

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

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

4 (1) **Initial disclosures.** Except in actions governed by Rule 65B, and unless otherwise
5 directed by the court, a party must, without waiting for a discovery request, serve
6 on the other parties:

7 (A) the name and, if known, the physical address, email address, and telephone
8 number of:

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

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

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

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

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

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

26 (2) **Timing of initial disclosures.** The disclosures required by paragraph (a)(1) must
27 be served on the other parties:

28 (A) by a plaintiff within 14 days after the filing of the first answer to that
29 plaintiff's complaint; and

30 (B) by a defendant within 28 days after the filing of that defendant's first answer
31 to the complaint.

32 (3) **Expert testimony.**

33 (A) **Witnesses who must provide a written report.** A party must serve on the
34 other parties a written report from any person who may be used at trial to
35 present evidence under Rule 702 of the Utah Rules of Evidence and who is
36 retained or specially employed to provide expert testimony in the case or whose
37 duties as an employee of the party regularly involve giving expert testimony.
38 The report must contain:

39 (i) a complete statement of all opinions the witness will express and the basis
40 and reasons for them;

41 (ii) the facts or data considered by the witness in forming those opinions;

42 (iii) any exhibits that will be used to summarize or support those opinions;

43 (iv) the witness's qualifications, including a list of all publications authored
44 by the witness in the previous ten years;

45 (v) a list of all other cases in which, during the previous four years, the
46 witness testified as an expert at trial or by deposition, and all cases in which a
47 report authored by the witness was disclosed to any other party; and

48 (vi) a statement of the compensation to be paid for the witness's study and
49 testimony in the case.

50 (B) **Summary of non-retained expert testimony.** If a party intends to present
51 evidence at trial under Rule 702 of the Utah Rules of Evidence from any person

52 other than an expert witness who is retained or specially employed to provide
53 testimony in the case or a person whose duties as an employee of the party
54 regularly involve giving expert testimony, that party must serve on the other
55 parties a written summary of the facts and opinions to which the witness is
56 expected to testify in accordance with the deadlines set forth in paragraph
57 (a)(3)(C). Such a witness cannot be required to provide a report pursuant to
58 paragraph (a)(3)(A).

59 **(C) Timing for expert reports and summaries.** A party must serve expert reports
60 and summaries at the times and in the sequence that the court orders. Absent a
61 court order, the reports and summaries must be served as follows:

62 (i) The party who bears the burden of proof on the issue for which expert
63 testimony is offered must serve on the other parties the report or summary
64 required by paragraph (a)(3)(A) or (a)(3)(B) no later than 28 days after the
65 close of fact discovery.

66 (ii) The party who does not bear the burden of proof on the issue for which
67 expert testimony is offered must serve on the other parties the report or
68 summary required by paragraph (a)(3)(A) or (a)(3)(B) no later than 56 days
69 after service of the written report required in paragraph (a)(3)(A) or the
70 summary required in paragraph (a)(3)(B).

71 (iii) If the party who bears the burden of proof on an issue wants to designate
72 rebuttal expert witnesses, it must serve on the other parties the report
73 required by paragraph (a)(3)(A) no later than 28 days after service of the
74 written report required in paragraph (a)(3)(A) or the summary required in
75 paragraph (a)(3)(B). The court may preclude an expert disclosed only as a
76 rebuttal expert from testifying in the case in chief for the proponent of the
77 expert.

78 **(D) Depositions of expert witnesses.**

79 (i) Any witness who provides a written report may be deposed by any party
80 against whom the opinion offered by such witness may be used at trial. No
81 such witness may be deposed for more than six hours and the party or parties
82 taking the deposition must pay the expert's reasonable hourly fee for
83 attendance at, and up to four hours of fees incurred in preparing for, the
84 deposition.

85 Any non-retained expert witness may be deposed by any party against whom
86 the opinion offered by such witness may be used at trial. A deposition of
87 such a witness may not exceed four hours and, unless manifest injustice
88 would result, the party taking the deposition must pay the expert's
89 reasonable hourly fee for attendance at the deposition.

90 (E) **Expert discovery.** Expert discovery must be completed no later than 28 days
91 after the last expert report or summary is served pursuant to paragraph (a)(3).

92 (4) **Pretrial disclosures.**

93 (A) A party must, without waiting for a discovery request, serve on the other
94 parties:

95 (i) the name and, if not previously provided, the physical address, email
96 address, and telephone number of each witness, unless solely for
97 impeachment, separately identifying witnesses the party will call and
98 witnesses the party may call;

99 (ii) the name of witnesses whose testimony is expected to be presented by
100 transcript of a deposition;

101 (iii) designations of the proposed deposition testimony; and

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

105 (B) Unless the court orders otherwise, disclosure required by paragraph (a)(4)(A)
106 must be served on the other parties no later than 28 days before trial. Disclosures
107 required by paragraph (a)(4)(A)(i) and (a)(4)(A)(ii) must also be filed on the date
108 that they are served. No later than 14 days before trial, a party must serve any
109 counter designations of deposition testimony and any objections and grounds for
110 the objections to the use of any deposition, witness, or exhibit if the grounds for
111 the objection are apparent before trial. Other than objections under Rules 402 and
112 403 of the Utah Rules of Evidence, other objections not listed are waived unless
113 excused by the court for good cause.

