**Rule 1. General provisions.**

~~(a)~~ **Scope of rules.** These rules ~~shall~~ govern the procedure in the courts of the state of Utah in all actions~~, suits, and proceedings~~ of a civil nature, whether cognizable at law or in equity, and in all ~~special~~ statutory proceedings, except as governed by other rules promulgated by this court or statutes enacted by the Legislature and except as stated in Rule 81. They shall be liberally construed and applied to ~~secure~~ achieve the just, speedy, and inexpensive determination of every action.

~~(b) Effective date.~~ These rules ~~shall take effect on January 1, 1950; and thereafter all laws in conflict therewith shall be of no further force or effect. They~~ govern all ~~proceedings in~~ actions brought after they take effect and ~~also~~ all further proceedings in actions then pending~~, except to the extent that~~. If, in the opinion of the court, ~~their application in a particular~~ applying a rule in an action pending when the ~~rules take~~ rule takes effect would not be feasible or would ~~work injustice, in which event~~ be unjust, the former procedure applies.

**Advisory Committee Notes**

A primary purpose of the 2011 amendments is to give effect to the long-standing but often overlooked directive in Rule 1 that the Rules of Civil Procedure should be construed and applied to achieve "the just, speedy and inexpensive determination of every action." The amendments serve this purpose by limiting parties to discovery that is proportional to the stakes of the litigation, curbing excessive expert discovery, and requiring the early disclosure of documents, witnesses and evidence that a party intends to offer in its case-in-chief. The committee's purpose is to restore balance to the goals of Rule 1, so that a just resolution is not achieved at the expense of speedy and inexpensive resolutions, and greater access to the justice system can be afforded to all members of society.

Due to the significant changes in the discovery rules, the Supreme Court order adopting the 2011 amendments makes them effective only as to cases filed on or after the effective date, November 1, 2011, unless otherwise agreed to by the parties or ordered by the court.

**Rule 8. General rules of pleadings.**

(a) **Claims for relief.** ~~A pleading which sets forth a claim for relief, whether an~~ An original claim, counterclaim, cross-claim or third-party claim~~,~~ shall contain ~~(1)~~ a short and plain: (1) statement of the claim showing that the ~~pleader~~party is entitled to relief; and (2) ~~a~~ demand for judgment for ~~the~~specified relief ~~to which he deems himself entitled~~. Relief in the alternative or of several different types may be demanded. A party who claims damages but does not plead an amount shall plead that their damages are such as to qualify for a specified tier defined by Rule 26(c)(3). A pleading that qualifies for tier 1 or tier 2 discovery shall constitute a waiver of any right to recover damages above the tier limits specified in Rule 26(c)(3), unless the pleading is amended under Rule 15.

(b) **Defenses; form of denials.** A party shall state in simple, short and plain terms ~~his~~any defenses to each claim asserted and shall admit or deny the ~~averments upon which~~statements in the ~~adverse~~claim. A party ~~relies. If he is~~ without knowledge or information sufficient to form a belief ~~as to~~about the truth of ~~an averment, he~~a statement shall so state, and this has the effect of a denial. Denials shall fairly meet the substance of the ~~averments~~statements denied. ~~When a pleader intends in good faith to~~ A party may deny ~~only~~ all of the statements in a ~~part or a qualification of an averment, he shall~~ claim by general denial. A party may specify ~~so much of it as~~the statement or part of a statement that is ~~true~~admitted and ~~material and shall~~ deny ~~only the remainder. Unless the pleader intends in good faith to controvert all the averments of~~ the ~~preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, he~~rest. A party may ~~do so by general denial subject to~~specify the statement or part of a statement that is denied and admit the ~~obligations set forth in Rule 11~~rest.

(c) **Affirmative defenses.** ~~In pleading to a preceding pleading, a~~An affirmative defense shall contain a short and plain: (1) statement of the affirmative defense; and (2) a demand for relief. A party shall set forth affirmatively in a responsive pleading accord and satisfaction, arbitration and award, assumption of risk, contributory negligence,

discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. ~~When~~If a party ~~has~~ mistakenly ~~designated~~designates a defense as a counterclaim or a counterclaim as a defense, the court, on terms, ~~if justice so requires, shall~~may treat the pleadings as if ~~there~~the defense or counterclaim had been a ~~proper designation~~properly designated.

(d) **Effect of failure to deny.** ~~Averments~~Statements in a pleading to which a responsive pleading is required, other than ~~those as to~~statements of the amount of damage, are admitted ~~when~~if not denied in the responsive pleading. ~~Averments~~Statements in a pleading to which no responsive pleading is required or permitted ~~shall be taken as~~are deemed denied or avoided.

(e) ~~Pleading to be concise and direct; consistency.~~

~~(e)(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.~~

~~(e)(2)~~**Consistency.** A party may ~~set forth two or more statements of~~state a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. ~~When two or more~~If statements are made in the alternative and one of them ~~if made independently would be~~is sufficient, the pleading is not made insufficient by the insufficiency of ~~one or more of the~~an alternative ~~statements~~statement. A party may ~~also~~ state ~~as many separate~~ legal and equitable claims or legal and equitable defenses ~~as he has~~ regardless of consistency ~~and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.~~.

(f) **Construction of pleadings.** All pleadings shall be ~~so~~ construed ~~as~~ to do substantial justice.

**Advisory Committee Notes**

The pleading standard under Rule 8 remains "notice pleading" as exemplified by the official forms appended to the Rules. But parties are encouraged to plead facts that entitle them to relief or establish affirmative defenses because more expansive pleadings will trigger broader disclosures from the opponent under Rule 26. This

encouragement is consistent with the general approach of the 2011 amendments which require each party to disclose its affirmative case early in the process so that the adversary might evaluate its merits and focus the need for discovery.

The amount of damages pled will determine the amount of standard discovery available under Rule 26(c)(3). It would be unfair for a party to plead a smaller amount of damages in order to take advantage of the streamlined discovery and then seek to recover greater damages. Thus, Rule 8 provides that a party waives its right to recover damages in excess of the maximums provided for that tier unless the pleading is amended. The trial court may determine if the amendment requires further discovery.

**Rule 9. Pleading special matters.**

(a)(1) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. A party may raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity by specific negative averment, which shall include facts within the pleader's knowledge. If raised as an issue, the party relying on such capacity, authority, or legal existence, shall establish the same on the trial.

(a)(2) Designation of unknown defendant. When a party does not know the name of an adverse party, he may state that fact in the pleadings, and thereupon such adverse party may be designated in any pleading or proceeding by any name; provided, that when the true name of such adverse party is ascertained, the pleading or proceeding must be amended accordingly.

(a)(3) Actions to quiet title; description of interest of unknown parties. In an action to quiet title wherein any of the parties are designated in the caption as "unknown," the pleadings may describe such unknown persons as "all other persons unknown, claiming any right, title, estate or interest in, or lien upon the real property described in the pleading adverse to the complainant's ownership, or clouding his title thereto."

(b) Fraud, mistake, condition of the mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) Conditions precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity, and when so made the party pleading the performance or occurrence shall on the trial establish the facts showing such performance or occurrence.

