LEGISLATIVE GENERAL COUNSEL
₵ Approved for Filing: E. Chelsea-McCarty ₵
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S.J.R. 15

JOINT RESOLUTION AMENDING RULES OF CIVIL PROCEDURE ON PEER REVIEW

2012 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Jerry W. Stevenson

House Sponsor: Paul Ray

LONG TITLE

General Description:

This joint resolution amends the Rules of Civil Procedure to include protections against discovery and admission into evidence for privileged matters connected to medical care and peer review.

Highlighted Provisions:

This resolution:

- amends Rule 26 of the Utah Rules of Civil Procedure; and
- establishes additional privileges that protect matters connected to medical care and peer review against discovery and admission into evidence.

Special Clauses:

This resolution provides an immediate effective date.

Utah Rules of Civil Procedure Affected:

AMENDS:

Rule 26, Utah Rules of Civil Procedure

Be it resolved by the Legislature of the state of Utah, two-thirds of all members elected to each of the two houses voting in favor thereof:

As provided in Utah Constitution Article VIII, Section 4, the Legislature may amend rules of procedure and evidence adopted by the Utah Supreme Court upon a two-thirds vote of

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all members of both houses of the Legislature:

Section 1. **Rule 26**, Utah Rules of Civil Procedure is amended to read:

Rule 26. General provisions governing disclosure and discovery.

(a) 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 paragraph (a)(3), a party shall, without 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 all documents, data compilations, electronically stored information, and tangible things in the possession 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 damages claimed and a copy of all discoverable documents or evidentiary material on which such computation is based, including materials about the nature and extent of injuries suffered;

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

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

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

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

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

(a) (4) Expert testimony. .

(a) (4) (A) Disclosure of expert testimony. A party shall, without waiting for a discovery request, provide to the other parties the following information regarding any person who may be used at trial to present evidence under Rules 702, 703, or of the Utah Rules of Evidence 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: (i) the expert's name and qualifications, including a list of all publications authored within the preceding 10 years, and a list of any other cases in which the 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) (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 party taking the deposition shall pay the 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 paragraph (a)(4)(A) within seven days after the close of fact discovery. 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) (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 (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) (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:

(a) (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 will call and witnesses the party may call;

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

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

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

(b) Discovery scope.

(b) (1) In general. Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below. Privileged matters that are not discoverable or admissible in any proceeding of any kind or character include all information in any form provided **Ŝ→ [~~to~~] during ←Ŝ** and **Ŝ→ [~~relating to~~] created specifically as part of a request for an investigation ←Ŝ** the investigation, findings, or conclusions of **Ŝ→ peer review, care review, or quality assurance processes of ←Ŝ** any organization of health care providers as defined in the Utah Health Care Malpractice Act for the purpose of evaluating care provided to reduce morbidity and mortality or to improve the quality of medical care, or for the purpose of peer review of the ethics, competence, or professional conduct of any health care provider.

(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 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 electronically stored information is not reasonably accessible because of undue burden or cost 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 evaluate the claim.

(b) (5) Trial preparation materials. A party may obtain otherwise discoverable documents and tangible things 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 and that the party is unable without undue hardship to obtain substantially equivalent materials by other means. In ordering discovery of such materials, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

(b) (6) Statement previously made about the action. A party may obtain without the showing required 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 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 under Rule 37. A statement previously made is (A) a written statement signed or approved by the person making it, or (B) a stenographic, mechanical, 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) (7) Trial preparation; experts.

(b) (7) (A) Trial-preparation protection for draft reports or disclosures. Paragraph

(b)(5) protects drafts of any report or disclosure required under 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 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) (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 to prepare for trial and who is not expected to be called as a witness at trial. A party may do so only:

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

(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 or protection of trial preparation materials.

(b) (8) (A) Information withheld. If a party withholds discoverable information by claiming that it is privileged or 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 in a manner that, without revealing the information itself, will enable other parties to evaluate the claim.

(b) (8) (B) Information produced. If a party produces information that the party claims is privileged or prepared in anticipation of litigation or for trial, the producing party may notify any receiving party 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) 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. Methods of discovery may be used in any sequence, and the fact that a party is conducting discovery shall not delay any other party's discovery. Except for cases exempt under paragraph (a)(3), a party may not seek discovery from any source before that party's initial disclosure obligations are satisfied.

(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. 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)(4)(C) and (D).

Tier	Amount of Damages	Total Fact Deposition Hours	Rule 33 Interrogatories including all discrete subparts	Rule 34 Requests for Production	Rule 36 Requests for Admission	Days to Complete Standard Fact Discovery
1	$50,000 or less	3	0	5	5	120
2	More than $50,000 and less than $300,000 or non-monetary relief	15	10	10	10	180
3	$300,000 or more	30	20	20	20	210

(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 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 a disclosure or response is incomplete or incorrect in some important way, the party must timely provide the additional or correct information 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) Signing discovery requests, responses, and objections. Every disclosure, request for discovery, response to a request for discovery and objection to a 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. The signature of the attorney or party is a certification under Rule 11. If a request or response is not signed, the receiving party does not need to take any action with respect to it. If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, may take any action authorized by Rule 11 or Rule 37(e).

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

Section 2. **Legislative note.**

It is the intent of the Legislature that when the Court Rules are compiled and printed, the following language be added as a Legislative Note.

"**Legislative Note.**

(1) The amended language in paragraph (b)(1) is intended to incorporate long-standing protections against discovery and admission into evidence of privileged matters connected to medical care review and peer review into the Utah Rules of Civil Procedure. These privileges, found in both Utah common law and statute, include Sections 26-25-3, 58-13-4, and 58-13-5, UCA, 1953. §→ **The language is intended to ensure the confidentiality of peer review, care review, and quality assurance processes and to ensure that the privilege is limited only to documents and information created specifically as part of the processes. It does not extend to knowledge gained or documents created outside or independent of the processes. The language is not intended to limit the court's existing ability, if it chooses, to review contested documents in camera in order to determine whether the documents fall within the privilege. The language is not intended to alter any existing law, rule, or regulation relating to the confidentiality, admissibility, or disclosure of proceedings before the Utah Division of Occupational and Professional Licensing.** ←§ The Legislature intends that these privileges apply to all pending and future proceedings governed by court rules, including administrative proceedings regarding licensing and reimbursement.

(2) The Legislature does not intend that the amendments to this rule be construed to change or alter a final order concerning discovery matters entered on or before the effective date of this amendment.

(3) The Legislature intends to give the greatest effect to its amendment, as legally permissible, in matters that are pending on or may arise after the effective date of this amendment, without regard to when the case was filed."

Section 3. **Effective date.**

This resolution takes effect upon approval by a constitutional two-thirds vote of all members elected to each house.

Legislative Review Note
as of 2-21-12 8:20 AM

Office of Legislative Research and General Counsel