114 (5) **Form of disclosure and discovery production.** Rule 34 of the Utah Rules of Civil
115 Procedure governs the form in which all documents, data compilations,
116 electronically stored information, tangible things, and evidentiary material must be
117 produced under this Rule.

118 (b) **Discovery scope.**

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

122 (2) **Privileged matters.**

123 (A) Privileged matters that are not discoverable or admissible in any proceeding
124 of any kind or character include:

125 (i) all information in any form provided during and created specifically as
126 part of a request for an investigation, the investigation, findings, or
127 conclusions of peer review, care review, or quality assurance processes of any
128 organization of health care providers as defined in Utah Code Title 78B,
129 Chapter 3, Part 4, Utah Health Care Malpractice Act, for the purpose of
130 evaluating care provided to reduce morbidity and mortality or to improve the

131 quality of medical care, or for the purpose of peer review of the ethics,
132 competence, or professional conduct of any health care provider; and

133 (ii) except as provided in paragraph (b)(2)(C), (D), or (E), all communications,
134 materials, and information in any form specifically created for or during a
135 medical candor process under Utah Code Title 78B, Chapter 3, Part 4a, Utah
136 Medical Candor Act, including any findings or conclusions from the
137 investigation and any offer of compensation.

138 (B) Disclosure or use in a medical candor process of any communication,
139 material, or information in any form that contains any information described in
140 paragraph (b)(2)(A)(i) does not waive any privilege or protection against
141 admissibility or discovery of the information under paragraph (b)(2)(A)(i).

142 (C) Any communication, material, or information in any form that is made or
143 provided in the ordinary course of business, including a medical record or a
144 business record, that is otherwise discoverable or admissible and is not created
145 for or during a medical candor process is not privileged by the use or disclosure
146 of the communication, material or information during a medical candor process.

147 (D)

148 (i) Any information that is required to be documented in a patient's medical
149 record under state or federal law is not privileged by the use or disclosure of
150 the information during a medical candor process.

151 (ii) Information described in paragraph (b)(2)(D)(i) does not include an
152 individual's mental impressions, conclusions, or opinions that are formed
153 outside the course and scope of the patient's care and treatment and are used
154 or disclosed in a medical candor process.

155 (E)

156 (i) Any communication, material or information in any form that is provided
157 to an affected party before the affected party's written agreement to

158 participate in a medical candor process is not privileged by the use or
159 disclosure of the communication, material, or information during a medical
160 candor process.

161 (ii) Any communication, material, or information described in paragraph
162 (b)(2)(E)(i) does not include a written notice described in Utah Code section
163 78B-3-452.

164 (F) The terms defined in Utah Code section 78B-3-450 apply to paragraphs
165 (b)(2)(A)(ii), (B), (C), (D), and (E).

166 (G) Nothing in this paragraph (b)(2) prevents a party from raising any other
167 privileges provided by law or rule as to the admissibility or discovery of any
168 communication, information, or material described in paragraph (b)(2)(A), (B),
169 (C), (D), or (E).

170 (3) **Proportionality.** Discovery and discovery requests are proportional if:

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

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

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

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

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

180 (F) the party seeking discovery has not had sufficient opportunity to obtain the
181 information by discovery or otherwise, taking into account the parties' relative
182 access to the information.

183 (4) **Burden.** The party seeking discovery always has the burden of showing
184 proportionality and relevance. To ensure proportionality, the court may enter orders
185 under Rule 37 of the Utah Rules of Civil Procedure.

186 (5) **Electronically stored information.** A party claiming that electronically stored
187 information is not reasonably accessible because of undue burden or cost must
188 describe the source of the electronically stored information, the nature and extent of
189 the burden, the nature of the information not provided, and any other information
190 that will enable other parties to evaluate the claim.

191 (6) **Trial preparation materials.** A party may obtain otherwise discoverable
192 documents and tangible things prepared in anticipation of litigation or for trial by or
193 for another party or by or for that other party's representative (including the party's
194 attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that
195 the party seeking discovery has substantial need of the materials and that the party
196 is unable without undue hardship to obtain substantially equivalent materials by
197 other means. In ordering discovery of such materials, the court must protect against
198 disclosure of the mental impressions, conclusions, opinions, or legal theories of an
199 attorney or other representative of a party.