(d) Official document or act. In pleading an official document or act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it. A denial of jurisdiction shall be made specifically and with particularity and when so made the party pleading the judgment or decision shall establish on the trial all controverted jurisdictional facts.

(f) Time and place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special damage. When items of special damage are claimed, they shall be specifically stated.

(h) Statute of limitations. In pleading the statute of limitations it is not necessary to state the facts showing the defense but it may be alleged generally that the cause of action is barred by the provisions of the statute relied on, referring to or describing such statute specifically and definitely by section number, subsection designation, if any, or otherwise designating the provision relied upon sufficiently clearly to identify it. If such allegation is controverted, the party pleading the statute must establish, on the trial, the facts showing that the cause of action is so barred.

(i) Private statutes; ordinances. In pleading a private statute of this state, or an ordinance of any political subdivision thereof, or a right derived from such statute or ordinance, it is sufficient to refer to such statute or ordinance by its title and the day of its passage or by its section number or other designation in any official publication of the statutes or ordinances. The court shall thereupon take judicial notice thereof.

(j) Libel and slander.

(j)(1) Pleading defamatory matter. It is not necessary in an action for libel or slander to set forth any intrinsic facts showing the application to the plaintiff of the defamatory matter out of which the action arose; but it is sufficient to state generally that the same was published or spoken concerning the plaintiff. If such allegation is controverted, the party alleging such defamatory matter must establish, on the trial, that it was so published or spoken.

(j)(2) Pleading defense. In his answer to an action for libel or slander, the defendant may allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages, and, whether he proves the justification or not, he may give in evidence the mitigating circumstances.

(k) Renew judgment. A complaint alleging failure to pay a judgment shall describe the judgment with particularity or attach a copy of the judgment to the complaint.

(l) Allocation of fault.

(l)(1) A party seeking to allocate fault to a non-party under Title 78B, Chapter 5, Part 8 shall file:

(l)(1)(A) a description of the factual and legal basis on which fault can be allocated; and

(l)(1)(B) information known or reasonably available to the party identifying the non-party, including name, address, telephone number and employer. If the identity of the non-party is unknown, the party shall so state.

(l)(2) The information specified in subsection (l)(1) must be included in the party's responsive pleading if then known or must be included in a supplemental notice filed within a reasonable time after the party discovers the factual and legal basis on which fault can be allocated ~~but no later than the deadline specified in the discovery plan under Rule 26(f)~~. The court, upon motion and for good cause shown, may permit a party to file the information specified in subsection (l)(1) after the expiration of any period permitted by this rule, but in no event later than 90 days before trial.

(l)(3) A party may not seek to allocate fault to another except by compliance with this rule.

**Rule 16. Pretrial conferences, scheduling, and management conferences.**

(a) Pretrial conferences. The In any action, the court, in its discretion or upon motion of a party, may direct the attorneys and, when appropriate, for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as:

(a)(1) expediting the disposition of the action;

(a)(2) establishing early and continuing control so that the case will not be protracted for lack of management;

(a)(3) discouraging wasteful pretrial activities;

(a)(4) improving the quality of the trial through more thorough preparation;

(a)(5) facilitating mediation or other ADR processes for the settlement of the case; and

(a)(6) considering all matters as may aid in the disposition of the case;.

(a)(7) establishing the time to join other parties and to amend the pleadings;

(b) Scheduling and management conference and orders. In any action, in addition to any other pretrial conferences that may be scheduled, the court, upon its own motion or upon the motion of a party, may conduct a scheduling and management conference. The attorneys and unrepresented parties shall appear at the scheduling and management conference in person or by remote electronic means. Regardless whether a scheduling and management conference is held, on motion of a party the court shall enter a scheduling order that governs the time:

(b)(1) to join other parties and to amend the pleadings;

(b)(2) (a)(8) establishing the time to file motions; and

(b)(3) (a)(9) establishing the time to complete discovery;.

(a)(10) extending fact discovery;

The scheduling order may also include:

(b)(4) modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted;

(b)(5) (a)(11) setting the date for pretrial and or dates for conferences before trial, a final pretrial conferencesconference, and trial; and

(a)(12~~b~~)(~~6~~) provisions providing for the preservation, disclosure or discovery of electronically stored information;

~~(b)(7)~~ (a)(13) considering any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production; and

~~(b)(8)~~ (a)(14) considering any other ~~matters~~ appropriate matters~~in the circumstances of the case~~.

(b) **Trial settings.** Unless an~~the~~ order sets the ~~date of~~ trial date, any party may and the plaintiff shall, at the close of all discovery, certify to the court that discovery is complete, that any required mediation or other ADR processes have been completed or excused and that the case is ready for trial. The court shall schedule the trial as soon as mutually convenient to the court and parties. The court shall notify parties of the ~~date of~~ trial date and of any final pretrial conference.

(c) **Final pretrial conferences.** The court, in its discretion or upon motion, may direct the attorneys and, when appropriate, the parties to appear for such purposes as settlement and trial management. The~~conferences. In any action where a final pretrial~~ conference ~~has been ordered, it~~ shall be held as close to the time of trial as reasonable under the circumstances. ~~The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties, and the attorneys attending the pretrial, unless waived by the court, shall have available, either in person or by telephone, the appropriate parties who have authority to make binding decisions regarding settlement.~~

(d) **Sanctions.** If a party or a party's attorney fails to obey an~~a scheduling or pretrial~~ order, if ~~no appearance is made on behalf of~~ a party or a party's attorney fails to attend a~~at a scheduling or pretrial~~ conference, if a party or a party's attorney is substantially unprepared to participate in a~~the~~ conference, or if a party or a party's attorney fails to participate in good faith, the court, upon motion or its own initiative, may take any action authorized by Rule 37(e~~b~~)(~~2~~).

**Advisory Committee Notes**

For the purposes of this rule, "ADR" is as defined in CJA Rule 4-510.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a)(~~2~~3)(A)(~~iii~~ii) governed by Rule 65B or Rule 65C;

(a)(~~2~~3)(A)(~~iv~~iii) to enforce an arbitration award;

(a)(~~2~~3)(A)(~~v~~iv) for water rights general adjudication under Title 73, Chapter 4~~; and~~.

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

~~(a)~~(~~2~~3)(B) In an exempt action, the matters subject to disclosure under ~~subpart~~paragraph (a)(1) are subject to discovery under ~~subpart~~paragraph (b).

