2017

Intermountain Surgical, LLC, Petitioner / Appellant, vs. Whitney A. Nesbitt, Jacob C. Loveland, Ignacio Buenrostro, Ester Buenorostro, and Hon. Ryal I. Hansen Respondents / Appellees.

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

INTERMOUNTAIN SURGICAL, LLC, Petitioner / Appellant, vs. WHITNEY A. NESBITT AND JACOB C. LOVELAND, IGNACIO BUENROSTRO and ESTHER BUENROSTRO, and THE HONORABLE ROYAL I. HANSEN, THIRD JUDICIAL DISTRICT COURT JUDGE, Respondents / Appellees.	Case No. 20170701-CA

BRIEF OF RESPONDENT-APPELLEE NESBITT

Opposing Petition for Writ of Extraordinary Relief from the Order of the Honorable Royal I. Hansen, Third District Court Judge, Utah Case No. 160902137

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LIST OF FORMER AND CURRENT PARTIES

The parties to this Petition are Intermountain Surgical, LLC ("IMS") represented by Kara J. Porter, Scott T. Evans and Kirsten C. Kiburtz with Christensen & Jensen, P.C.; and Whitney A. Nesbitt ("Nesbitt") represented by Lloyd R. Jones with Law Office of Lloyd R. Jones and Gary L. Cooper with Cooper & Larsen. Jacob C. Loveland has been dismissed from the litigation. Ignacio and Esther Buenrostro ("Buenrostros" collectively and "Ignacio" or "Esther" individually) are represented by Brett R. Boulton with Flickinger Sutterfield & Boulton, but have not participated in the proceedings concerning the Protective Order.

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INTRODUCTION

IMS is a "financial services company[1]" in the loosest sense of the term. It invests in litigation claims by paying for surgeries it arranges for plaintiffs who have claims in litigation and charges them a substantial premium. Before investing in the claims of its clients, IMS investigates the merits of the claim including evaluating liability, determining the existence of liability insurance and obtaining a medical opinion from a doctor it has under contract to support medical causation and necessity for surgery. IMS not only finances the surgeries, it contracts with a doctor to perform the surgery at a location determined by IMS so that it can control the costs. The premium IMS charges to finance these surgeries is described by it as an amount which reflects "the nature and value of the financial services provided to Client, including risk of capital loss and similar exposure undertaken by [IMS] on behalf of Client."[2] IMS primarily uses one orthopedic surgeon for this purpose and pays the surgeon handsomely and repeatedly for these evaluations and surgeries. IMS's finance charge for arranging for the surgery and paying for it is secured by a lien on any "judgment, settlement or verdict" the client recovers in their "claim for bodily injury damages"[3].

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[1]"Financial services company" is the term IMS uses to describe itself in the disclosure it provides to its clients. (*See* Addendum to Response of Nesbitt to Intermountain Surgical's Petition for Writ of Extraordinary Relief, at NESBITT 0036)

[2]IMS Disclosure of Financial Services. Addendum to Response of Nesbitt to Intermountain Surgical's Petition for Writ of Extraordinary Relief, at NESBITT 0036.

[3]IMS Service Provider Lien and Authorization at NESBITT 0036, in Addendum to Response of Nesbitt to Intermountain Surgical's Petition for Writ of Extraordinary Relief.

The reason IMS should be subject to discovery is because its finance charge is cleverly disguised as a medical bill by its use of CPT codes and medical terminology. Its clients, the plaintiffs in litigation, use IMS's charges, or estimates in this case, as evidence of their economic loss for past or future medical expenses. Because the finance charge is two or more times the reasonable and customary charge for the medical services IMS finances, the use of the IMS client invoice/estimate by plaintiffs as proof of the reasonable and necessary medical expenses incurred raises questions about the legitimacy of the IMS client invoice/estimate as evidence of the reasonable and customary medical expense for the surgery. In addition, the way plaintiffs and the IMS contract surgeon are introduced together with the mutually beneficial relationship between the surgeon and IMS, raises questions about the objectivity of the surgeon's surgery recommendations.

This is a Tier 3 case arising from a low speed and minimal property damage three vehicle accident which occurred on June 27, 2011. After three and half years, Ignacio had incurred approximately $11,000 in medical expenses to treat what he claimed were injuries suffered in the June 27, 2011 accident. His wife, Esther, had incurred approximately $12,000 in medical expenses over the same period of time to treat what she claimed were injuries suffered in the June 27, 2011 accident[4]. In December 2014, their lawyer referred both Ignacio and Esther to IMS which arranged for a medical evaluation by its contract doctor,

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[4]*See* Plaintiff's Rule 26 Initial Disclosures dated May 16, 2016 at NESBITT 0012 - 13 in Addendum to Response of Nesbitt to Intermountain Surgical's Petition for Writ of Extraordinary Relief.

Dr. Kade T. Huntsman, who saw both Ignacio and Esther once on December 15, 2014. After this one examination, Dr. Huntsman recommended multiple level cervical fusion surgeries for both Ignacio and Esther and opined in his report that the "need for surgery is due to the motor vehicle accident." Three days later on December 18, 2014, IMS provided a statement, on its Intermountain Surgical letterhead, to Ignacio advising him that it estimated the cost of the surgery Dr. Huntsman recommended for him to be $75,000. On the same date IMS provided a statement, on its Intermountain Surgical letterhead, to Esther advising her that it estimated the cost of the surgery Dr. Huntsman recommend for her to be $65,000. Although Dr. Huntsman told both Ignacio and Esther that they needed the surgery "as soon as possible" due to the nature of their conditions, neither went under the knife immediately and neither has had the surgery as of this date, nearly six and a half years after the June 27, 2011 accident. However, both Ignacio and Esther have used the surgical estimates as part of the computation of damages contained in their Rule 26 Initial Disclosures[5] and have hired Dr. Huntsman as their "retained expert" to provide a causation opinion to support their claim that the surgeries are necessary because of the auto accident at issue and to support their claim

[5]*See* Plaintiff's Rule 26 Initial Disclosures dated May 16, 2016 at NESBITT 0012 - 13 in Addendum to Response of Nesbitt to Intermountain Surgical's Petition for Writ of Extraordinary Relief.

that the surgical cost estimates from IMS are the reasonable and customary charges for the surgeries they ardently believe they need because Dr. Huntsman recommended it[6].

If the jury believes that the Buenrostros require expensive, risky and complicated spinal surgeries as a result of the relatively minor auto accident in which they were involved on June 27, 2011, the potential financial exposure from a verdict for damages increased significantly because of the involvement of IMS in this case. It is not only relevant, but logical, to question (1) the business model/plan of IMS to determine if it has acted as a medical facilities provider or as a finance company in this case; (2) the factual foundation for the estimated costs of surgery provided to the Plaintiffs by IMS to determine if the estimate represents reasonable and customary medical expenses or collateral source evidence about how the Buenrostros intend to pay for their medical expenses; and (3) the contractual and financial relationship between IMS and Dr. Huntsman who provided causation opinions and surgical recommendations at the request of IMS and who has been designated as a "retained expert" by the Buenrostros to testify concerning causation, surgical necessity and reasonable and customary charges for the medical treatment he recommended.[7]

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[6]See Plaintiff's Expert Disclosures dated April 18, 2017 at NESBITT 0016 - 0019 and Dr. Huntsman's expert witness reports dated January 12, 2017 at NESBITT 0032 - 0033 (Esther) and dated April 20, 2017 at NESBITT 0030 - 0031 (Ignacio) in Addendum to Response of Nesbitt to Intermountain Surgical's Petition for Writ of Extraordinary Relief.

[7]2017-06-01, Order on Non-Party's Motion for Protective Order.

The discovery ordered by Judge Hansen is relevant to the claims and defenses at issue in this case and is proportional to the significant involvement of IMS in the development and presentation of Buenrostros' damage claims. The Petition for Extraordinary Relief by IMS should be denied and Judge Hansen's Order should be enforced. Even though this Court has requested full briefing of the issues raised by IMS, the question to be determined before considering the merits of the discovery order of May 31, 2017 is whether a petition for extraordinary relief is appropriate based on what IMS has developed at the hearing on its Protection Order and in its Brief.

The determination of relevance and proportionality is a matter entrusted to the sound discretion of the trial court. Judge Hansen's reasoning has not been shown to be wrong, let alone an egregious abuse of discretion. There is no significant legal issue identified by IMS in its Brief. Judge Hansen's Order requires IMS to submit to a well defined and discrete inquiry into its business practices to determine whether the "surgical estimate" it provided to the Buenrostros is a collateral source and whether Dr. Huntsman is so inextricably connected to IMS as to be subject to impeachment for bias. Any testimony and documents IMS provides in response to Judge Hansen's Order are insulated from disclosure outside of this litigation by what amounts to an "attorney eyes only" protective order which prohibits the disclosure of the information to anyone other than the attorneys representing the parties to this litigation and limits the use of the information to this case only. IMS cannot show irreparable harm under these circumstances. Therefore, IMS is not entitled to an extraordinary writ in this case.

STATEMENT OF THE ISSUE

IMS identifies a single issue for review, namely "Whether the District Court correctly interpreted and determined the relevancy and proportionality standard of Utah R. Civ. P. 26(b) with respect to discovery requests to a non-party to the litigation?"

IMS misstates the standard of review for the issue it identifies. Nesbitt submits that the correct standard of appellate review of Judge Hansen's discovery order is abuse of discretion. This Court recently had the opportunity to address this very issue in *RJW Media Inc. v. Heath*, 2017 UT App 34, ¶ 18, 392 P.3d 956, 960 where it explained:

> While interpretations of the Utah Rules of Civil Procedure are questions of law reviewed for correctness, *Pete v. Youngblood*, 2006 UT App 303, ¶ 7, 141 P.3d 629, "we grant district courts a great deal of deference in matters of discovery and review discovery orders for abuse of discretion," *Dahl v. Dahl*, 2015 UT 79, ¶ 63. "Accordingly, we 'will not find abuse of discretion absent an erroneous conclusion of law or where there is no evidentiary basis for the trial court's ruling.' " *Id.* (quoting *Green v. Louder*, 2001 UT 62, ¶ 37, 29 P.3d 638).

See also *Williams v. Anderson*, 2017 UT App 91, ¶ 13 (While we afford trial courts broad discretion in discovery matters, we review the interpretation of the Utah Rules of Civil Procedure for correctness). The issue presented by IMS does not involve "interpretation" of the Utah Rules of Civil Procedure but only a discovery issue, the review of which should be determined using an abuse of discretion standard.

IMS ignores the real issue which must first be determined, namely whether extraordinary relief is appropriate under the facts and circumstances of this case. The standard for review of a Petition for Extraordinary Relief is identified in *Snow, Christensen*

& Martineau v. Lindberg, 2013 UT 15, ¶ 22, 299 P.3d 1058, 1065 where the Supreme Court of Utah held:

> The question of whether to grant a petition for extraordinary relief lies within the sound discretion of this court. *Id.* When considering whether to grant a petition, we may consider a variety of factors such as "the egregiousness of the alleged error, the significance of the legal issue presented by the petition, the severity of the consequences occasioned by the alleged error, and additional factors." *Id.* ¶ But these factors are neither controlling nor do they wholly measure the extent of our discretion. *Id.*

STATEMENT OF THE CASE

IMS is not licensed to provide medical services or medical facilities. IMS states specifically in its Disclosure of Financial Services that it "is a financial services company, and not a healthcare provider or medical services provider."[8] Therefore, when IMS refers to itself as a "facilities provider"[9] and attempts to suggest that its charges are "similar to the facility fees charged by other facility providers"[10] in its Brief, one must question the accuracy of such claims. "Medical facility provider" is not a term of art used in the Health Care Facility Licensing and Inspection Act, Title 26, Chapter 21, Utah Code. Therefore, IMS's self identification as a "facilities provider" is nothing more than a play on words to create the impression that it is something more or different than what it is.

