

1 **JOINT RESOLUTION AMENDING RULES OF CIVIL**
2 **PROCEDURE ON EXPERT WITNESSES**

3 2020 GENERAL SESSION

4 STATE OF UTAH

5 **Chief Sponsor: Michael K. McKell**

6 Senate Sponsor: Kirk A. Cullimore

8 **LONG TITLE**

9 **General Description:**

10 This joint resolution amends the Utah Rules of Civil Procedure, Rule 26, regarding
11 discovery obtained from an expert witness.

12 **Highlighted Provisions:**

13 This resolution:

- 14 ▶ amends the Utah Rules of Civil Procedure, Rule 26, regarding a party's duty to pay
- 15 an expert witness's hourly fee for attendance at a deposition; and
- 16 ▶ makes technical and conforming changes.

17 **Special Clauses:**

18 This resolution provides a special effective date.

19 **Utah Rules of Civil Procedure Affected:**

20 AMENDS:

21 **Rule 26**, Utah Rules of Civil Procedure

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

25 As provided in Utah Constitution Article VIII, Section 4, the Legislature may amend
26 rules of procedure and evidence adopted by the Utah Supreme Court upon a two-thirds vote of
27 all members of both houses of the Legislature:



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

29 **Rule 26. General provisions governing disclosure of discovery.**

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

32 **(a) (1) Initial disclosures.** Except in cases exempt under paragraph (a)(3), a party
33 shall, without waiting for a discovery request, serve on the other parties:

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

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

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

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

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

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

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

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

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

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

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

58 (a) (3) (A) Unless otherwise ordered by the court or agreed to by the parties, the

59 requirements of paragraph (a)(1) do not apply to actions:

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

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

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

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

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

68 (a) (4) **Expert testimony.**

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

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

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

88 (a) (4) (C) (i) The party who bears the burden of proof on the issue for which expert
89 testimony is offered shall serve on the other parties the information required by paragraph

90 (a)(4)(A) within seven days after the close of fact discovery. Within seven days thereafter, the
91 party opposing the expert may serve notice electing either a deposition of the expert pursuant to
92 paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The
93 deposition shall occur, or the report shall be served on the other parties, within 28 days after the
94 election is served on the other parties. If no election is served on the other parties, then no
95 further discovery of the expert shall be permitted.

96 (a) (4) (C) (ii) The party who does not bear the burden of proof on the issue for which
97 expert testimony is offered shall serve on the other parties the information required by
98 paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election
99 under paragraph (a)(4)(C)(i) is due, or (B) receipt of the written report or the taking of the
100 expert's deposition pursuant to paragraph (a)(4)(C)(i). Within seven days thereafter, the party
101 opposing the expert may serve notice electing either a deposition of the expert pursuant to
102 paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The
103 deposition shall occur, or the report shall be served on the other parties, within 28 days after the
104 election is served on the other parties. If no election is served on the other parties, then no
105 further discovery of the expert shall be permitted.

106 (a) (4) (C) (iii) If the party who bears the burden of proof on an issue wants to
107 designate rebuttal expert witnesses it shall serve on the other parties the information required
108 by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election
109 under paragraph (a)(4)(C)(ii) is due, or (B) receipt of the written report or the taking of the
110 expert's deposition pursuant to paragraph (a)(4)(C)(ii). Within seven days thereafter, the party
111 opposing the expert may serve notice electing either a deposition of the expert pursuant to
112 paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The
113 deposition shall occur, or the report shall be served on the other parties, within 28 days after the
114 election is served on the other parties. If no election is served on the other parties, then no
115 further discovery of the expert shall be permitted.

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

120 (a) (4) (E) **Summary of non-retained expert testimony.** If a party intends to present

121 evidence at trial under Rule 702 of the Utah Rules of Evidence from any person other than an
122 expert witness who is retained or specially employed to provide testimony in the case or a
123 person whose duties as an employee of the party regularly involve giving expert testimony, that
124 party must serve on the other parties a written summary of the facts and opinions to which the
125 witness is expected to testify in accordance with the deadlines set forth in paragraph (a)(4)(C).
126 A deposition of such a witness may not exceed four hours and ~~H~~→ , **unless manifest injustice**
126a **would result,** ←~~H~~ the party taking the deposition
127 shall pay the expert's reasonable hourly fees for attendance at the deposition.