(a)(~~3~~4) **Expert testimony.**

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

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

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

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

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

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

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

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

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

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

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

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

(a)(4~~5~~)(A)(i) the name and, if not previously provided, the address and telephone number of each witness, unless solely for impeachment, separately identifying witnesses the party ~~expects to present~~ will call and witnesses the party may call ~~if the need arises;~~;

(a)(~~4~~)(~~B~~5)(A)(ii) the ~~designation~~name of witnesses whose testimony is expected to be presented by ~~means of a deposition and, if not taken stenographically, a~~ transcript of ~~the pertinent portions of the~~ a deposition and a copy of the transcript with the proposed testimony designated; and

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

~~Unless otherwise stipulated~~(a)(5)(B) Disclosure required by ~~the parties or ordered by the court, the disclosures required by subdivision (a)(4~~paragraph (a)(5) shall be made at least ~~30~~28 days before trial. ~~Within~~At least 14 days ~~thereafter, unless a different time is specified by the court~~before trial, a party ~~may~~shall serve and file ~~a list disclosing (i) any~~ counter-104 designations of deposition testimony, objections and grounds for the objections to the use ~~under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to~~ of a deposition and to the admissibility of ~~materials identified under subparagraph (C). Objections not so disclosed, other~~exhibits. Other than objections under Rules ~~402~~ and ~~403~~ of the Utah Rules of Evidence, ~~shall be deemed~~objections not listed are waived unless excused by the court for good cause ~~shown.~~.

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

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

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

(b) **Discovery scope.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b)(~~5~~7) **Trial preparation:~~ Experts.~~; experts.**

(b)(~~5~~7)(A) ~~A party may depose~~**Trial-preparation protection for draft reports or disclosures.** Paragraph (b)(5) protects drafts of any ~~person who has been identified as an expert whose opinions may be presented at trial. If a~~ report ~~is~~ or disclosure required under ~~subdivision (a)(3)(B),~~paragraph (a)(4), regardless of the form in which the draft is recorded.

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

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

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

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

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

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

(~~b~~)(~~5~~7)(C)(i) ~~The court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under Subdivision (b)(5) of this rule; and~~as provided in Rule 35(b); or

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

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

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

(b)(~~6~~8)(A) **Information withheld.** ~~When~~If a party withholds ~~information otherwise~~ discoverable ~~under these rules~~ information by claiming that it is privileged or ~~subject to protection as trial preparation material~~prepared in anticipation of litigation or for trial, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced ~~or disclosed~~ in a manner that, without revealing the information itself ~~privileged or protected~~, will enable other parties to ~~assess the applicability of~~evaluate the ~~privilege or protection.~~claim.

(b)(~~6~~8)(B) **Information produced.** If a party produces information that the party claims is ~~produced~~privileged or prepared in ~~discovery that is subject to a claim~~anticipation of ~~privilege~~litigation or ~~of protection as~~for trial ~~preparation material, the party making,~~ the ~~claim~~producing party may notify any receiving party ~~that received the information~~ of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

| | | | | | | |
|---|---|---|---|---|---|---|
| | less | | | | | |
| 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 |

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

~~(i) Filing.~~

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

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

~~Advisory Committee Notes~~

**Advisory Committee Notes**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

644 which should include any opinion testimony that a party expects to elicit from them at
645 trial. If a party has disclosed possible opinion testimony in its Rule 26(a)(1)(A)(ii)
646 disclosures, that party is not required to prepare a separate Rule 26(a)(3)(D) disclosure
647 for the witness. And if that disclosure is made in advance of the witness's deposition,
648 those opinions should be explored in the deposition and not in a separate expert
649 deposition. Otherwise, the timing for disclosure of non-retained expert opinions is the
650 same as that for retained experts under Rule 26(a)(4)(C) and depends on whether the
651 party has the burden of proof or is responding to another expert. Rule 26(a)(3)(D) and
652 26(a)(1)(A)(ii) are not intended to elevate form over substance – all they require is that a
653 party fairly inform its opponent that opinion testimony may be offered from a particular
654 witness. And because a party who expects to offer this testimony normally cannot
655 compel such a witness to prepare a written report, further discovery must be done by
656 interview or by deposition.
657 Finally, the amendments include a new Rule 26(b)(7) that protects from discovery
658 draft expert reports and, with limited exception, communications between an attorney
659 and an expert. These changes are modeled after the recent changes to the Federal
660 Rules of Civil Procedure and are intended to address the unnecessary and costly
661 procedures that often were employed in order to protect such information from
662 discovery, and to reduce "satellite litigation" over such issues.
663 **Scope of discovery—Proportionality. Rule 26(b).** Proportionality is the principle
664 governing the scope of discovery. Simply stated, it means that the cost of discovery
665 should be proportional to what is at stake in the litigation.
666 In the past, the scope of discovery was governed by "relevance" or the "likelihood to
667 lead to discovery of admissible evidence." These broad standards may have secured
668 just results by allowing a party to discover all facts relevant to the litigation. However,
669 they did little to advance two equally important objectives of the rules of civil
670 procedure—the speedy and inexpensive resolution of every action. Accordingly, the
671 former standards governing the scope of discovery have been replaced with the
672 proportionality standards in subpart (b)(1).

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

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

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

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

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

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

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

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

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

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

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

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

**Rule 26.1. Disclosure and discovery in domestic relations actions.**

(a) **Scope.** This rule applies to the following domestic relations actions: divorce; temporary separation; separate maintenance; parentage; custody; child support; and modification. This rule does not apply to adoptions, enforcement of prior orders, cohabitant abuse protective orders, child protective orders, civil stalking injunctions, or grandparent visitation.

(b) **Time for disclosure.** In addition to the disclosures required in Rule 26, in all domestic relations actions, the documents required in this rule shall be disclosed by the petitioner within 14 days after service of the first answer to the complaint and by the respondent within 28 days after the petitioner's first disclosure or 28 days after that respondent's appearance, whichever is later.

(c) **Financial declaration.** Each party shall disclose to all other parties a fully completed court-approved Financial Declaration and attachments. Each party shall attach to the Financial Declaration the following:

(c)(1) For every item and amount listed in the Financial Declaration, excluding monthly expenses, the producing party shall attach copies of statements verifying the amounts listed on the Financial Declaration that are reasonably available to the party.

(c)(2) For the two tax years before the petition was filed, complete federal and state income tax returns, including Form W-2 and supporting tax schedules and attachments, filed by or on behalf of that party or by or on behalf of any entity in which the party has a majority or controlling interest, including, but not limited to, Form 1099 and Form K-1 with respect to that party.

(c)(3) Pay stubs and other evidence of all earned and un-earned income for the 12 months before the petition was filed.

(c)(4) All loan applications and financial statements prepared or used by the party within the 12 months before the petition was filed.

(c)(5) Documents verifying the value of all real estate in which the party has an interest, including, but not limited to, the most recent appraisal, tax valuation and refinance documents.

(c)(6) All statements for the 3 months before the petition was filed for all financial accounts, including, but not limited to checking, savings, money market funds,

certificates of deposit, brokerage, investment, retirement, regardless of whether the account has been closed including those held in that party's name, jointly with another person or entity, or as a trustee or guardian, or in someone else's name on that party's behalf.

(c)(7) If the foregoing documents are not reasonably available or are in the possession of the other party, the party disclosing the Financial Declaration shall estimate the amounts entered on the Financial Declaration, the basis for the estimation and an explanation why the documents are not available.

(d) **Certificate of service.** Each party shall file a Certificate of Service with the court certifying that he or she has provided the Financial Declaration and attachments to the other party in compliance with this rule.

(e) **Exempted agencies.** Agencies of the State of Utah are not subject to these disclosure requirements.