IMS also attempts to give itself credibility by claiming that because it uses "CPT

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[8]*See* IMS Disclosure of Financial Services contained in the Addendum to Response of Nesbitt to Intermountain Surgical's Petition for Writ of Extraordinary Relief, at NESBITT 0036.

[9]Brief of Petitioner/Appellant, p. 8.

[10]Brief of Petitioner/Appellant, p. 8.

codes" in its invoices it is similar to "other facility providers."[11] IMS did not immediately identify who these "other facility providers" are in its Brief, but instead delayed until page 16 of the Brief of Petitioner/Appellant to suggest that it is like "IHC, St. Marks/Mountain Star, IASIS, University of Utah Hospital, as well as other outpatient surgical centers."[12] According to the American Medical Association, the AMA holds the copyright in CPT (Current Procedural Terminology) and the use or reprinting of CPT in any product or publication requires a license. Hospitals, ambulatory clinics, physician groups and other organizations involved in care delivery use CPT codes to report medical, surgical, and diagnostic procedures and services to entities such as health insurance companies. Until IMS submits to a 30(b)(6) deposition one cannot say with certainty whether IMS has a license to use CPT codes in its invoices, but it is doubtful because IMS is not involved in care delivery and is not a licensed health care facility[13] in the state of Utah.

IMS is a financial services company only in the sense that it invests in litigation by financing surgeries in exchange for liens on the settlements, verdicts and judgments of its clients who are plaintiffs in litigation. It markets itself to plaintiff firms. It carefully investigates the cases it finances. Alan McDonald, the chief executive officer of IMS,

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[11]Brief of Petitioner/Appellant, p. 8

[12]Brief of Petitioner/Appellant, p. 16

[13]"Health care facility" means general acute hospitals, specialty hospitals, home health agencies, hospices, nursing care facilities, residential-assisted living facilities, birthing centers, ambulatory surgical facilities, small health care facilities, abortion clinics, facilities owned or operated by health maintenance organizations, end stage renal disease facilities, and any other health care facility which the committee designates by rule. Utah Code § 26-21-2.

testified in a 30(b)(6) deposition in the *Vigueras* case identified in the Addendum to the Brief of Petitioner/Appellant about the investigation it conducts:

> 11 Q. Does Intermountain Surgical vet these
> 12 referrals, or does it take everyone that's referred?
> 13 A. Yeah. We vet the referrals.
> 14 Q. In what way?
> 15 A. We ask the attorney about the underlying --
> 16 it's basically an intake process. In other words, we'll
> 17 ask the attorney about the underlying case, what
> 18 happened, what are the facts, and basically is there
> 19 insurance, ultimately, on the other end of this thing,
> 20 whether it's uninsured, underinsured, or bodily injury
> 21 coverage by a tortfeasor, and if the answer to those
> 22 questions is satisfactory, then we will go ahead and
> 23 green light a consult with one of the physicians that we
> 24 work with, that we contract with.

Alan T. McDonald Deposition, pp. 9 - 10

IMS chooses the doctors who perform the surgeries on its clients and the facilities where the surgeries are performed. It rewards the medical professionals by paying their full non-discounted or barely discounted fee. In this case, Dr. Kade T. Huntsman testified about his billing protocol with IMS:

> 24 Q. When you do these surgeries for IMS, do you
> 25 discount your fee at all?
> 1 A. Slightly.
>
> * * *
>
> 19 Q. Do you know whether the discount to IMS is a
> 20 greater discount or a smaller discount than what you give
> 21 to Blue Cross, Aetna, or Cigna?
> 22 MR. KELSON: Same objections.
> 23 THE WITNESS: I would make the assumption that
> 24 it's less, but I would have to actually look at the
> 25 amounts.

Dr. Kade T. Huntsman Deposition, pp. 36 - 37

IMS makes a substantial profit for its investment, approximately 2 - 3 times its monetary outlay for a surgery, in exchange for assuming the "risk of capital loss and similar exposure"[14] on its investment. It is a very profitable business model, but it is the business model of an financier, not a medical services or medical facilities provider.

On February 22, 2017, Nesbitt served IMS with a Notice of Rule 30(b)(4) and 30(b)(6) Deposition Duces Tecum requesting that IMS designate a witness or witnesses to testify on March 8, 2017 about well-defined and circumscribed topics and produce the IMS business records which document or would be used to form the basis for the answers to the questions on those topics[15].

IMS claims that it is unfair and disproportionate for it to have to respond to this kind of discovery because it did not finance the surgeries Dr. Huntsman recommended, obtained no lien rights and has no contractual agreement with the Buenrostros. However, IMS admits that it referred the Buenrostros to Dr. Huntsman and provided them with an estimate of what it would charge to finance the surgeries he recommended which they, in turn, have used it to develop their damage case against Nesbitt[16]. This extra-contractual help for the Buenrostros is part of the IMS business plan for cultivating and maintaining relationships

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[14]See IMS Disclosure of Financial Services contained in the Addendum to Response of Nesbitt to Intermountain Surgical's Petition for Writ of Extraordinary Relief, at NESBITT 0036.

[15] 2017-06-01, Order on Non-Party's Motion For Protective Order attached as Addendum 1 to the Brief of Petitioner/Appellant.

[16]Brief of Petitioner/Appellant, pp. 8 - 9.

with personal injury lawyers and law firms. Chief Executive Officer Alan T. McDonald explained in his 30(b)(6) deposition in the *Vigueras* case that IMS has only three employees and marketing and cultivating relationships with lawyers and law firms is their primary mission:

> 14 Q. (BY MR. COOPER) What does Tyson DowDell do
> 15 for IMS?
> 16 A. Tyson's description is a -- is a market
> 17 manager, and Tyson markets to personal injury lawyers and
> 18 law firms, cultivates and maintains those relationships,
> 19 works as a liaison with our physicians and their
> 20 scheduling people, their staff, the staff at Canyon Crest
> 21 Surgical Center, and their scheduling people, et cetera,
> 22 to just make the Intermountain Surgical process go.

Alan T. McDonald Deposition, p. 12

The arguments by IMS that it had only minimal involvement in this case ignores that by providing an estimate of the cost to finance future surgeries which had not yet been performed, IMS increased the Buenrostros' claim for economic/medical expense damages from approximately $11,000 for Ignacio to over $85,000 and from approximately $12,000 for Esther to over $75,000. The input by IMS dramatically changed the nature of the case against Nesbitt. The CEO of IMS, Alan T. McDonald, is experienced in and fully understands the litigation arena in which IMS invests. On the IMS website McDonald represents that he received his law from the J. Reuben Clark School of Law at BYU in 1992; that he is licensed as a lawyer in Arizona, Idaho and Utah; that he has over twenty years of experience in the practice of law; that his focus has been primarily in the areas of personal injury and law firm management; and that he previously served as the Chief Operating

Officer at one of Utah's largest personal injury firms. The conduct which subjects IMS to discovery is its referral of selected plaintiffs to a surgeon in cases involving an accident caused by a defendant with sufficient insurance coverage to justify its investment plus its active participation in their lawsuit by disguising its charges to finance the surgeries as medical bills. If left unchallenged, the IMS claim that it is a "facilities provider"[17] makes it more likely that its surgical estimate will be admitted into evidence to establish the reasonable and customary cost of medical treatment. If the surgical estimate is admissible, the defense should have the right to show that it is actually a financing arrangement which explains why it is so significantly higher than other evidence that may be available to establish the reasonable and customary charges for these surgeries in this locality[18].

It is clear in this case that IMS's role is far greater than the limited role IMS describes in its Brief at pages 8 - 9. On April 18, 2017, Buenrostros served Expert Witness Disclosures disclosing Dr. Huntsman, the IMS contract doctor, as their retained expert to testify on

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[17]Brief of Petitioner/Appellant, p. 8.

[18]See NESBITT 0049 and 0060 in that Addendum to Response of Nesbitt to Intermountain Surgical's Petition for Writ of Extraordinary Relief

causation, medical necessity and reasonable and customary charges for medical treatment[19]. Dr. Huntsman's disclosure contains an opinion that the cost of future surgery for the Buenrostros is in the same approximate amounts as those contained in the IMS surgical cost estimates. Although one might argue that he developed that opinion independently, in his deposition in this case Dr. Huntsman admitted that his cost opinions were based on what he vaguely described as his "experience seeing patient bills and so forth," and that he would not be able to produce the "patient bills" on which he claimed to have relied for his opinions:

Q. In other words, if I wanted to see the bills that you are relying upon to make that cost range, would I be able to find them?
A. No.
Q. I mean, could you produce them?
A. No. We'd have to pull varying bills and see what the average is, but I don't know exactly what that amount is. That's my estimation.
Q. All right. So to come up with this amount, you didn't go pull particular bills; this is just something that you had off the top of your head; am I following correctly?
A. Yes. With some experience.
Q. Well, I understand that. But, I mean, if we wanted to see the source of this, I can't go have you pull the same bills that you used; these are just numbers that you kind of came up with over time; is that right?
A. Yes.

Dr. Kade T. Huntsman Deposition, p. 40

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[19]See Plaintiff's Expert Disclosures dated April 18, 2017 at NESBITT 0016 - 0019 and Dr. Huntsman's expert witness reports dated January 12, 2017 at NESBITT 0032 - 0033 (Esther) and dated April 20, 2017 at NESBITT 0030 - 0031 (Ignacio) in Addendum to Response of Nesbitt to Intermountain Surgical's Petition for Writ of Extraordinary Relief.

Although IMS claims that it "has not been designated as an expert in this case, is not qualified as an expert, and has no intention of testifying as an expert"[20] IMS has supplied David Gillies as an expert in another case to opine that its finance charges "are within what is reasonable and customary for similar surgeries"[21] and its contract doctor, Dr. Huntsman, is identified in this case as a "retained expert" for the Buenrostros to support their claim that the surgical costs estimated by IMS are the reasonable and customary charges for the surgeries Dr. Huntsman recommended[22]. In its Disclosure of Financial Services, IMS represents that "Services charged to client shall be usual, customary and reasonable for the community, and shall be set at the sole discretion of the Company."[23] Finally, in its Brief IMS claims that "invoices to patients include facility fees and CPT codes that are similar to the facility fees charged by other facility providers."[24]

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[20]Brief of Petitioner/Appellant, p. 26

[21]Exhibit "A" to Memorandum of Points and Authorities in Support of Petition for Writ of Extraordinary Relief From Order of the Honorable Royal I. Hansen, Third District Court Judge, Utah Case No. 160902137.

[22]See Plaintiff's Expert Disclosures dated April 18, 2017 at NESBITT 0016 - 0019 and Dr. Huntsman's expert witness reports dated January 12, 2017 at NESBITT 0032 - 0033 (Esther) and dated April 20, 2017 at NESBITT 0030 - 0031 (Ignacio) in Addendum to Response of Nesbitt to Intermountain Surgical's Petition for Writ of Extraordinary Relief.

[23]See IMS Disclosure of Financial Services contained in the Addendum to Response of Nesbitt to Intermountain Surgical's Petition for Writ of Extraordinary Relief, at NESBITT 0036.

[24]Brief of Petitioner/Appellant, p. 8.