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

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

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

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

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

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

146 **(b) Discovery scope.**

147 **(b) (1) In general.** Parties may discover any matter, not privileged, which is relevant to
148 the claim or defense of any party if the discovery satisfies the standards of proportionality set
149 forth below. Privileged matters that are not discoverable or admissible in any proceeding of any
150 kind or character include all information in any form provided during and created specifically
151 as part of a request for an investigation, the investigation, findings, or conclusions of peer

152 review, care review, or quality assurance processes of any organization of health care providers
153 as defined in the Utah Health Care Malpractice Act for the purpose of evaluating care provided
154 to reduce morbidity and mortality or to improve the quality of medical care, or for the purpose
155 of peer review of the ethics, competence, or professional conduct of any health care provider.

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

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

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

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

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

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

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

170 **(b) (3) Burden.** The party seeking discovery always has the burden of showing
171 proportionality and relevance. To ensure proportionality, the court may enter orders under Rule
172 37.

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

178 **(b) (5) Trial preparation materials.** A party may obtain otherwise discoverable
179 documents and tangible things prepared in anticipation of litigation or for trial by or for another
180 party or by or for that other party's representative (including the party's attorney, consultant,
181 surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has
182 substantial need of the materials and that the party is unable without undue hardship to obtain

183 substantially equivalent materials by other means. In ordering discovery of such materials, the
184 court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal
185 theories of an attorney or other representative of a party.

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

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

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

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

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

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

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

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

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

213 (b) (7) (C) (ii) on showing exceptional circumstances under which it is impracticable

214 for the party to obtain facts or opinions on the same subject by other means.

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

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

221 **(b) (8) (B) Information produced.** If a party produces information that the party
222 claims is privileged or prepared in anticipation of litigation or for trial, the producing party may
223 notify any receiving party of the claim and the basis for it. After being notified, a receiving
224 party must promptly return, sequester, or destroy the specified information and any copies it
225 has and may not use or disclose the information until the claim is resolved. A receiving party
226 may promptly present the information to the court under seal for a determination of the claim.
227 If the receiving party disclosed the information before being notified, it must take reasonable
228 steps to retrieve it. The producing party must preserve the information until the claim is
229 resolved.

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

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

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

241 **(c) (3) Definition of tiers for standard discovery.** Actions claiming \$50,000 or less in
242 damages are permitted standard discovery as described for Tier 1. Actions claiming more than
243 \$50,000 and less than \$300,000 in damages are permitted standard discovery as described for
244 Tier 2. Actions claiming \$300,000 or more in damages are permitted standard discovery as

245 described for Tier 3. Absent an accompanying damage claim for more than \$300,000, actions
 246 claiming non-monetary relief are permitted standard discovery as described for Tier 2.

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

250 **(c) (5) Limits on standard fact discovery.** Standard fact discovery per side (plaintiffs
 251 collectively, defendants collectively, and third-party defendants collectively) in each tier is as
 252 follows. The days to complete standard fact discovery are calculated from the date the first
 253 defendant's first disclosure is due and do not include expert discovery under
 254 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

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

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

265 (c) (6) (B) before the close of standard discovery and after reaching the limits of
 266 standard discovery imposed by these rules, a request for extraordinary discovery under Rule
 267 37(a).

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

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

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

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

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

284 (d) (5) If a party learns that a disclosure or response is incomplete or incorrect in some
285 important way, the party must timely serve on the other parties the additional or correct
286 information if it has not been made known to the other parties. The supplemental disclosure or
287 response must state why the additional or correct information was not previously provided.

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

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

299 Section 2. **Effective date.**

300 This resolution takes effect upon approval by a constitutional two-thirds vote of all

301 members elected to each house.