(f) **Sanctions.** Failure to fully disclose all assets and income in the Financial Declaration and attachments may subject the non-disclosing party to sanctions under Rule 37 including an award of non-disclosed assets to the other party, attorney's fees or other sanctions deemed appropriate by the court.

(g) **Failure to comply.** Failure of a party to comply with this rule does not preclude any other party from obtaining a default judgment, proceeding with the case, or seeking other relief from the court.

(h) **Notice of requirements.** Notice of the requirements of this rule shall be served on the Respondent and all joined parties with the initial petition.

**Advisory Committee Note**

Rule 26.1 was developed by the Family Law Section of the Utah State Bar. It represents the type of discovery or disclosure rule that the advisory committee anticipated when drafting proposed Rule 26(a).

**Rule 29. Stipulations regarding disclosure and discovery procedure.**

The ~~Unless the court orders otherwise, the~~ parties may ~~by written stipulation~~

~~(1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and~~

~~(2)~~ modify the limits and procedures ~~provided by these rules~~ for disclosure and discovery by filing, before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a stipulated statement that the extraordinary discovery is necessary and proportional under Rule 26(b)(2) and~~, except~~ that each party has reviewed and approved a discovery budget. Stipulations~~stipulations~~ extending the time for disclosure or discovery do not require a statement regarding proportionality or discovery budgets. Stipulations extending the time for or limits of disclosure or discovery require court ~~the~~ approval only~~of the court~~ if the extension~~they~~ would interfere with a court order~~the time set~~ for completion of discovery or with the date of a hearing or trial.

Advisory Committee Notes

**Rule 30. Depositions upon oral questions~~examination~~.**

(a) **When depositions may be taken; when~~When~~ leave required.**

~~(a)(1)~~ A party may depose~~take the testimony of any person, including~~ a party or witness~~,~~ by oral questions. A witness may not be deposed ~~deposition upon oral examination without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by subpoena as provided in Rule 45.~~

~~(a)(2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(3), if the person to be examined is confined in prison or if, without the written stipulation of the parties:~~

~~(a)(2)(A) a proposed deposition would result in~~ more than once in standard discovery. An expert who has prepared a report disclosed~~ten depositions being taken~~ under Rule 26(a)(3~~this rule or Rule 31 by the plaintiffs, or by the defendants, or by third-party defendants;~~

~~(a)(2)~~(B) may not be ~~the person to be examined already has been deposed in the case; or~~

~~(a)(2)(C) a party seeks to take a deposition before the time specified in Rule 26(d) unless the notice contains a certification, with supporting facts, that the person to be examined is expected to leave the state and will be unavailable for examination unless~~ deposed ~~before that time. The party or party's attorney shall sign the notice, and the signature constitutes a certification subject to the sanctions provided by Rule 11.~~

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

(b)(1) The~~A~~ party deposing a witness~~desiring to take the deposition of any person upon oral examination~~ shall give reasonable notice in writing to every other party ~~to the action~~. The notice shall state the date, time and place for ~~taking~~ the deposition and the name and address of each witness. If ~~person to be examined, if known, and, if~~ the name of a witness is not known, the notice shall describe the witness sufficiently~~a general description sufficient~~ to identify the person or state the ~~particular~~ class or group to which the person belongs. The notice shall designate any documents and tangible things~~If a subpoena duces tecum is to be served on the person to be examined, the designation~~

~~of the materials~~ to be produced by a witness. The notice~~as set forth in the subpoena~~ shall designate the officer who will conduct~~be attached to or included in~~ the deposition~~notice~~.

(b)(2) The notice~~party taking the deposition~~ shall designate~~state in the notice~~ the method by which the deposition will~~testimony shall~~ be recorded. With prior notice to the officer, witness and other parties, any party may designate a recording method in addition to the method designated in the notice. Depositions~~Unless the court orders otherwise, it~~ may be recorded by sound, sound-and-visual, or stenographic means, and the party designating~~taking~~ the recording method~~deposition~~ shall bear the cost of the recording. The appearance or demeanor of witnesses or attorneys shall not be distorted through recording techniques.

(b)(3) A~~With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders.~~

~~(b)(4) Unless otherwise agreed by the parties, a~~ deposition shall be conducted before an officer appointed or designated under Rule 28 and shall begin with a statement on the record by the officer that includes (A) the officer's name and business address; (B) the date, time and place of the deposition; (C) the name of the witness~~deponent~~; (D) the administration of the oath or affirmation to the witness~~deponent~~; and (E) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (A) through (C) at the beginning of each unit of the recording medium.~~tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques.~~ At the end of the deposition, the officer shall state on the record that the deposition is complete and shall state any stipulations~~set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters~~.

(b)(4~~5~~) The notice to a party witness~~deponent~~ may be accompanied by a request under~~made in compliance with~~ Rule 34 for the production of documents and tangible things at the ~~taking of the~~ deposition. The procedure of Rule 34 shall apply to the

request. The attendance of a nonparty witness may be compelled by subpoena under Rule 45. Documents and tangible things to be produced shall be stated in the subpoena.

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

(b)(6) A party may ~~in the notice and in a subpoena~~ name as the witness a~~deponent a public or private~~ corporation, a partnership, an association, or a governmental agency, ~~and~~ describe with reasonable particularity the matters on which questioning~~examination~~ is requested, and direct. ~~In that event,~~ the organization to~~so named shall~~ designate one or more officers, directors, managing agents, or other persons ~~who consent~~ to testify on its behalf. The organization shall state ~~and may set forth~~, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The person~~persons~~ so designated shall testify as to matters known or reasonably available to the organization. ~~This Subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.~~

~~(b)(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by remote electronic means. For the purposes of this rule and Rules 28(a), 37(b)(1), and 45(d), a deposition taken by remote electronic means is taken at the place where the deponent is to answer questions.~~

(c) **Examination and cross-examination;** ~~record of examination; oath;~~ **objections.**

(c)(1) Questioning ~~Examination and cross-examination~~ of witnesses may proceed as permitted at the trial under the ~~provisions of the~~ Utah Rules of Evidence, except Rules 103 and 615.