To determine if the IMS surgical estimate is entitled to be treated as evidence of the reasonable and customary charge for the surgeries recommended by Dr. Huntsman, topics eight through fifteen on which Judge Hansen ordered IMS to produce documents and a 30(b)(6) witness require IMS to disclose the foundation and other information relied upon by IMS to formulate the surgical cost estimates it provided to the Buenrostros. Requiring IMS to produce and explain the factual foundation for the estimated costs of surgery provided to the Buenrostros to determine if the estimates represent collateral source evidence about the cost of financing the Buenrostro's medical expenses is relevant and proportional based on the degree IMS has involved itself in the development of the Buenrostro's medical economic loss damages.

This is not a fishing expedition to harass and annoy IMS. This discovery was not sought until after the defense had developed substantial reliable evidence that the finance charges which IMS will charge to finance the surgery are not the same as the reasonable and customary cost of surgery. Dr. Brent Clyde, a Board Certified neurosurgeon practicing in Ogden, has provided expert opinion that the reasonable and customary charges for the two level ACDF surgery Dr. Huntsman recommended for Esther is much less than the IMS surgical cost estimate:

> The estimated facility costs for a two-level cervical discectomy and fusion(and exclusive of surgeon/assistant fees) of $65,000 is not usual and customary. At Davis Hospital(an inpatient facility) the average full-fee non-negotiated charges for this procedure are $31,600.

(Nesbitt 0049 in the Addendum to Response of Nesbitt to Intermountain Surgical's Petition for Writ of Extraordinary Relief)

Dr. Clyde has also provided expert opinion about that the reasonable and customary charges for the three level ACDF surgery Huntsman recommended for Ignacio is much less than the IMS surgical cost estimate:.

> The estimated facility cost (exclusive of surgeon/assistant) of a three-level cervical discectomy and fusion of $75,000 is not usual and customary. At Davis Hospital, the average full-fee non-negotiated charges were $31,600 for a two-level and $27,400 for a single-level fusion. The expected full-fee charges for this procedure (a three level fusion) would therefore be about $36,000.

(Nesbitt 0060 in the Addendum to Response of Nesbitt to Intermountain Surgical's Petition for Writ of Extraordinary Relief)

Based on Dr. Clyde's testimony, the IMS estimates are approximately double the reasonable and customary charges for the surgeries Huntsman has recommended. Before this case goes to trial, Judge Hansen will have to determine whether the IMS surgical estimate is admissible evidence of reasonable and customary medical expenses or inadmissible collateral source evidence about how the Buenrostros chose to finance their medical care. When entering the Protective Order in this case, Judge Hansen understood that to get this evidentiary ruling correct it would be critical to understand the unique IMS business model[25].

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[25] Judge Bates similarly understood that the IMS business model is sufficiently different from the traditional model that discovery into the IMS business model was appropriate: "Were this a traditional case involving, you know, payments by Select Health or Blue Cross or something like that, I think the answer would be a little different here, because we've got — we've got some well established practices, we've got lots of case law that generally you don't get too far in the night. Simply take the bills as they are, and then you compare them to what is allowed in the — what is reasonable in the community. This case is a little different because we all know, sitting here, that there is a financial arrangement and that IMS is — appears to me, at least there is some evidence that IMS is augmenting these costs to account for the fact that they're covering the plaintiff's bills and providing essentially a collateral source for him. So it seems to me in this unique case, that it is appropriate to allow the defense to get behind that initial bill and look a little bit deeper." (Judge Bates oral remarks at 11/8/16 hearing on IMS Motion for Protective Order in *Vigueras-Amezcua v. Shoeman*, No. 160903969, 3rd Dist. Utah)

The first three topics on which Judge Hansen ordered IMS to produce documents and a 30(b)(6) witness in the Protective Order require IMS to disclose the licenses and accreditations IMS holds to operate a medical facility. A lack of licenses and accreditations is relevant evidence that IMS is not a "facilities provider." Under the unique circumstances of his case, it is not disproportional for IMS to be required to disclose its licensing, accreditation and the data, documentation or other information relied upon by IMS to prepare the surgical cost estimate.

However, cost is not the only disputed fact issue in this litigation. The causation opinion of Dr. Huntsman, IMS's contract doctor, is also at issue. After seeing Esther once on December 15, 2014, Dr. Huntsman diagnosed herniated discs with severe spinal stenosis at C5/6 and C6/7 with radiculopathy and myelopathy. Dr. Huntsman recommended a two level ACDF and related the necessity of such to the auto accident in 2011. Dr. Clyde, who regularly performs multi-level cervical fusion surgeries, conducted a comprehensive review of Esther's medical records and performed a Rule 35 medical examination. He concluded:

> In summary, there is no clear evidence for a disc related or other substantial structural neck injury from the accident on 6/27/11 based on the medical record and my examination today. There is not a good indication for surgery in this patient and I would strongly advise against it. The likelihood of any benefit is remote and the consequences associated with a multi-level cervical fusion outweigh the benefit.

(Nesbitt 0060 in the Addendum to Response of Nesbitt to Intermountain Surgical's Petition for Writ of Extraordinary Relief)

After seeing Ignacio once on December 15, 2014, Dr. Huntsman diagnosed cervical myelopathy and severe canal stenosis with contusion of the cord in the cervical spine and recommended a three level ACDF at C3/4, C4/5 and C5/6 which he causally related to the

"motor vehicle accident." Dr. Clyde conducted a comprehensive review of Ignacio's medical records and performed a Rule 35 medical examination. He concluded:

> The medical record is clear that the prior accident in 2010 resulted in ongoing cervical symptoms and on 8/2/10 Dr. Erasmus found that Ignacio had a displaced cervical disc "confirmed by MRI" and ongoing cervical complaints, but was at MMI. Dr. Bova clearly documented that the neck was only aggravated and had returned to baseline, per his history with the patient. He reports this as a first person account from Ignacio. The MRI findings in 2010 did not change on subsequent studies. Based on these facts alone one would have to conclude that nothing changed structurally from the accident on 6/27/11 and symptoms were only temporarily aggravated. . . . Based on the totality of the medical record, and my own examination today, the 6/27/11 accident resulted in a temporary aggravation of cervical, and possibly leftarm, symptoms, which were back to baseline by 7/13/11.

(Nesbitt 0048-0049 in the Addendum to Response of Nesbitt to Intermountain Surgical's Petition for Writ of Extraordinary Relief)

The significant history of symptoms and structural damage to Ignacio's cervical spine which pre-dated the subject auto accident on June 27, 2011, is well documented in Ignacio's medical record. Even Dr. Thomas Berg, the radiologist who read a cervical MRI performed on November 18, 2014, just days before Dr. Huntsman examined Ignacio for the first and only time, compared it with a cervical MRI performed on June 15, 2010. He concluded Ignacio had the same problems Dr. Huntsman opined were caused by the accident on June 27, 2011, for at a least a year before the accident on June 27, 2011.

Dr. Huntsman is the "go to" orthopedic spinal surgeon when IMS is evaluating whether it should invest in a litigated case.

> 12 Q. Okay. How many patients do you see for
> 13 Intermountain Surgical a year?
> 14 A. I've -- I don't keep track of that. I'd have
> 15 to go back and sort through it. But I would guess 60,
> 16 70, 80 patients a year.

17 Q. And then do you perform surgeries on at least
18 some of those patients that you see?
19 A. Yes.
20 Q. Do you have an estimate of how many surgeries
21 you've performed on patients that Intermountain Surgical
22 is involved in?
23 A. Same thing. I've never counted, but I would
24 guess that it's maybe on half or two-thirds of those, so
25 probably, I don't know, 40, 50.
Dr. Kade T. Huntsman Deposition, p. 6

The consults and surgeries he performs for IMS are a significant source of income for Dr. Huntsman which creates a significant financial incentive for Dr. Huntsman to make a case for causation in those cases where IMS is considering investing. IMS and Dr. Huntsman have mutually beneficial financial interests. Topics four and five in the Protective Order require IMS to produce documents and a witness to explain the number of surgeries and how much IMS paid Dr. Huntsman in 2016. It is not disproportionate to require IMS to respond to discovery on these issues because of the relationship which exists between IMS and Dr. Huntsman. Dr. Huntsman did not consider the information proprietary and has already estimated the number of surgeries he performs for IMS. The requirement of the Protective Order simply adds certainty to the numbers Dr. Huntsman estimated.

IMS is significantly involved in this case by arranging for and providing evidence for the Buenrostros on the issues of diagnosis, necessity for medical treatment, causation and cost of treatment. It is not disproportionate to permit the defense to conduct discovery into the IMS business model to prove that its "surgical estimates" are really finance charges. IMS argues that Judge Hansen's Protective Order "diverged from the interpretations of Judge

Bates and Judge Scott."[26] Actually, the orders in this case and in the *Vigueras-Amezcua v. Shoeman* case[27] are more similar than dissimilar. Both decisions provide IMS with the significant protection of what amounts to an "attorney eyes only" protective order and both decisions recognize that the collateral source rule does not bar discovery into costs incurred and the augmentation of those costs by IMS. Because of the restrictions imposed in Judge Hansen's Protective Order, IMS cannot seriously claim that production of the requested information will cause it irreparable harm by granting "unprecedented and expansive access to Intermountain's confidential proprietary business information, processes and trade secrets."[28] All of the evidence developed during the 30(b)(4) and (6) deposition of IMS can only be used in this case and any similar evidence will have to be developed independently in any other case to be used by the defense in those other cases. That hardly places an undue burden on IMS, especially given its significant involvement in this case.

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[26]Brief of Petitioner/Appellant, p. 11.

[27]The undersigned was not involved in the *Salisbury v. The Living Planet* case is not familiar with the arguments which were presented for and against the Motions by IMS and Canyon Crest. It does not appear that the issue of "collateral source" was a significant issue in *Salisbury* like it was in *Vigueras-Amezcua* and like it is in this case. That difference makes the *Salisbury* decision of limited importance in evaluating Judge Hansen's order in this case.

[28]Brief of Petitioner/Appellant, p. 11.

SUMMARY OF ARGUMENT

This case is not appropriate for extraordinary relief for an abuse of discretion by Judge Hansen because extraordinary circumstances do not exist. The issues involve a discovery dispute over the appropriate scope of discovery into the business practices of IMS and its relationship with its contract doctor, Kade T. Huntsman, M.D., to determine if IMS is a collateral source and whether its relationship with Dr. Huntsman limits his objectivity as an expert witness for the Buenrostros. Judge Hansen entered an order allowing discreet and limited discovery on these issues and provided that any information obtained from the discovery would be restricted from disclosure by a strict attorney eyes only protective order and could be used only in this case. Because of the issues raised by the Buenrostros in this litigation this discovery is both relevant and proportional. Judge Hansen did not abuse his discretion in ordering the discovery protected, as it is, by a restrictive protective order.

