iv) the compensation to be paid for the witness's study and testimony.

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

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

60 (a)(3)(C)(i) The party who bears the burden of proof on the issue for which expert
61 testimony is offered shall provide the information required by paragraph (a)(3)(A) within
62 seven days after the close of fact discovery. Within seven days thereafter, the party

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

68 (a)(3)(C)(ii) The party who does not bear the burden of proof on the issue for which
69 expert testimony is offered shall provide the information required by paragraph (a)(3)(A)
70 within seven days after the later of (i) the date on which the election under paragraph
71 (a)(3)(C)(i) is due, or (ii) receipt of the written report or the taking of the expert's
72 deposition pursuant to paragraph (a)(3)(C)(i). Within seven days thereafter, the party
73 opposing the expert may serve notice electing either a deposition of the expert pursuant
74 to paragraph (a)(3)(B) and Rule 30, or a written report pursuant to paragraph (a)(3)(B).
75 The deposition shall occur, or the report shall be provided, within 28 days after the
76 election is made. If no election is made, then no further discovery of the expert shall be
77 permitted.

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

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

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

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

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

97 (a)(4)(C) a copy of each exhibit, including charts, summaries and demonstrative
98 exhibits, unless solely for impeachment, separately identifying those which the party will
99 offer and those which the party may offer.

100 (a)(4)(D) Disclosure required by paragraph (a)(4) shall be made at least 28 days
101 before trial. At least 14 days before trial, a party shall serve and file counter-
102 designations of deposition testimony, objections and grounds for the objections to the
103 use of a deposition and to the admissibility of exhibits. Other than objections under
104 Rules 402 and 403 of the Utah Rules of Evidence, objections not listed are waived
105 unless excused by the court for good cause.

106 (b) Discovery scope.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

185 notified, it must take reasonable steps to retrieve it. The producing party must preserve
186 the information until the claim is resolved.

187 (c) Sequence and timing of discovery; tiers; limits on standard discovery;
188 extraordinary discovery.

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

190 (c)(1) Parties may obtain discovery by one or more of the following methods:

191 depositions upon oral examination or written questions; written interrogatories;
192 production of documents or things or permission to enter upon land or other property,
193 for inspection and other purposes; physical and mental examinations; requests for
194 admission; and subpoenas other than for a court hearing or trial.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

259 **Advisory Committee Notes**

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

268 expected testimony, a copy of all documents the party may offer in its case-in-chief, and
269 all documents to which a party refers in its pleadings.

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

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

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

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

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

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

325 Finally, the 2011 amendments eliminate two categories of actions that previously
326 were exempt from the mandatory disclosure requirements. Specifically, the
327 amendments eliminate the prior exemption for contract actions in which the amount
328 claimed is \$20,000 or less, and actions in which any party is proceeding pro se. In the

329 committee's view, these types of actions will benefit from the early disclosure
330 requirements and the overall reduced cost of discovery.

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

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

351 Disclosures of expert testimony are made in sequence, with the party who bears the
352 burden of proof on the issue for which expert testimony will be offered going first. Within
353 seven days after the close of fact discovery, that party must disclose: (i) the expert's
354 curriculum vitae identifying the expert's qualifications, publications, and prior testimony;
355 (ii) compensation information; (iii) a brief summary of the opinions the expert will offer;
356 and (iv) a complete copy of the expert's file for the case. The file should include all of
357 the facts and data that the expert has relied upon in forming the expert's opinions. If the
358 expert has prepared summaries of data, spreadsheets, charts, tables, or similar
359 materials, they should be included. If the expert has used software programs to make

360 calculations or otherwise summarize or organize data, that information and underlying
361 formulas should be provided in native form so it can be analyzed and understood. To
362 the extent the expert is relying on depositions or materials produced in discovery, then a
363 list of the specific materials relied upon is sufficient. The committee recognizes that
364 experts frequently will prepare demonstrative exhibits or other aids to illustrate the
365 expert's testimony at trial, and the costs for preparing these materials can be
366 substantial. For that reason, these types of demonstrative aids may be prepared and
367 disclosed later, as part of the Rule 26(a)(4) pretrial disclosures when trial is imminent.

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

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

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

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

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

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

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

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

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

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

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

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

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

469 Rule 26(c) provides for three separate “tiers” of limited, “standard” discovery that are
470 presumed to be proportional to the amount and issues in controversy in the action, and
471 that the parties may conduct as a matter of right. An aggregation of all damages sought
472 by all parties in an action dictates the applicable tier of standard discovery, whether
473 such damages are sought by way of a complaint, counterclaim, or otherwise. The tiers
474 of standard discovery are set forth in a chart that is embedded in the body of the rule
475 itself. “Tier 1” describes a minimal amount of standard discovery that is presumed
476 proportional for cases involving damages of \$50,000 or less. “Tier 2” sets forth larger
477 limits on standard discovery that are applicable in cases involving damages above
478 \$50,000 but less than \$300,000. Finally, “Tier 3” prescribes still greater standard
479 discovery for actions involving damages in excess of \$300,000. The tiers also provide
480 presumptive limitations on the time within which standard discovery should be
481 completed, which limitations similarly increase with the amount of damages at issue.
482 After the expiration of the applicable time limitation, a case is presumed to be ready for

483 trial. Actions for non-monetary relief, such as injunctive relief, are subject to the
484 standard discovery limitations of Tier 2, absent an accompanying monetary claim of
485 \$300,000 or more, in which case Tier 3 applies. The committee determined these
486 standard discovery limitations based on the expectation that for the majority of cases
487 filed in the Utah State Courts, the magnitude of available discovery and applicable time
488 parameters available under the three-tiered system should be sufficient for cases
489 involving the respective amounts of damages.

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

503 The second method to obtain additional discovery is by motion. The committee
504 recognizes there will be some cases in which additional discovery is appropriate, but the
505 parties cannot agree to the scope of such additional discovery. These may include,
506 among other categories, large and factually complex cases and cases in which there is
507 a significant disparity in the parties' access to information, such that one party
508 legitimately has a greater need than the other party for additional discovery in order to
509 prepare properly for trial. To prevent a party from taking advantage of this situation, the
510 2011 amendments allow any party to move the Court for additional discovery. As with
511 stipulations for extraordinary discovery, a party filing a motion for extraordinary
512 discovery should do so before the close of the standard discovery time limit, but only
513 after the moving party has completed the standard discovery available to it under the

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

523 Protective Order Language Moved to Rule 37. The 2011 amendments delete in its
524 entirety the prior language of Rule 26(c) governing motions for protective orders. The
525 substance of that language is now found in Rule 37. The committee determined it was
526 preferable to cover motions to compel, motions for protective orders, and motions for
527 discovery sanctions in a single rule, rather than two separate rules. Accordingly, Rule
528 37 now governs these motions and orders.

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

539