200 (7) **Statement previously made about the action.** A party may obtain without the
201 showing required in paragraph (b)(5) a statement concerning the action or its subject
202 matter previously made by that party. Upon request, a person not a party may
203 obtain without the required showing a statement about the action or its subject
204 matter previously made by that person. If the request is refused, the person may
205 move for a court order under Rule 37 of the Utah Rules of Civil Procedure. A
206 statement previously made is (A) a written statement signed or approved by the
207 person making it, or (B) a stenographic, mechanical, electronic, or other recording, or
208 a transcription thereof, which is a substantially verbatim recital of an oral statement
209 by the person making it and contemporaneously recorded.

210 (8) **Trial preparation; experts.**

211 (A) **Trial-preparation protection for draft reports or summaries.** Paragraph
212 (b)(6) protects drafts of any report or summary required under paragraphs
213 (a)(3)(A) or (a)(3)(B), regardless of the form in which the draft is recorded.

214 (B) **Trial-preparation protection for communications between a party's**
215 **attorney and expert witnesses.** Paragraph (b)(6) protects communications
216 between the party's attorney and any witness required to provide disclosures
217 under paragraph (a)(3), regardless of the form of the communications, except to
218 the extent that the communications:

219 (i) relate to compensation for the expert's study or testimony;

220 (ii) identify facts or data that the party's attorney provided and that the
221 expert considered in forming the opinions to be expressed; or

222 (iii) identify assumptions that the party's attorney provided and that the
223 expert relied on in forming the opinions to be expressed.

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

229 (i) as provided in Rule 35(b) of the Utah Rules of Civil Procedure; or

230 (ii) on showing exceptional circumstances under which it is impracticable for
231 the party to obtain facts or opinions on the same subject by other means.

232 (9) **Claims of privilege or protection of trial preparation materials.**

233 (A) **Information withheld.** If a party withholds discoverable information by
234 claiming that it is privileged or prepared in anticipation of litigation or for trial,
235 the party must make the claim expressly and must describe the nature of the

236 documents, communications, or things not produced in a manner that, without
237 revealing the information itself, will enable other parties to evaluate the claim.

238 **(B) Information produced.** If a party produces information that the party claims
239 is privileged or prepared in anticipation of litigation or for trial, the producing
240 party may notify any receiving party of the claim and the basis for it. After being
241 notified, a receiving party must promptly return, sequester, or destroy the
242 specified information and any copies it has and may not use or disclose the
243 information until the claim is resolved. A receiving party may promptly present
244 the information to the court under seal for a determination of the claim. If the
245 receiving party disclosed the information before being notified, it must take
246 reasonable steps to retrieve it. The producing party must preserve the
247 information until the claim is resolved.

248 **(c) Methods, sequence, and timing of discovery; limits on standard fact discovery;**
249 **extraordinary discovery.**

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

256 **(2) Sequence and timing of discovery.** Methods of discovery may be used in any
257 sequence, and the fact that a party is conducting discovery must not delay any other
258 party's discovery. A party may not seek discovery from any source before that
259 party's initial disclosure obligations are satisfied.

260 **(3) Limits on fact discovery.** Fact discovery per side (plaintiffs collectively,
261 defendants collectively, and third-party defendants collectively) is presumptively as
262 follows, but may be modified by the court upon a motion of one or more of the

263 parties. Fact discovery must be completed no later than 210 days after the first
264 defendant's first disclosure is due. Each side is entitled to:

265 (i) serve the following discovery requests as provided in Rules 33, 34, and 36
266 of the Utah Rules of Civil Procedure:

267 (a) 20 Interrogatories (including all discrete subparts);

268 (b) 25 Requests for Production (including all discrete subparts); and

269 (c) 30 Requests for Admission (including all discrete subparts); and

270 (ii) take ten depositions as provided in Rule 30 of the Utah Rules of Civil
271 Procedure.

272 (4) **Extraordinary discovery.** To obtain discovery beyond the limits established in
273 paragraph (c)(3) or by the court, a party must, before the close of fact discovery and
274 after reaching the limits of discovery imposed by these rules or by the court, file a
275 request for extraordinary discovery under Rule 37(a) of the Utah Rules of Civil
276 Procedure, whether or not the request is opposed, establishing good cause for the
277 relief requested.

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

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

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

287 (3) A party is not excused from making disclosures or responses because the party
288 has not completed investigating the case, the party challenges the sufficiency of

289 another party's disclosures or responses, or another party has not made disclosures
290 or responses.

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

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

300 (e) **Signing discovery requests, responses, and objections.** Every disclosure, request
301 for discovery, response to a request for discovery, and objection to a request for
302 discovery must be in writing and signed by at least one attorney of record or by the
303 party if the party is not represented. The signature of the attorney or party is a
304 certification under Rule 11 of the Utah Rules of Civil Procedure. If a request or response
305 is not signed, the receiving party does not need to take any action with respect to it. If a
306 certification is made in violation of the rule, the court, upon motion or upon its own
307 initiative, may take any action authorized by Rule 11 or Rule 37(b) of the Utah Rules of
308 Civil Procedure.

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

313 *Effective May/November 1, 20____*

314