ARGUMENT

1. IMS HAS NOT SHOWN ENTITLEMENT TO EXTRAORDINARY RELIEF

In *Snow, Christensen & Martineau v. Lindberg*, 2013 UT 15, ¶ 22, 299 P.3d 1058, 1065 the Supreme Court of Utah held:

> The question of whether to grant a petition for extraordinary relief lies within the sound discretion of this court. *Id.* When considering whether to grant a petition, we may consider a variety of factors such as "the egregiousness of the alleged error, the significance of the legal issue presented by the petition, the severity of the consequences occasioned by the alleged error, and additional factors." *Id.* ¶ But these factors are neither controlling nor do they wholly measure the extent of our discretion. *Id.*

The determination of relevance and proportionality is a matter entrusted to the sound discretion of the trial court. IMS argues that Judge Hansen abused his discretion because he failed to properly determine whether the information sought by discovery is relevant to any claim or defense and suggests that how IMS determined the cost estimate for the surgeries is irrelevant to determining the value of medical services[29]. The common method of proving medical damages is by offering a bill for the medical procedure into evidence with minimal foundation. The Buenrostros have made clear their intention to use the IMS estimate to prove their medical expenses by including it as part of their Rule 26 Initial Disclosures. The defense seeks through this discovery to prove that the IMS estimate is an inadmissible collateral source which only identifies the cost of financing the surgery. Judge Hansen reasoned that the discovery seeks material which is relevant to the determination whether the IMS cost estimate is a collateral source or is evidence of reasonable and customary charges for medical services. IMS argues that the reasonableness of medical expenses is determined by the "customary charges for services in a similar geographic area in which the services are provided"[30] but ignores that this is exactly how its surgical cost estimate is being used in this case. Judge Hansen also reasoned that understanding the contractual and financial relationship between Dr. Huntsman and IMS is relevant because Dr. Huntsman is acting in the dual capacity of an adviser to IMS on whether surgery is necessary and causally related

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[29]Brief of Petitioner/Appellant, p. 14.

[30]Brief of Petitioner/Appellant, p. 16.

to the subject accident and also in the capacity of a retained expert for Buenrostros on medical necessity, causation and reasonable and customary charges for medical services.

In a case involving a claim that the trial court erred in preventing the plaintiff from presenting damages-related evidence at trial because of the failure to disclose "a computation of any damages claimed" for purposes of Rule 26 of the Utah Rules of Civil Procedure, this Court held in *Williams v. Anderson*, 2017 UT App 91, ¶ 13, 400 P.3d 1071, 1074 that "We will not find an abuse of discretion 'absent an erroneous conclusion of law or where there is no evidentiary basis for the trial court's ruling.'" In this case Judge Hansen's reasoning that discovery about the factual foundation for the estimated surgery costs was relevant to a determine whether the estimated surgery cost documents were evidence of a collateral source has not been shown to be erroneous, let alone an egregious abuse of discretion. Similarly, Judge Hansen's reasoning that discovery into the contractual and financial relationship between IMS and Dr. Huntsman is relevant to whether Dr. Huntsman is conflicted and biased as an expert has not been shown to be erroneous, let alone an egregious abuse of discretion. *State v. Hackford*, 737 P.2d 200, 203 (Utah 1987) (evidence of bias or motive is always relevant to discrediting the witness and affecting the weight of his testimony).

The suggestion that IMS has been on the receiving end of different discovery orders[31]

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[31]IMS has attached as an Addendum to its Brief the Orders from three trial courts addressing the extent and scope of discovery into its business of financing surgeries for litigants.

from different trial courts is not a reason for granting IMS's petition for extraordinary relief in this case. Achieving uniformity and predictability of discovery under Rule 26 will necessarily be difficult, if not impossible, because of the myriad facts and circumstances presented by different cases[32]. Utah R. Civ. P. 26, Advisory Committee Notes (Any system of rules which permits the facts and circumstances of each case to inform procedure cannot eliminate uncertainty.). This is why trial judges are cloaked with broad discretion to determine what is and what is not proportional. This Court recently explained in *Ford v. Ford*, 2016 UT App 127, 379 P.3d 14, 15:

> . . . discovery requests are proportional, however, if they meet a number of criteria, including (1) reasonability considering the needs of the case, the amount in controversy, and the importance of the discovery in resolving the issues; (2) the benefit of the discovery when compared with the burden or expense it imposes; and (3) its furtherance of a "just, speedy and inexpensive determination of the case," among other things. *Id.* R. 26(b)(2). A district court "has broad discretion in deciding whether a discovery request is proportional."

IMS has been ordered to submit to a well defined and discrete inquiry into its business practices to determine whether the "surgical estimate" it provided to the Plaintiffs is a collateral source and whether its contract doctor is an unbiased expert witness on the issues of medical necessity, causation and reasonable and customary medical costs. IMS's response is protected by what amounts to an "attorney eyes only" restriction which prohibits the

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[32]The fact that Judge Bates, Judge Scott and Judge Hansen arrived at different protective orders is not an indication that trial judges are struggling to apply proportionality standards which requires intervention by the Utah Court of Appeals to bring uniformity and predictability to proportionality decisions, but rather it is a testament to the fact that these cases involved different facts and circumstances.

disclosure of the information to anyone other than the attorneys representing the parties and limits the use of the information to this case only. IMS cannot show severe adverse consequences to its business under these circumstances. Therefore, IMS is not entitled to extraordinary relief insulating it from discovery in this case.

2. THE DISCOVERY REQUIRED BY JUDGE HANSEN'S ORDER IS RELEVANT AND PROPORTIONAL

Discovery which seeks to determine whether evidence is inadmissible evidence of collateral source or admissible evidence of future anticipated medical expenses is clearly relevant in a negligence case of the kind involved here.

Only by characterizing itself as a "health care facility" can IMS make the argument that its profit margins, contracts, costs, etc. are irrelevant to a determination of the reasonable amount of the Buenrostros' future anticipated medical expenses. Medical bills from health care providers and facilities are generally accorded a great deal of deference as evidence of reasonable and customary medical charges. However, IMS is not a medical provider or a health care facility and its finance charges should not be accorded the same deference. Yet, because of the way it presents its estimates and charges for financing surgeries, they are easily mistaken for a medical bill. Because IMS refuses to acknowledge that its estimate is nothing more than its estimate of what it would charge to finance the Buenrostros' surgeries and because the Buenrostros persist in presenting the IMS estimates as medical bills, it is necessary to expose the estimate for what it really is, namely what IMS would charge to finance the surgeries for the Buenrostros in exchange for a lien on their lawsuit.

The amount IMS proposes to charge is well in excess of its monetary outlay and well in excess of the reasonable and customary charges for such surgeries. Once its actual costs are identified and disclosed, it will be apparent that the estimate is an estimate of financing charges, not an estimate of medical expenses. That makes the discovery permitted under Judge Hansen's May 31, 2017 Order relevant and proportional.

IMS's argument that the defense in this case did not demonstrate how IMS's business information was relevant to determining the Buenrostros' damages misses the point. Judge Hansen determined that IMS's business information is relevant to determine whether IMS is a medical service provider, as it claims, or a financier of the costs of surgery. This is a relevant inquiry to determine if the IMS cost estimate is a collateral source. Ordering such discovery is not an egregious abuse of discretion.

IMS's argument that the reasonableness of medical expenses is determined in the marketplace and that the defense has access to witnesses to establish and/or rebut the reasonable and customary charge for surgeries also misses the point. Medical bills carry more weight than an academic evaluation of market place economics and that is why it is relevant and proportional to subject IMS to discovery for the purpose of proving that its surgical cost estimate is not a medical bill. This endeavor is even more necessary when the IMS contract doctor acts as an expert witness to prove that the IMS cost estimate is the reasonable and customary charge for the proposed surgeries. It is well-understood by trial lawyers that a treating surgeon's opinion on necessity, causation and cost is likely to be better

received by a jury than that of an "independent" evaluator whose only connection is being hired to testify as an expert. That is, unless the jury is fully informed about how and why the "treating surgeon" became the treating surgeon and why Dr. Huntsman's opinions on necessity, causation and cost may not be objective because he is hired repeatedly by IMS whose primary motivation is to eliminate the risks associated with investing in the very litigation in which Dr. Huntsman is testifying.

IMS argues that Judge Hansen was persuaded to "go off into the weeds" when he concluded that discovery related to collateral source, reasonable and customary charges for medical services and the relationship between IMS and Dr. Huntsman were relevant. IMS's arguments that because it did not finance the Buenrostros' surgeries its status as a collateral source or medical provider is not an issue ignores that it provided a surgical cost estimate that the Buenrostros claim represents the reasonable and customary charge for the future medical treatment its contract doctor, Dr. Huntsman, recommended they have as soon as possible. IMS is front and center involved in the Buenrostros' damage claim and it is relevant and proportional that it be subject to discovery on the discreet and limited issues identified in Judge Hansen's May 31, 2017 Order.

Judge Hansen addressed each of the proportionality factors identified in Utah R. Civ. P. 26(b)(2) and identified the reasons why the information is needed in this case. IMS does not claim that Judge Hansen's decision is without an evidentiary basis, it just claims he got it wrong. That does not rise to the level of abuse of discretion. For example, IMS argues that

its business information is not necessary to determine if its surgical cost estimate represents the reasonable and customary charge for the surgeries because evidence of the reasonable and customary charge for the surgeries can be obtained from experts and other medical providers. The argument ignores that the issue is collateral source and its business information is relevant to show that IMS is acting as a collateral source. Judge Bates reached a similar conclusion in *Vigueras* case, where he concluded that because it looks like IMS is a collateral source for the plaintiff, "it is appropriate to allow the defense to get behind that initial bill." (Judge Bates oral remarks at 11/8/16 hearing on IMS Motion for Protective Order in *Vigueras-Amezcua v. Shoeman*, No. 160903969, 3rd Dist. Utah).

IMS overstates the burden it claims is imposed on it by the discovery order. It has previously produced its Chief Executive Officer as a 30(b)(6) witness to answer similar questions in the *Vigueras* case. IMS is not an involuntary participant in this case. It voluntarily injected itself into this case by deciding to evaluate the possibility of investing in the Buenrostros case, providing a referral to Dr. Huntsman for a surgical consult, providing an estimate of what it would charge to finance Buenrostros' surgery and remaining supportive of Buenrostros' efforts to use the cost estimate to prove their future medical economic loss damages. Discovery is both relevant and proportional under the circumstances of this case.

CONCLUSION

For the foregoing reasons, Nesbitt submits that IMS's petition for extraordinary relief should be denied and this matter remanded to the District Court for further discovery in accordance with the May 31, 2017 Protective Order.

DATED this 10th day of November, 2017.

COOPER & LARSEN

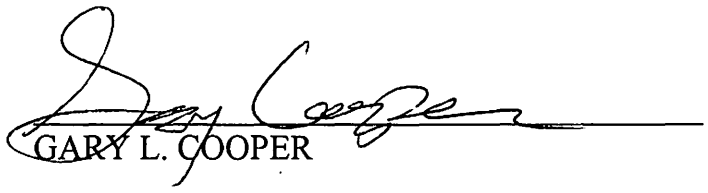
GARY L. COOPER

CERTIFICATE OF COMPLIANCE

Pursuant to URAP 24(a)(11) this Brief complies with URAP 24(g) and URAP 21.

DATED this 10th day of November, 2017.