(c)(2) ~~The officer before whom the deposition is to be taken shall put the witnesses on oath or affirmation and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness.~~ All objections shall be recorded~~made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, or to the conduct of any party and any other objection to the proceedings shall be noted by~~

~~the officer upon the record of the deposition~~, but the questioning~~examination~~ shall proceed, and ~~with~~ the testimony ~~being~~ taken subject to the objections. ~~In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition, and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.~~

~~(d) Schedule and duration; motion to terminate or limit examination.~~

~~(d)(1)~~ Any objection ~~to evidence during a deposition~~ shall be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a witness~~deponent~~ not to answer only ~~when necessary~~ to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion for a protective order under Rule 37. Upon demand of the objecting party or witness, the deposition shall be suspended for the time necessary to make a motion. The party taking the deposition may complete or adjourn the deposition before moving for an order to compel discovery under Rule 37.~~under paragraph (4).~~

(d) **Limits.** During standard discovery, oral questioning~~(2) Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day~~ of a nonparty shall not exceed four hours,~~seven hours. The court must allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another person, or other circumstance, impedes or delays the examination.~~

~~(d)(3) If the court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs~~ and oral questioning~~attorney fees incurred by any parties as a result thereof.~~

~~(d)(4) At any time during the taking of the deposition, on motion~~ of a party ~~or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition

~~as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition~~ shall not exceed seven hours.~~be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.~~

(e) **Submission to witness; changes; signing.** Within 28~~If requested by the deponent or a party before completion of the deposition, the deponent shall have 30~~ days after being notified by the officer that the transcript or recording is available, a witness may sign a statement of changes to the form or substance of the ~~in which to review the~~ transcript or recording and~~, if there are changes in form or substance, to sign a statement reciting such changes and~~ the reasons for the changes. The officer~~given by the deponent for making them. The officer shall indicate in the certificate prescribed by subdivision (f)(1) whether any review was requested and, if so,~~ shall append any changes timely made by the witness~~deponent during the period allowed~~.

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

(f)(1) The officer shall ~~transcript or other recording of the deposition made in accordance with this rule shall be the~~ record the deposition or direct another person present to record~~of~~ the deposition. The officer shall sign a certificate, to accompany the record ~~of the deposition~~, that the witness was under oath or affirmation~~duly sworn~~ and that the record ~~transcript or other recording~~ is a true record of the deposition. The officer shall keep a copy of the record. The ~~testimony given by the witness. Unless otherwise ordered by the court, the~~ officer shall securely seal the record ~~of the deposition in an envelope~~ endorsed with the title of the action and marked "Deposition of (name). Do not open."~~"~~ and shall promptly send the sealed record ~~of the deposition~~ to the attorney ~~who arranged for the transcript~~ or ~~other record to be made. If~~ the party who designated the recording method.~~taking the deposition is not represented by an attorney, the record of the deposition shall be sent to the clerk of the court for filing unless otherwise ordered by the court.~~ An attorney or party receiving the record ~~of the deposition~~ shall store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(f)(2) Every party may inspect and copy documents~~Documents~~ and things produced for inspection and must have a fair opportunity to compare copies and originals. Upon~~during the examination of the witness shall, upon~~ the request of a party, documents and things produced for inspection shall~~be marked for identification and annexed to the record of the deposition and may be inspected and copied by any party, except that, if the person producing the materials desires to retain them, that person may (A) offer copies to~~ be marked for identification and added to the record. If the witness wants to retain ~~annexed to the record of the deposition and to serve thereafter as originals, if the person affords to all parties fair opportunity to verify the copies by comparison with~~ the originals, that person shall ~~or (B)~~ offer the originals to be copied, marked for identification and added to the record~~, after giving to each party an opportunity to inspect and copy them, in which event the originals may be used in the same manner as if annexed to the record of the deposition. Any party may move for an order that the originals be annexed to and returned with the record of the deposition to the court, pending final disposition of the case~~.

(f)(3) ~~(f)(3) Unless otherwise ordered by the court or agreed by the parties, the officer shall retain stenographic notes of any depositions taken stenographically or a copy of the recording of any deposition taken by another method.~~ Upon payment of reasonable charges ~~therefor~~, the officer shall furnish a copy of the record ~~of the deposition~~ to any party or to the witness. An official transcript~~deponent. Any party or the deponent may arrange for a transcription to be made from the recording~~ of a recording made ~~deposition taken~~ by non-stenographic means shall be prepared under Utah Rule of Appellate Procedure 11(e)~~.~~.

(g) **Failure to attend or to serve subpoena; expenses.**

~~(g)(1)~~ If the party giving the notice of ~~the taking of~~ a deposition fails to attend or fails to serve a subpoena upon a witness who fails to attend, and ~~and proceed therewith and~~ another party attends in person or by attorney ~~pursuant to the notice~~, the court may order the party giving the notice to pay to the~~such~~ other party the reasonable costs, expenses ~~incurred by him~~ and ~~his~~ attorney ~~in attending, including reasonable attorney's~~ fees incurred.

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

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

~~(g)(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.~~

~~Advisory Committee Notes~~

**Rule 31. Depositions upon written questions.**

(a) A party may depose a party or witness by written~~Serving~~ questions. Rules 30 and 45 apply to depositions ~~; notice.~~

~~(a)(1) A party may take the testimony of any person, including a party, by deposition~~ upon written questions, ~~without leave of court~~ except insofar as ~~provided in paragraph (2). The attendance of witnesses may be compelled~~ by their nature they are clearly inapplicable~~the use of subpoena as provided in Rule 45~~.

(b~~a~~)~~(2)~~ A party taking a deposition using~~must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties,~~

~~(a)(2)(A) a proposed deposition would result in more than ten depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by third-party defendants;~~

~~(a)(2)(B) the person to be examined has already been deposed in the case; or~~

~~(a)(2)(C) a party seeks to take a deposition before the time specified in Rule 26(d).~~

~~(a)(3) A party desiring to take a deposition upon~~ written questions shall serve on the parties~~them upon every other party with~~ a notice which includes~~stating (1)~~ the name or description and address of the deponent,~~person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (2)~~ the name or descriptive title ~~and address~~ of the officer before whom the deposition will~~is to~~ be taken, and the~~. A deposition upon written~~ questions to be asked.~~may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6).~~

(c~~a~~)~~(4)~~ Within 14 days after the ~~notice and written~~ questions are served, a party may serve cross questions~~upon all other parties~~. Within 7 days after being served with cross questions, a party may serve redirect questions~~upon all other parties~~. Within 7 days after being served with redirect questions, a party may serve re-cross~~recross~~ questions~~upon all other parties. The court may for cause shown enlarge or shorten the time.~~

(d)~~(b) Officer to take responses and prepare record.~~ A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the ~~officer~~

designated officer ~~in the notice,~~ who shall proceed promptly~~, in the manner provided by Rule 30(c), (e), and (f), attaching~~ to ask~~the deposition the copy of the notice and~~ the questions and prepare a record of the responses~~received~~.

(e) During standard discovery, a deposition by written questioning shall not cumulatively exceed 15 questions, including discrete subparts, by the plaintiffs collectively, by the defendants collectively or by third-party defendants collectively.

~~Advisory Committee Notes~~

**Rule 33. Interrogatories to parties.**

(a) **Availability; procedures for use.** During standard discovery, any party may serve written interrogatories upon any other party, subject to the limits of Rule 26(c)(5). Each interrogatory shall be separately stated and numbered.

~~(a) Availability; procedures for use. Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(3). Without leave of court or written stipulation, interrogatories may not be served before the time specified in Rule 26(d).~~

(b) **Answers and objections.** The responding party shall serve a written response within 28 days after service of the interrogatories. The responding party shall restate each interrogatory before responding to it.