COOPER & LARSEN



GARY L. COOPER

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of November, 2017, a true and correct copy of the foregoing was served by e-mail and along with two bound copies via mail:

Brett R. Boulton Flickinger Sutterfield & Boulton 3000 N. University Ave., #300 Provo, UT 84604	[ ] [X] [ ] [ ] [X]	U.S. mail Express mail Hand delivery Facsimile: 801-343-0954 Electronic: brett@fsutah.com
Scott T. Evans Karra J. Porter Christensen & Jensen, P.C. 257 East 200 South, Suite 1100 Salt Lake City, UT 84111	[ ] [X] [ ] [ ] [X]	U.S. mail Express mail Hand delivery Facsimile: Electronic: scott.evans@chrisjen.com karra.porter@chrisjen.com
Brent M. Johnson Attorney for Judge Royal I. Hansen Administrative Office of the Courts P. O. Box 140241 Salt Lake City, UT 84114-0241	[ ] [X] [ ] [ ] [X]	U.S. mail Express mail Hand delivery Facsimile: Electronic: brentj@utcourts.gov carols@utcourts.gov

GARY L. COOPER

ADDENDUM

1. Transcript of Telephone Conference/Motion for Protective Order on the 9th day of May, 2017, before the Honorable Royal I. Hansen

2. Transcript of Court Ruling Electronically Recorded on December 8, 2017, before the Honorable Matthew Bates

3. Deposition Transcript of Kade T. Huntsman, M.D., taken on April 27, 2017

4. Excerpts of Deposition Transcript of Alan Taylor McDonald taken on February 2, 2017

5. Health Care Facility Licensing and Inspection Act, Title 26, Chapter 21, Utah Code

6. Utah R. Civ. P. 26 (Advisory Committee Notes)

ADDENDUM 1

TRANSCRIPT OF TELEPHONE CONFERENCE/MOTION FOR PROTECTIVE ORDER ON THE 9TH DAY OF MAY, 2017, BEFORE THE HONORABLE ROYAL I. HANSEN

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE

SALT LAKE COUNTY, STATE OF UTAH

-o0o-

IGNACIO BUENROSTRO,	)	
	)	
Plaintiff,	)	Case No. 160902137
	)	
vs.	)	TELEPHONE CONFERENCE/
	)	MOTION FOR PROTECTIVE ORDER
WHITNEY A. NESBITT,	)	
	)	
Defendant.	)	

-o0o-

BE IT REMEMBERED that on the 9th day of May, 2017, commencing at the hour of 1:35 p.m., the above-entitled matter came on for hearing before the HONORABLE ROYAL I. HANSEN, sitting as Judge in the above-named Court for the purpose of this cause and that the following proceedings were had.

-o0o-

A P P E A R A N C E S

For the Plaintiff:	No appearance
For the Defendant:	GARY L. COOPER Attorney at Law Cooper & Larsen 151 North Third Avenue, 2nd Floor Pocatello, Idaho 93205
For Intermountain Surgical:	SCOTT T. EVANS Attorney at Law Christensen & Jensen 257 East 200 South, Suite 1100 Salt Lake City, Utah 84111

* * *

P R O C E E D I N G S

(Transcriber's Note: Speaker identification may not be accurate with audio recordings.)

THE COURT: Good afternoon, Counsel. This is Judge Hansen. And this is the time and place for the telephone conference with regard to the issues that are before the Court in the Nesbitt matter.

Appearances of the parties and counsel.

MR. EVANS: Scott Evans on behalf of the non-party.

THE COURT: Great. Thank you.

MR. COOPER: Gary Cooper on behalf of Nesbitt and Loveland.

THE COURT: And let's see, do I have Mr. Boulton here as well? It doesn't sound like it. I don't know that he had been active in briefing this matter.

Is that fair from Mr. Cooper, Mr. Evans?

MR. EVANS: I can't remember if he--I can't remember if he did, in fact, file--

MR. COOPER: This is Gary Cooper. I don't have any

record that he filed anything.

THE COURT: Okay. Thank you.

And let's see, the issues that we're addressing here are largely between the non-parties and the Nesbitts.

Tell me current status, Mr. Cooper.

And then, Mr. Evans, I'd like to get a current status report from you.

MR. COOPER: Your Honor, the current status is that the--is that the 30(b)(6) depositions that were scheduled of IMS have been delayed pending the outcome of this.

Dr. Huntsman's deposition, as the treating physician was taken about ten days ago.

And that's the current status.

THE COURT: Okay. Good.

And Mr. Evans, any update that you have from the non-parties?

MR. EVANS: No, your Honor. Mr. Cooper was accurate and the--the only issue here now is that which we're--that was briefed and--

THE COURT: Good. And I--the Court's reviewed the pleadings that have been filed by the respective parties in the case and--

MR. EVANS: Oh, your Honor--

THE COURT: Yeah. Go ahead.

MR. EVANS: --there is one.

THE COURT: Okay.

MR. EVANS: In our briefing, we made reference to another case, the Garretts, and in that case, the plaintiff and the defendant settled their claims and so that case went the way of the world.

THE COURT: Okay. And are you saying it's another one where we had a trial court ruling like we did from Judge Bates and Judge Scott?

MR. EVANS: I--it was Judge Bates.

THE COURT: Oh. It was Judge Bates's case. Okay.

MR. EVANS: That--that case has been--

THE COURT: So--

MR. EVANS: --settled.

THE COURT: Okay. Great.

MR. EVANS: By the parties.

THE COURT: And tell me if that has any bearing on what you're doing here today, Mr. Evans.

MR. EVANS: I don't--I don't think so, it was just referenced in the briefing and whether the Court had a question regarding that or not.

THE COURT: Okay.

MR. EVANS: I don't think it has anything to do with this hearing today.

THE COURT: Good. And let's see, let me hear from the parties with regard to the motion. What I anticipate,

gentlemen, is inviting you at the close of your argument to submit a proposed order as if there--this were a current discovery dispute and dealing with the issues that we currently address in doing so.

And--and then the Court would--would look at the proposed orders and in all likelihood sign one or--as opposed to the other, but I can't guarantee that, but that's my, at least, initial reaction to it here today.

MR. EVANS: Okay.

THE COURT: Okay. And let's hear from the moving party with regard to this and then proceed on that basis.

MR. EVANS: Okay, your Honor, this is Scott Evans.

THE COURT: Okay.

MR. EVANS: I represent IMS, Intermountain Surgical. And Intermountain Surgical's involvement in this case is minimal at best. They arranged for a surgical consult with Dr. Huntsman. Dr. Huntsman's deposition was taken a couple weeks ago. IMS did not do anything other than that. IMS didn't receive any payment of any kind, it didn't do anything except arrange for this.

We don't know if the plaintiff had surgery or any other treatment subsequent to, I believe it was 2014.

THE COURT: Okay.

MR. EVANS: And the--the discovery, as outlined in the 30(b)(6) deposition notice is--is significant. Under

normal circumstances, even if Intermountain Surgical was involved as a treating party to provide services for the plaintiff, the--the discovery that was requested or noticed goes far beyond the pale of what would normally be discovery in a personal injury case such as this.

THE COURT: Tell me, Mr. Evans, how, if--if I were filing a personal injury case and I wanted to get IMS involved to assist me in, what, putting together a package with regard to special damages and future medicals and potentially a--a treating physician, would I check in with you at IMS? Tell me what--how that works.

MR. EVANS: Okay. You wouldn't check in with me, but the--

THE COURT: Well,--

MR. EVANS: --the plaintiffs here--

THE COURT: --your--your clients, yeah.

MR. EVANS: Right. Right. Right.

If you were--if you were the plaintiff's attorney--

THE COURT: Okay.

MR. EVANS: --what would occur is, first of all, they would contact Intermountain Surgical, let them know what the case is about and then provide them with the information that--you know, who the patient is and what--what treatment will be requested and the type of accident and--and so on. And IMS would review it and make a determination of whether or

not it would want to take on the case.

If--if a sur--if a doctor is necessary, if the plaintiff, in fact, doesn't already have one, then they can refer the patient to a doctor. And in this instance, that's what happened and nothing else happened thereafter.

THE COURT: And did--and did--

MR. EVANS: If, in fact--

THE COURT: --does Dr.--

MR. EVANS: Go ahead.

THE COURT: --does Dr. Huntsman, is he a physician with IMS or does he have his own--

MR. EVANS: No.

THE COURT: --sole practice or practice some place else?

MR. EVANS: Dr. Huntsman is a surgeon at the Salt Lake Orthopedic Center, which is out of St. Mark's Hospital. He is among, oh, a dozen or--or more surgeons in a partnership of some sort, I don't know what their arrangement is per se, but it's like a clinic, they're a clinic.

THE COURT: Okay.

MR. EVANS: And they--they're not associated with Intermountain Surgical, there's no ownership, there's no--there's no shares or anything. It's similar to, you know, if you had--if you have neurosurgical associates out there doing surgeries at Intermountain Medical Center, they may or may not

be employees of IMS--or Intermountain Medi--Intermountain Medical Center, but they're a separate clinic and there's--well, there's no association on it. They can go perform surgeries wherever they want.

THE COURT: Okay. And so IMS, as I understand it, when they get a--when they arrange for a physician for--for the plaintiff, it--it needn't be a physician from Salt Lake Surgical; is that right?

MR. EVANS: No, it can be--there are several physicians that are--that do surgeries with Intermountain Surgical. For example, Dr. Rich, who's a neurosurgeon, I can't remember if he's out of TOSH or I can't remember.

THE COURT: I think he is out of TOSH.

MR. EVANS: Several other doctors, there's a few doctors at Salt Lake Orthopedic that do it, there's a Dr. Winterton, who is not associated, it's just whoever, you know, there's--there's several doctors that regularly do these surgeries--

THE COURT: Okay. So it's--

MR. EVANS: --by referral.

THE COURT: --on a case-by-case basis, no--no arrangement with a physician or a group of physicians, they make it on an ad hoc basis, the determination?

MR. EVANS: Well, I mean, they have a--a handful of, you know, maybe--I don't know how many they have on what I

would call a quote, panel, to choose from, but they're not--you don't have to choose them.

THE COURT: Okay. And then--

MR. EVANS: But they may--

THE COURT: --then if I'm--if I'm the plaintiff and I decide that I won't get surgery right now, I've at least got a--an estimate as to what my future medicals are going to be if, in fact, I need surgery at some time in the future.

MR. EVANS: It depends on if the plaintiff's attorney asks for an estimate. And recognize this that--and--and Mr. Cooper knows this, he's taken depositions, Intermountain Surgical is not an expert and doesn't provide expert testimony with respect to how much things will cost in the future, whether it's reasonable and customary. That's--the plaintiff is required to go get the appropriate foundation for that.

IMS submits bills and using the CPT codes of what it believes is reasonable and customary but it doesn't provide the--the testimony for it, you know.

THE COURT: And tell me, what's the advantage of doing this as opposed to simply going out and--and getting your own physician and--and having them do a medical exam and see if you need further treatment? What's the benefit to a plaintiff? Is it all in one package or something like that that they get?

MR. EVANS: Well, what the benefit is, is this: the services that IMS provides, IMS provides financial backing and the ability for people who don't have health insurance to get the treatment they need after an accident.

So, for example, if you have a--somebody who's in a car accident and they're seriously injured, they need a back fusion or, you know, a shoulder repair or whatever, but they don't have any health insurance.

THE COURT: Okay.

MR. EVANS: That leaves them in a bind and they either have to settle with the--with the opposing party and get the funds needed for surgery or figure out how--what doctors may or may not be able to perform the services for--on a lien basis, what facilities would do it on a lien basis. For the most part, you know, most of the hospitals around usually don't do that.

THE COURT: Okay.

MR. EVANS: So IMS provides--they--they lease a surgical suite from Canyon Crest, which is a surgical center, IMS pays for and purchases the equipment for the surgeries that are performed on these, it would be plaintiffs, but patients. And then contracts with doctors, doctors will go ahead and--I don't know if it's a contract, but the doctor will then perform the surgery, submit the bill, the doctor is paid and--and then the--the anesthesiologist is paid, the

professionals are paid immediately and then a lien is taken on the other stuff, including the amounts paid to the professionals.

THE COURT: So you would--

MR. EVANS: They--

THE COURT: --IMS would finance that and--

MR. EVANS: Correct.

THE COURT: --for, say, the surgery, the costs were $10,000, they pay those up front and then either charge some kind of--

MR. EVANS: They hold a lien for--they--they don't charge any interest or anything.

THE COURT: Okay.

MR. EVANS: They--they hold the lien and--and then at the end of the case, they're repaid. And what happens is, because of their relationship with vendors and stuff like that, they can--and they provide the facilities at a contracted rate and so on, they are able to then charge, themselves, as Judge Bates indicated, you have a hybrid here where they're a provider and they also indicate that they help finance, which is not uncommon with medical--

THE COURT: Okay.

MR. EVANS: --health facilities anyway, so--

THE COURT: And so if--if--

MR. EVANS: So that--none of that's happened here.

THE COURT: Okay. That's--that's simply an option that you could have. So I could go--

MR. EVANS: (Inaudible) I just--

THE COURT: --I could go in and get surgery and things were set up to do that and assuming the surgery costs $10,000 to pay the anesthesiologist and the--and the neurosurgeon or the orthopedic surgeon and the Canyon Crest and it costs $10,000 total, I have a lien for $10,000, with no interest on that and if it takes three years to finish the case and--and get a recovery, the first ten thousand goes to me--goes to IMS?

MR. EVANS: Well, it's whatever they were--yes.

THE COURT: Okay.

MR. EVANS: There's a lien that the patient signs as well as the attorney who then--IMS foregoes any kind of collection until after the case is over, so--

THE COURT: And if--if in fact there was no cause or no recovery with regard to the plaintiff's case, is the plaintiff still on the hook for the cost of the surgery at the end of the litigation?

MR. EVANS: Yes.

THE COURT: Okay.

MR. EVANS: There's a contract there that says even if you don't get anything--

THE COURT: You still have to pay, huh?

MR. EVANS: --you have a legal obligation to pay.

THE COURT: Okay.

Number one, that's helpful for me to sort of get that understanding as to how things work from your perspective.

Tell me what else I should know with regard to the protective order and--and the discovery.

MR. EVANS: Well, going back to what the discovery has been requested, what--what they're asking for is stuff that--that has no bearing on--on what--whether the charges are reasonable and customary.

And as in the other cases that we've been involved in, the reality of it and in fact, I think we submitted an affidavit, what is the basis for reasonable and customary is--is an objective basis, based upon what's been charged in the--in the area.

So going in and finding out what IMS charges as--what IMS's overhead is or what they pay wholesale for parts or instruments or hardware, has no bearing on whether or not the--the medical charges that they give are reasonable and customary.

THE COURT: And if I'm an--

MR. EVANS: So--

THE COURT: --if I'm an insurance adjustor, do I care whether the plaintiff gives me a IMS estimate or a--you

know, costs of medi--future medicals or do I--do I want to have somebody that is a--sort of a third party, has no contractual relationship that--that can give me a medical exam and tell me what future meds are and maybe there's no difference in the costs or the--in the amounts.

MR. EVANS: Well, I mean, there are differences as--as Mr. Cooper will--Cooper will argue, that be--because of the situation where there's no health insurance and because, you know, there's risks involved here, there is no discount given, you know. If you want to get into the, like the--like the HMO and the PPO and stuff like that, it--Blue Cross, everybody, all the insurance companies have different contracts with different providers saying it doesn't matter what you charge us, we will pay you this amount.

THE COURT: Yeah.

MR. EVANS: And--but none of that's relevant for purposes of trial. Whether, you know, Medicare or Medicaid pays ten cents on the dollar or IHC gives 90 percent on the dollar from Select Health, the jury doesn't need to know and shouldn't know what that is, that's the collateral source rule.

So what--what--what the--the defendants and Farmers are trying to do here is get behind and find out what our business, you know, confidential business records, what our overhead is, how we come to determine what is reasonable and

customary, when the reality is, all they need is their own expert, which they have, to review the bills and review the records and say this is reasonable and customary, this isn't reasonable and customary, it's too high, you know, but they don't need our confidential, you know, proprietary information that we've compiled to get that--

THE COURT: Okay. And tell--

MR. EVANS: (Inaudible)

THE COURT: --tell me one other thing. Tell me about the number of cases. You've referenced two cases at least that I saw, one that Judge Scott issued a protective order in and another one that Judge Bates ruled on. And are--are you in this kind of litigation regularly or are these the first two and only cases--

MR. EVANS: Not regularly.

THE COURT: Okay.

MR. EVANS: What--what happens is periodically an insurance company gets a burr under their saddle and decides, hey, Intermountain Surgical is doing it differently than say, you know, IHC or Select Health or whatever and they're suspect of the charges and--and the charges are not Medicaid--they're not Medicaid charges or paid by Medicaid and they go in and well, they're really over-charging and so we really want to find out how much it costs them and see what their profit margin is.

The reality of that is completely and utterly irrelevant and like we said, but this happens--it happened, oh, about in 2015, Liberty Mutual did that and then a couple of years before, State Farm decided to do that and--and the rulings have all been quite consistent in that, no, collateral source is collateral source. You don't get to go behind and get the overhead information.

Judge Bates wiggled a little and allowed them to get some information about the--the lease between IMS and Canyon Crest but--and that's subject to debate in the order that was given, but the fact of the matter is, this doesn't occur often, it just occurs in flurries when it happens, so--

THE COURT: And do you--did you have a--a ruling and a written opinion from the trial court judge in the Liberty Mutual case or the--the State Farm?

MR. EVANS: That was Judge Scott.

THE COURT: That was Judge Scott.

And what about the State Farm case?

MR. EVANS: The State Farm one, yeah, we--we did, it--it--

[Call interruption - unrelated matter]

THE COURT: Okay. Mr. Cooper, you were telling me State Farm had a written opinion--

MR. EVANS: Your Honor, this is Mr. Evans.

THE COURT: Okay.

MR. EVANS: There is a written--there was a written opinion and I have it--I could, you know, if the Court wants to look at it. Farmers has argued that even the Liberty Mutual opinion is not applicable because they weren't a party to that action and you know, I can understand what they're saying. But I could get that to you if you wanted.

THE COURT: Well, would it be helpful? I mean, I'm--this is a--

MR. EVANS: It's basically the same.

THE COURT: Yeah. Well, and--and with the same questions--you're telling me what are the same questions, I'm getting different, a little different rulings from the judges, so maybe the--the State Farm ruling may be a little different than Judge Scott or Judge Bates.

MR. EVANS: But in none--in no case did the judge say that they could have the information that they were requesting. For example, in our case, my recollection is that they're asking for even tax returns and--and 1099s and things--

[Call interruption - unrelated matter]

MR. EVANS: Your Honor?

THE COURT: Go ahead.

Go ahead, Mr. Evans.

MR. EVANS: I think we can--I can brief this down a little bit more, so that, you know, we're not going to be

going over lots of stuff that's in the briefing, but the court uniformly says: Your requests Farmers are not, (1) they're not relevant; and (2) even if they're a little bit relevant, they're not proportional; and (3) any information that the Court requires Intermountain to produce is protected by a--a confidentiality protective order so it's not disclosed outside of the case, which makes sense, because these are private matters--

THE COURT: Sure.

MR. EVANS: --and--and additionally, beside it being a health care situation where the patient wants to keep their--their information as private as possible, the--IMS has its own proprietary information that--that shouldn't be disclosed first--in the first place and then if, for some reason it was disclosed or required to be disclosed, it shouldn't be disclosed to anybody else outside of this litigation.

THE COURT: Okay. Good. And--and I think I understand your position with regard to that.

Let me hear from Mr. Cooper and then give you a chance to respond by way of rebuttal, Mr. Evans, to any other issues that we need to deal with.

Mr. Cooper?

MR. EVANS: Thank you.

MR. COOPER: Thank you, Judge Hansen.

Can you all hear me okay? I'm parked at the side of

the road and I flipped to--from my phone to the speaker system in the car, so I--and I don't know how to get it back off of that.

MR. EVANS: Yeah. I can hear you.

THE COURT: We're just fine, yeah. Go ahead.

MR. COOPER: All right. Thank you. Let me know if there's a problem.

To try to boil this down to the essence, this discovery is directed at the estimates that Intermountain Surgical, IMS, provided to both of the Buenrostros as to what they would charge, what IMS would charge to finance their surgery and (inaudible)

IMS is a finance company. It's not a medical provider. When Judge Hansen--excuse me, when Judge Bates heard this matter, no discovery had taken place and so he's never seen the fruits of discovery that was undertaken under his order. That determines that there's absolutely no medical services that are provided by IMS. IMS consists of two, possibly three employees, all of which are salesmen. There are no medical providers that are on staff for IMS.

IMS pays the expenses in providing the surgery and then up charges those expenses significantly, two to three times what the actual charges are. While IMS doesn't charge interest, it has a significant fee within this estimate or within the bills that it provides if it does actually finance

the surgery, that more than accounts for interest and as this calls it in its lien papers, the risk of financing these kinds of surgeries.

THE COURT: So you're telling me--

MR. COOPER: What we're--

THE COURT: --you're telling me, Mr. Cooper, that if in fact, I went to Dr. Huntsman and he performed a surgery, it cost a thousand dollars to--for the facility, to--for his surgery and for the anesthesiologist and any other personnel, that the lien would not be a thousand dollars, but it would be double or triple that amount; is that right?

MR. COOPER: That's correct.

THE COURT: Okay. And how do you know that?

MR. COOPER: That--that's exact--

THE COURT: How--how do you know that?

MR. COOPER: I--I know that--I know that from having taken the depositions of Dr. Huntsman, IMS and Canyon Crest Surgical Center where they rent the surgical suite for the surgeon to do these surgeries and other cases.

THE COURT: Okay.

MR. COOPER: I can't use those depositions in this case, that's why I have to take them in this case because of the protective order entered by Judge Bates in that case.

THE COURT: And you were allowed--

MR. COOPER: (Inaudible)

THE COURT: --you were allowed to engage in that discovery by all the courts that you have approached?

Did Judge Scott allow you to do that as well?

MR. EVANS: He wasn't involved in--

MR. COOPER: Your Honor, I--

THE COURT: Oh, just--

MR. COOPER: --haven't been involved--

THE COURT: Okay.

MR. COOPER: --in the other cases. I was not involved in that case, I wasn't involved in the State Farm case.

THE COURT: Okay.

MR. COOPER: I'm involved in three cases involving Farmers, the one, which is the Garrett case, which is Judge Bates case, this case which involves two plaintiffs and another case, the Bahina case, and I'm sorry, I don't recall the judge off the top of my head. Those are the only three cases.

THE COURT: And what--

MR. COOPER: The judge in the Bahina case has not issued a ruling yet.

THE COURT: Okay. So it's under advisement there; is that right?

MR. COOPER: No. It hadn't even been argued.

THE COURT: Okay.

MR. COOPER: It's been briefed and no hearing has been scheduled so--

THE COURT: Okay.

MR. COOPER: --yours is the second hearing that's been held in cases that I'm involved in.

THE COURT: Okay.

MR. COOPER: And I know of no other cases that Farmers is involved in.

THE COURT: Thank you for that background.

MR. COOPER: Yeah, absolutely.

So we know from those depositions that if allowed to proceed with the 30(b)(6) depositions that were scheduled and that were vacated, I will be able to find out what is the underlying basis for this estimate that IMS provided as the cost of the surgery. Until I take those depositions, I have no way of knowing.

I do, however, know that the plaintiff intends to use this estimate as the reasonable and customary charges with this kind of surgery that he believes that his clients were going to need in the future. That's the problem.

Now, I'm going to make a motion that none of that should come into evidence because it's a collateral source, but unless you have the background, unless I'm entitled-- allowed to do the discovery and provide you with the background, you aren't going to know whether this is a valid

medical bill or if it is, as I suggest, simply a financing statement that contains a significant up charge above and beyond the actual cost of the medical treatment.

THE COURT: Well, now, would you know already, Mr. Cooper, if--if say, this was a herniated disc and they were going to trim that disc back and I went to the University or to IHC and had that procedure, it would all be coded and I would know exactly what it is and what the charge is and I would say that's what's reasonable and necessary. Is that fair?