~~(b)(1)~~ Each interrogatory shall be answered separately and fully in writing under oath or affirmation, unless it is objected to. If an interrogatory is objected to,~~, in which event~~ the ~~objecting~~ party shall state the reasons for the objection~~ and shall answer to the extent the interrogatory is not objectionable.~~

~~(b)(2) The answers are to be signed by the person making them, and the objections signed by the attorney making them.~~

~~(b)(3) The party upon whom the interrogatories have been served shall serve a copy of the answers and objections, if any, within 30 days after the service of the interrogatories. A shorter or longer time may be ordered by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29.~~

~~(b)(4) All grounds for an objection to an interrogatory shall be stated with specificity.~~ Any reason~~ground~~ not stated ~~in a timely objection~~ is waived unless ~~the party's failure to object is~~ excused by the court for good cause ~~shown.~~

~~(b)(5) The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.~~

~~(c) **Scope; use at trial.** . Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the Rules of Evidence.~~

An interrogatory ~~otherwise proper~~ is not ~~necessarily~~ objectionable merely because an answer ~~to the interrogatory~~ involves an opinion or argument~~contention~~ that relates to fact or the application of law to fact. The party shall answer any part of an interrogatory that is not objectionable. ~~, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.~~

(c) **Scope; use at trial.** Interrogatories may relate to any discoverable matter. Answers may be used as permitted by the Rules of Evidence.

(d) **Option to produce business records.** If~~Where~~ the answer to an interrogatory may be found by inspecting~~derived or ascertained from~~ the answering party's business records, including electronically stored information, ~~of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such business records, including a compilation, abstract, or summary thereof~~ and the burden of finding~~deriving or ascertaining~~ the answer is substantially the same for both parties, the answering party may identify~~serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify~~ the records from which the answer may be found. The answering party must give the asking~~derived or ascertained and to afford to the~~ party ~~serving the interrogatory~~ reasonable opportunity to ~~examine, audit, or~~ inspect the~~such~~ records and to make copies, compilations, ~~abstracts,~~ or summaries. The answering party must identify the records ~~A specification shall be~~ in sufficient detail to permit the asking~~interrogating~~ party to locate and to identify them~~,~~ as readily as the answering party~~can the party served, the records from which the answer may be ascertained~~.

~~Advisory Committee Notes~~

**Rule 34. Production of documents and things and entry upon land for inspection and other purposes.**

(a) **Scope.** ~~Any party may serve on any other party a request~~

(a)(1) Any party may serve on any other party a request to produce and permit the requesting party~~party making the request, or someone acting on his behalf,~~ to inspect, copy, test or sample any designated discoverable documents, ~~or~~ electronically stored information or tangible things (including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent into reasonably usable form)~~), or to inspect, copy, test or sample any designated tangible things which constitute or contain matters within the scope of Rule 26(b) and which are~~ in the possession~~, custody~~ or control of the responding party. ~~upon whom the request is served; or~~

(a)(2) Any party may serve on any other party a request to permit entry upon designated ~~land or other~~ property in the possession or control of the responding party ~~upon whom the request is served~~ for the purpose of inspecting, ~~inspection and~~ measuring, surveying, photographing, testing, or sampling the property or any designated discoverable object or operation on the property. ~~thereon, within the scope of Rule 26(b).~~

(b) **Procedure and limitations.**

(b)(1) The request shall identify~~set forth~~ the items to be inspected ~~either~~ by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable date, time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced. ~~Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d).~~

(b)(2) The responding party ~~upon whom the request is served~~ shall serve a written response within 28~~30~~ days after ~~the~~ service of the request. The responding party shall restate each request before responding~~A shorter or longer time may be directed by the court or, in the absence of such an order, agreed~~ to it ~~in writing by the parties, subject to Rule 29~~. The response shall state, with respect to each item or category, that inspection

and related actsactivities will be permitted as requested, or thatunless the request is objected to. If the party objects to a request, the party must state, including an objection to the requested form or forms for producing electronically stored information, stating the reasons for the objection. Any reason not statedIf objection is waived unless excused bymade to part of an item or category, the court for good cause. The partypart shall identifybe specified and permit inspection of any part of a request that is not objectionable.permitted of the remaining parts. If the party objectsobjection is made to the requested form or forms for producing electronically stored information -- or if no form was specified in the request -- the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(c) **Form of documents and electronically stored information.**

(c)(1) (b)(3) Unless the parties otherwise agree or the court otherwise orders:

(b)(3)(A) a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.;

(c)(2) Ifb)(3)(B) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable.; and

(cb)(3) A)(C) a party need not produce the same electronically stored information in more than one form.

(c) Persons not parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

Advisory Committee Notes

**Rule 35. Physical and mental examination of persons.**

(a) **Order for examination**. When the mental or physical condition or attribute~~(including the blood group)~~ of a party or of a person in the custody or ~~under the legal~~ control of a party is in controversy, the court ~~in which the action is pending~~ may order the party ~~or person~~ to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or ~~legal~~ control., ~~unless the party is unable to produce the person for examination.~~ The order may be made only on motion for good cause shown. All papers related to the motion and ~~upon~~ notice of any hearing shall be served on a nonparty ~~to the person~~ to be examined. The order ~~and to all parties and~~ shall specify the time, place, manner, conditions, and scope of the examination and the person ~~or persons~~ by whom the examination~~it~~ is to be made. The person being examined may record the examination by audio or video means unless the party requesting the examination shows that the recording would unduly interfere with the examination.

(b) **Report.** The party requesting ~~of examining physician.~~

~~(b)(1) If requested by a party against whom an order is made under Rule 35(a) or the person examined, the party causing~~ the examination ~~to be made~~ shall disclose~~deliver to the person examined and/or the other party a copy of~~ a detailed written report of the examiner, setting out the examiner's findings, including results of all tests made, diagnoses~~diagnosis~~ and conclusions. If the party requesting, ~~together with like reports of all earlier examinations of the same condition. After delivery the party causing~~ the examination wishes to call the~~shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the report cannot be obtained. The court on motion may order delivery of a report on such terms as are just. If an~~ examiner as a witness, the party shall disclose~~fails or refuses to make a report, the court on motion may take any action authorized by Rule 37(b)(2).~~

~~(b)(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of~~ the examiner as an expert as required by Rule 26(a, ~~the party examined waives any privilege the party may have in that action or any other involving~~

~~the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.~~

~~(b)~~(3)~~.)~~ ~~This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of any other examiner or the taking of a deposition of an examiner in accordance with the provisions of any other rule.~~

(c) **Sanctions.**~~(c) Right of party examined to other medical reports. At the time of making an order to submit to an examination under Subdivision (a), the court shall, upon motion of the party to be examined, order the party seeking such examination to furnish to the party to be examined a report of any examination previously made or medical treatment previously given by any examiner employed directly or indirectly by the party seeking the order for a physical or mental examination, or at whose instance or request such medical examination or treatment has previously been conducted.~~

~~(d) Sanctions.~~

~~(d)(1)~~ If a party or a person in the custody or under the legal control of a party fails to obey an order entered under paragraph~~Subdivision~~ (a), the court on motion may take any action authorized by Rule 37(e~~b~~)~~(2)~~, except that the failure cannot be treated as contempt of court.