MR. COOPER: It's a little more complicated than that because--because of anti-trust concerns. Medical providers, including hospitals, can't exactly share their charges with each other to avoid any charges of price-fixing, but yes, I can come up with evidence of what I believe the reasonable and customary charge is. The problem is, is that that is completely unfair in normal litigation because the plaintiff is simply going to come in and say, well, here's the bill or here's the estimate and they're going to use the IMS estimate. Where if I can present the evidence to say, whoa, that is not a medical bill, that's a financing charge, the judge or the jury, if it's allowed to go to a jury, is never going to understand the difference between the two. And that's why it's important to do this.

Until there's some established precedence perhaps by

the Utah Supreme Court or whatever, that these IMS bills are not admissible in evidence, we're going to go through this fight and we're going to have different judges that are going to view this differently and I don't think a judge can make a decision on this unless I'm allowed to do the discovery and get the underlying facts so that the judge has a full picture of what--what the background is and what the underlying facts are for it.

THE COURT: Sounds like all the judges that have addressed this have granted a protective order in some--to some extent, is that true?

MR. COOPER: Well, I know that Judge Bates did. I know that I've seen the one that came from--the decision that Scott has alluded to in this case, I'm sorry, the name escapes me. I have never heard of the State Farm case so I have no idea.

The problem with those protective orders is that they were done before any discovery was conducted and so nobody had the benefit of understanding what it is. There's no need for a protective order in this case because the things that are produced by IMS and presumably, it's the same type of information which will be used by IMS to support their estimate here, are simply some bills that they paid. There's nothing secret about those.

And while they suggest that maybe they got a

discount from somebody, they've never produced any documentation which supports that. Now, if they produce that, then, you know, maybe that's a valid argument but I've never seen the proof of that.

Furthermore, the--the protective order that was entered by Judge Bates, which is completely unworkable, is that it was essentially attorney eyes only. I was the only person on the defense side, and my co-counsel, that could even see this information. It made it very cumbersome and very difficult to use it with experts and the like, it required us to go back to court and do that. I understand his concern. At the outset, he didn't know what it was that he was going to uncover in discovery. And we had a motion pending before Judge Bates to relieve us from that protective order based on what we actually determined; unfortunately, the case--or fortunately, the case settled before he was able to hear that so he never ruled on it. But I just absolutely believe that it is wrong and inappropriate to just be restricted, or the information be restricted to essentially an attorney eyes only protective order where me, my staff and my co-counsel are the only people that can see the information.

THE COURT: Okay. Anything else? I--I know you've briefed this and--extensively. Anything else I should know--

MR. COOPER: Well--

THE COURT: --Mr. Cooper, to understand--

MR. COOPER: --perhaps one--

THE COURT: --and appreciate.

MR. COOPER: Yeah. Perhaps one other thing. I don't know how significant it is in making your ruling, but Dr. Huntsman is associated with IMS. There isn't any question whatsoever about it. IMS has testified and Dr. Huntsman has indicated that he goes along with that, that he is a part of their network of physicians. He knows that when a referral is made to him by IMS, that his job is number one, make a determination whether the person needs surgery; number two, make an opinion on causation, that is that it's caused by the particular auto accident that has in--insurance associated with it; and third, that he provide all of that in writing as a part of the due diligence that IMS uses in determining whether they're going to finance the surgery.

He's testified that he does as many as 60 to 80 surgeries for IMS a year and these are full-fee, non-discounted fees. It's a significant financial incentive to determine causation and necessity of surgeries in these matters. And in every one of these cases that I'm involved in, there is significant dispute about whether the surgery is even necessary and whether it's even caused by the auto accident in question.

And so there is a significant association there and I think that that's something that we're entitled to develop

and use as a part of cross-examination of Dr. Huntsman when he provides these defendants (?) at trial.

THE COURT: And you--I assume, if you had--

MR. COOPER: Thank you, your Honor.

THE COURT: --the old IMEs, the Rule 35 exam now, I guess, if you did that, where would you be?

MR. COOPER: Well, I would be at two experts who were counter to each other but have--

THE COURT: That--that's true all the time, isn't it?

MR. COOPER: --the plaintiff--well, that's true, but the plaintiff's defense would be to our experts is that, hey, these guys are essentially defense whores. They only testify for the defense and they do everything they can to make out the defense case.

On the other side of the coin, in this particular case, I should be able to establish that Dr. Huntsman has a significant financial relationship with IMS and that he profits significantly from finding causation and necessity in these cases.

THE COURT: Good.

MR. COOPER: Now, when you hear the evidence, you may decide, no, that's unfair; but I should be able to--this is discovery, I should be able to develop that evidence so that I can present it properly to defend my client.

THE COURT: Okay. Let's see, you know, my thought is that I want to do two things, one, give Mr. Evans a chance to briefly respond and two, invite the parties to submit proposed orders now that we've honed in a--to some extent as to what the issues are and how we should approach them.

Mr. Evans, any rebuttal that you have?

MR. EVANS: Yes, a couple of things, I'll jump around so I don't get terribly redundant.

First, as in our briefing, IMS is not going to be an expert in this or any other case. That's something that has been--is a red herring. IMS has already testified that it's not an expert and would not be giving expert testimony with respect to reasonable and customary charges.

So that if he needs to take the deposition of IMS to get into the underlying whatever with regard to this estimate, it--it's not necessary and it won't matter because they're going to have to provide--"they" being the plaintiff, they're going to have to provide the expert testimony to--for the support of the reasonable and customary. And it's not going to be IMS. And--and that's been the testimony of IMS in the other cases and it's the representations to this Court in our briefing and during this hearing.

So that--to suggest that they're entitled to dive in to IMS's confidential information and--and processes and--and so forth is somewhat internally inconsistent,--

THE COURT: Okay.
MR. EVANS: --for them to say that.
THE COURT: And so--and tell me--tell me with regard to that, Dr. Huntsman, it's been proffered to me that--does approximately 60 to 80 of these cases for IMS a year.
MR. EVANS: Correct.
THE COURT: It sounds like there--
MR. EVANS: That's what he says.
THE COURT: Yeah, that's what he says, right.
And--and it sounds like he's at least--has some kind of basis for saying there's a financial relationship between the two, between Dr. Huntsman and IMS. And you may know more than any of us with regard to that relationship.
MR. EVANS: Well, if I--if I may, there has been representations, both in affidavit and during depositions, by Dr. Huntsman, by IMS, that Dr. Huntsman does not have any ownership interest whatsoever in IMS or Canyon Crest.
Now, that doesn't mean that--I mean, you could talk to any orthopedic surgeon and say, well, he does all his surgeries at St. Mark's, therefore, he has a--an association or a relationship with St. Mark's. That's--you know, he doesn't need to take our guy's deposition for that, he's got it already from Dr. Huntsman, who has testified that he does a certain number of surgeries, I believe he said 40--whatever, 40 to 60, but out of how many surgeries has he done in a year,

I can't remember, but I think it was hundreds and hundreds and hundreds, maybe even a thousand, I don't remember specifically what he testified to and that--that's not private information, that's not protected by any protective order, it was taken in this particular case only a few weeks ago.

THE COURT: And so--

MR. EVANS: So he can--he already--

THE COURT: --so if--

MR. EVANS: Oh, sorry.

THE COURT: And so if Dr. Huntsman appears for a deposition and would he have all the cases--

MR. EVANS: He already did.

THE COURT: Yeah. I know--I know that. Would--was--would he have in his disclosures, a list of all the cases that he's done in conjunction with IMS that was tendered to the other side?

MR. EVANS: If--if he's a retained expert, then he would have to do that. I--it depends on if the plaintiff decides to use him as a retained expert or a non-retained expert.

THE COURT: I see. And what is--

MR. EVANS: And so--

THE COURT: --what are they using--what's the plaintiff doing here? Do we know?

MR. EVANS: I have no idea.

THE COURT: Okay.

MR. COOPER: They've retained him as an expert and Dr. Huntsman testified that he doesn't even know what his fee for this kind of surgery is and we'd have to take somebody else's deposition.

THE COURT: Okay.

MR. COOPER: Then we have to take a 30(b)(6) deposition of one or more people at IMS to get that kind of information--excuse me, at Salt Lake Orthopedics to get that kind of information.

THE COURT: Thank you.

MR. EVANS: Did he--did somebody testify that he was a retained expert?

MR. COOPER: Yeah. He's even issued a report.

MR. EVANS: (Inaudible) said he was--well, that's the treating expert.

MR. COOPER: He's issued a specific report in this case and--and represented to be a retained expert.

MR. EVANS: By plaintiffs?

MR. COOPER: Yes.

MR. EVANS: I haven't seen that.

MR. COOPER: Well, I hadn't seen it until I took his deposition. It surprised me.

THE COURT: But--well, and I'm--

MR. EVANS: But in any event, then he just--if he is

actually a retained expert then, you know, plaintiff has retained him and they have to obey the rules--the Rules of Civil Procedure, but that has no bearing on this--this hearing because IMS has not been retained as an expert and IMS is not going to be giving expert testimony in this case.

So let me--

MR. COOPER: But Dr. Huntsman is relying on the estimates from IMS as the basis for his testimony that that's the reasonable and customary charge for such surgery.

MR. EVANS: Well, that's--that has noth--your Honor, that has nothing to do with IMS, that's Dr. Huntsman.

THE COURT: Okay.

MR. EVANS: If they want to impeach--

THE COURT: I--I--

MR. EVANS: --Dr. Huntsman, they can--

THE COURT: I think I understand your respective positions with regard to that.

Anything else, Mr. Evans, that I should know?

MR. EVANS: Okay. Yeah, there was a couple--your Honor, there was a couple more issues--there's about three more items that I needed to--to clarify.

With regard to the CPT code question that you asked counsel, of course, you can go and get the CPT codes and--and then ask IHC what they would charge under the CPT code or St. Mark's or--or any other hospital, I've done it, both as a

defense attorney and as a plaintiff, and as a patient, frankly. And it can be done readily and--and easily, so--and they already have their own experts and they can do their own due diligence anyway.

THE COURT: Okay. And if it--

MR. EVANS: So--

THE COURT: --if that figure's different than IMS, you just have--or Dr. Huntsman, you just have to accept whatever he says--

MR. EVANS: No. What you do is if--if Dr. Huntsman and I don't know this to be true, but if Dr. Huntsman or any other expert for the plaintiff is going to testify that a thousand dollars for this surgery is reasonable and customary, then Farmers has an expert who will testify, no, it's not, it's--reasonable and customary is this, or that's way far--that's way higher than what's reasonable and customary.

THE COURT: And if Dr. Huntsman--

MR. EVANS: And then--

THE COURT: --if Dr. Huntsman doesn't know what the expenses are and says, you've got to talk to IMS to find that out, what should I do?

MR. EVANS: Well that's actually quite easy because Dr.--all the plaintiff has to do is retain their own expert--

THE COURT: I have--we--we've talked about that, we--we understand that there may be a--

MR. EVANS: If--if Dr.--if Dr. Huntsman refers to IMS, saying, well, I'm just relying on their estimate and if IMS says, well, we're not an expert here, then the plaintiff's counsel and their expert--or not plaintiff's now, but defense counsel and their expert can impeach Dr. Huntsman quite readily, saying, well, there's no basis for it. We have our own expert who actually is qualified to give the opinions--

THE COURT: And is your--your own expert, is that Dr. Huntsman that said they--he couldn't tell you what any of the charges are? Who's the expert?

MR. EVANS: I'm saying that defense counsel, Farmers--

THE COURT: Yeah, they've got their--their Rule 35--

MR. EVANS: --they have their own expert--

THE COURT: --exam, okay.