~~(d)(2) If a party fails to obey an order entered under Subdivision (c), the court on motion may take any action authorized by Rule 37(b)(2).~~

**Advisory Committee Notes**

Rule 35 has been substantially revised. A medical examination is not a matter of right, but should only be permitted by the trial court upon a showing of good cause. Rule 35 has always provided, and still provides, that the proponent of an examination must demonstrate good cause for the examination. And, as before, the motion and order should detail the specifics of the proposed examination.

The parties and the trial court should refrain from the use of the phrase "independent medical examiner," using instead the neutral appellation "medical examiner," "Rule 35 examiner," or the like.

The Committee has determined that the benefits of recording generally outweigh the downsides in a typical case. The amended rule therefore provides that recording shall

be permitted as a matter of course unless the person moving for the examination demonstrates the recording would unduly interfere with the examination.

Nothing in the rule requires that the recording be conducted by a professional, and it is not the intent of the committee that this extra cost should be necessary. The committee also recognizes that recording may require the presence of a third party to manage the recording equipment, but this must be done without interference and as unobtrusively as possible.

The former requirement of Rule 35(c) providing for the production of prior reports on other examinees by the examiner was a source of great confusion and controversy. It is the Committee's view that this provision is better eliminated, and in the amended rule there is no longer an automatic requirement for the production of prior reports of other examinations. Medical examiners will be treated as other expert witnesses are treated, with the required disclosure under Rule 26 and the option of a report or a deposition.

**Rule 36. Request for admission.**

(a) **Request for admission.**

~~(a)(1)~~ A party may serve upon any other party a written request to admit~~for~~ the ~~admission, for purpose of the pending action only, of the~~ truth of any discoverable matter ~~matters within the scope of Rule 26(b)~~ set forth in the request, including the genuineness of any document. The matter must ~~that~~ relate to statements or opinions of fact or of the application of law to fact. Each matter shall be separately stated and numbered. A copy of the document~~, including the genuineness of any documents described in the request. The request for admission shall contain a notice advising the party to whom the request is made that, pursuant to Rule 36, the matters shall be deemed admitted unless said request is responded to within 30 days after service of the request or within such shorter or longer time as the court may allow. Copies of documents~~ shall be served with the request unless it has already ~~they have~~ been ~~or are otherwise~~ furnished or made available for inspection and copying. The request shall notify the responding party that the matters will be deemed admitted unless the party responds within 28 days after service of the request. ~~Without leave of court or written stipulation, requests for admission may not be served before the time specified in Rule 26(d).~~

(b) **Answer or objection.**

(b)(1)~~a)(2) Each matter of which an admission is requested shall be separately set forth.~~ The matter is admitted unless, within 28~~thirty~~ days after service of the request, the responding party serves upon the requesting party a written response.

(b)(2) The answering party shall restate each request before responding to it. Unless the answering party objects to a matter, the party must admit or ~~or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically~~ deny the matter or state~~set forth~~ in detail the reasons why the ~~answering~~ party cannot truthfully admit or

deny. A party may identify the part of a matter which is true and deny the rest. A denial shall fairly meet the substance of the request. Lack~~requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack~~ of information is not~~or knowledge as~~ a reason for failure to admit or deny unless, after ~~he states that he has made~~ reasonable inquiry, ~~and that~~ the information known or reasonably available~~readily obtainable by him~~ is insufficient to enable an admission~~him to admit~~ or denial~~deny~~. A party who considers the subject~~that a matter~~ of a request for~~which an~~ admission to be~~has been requested presents~~ a genuine issue for trial may not object~~,~~ on that ground alone but~~, object to the request; he~~ may, subject to ~~the provisions of~~ Rule 37(fc), deny the matter or state the~~set forth~~ reasons for the failure to~~why he cannot~~ admit or deny ~~it~~.

(b)(3) If the party objects to a matter, the party shall state the reasons for the objection. Any reason not stated is waived unless excused by the court for good cause. The party shall admit or deny any part of a matter that is not objectionable. It is not grounds for objection that the truth of a matter is a genuine issue for trial.

(c(a)(3) ~~The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.~~

~~(b)~~ **Effect of admission**. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. The ~~Subject to the provisions of Rule 16 governing amendment of a pretrial order, the~~ court may permit withdrawal or amendment if~~when~~ the presentation of the merits of the action will be promoted~~subserved thereby~~ and ~~the party who obtained the admission fails to satisfy the court that~~ withdrawal or amendment will not prejudice the requesting party.~~him in maintaining his action or defense on the merits.~~ Any admission

~~made by a party~~ under this rule is for the purpose of the pending action only. It ~~and~~ is not an admission ~~by him~~ for any other purpose, nor may it be used ~~against him~~ in any other action~~proceeding~~.

Advisory Committee Notes

**Rule 37. Discovery and disclosure motions; Sanctions~~Failure to make or cooperate in discovery; sanctions~~.**

(a) **Motion for order compelling disclosure or discovery.** ~~discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:~~

(a)(1) A party may move to compel disclosure or discovery and~~Appropriate court. An application~~ for appropriate sanctions if another party:

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

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

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

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

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

(a)(2) A motion~~order to a party~~ may be made to the court in which the action is pending, or, on matters relating to a deposition or a document subpoena, to the court in the district where the deposition is being taken or where the subpoena was served. A motion ~~. An application~~ for an order to a nonparty witness~~deponent who is not a party~~ shall be made to the court in the district where the deposition is being taken or where the subpoena was served.

(a)(3) The moving~~2) Motion.~~

~~(a)(2)(A) If a~~ party must attach a copy of the request for discovery, the~~fails to make a~~ disclosure, or the response at issue. The moving~~ required by Rule 26(a), any other~~ party must also attach~~may move to compel disclosure and for appropriate sanctions. The motion must include~~ a certification that the moving party~~movant~~ has in good faith conferred or attempted to confer with the other affected parties ~~party not making the disclosure~~ in an effort to secure the disclosure or discovery without court action and that the discovery being sought is proportional under Rule 26(b)(2).~~.~~

~~(a)(2)(B) If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30~~(b) **Motion for protective order.**

(b)(1) A ~~)(6) or 31(a), or a~~ party or the person from whom discovery is sought ~~fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party~~ may move for an order of protection from discovery~~compelling an answer, or a designation, or an order compelling inspection in accordance with the request~~. The moving party shall attach to the motion a copy of the request for discovery or the response at issue. The moving party shall also attach~~must include~~ a certification that the moving party~~movant~~ has in good faith conferred or attempted to confer with other affected parties to resolve the dispute~~the person or party failing to make the discovery in an effort to secure the information or material~~ without court action.

(b)(2) If ~~When taking a deposition on oral examination,~~ the motion raises issues of proportionality under Rule 26(b)(2), ~~proponent of~~ the party seeking the discovery has the burden of demonstrating that the information being sought is proportional.

(c) **Orders**. The court~~question~~ may make any~~complete or adjourn the examination before applying for an~~ order to require disclosure or discovery or to protect a party or person from discovery being conducted in bad faith or from annoyance, embarrassment, oppression, or undue burden or expense, or to achieve proportionality under Rule 26(b)(2), including one or more of the following: ~~:~~

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

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

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

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

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

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

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

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

(c)(9) that a question about a statement or opinion of fact or the application of law to fact not be answered until after designated discovery has been completed or until a pretrial conference or other later time; or

(c)(10) that the costs, expenses and attorney fees of discovery be allocated among the parties as justice requires.

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

(d) ~~(a)(3) Evasive or incomplete disclosure, answer, or response. For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.~~

~~(a)(4)~~ **Expenses and sanctions for motions.**~~.~~

~~(a)(4)(A)~~ If the motion to compel or for a protective order is granted, or if a party provides~~the~~ disclosure or ~~requested~~ discovery or withdraws a disclosure or discovery request~~is provided~~ after a~~the~~ motion is~~was~~ filed, the court may order the party, witness or attorney~~shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them~~ to pay ~~to the moving party~~ the reasonable expenses and attorney fees incurred on account of the motion if ~~in obtaining the order, including attorney fees, unless~~ the court finds that the party, witness, or attorney did not act in ~~motion was filed without the movant's first making a~~ good faith or asserted a position that was not ~~effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was~~ substantially justified. ~~A, or that other circumstances make an award of expenses unjust.~~

~~(a)(4)(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after opportunity for hearing, require the moving party or the attorney or both of them to pay to the party or deponent who opposed the~~ motion to

compel orthe reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(a)(4)(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after opportunity for a protective order does not suspend or toll the time to complete standard discoveryhearing, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(eb) **Failure to comply with order.**

(eb)(1) Sanctions by court in district where deposition is taken. Failureif a deponent fails to follow an order ofbe sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken or where the document subpoena was served is, the failure may be considered a contempt of that court.

(e)(2) Sanctions by court in which action is pending. Unlessb)(2) Sanctions by court in which action is pending. If a party fails to obey an order entered under Rule 16(b) or if a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Subdivision (a) of this rule or Rule 35, , unless the court finds that the failure was substantially justified, the court in which the action is pending may impose appropriate sanctions for take such action in regard to the failure to follow its ordersas are just, including the following:

(eb)(2)(A) deem the matter or any other designated facts to be established for the purposes of the action in accordance with the claim or defense of the party obtaining the order;

(eb)(2)(B) prohibit the disobedient party from supporting or opposing designated claims or defenses or from introducing designated matters intoin evidence;

(eb)(2)(C) strike pleadings or parts thereof, stay further proceedings until the order is obeyed;

(e)(2)(D), dismiss all or part of the action, strike all or proceeding or any part of the pleadingsthereof, or render judgment by default on all or part ofagainst the actiondisobedient party;

(eb)(2)(ED) order the party or the attorney to pay the reasonable expenses, including attorney fees, caused by the failure;

(eb)(2)(FE) treat the failure to obey an order, other than an order to submit to a physical or mental examination, as contempt of court; and

(eb)(2)(GF) instruct the jury regarding an adverse inference.

(fe) **Expenses on failure to admit.** If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions ~~thereafter~~ proves the genuineness of the document or the truth of the matter, the party requesting the admissions may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that: ~~(1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.~~

(f)(1) the request was held objectionable pursuant to Rule 36(a);

(f)(2) the admission sought was of no substantial importance;

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

(f)(4) that the request is not proportional under Rule 26(b)(2); or

(f)(5) there were other good reasons for the failure to admit.

(gd) **Failure of party to attend at own deposition.** The court on motion may take any action authorized by paragraph (e)(2) if ~~or serve answers to interrogatories or respond to request for inspection. If~~ a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails ~~(1)~~ to appear before the officer taking ~~who is to take~~ the deposition, after ~~being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after~~ proper service of the notice. ~~interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court . on motion may take any action authorized by Subdivision (b)(2).~~

The failure to act described in this paragraph~~subdivision~~ may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order under paragraph (b). ~~as provided by Rule 26(c).~~

(h) **Failure to disclose.**~~(e) Failure to participate in the framing of a discovery plan. If a party or attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court on motion may take any action authorized by Subdivision (b)(2).~~

~~(f) Failure to disclose.~~ If a party fails to disclose a witness, document or other material as required by Rule 26(a) or Rule 26(de)(1), or to amend a prior response to discovery as required by Rule 26(d)(4~~e~~)(~~2~~), that party shall not be permitted to use the witness, document or other material at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose. In addition to or in lieu of this sanction, the court on motion may take any action authorized by paragraph (e~~Subdivision (b~~)(2).

(ig) **Failure to preserve evidence.** Nothing in this rule limits the inherent power of the court to take any action authorized by paragraph (e~~Subdivision (b~~)(2) if a party destroys, conceals, alters, tampers with or fails to preserve a document, tangible item, electronic data or other evidence in violation of a duty. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

**Advisory Committee Notes**

The 2011 amendments to Rule 37 make two principal changes. First, the amended Rule 37 consolidates provisions for motions for a protective order (formerly set forth in Rule 26(c)) with provisions for motions to compel. By consolidating the standards for these two motions in a single rule, the Advisory Committee sought to highlight some of the parallels and distinctions between the two types of motions and to present them in a single rule.

Second, the amended Rule 37 incorporates the new Rule 26 standard of "proportionality" as a principal criterion on which motions to compel or for a protective order should be evaluated. As to motions to compel, Rule 37(a)(3) requires that a party

moving to compel discovery certify to the court "that the discovery being sought is proportional under Rule 26(b)(2)." Rule 37(b) makes clear that a lack of proportionality may be raised as ground for seeking a protective order, indicating that "the party seeking the discovery has the burden of demonstrating that the information being sought is proportional."

**Rule 54. Judgments; costs.**

(a) **Definition; form.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings. Judgments shall state whether they are entered upon trial, stipulation, motion or the court's initiative; and, unless otherwise directed by the court, a judgment shall not include any matter by reference.

(b) **Judgment upon multiple claims and/or involving multiple parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) **Demand for judgment.**

(c)(1) Generally. Except as to a party against whom a judgment is entered by default, and except as provided in Rule 8(a), every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.

(c)(2) Judgment by default. A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment.

(d) **Costs.**

(d)(1) **To whom awarded.** Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the

prevailing party unless the court otherwise directs; provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, shall abide the final determination of the cause. Costs against the state of Utah, its officers and agencies shall be imposed only to the extent permitted by law.

(d)(2) **How assessed.** The party who claims his costs must within five days after the entry of judgment serve upon the adverse party against whom costs are claimed, a copy of a memorandum of the items of his costs and necessary disbursements in the action, and file with the court a like memorandum thereof duly verified stating that to affiant's knowledge the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may, within seven days after service of the memorandum of costs, file a motion to have the bill of costs taxed by the court.

A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, shall nevertheless be considered as served and filed on the date judgment is entered.

(e) **Interest and costs to be included in the judgment.** The clerk must include in any judgment signed by him any interest on the verdict or decision from the time it was rendered, and the costs, if the same have been taxed or ascertained. The clerk must, within two days after the costs have been taxed or ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for that purpose, and make a similar notation thereof in the register of actions and in the judgment docket.