MR. EVANS: Right. They have--they have their own expert who is going to comb through the CPT codes, comb through the charges and say, look, in the Salt Lake area, these--this--this surgery, the 75th percentile or whatever they want to call it, is such-and-such an amount and that's what's reasonable and customary by comparing all the hospitals and all the surgical centers--

THE COURT: Okay. But--

MR. EVANS: --that perform this surgery.

THE COURT: --but if I wanted to find out what the

numbers were behind the IMS services and Dr. Huntsman, Dr. Huntsman's been deposed and it's at least been represented to me by Mr. Cooper, that Dr. Huntsman didn't know what the charges and expenses would be associated with the procedures in this matter and that you would have to ask someone else other than him. Who would that someone else be?

MR. EVANS: Well, first of all, I disagree with what his--his argument is, if Dr. Huntsman doesn't have the ability to testify to what's reasonable and customary, you'll have to talk to somebody else, then Dr. Huntsman's--I mean, he's not the expert. We have not been designated as a retained expert and--nor will we be designated--

THE COURT: And that--I understand that. I understand that.

MR. EVANS: Therefore, the estimate is just an estimate.

When somebody comes to our client, IMS, and says, you know, how much do you think this will cost in the future? It's an estimate, it's not--it's an estimate based upon our, you know, our experience and how we do things, but--

THE COURT: Okay.

MR. EVANS: --we are not experts and I just don't understand the logic of, well, Huntsman says that you'll have to go somewhere else and he's relying on--on this other--this estimate, then that means he's not really an expert in

reasonable and customary. That's just--I--I just don't--it doesn't make a whole lot of sense to me.

THE COURT: Okay.

MR. EVANS: That--that they would then need to go depose--they could go depose IHC or St. Mark's, for that matter, because if--if Dr. Huntsman says, well, I think that St. Mark's charges about a thousand dollars, you might want to ask them, well, does that give them the right to go depose St. Mark's or IHC or--

THE COURT: Yeah.

MR. EVANS: I don't--I don't think that works.

THE COURT: Okay. And you know, I--I'm probably--I've gone a half hour more than I should have on this--

MR. EVANS: Your Honor?

THE COURT: Yeah.

MR. EVANS: There's just one more.

THE COURT: Okay. Tell me what it is quickly if you would, please.

MR. EVANS: I--IMS is a facilities provider. There's a difference between medical professional and medical care providers and a facilities provider. And it is clear that they are a facilities provider and can make those charges. So the argument that they're not a provider is without merit.

THE COURT: So they are a facilities provider like a

surgical center or like a hospital?

MR. EVANS: Yeah. And--and there's an affidavit of a guy in our--our reply brief, who has--David Gilles, who is an expert in the field of medical billing and--and charges and that's all he does and he does it for the Utah Medical Association and--and many others and in his affidavit--

[Call interruption]

MR. EVANS: --his affidavit is--his affidavit is very telling and--and explains the difference between the facilities and the medical providers, so...

THE COURT: Okay. Good.

Let me ask you, gentlemen, if you'd do this for me. If I gave you a week--do you need more time than that to prepare--

[Call interruption]

THE COURT: --to prepare a proposed order with regard to the proportionality of the discovery issues and the protective order?

MR. EVANS: I would be able to do it within a week, your Honor.

THE COURT: Okay.

[Call interruption]

THE COURT: Other side? Counsel?

MR. COOPER: (Inaudible)

THE COURT: I can't--

MR. COOPER: Yes, I can, your Honor.

THE COURT: Okay. So if we said that you would submit those proposed orders and they would be filed on or before May 16th at 5:00 p.m.

MR. EVANS: Okay.

THE COURT: Great.

MR. EVANS: Thank you.

THE COURT: Thanks, Counsel.

MR. EVANS: Bye-bye.

THE COURT: Court's in recess.

MR. COOPER: Thank you, your Honor.

THE COURT: Court's in recess on the 1:30 matter.

[Operator: Leaving the meeting:

MR. COOPER: Gary Cooper.

[Operator: Leaving the meeting:

MR. EVANS: Scott Evans.

(Whereupon, this hearing was concluded.)

* * *

TRANSCRIBER'S CERTIFICATE

STATE OF UTAH :
: ss.
COUNTY OF SALT LAKE :

I, Toni Frye, do hereby certify:

That I am a Certified Court Transcriber of Tape Recorded Court Proceedings; that I received the electronically recorded files of the within matter and have transcribed the same into typewriting, and the foregoing pages, to the best of my ability, constitute a full, true and correct transcription, except where it is indicated the Electronically Recorded Court Proceedings were inaudible.

Dated this 31 day of July, 2017.

Toni Frye

Toni Frye, Transcriber

I, RENEE L. STACY, Registered Professional Reporter, Certified Realtime Reporter and Notary Public for the State of Utah, do hereby certify that the foregoing transcript, prepared by Toni Frye, was transcribed under my supervision and direction.

Renee L. Stacy

Renee L. Stacy, RPR, CRR

My Commission Expires:

11-9-2019

Notary Public
RENEE L. STACY
Commission #685637
My Commission Expires
November 9, 2019
State of Utah

ADDENDUM 2

TRANSCRIPT OF COURT RULING ELECTRONICALLY RECORDED ON DECEMBER 8, 2017, BEFORE THE HONORABLE MATTHEW BATES

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH

JAVIER VIGUERAS-AMEZCUA, Plaintiff, vs. NOAH SHOEMAN, Defendant.	Case No. 160903969

Court Ruling
Electronically Recorded on
December 8, 2016

BEFORE: THE HONORABLE MATTHEW BATES
Third District Court Judge

APPEARANCES

For the Plaintiff:

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P R O C E E D I N G S

(Electronically recorded on December 8, 2016)

THE COURT: We're back on the record. Counsel and the parties-- I guess Counsel's present. We don't have any parties here, do we? All right, I have -- I read through the briefing, I've looked at the exhibits, I've considered some of the case law. I've heard argument.

This is a really, really interesting issue. It's one I understand has made its way around the courthouse a little bit. It's one I -- I mean, I've never really hope something gets appealed, but I think it would be really interesting to see this one get in front of one of our appellate Courts, because I think we really have found a somewhat novel niche in the collateral source rule in the way we conduct discovery in these cases where there are some medical bills that need to be dealt with.

So I am -- I am going to grant the statement of discovery issues in part and I'm going to deny it in part. I'm going to allow some limited discovery that is on these subpoenas; and first, let me make a record of sort of how I view things and how I'm applying facts in the law of this case. Then what I'd like to do is just walk through each of these subpoenas and I'll identify what I'm going to allow and what I'm not going to allow.

Mr. Cooper, since this is -- this is kind of your

burden, and you're the one seeking discovery, I'll ask you to put together an order when we're all done with this. So --

MR. COOPER: Okay, I'll try --

THE COURT: -- you need to pay a little more attention than they do.

MR. COOPER: -- I'll try to follow closely.

THE COURT: Okay, so if we start with Rule 26, Rule 26 allows discovery into any matter that is relevant to a claim or defense and that is not privileged. As I understand the word "privileged" as it's used there, I don't believe we've had any claims that this is privileged in that sense; that it's a, you know, Rule 500 privilege or fits the privilege that's in Rule 26. So it's just -- the question is, is it relevant to a claim of defense, and then is it proportional.

Under that analysis it seems there are sort of two big things that the Court considers in determining whether or not this is relevant to a claim or defense and whether it's proportional. The first is whether any of the evidence that is sought would be excluded by the collateral -- collateral source rule at trial. The fact that it would be excluded is not necessarily a per se of reason not to allow in discovery, but it seems to weigh against allowing it where it puts a burden on the non-parties.

The other aspect is simply a Rule 26 proportionality analysis. Looking at the fact that these are non-parties, and

looking at the factors in Rule 26(b), you know, whether it's reasonable in the case weighing the benefits and the burdens, whether it's consistent with the case management order, whether it's not duplicative, whether the defendants can get it from some other source and whether they've had any opportunity to get it from somewhere else. So those are kind of the two areas I've looked at.

With respect to the collateral source rule, this is a rule that basically states that the tort fees or may not reduce his damages by the amount that a plaintiff will receive from some other source. In that sense I think the parties seem to agree that IMS is a collateral source; that they are providing a benefit to the plaintiff in this case. That they are providing a way for him to pay for these injuries and the costs -- and the costs he's incurred.

It's different than -- different than you have other insurance and I'll get into that difference a little bit, but IMS is collateral source; and really what the collateral -- the most primary collateral source evidence here, which I think has already really been disclosed, is the evidence of a financial relationship -- of the financial relationship between IMS and the plaintiff in this case.

That is really the collateral source evidence here that should not come in at trial when we get there, because I don't think the jury needs to know or should know, just as they

don't -- shouldn't need to know that insurance paid for something, they don't need to know about whatever the financial arrangement is between IMS and the defendant, whether that bill will ever be paid, whether it's paid in installments, whether interest is accruing or not, and the fact that IMS has a lien on the judgment -- any judgment that's obtained so that they can get their -- their money back. That seems to me to be the real primary collateral source evidence.

Of course, as I said, it seems like some of that has already been discovered. Other -- other evidence that might fit that category, some of these bills, in the right context, might lead to the inference that there is a financial relationship between the plaintiff and IMS, but I think that's something that can be dealt with, if needed, with, you know, pretrial orders and motions in limine or whatnot.

So as far as the bulk of these -- of what's requested here in these two subpoenas, I don't find that the collateral source rule by itself bars really any of this from discovery at this stage in the litigation. It certainly may bar it come trial, but as far as discovery goes, I don't find that that rule by itself bars it.

However, when it comes to the question of the burden that is being put on non-parties, I think that's a different -- a different question, a little more difficult question. These subpoenas do ask for a great deal of very expansive information

including tax records for the entire year of 2015. Those, when I weigh the proportionality and the relevance of those, I don't find that discovery on those issues is proportional or necessary in this case.

The real question here is I think the extent to which the defense is allowed to dig into the costs and sort of behind the scenes numbers of a medical provider. Here, IMS, while it is a collateral source, it also is a medical provider. I know they seem to say that they aren't in their financial disclosure but the fact is they're telling me that they -- that they have a leased surgical space, that they own the equipment in that surgical space. So I think IMS appears to have a mul -- multiple roles in this. One of which is to provide medical services or at least coordinate medical services, and the other is to provide financial services.

So the question is under Rule 26, to what extent can the defendants dig into the costs and whatnot that IMS incurs in providing these services. Were this a traditional case involving, you know, payments by Select Health or Blue Cross or something like that, I think the answer would be a little different here, because we've got -- we've got some well established practices, we've got lots of case law that generally you don't get too far in the night. Simply take the bills as they are, and then you compare them to what is allowed in the -- what is reasonable in the community.

This case is a little different because we all know, sitting here, that there is a financial arrangement and that IMS is -- appears to me, at least there is some evidence that IMS is augmenting these costs to account for the fact that they're covering the plaintiff's bills and providing essentially a collateral source for him.

So it seems to me in this unique case, that it is appropriate to allow the defense to get behind that initial bill and look a little bit deeper. This seems to me -- the analogy with -- that Mr. Kendall provided with Select Health was somewhat helpful.

I mean, it seems to me that if the defense came in and simply laid out the Select Health bill and said, "That's all we're -- that's all we should have to pay," that when in reality the bills behind the Select Health bill that the providers had charged were much greater than that, you know, that we wouldn't be -- nobody would be showing the Select Health bill to the jury. We'd be looking at the providers' bills. I think that the same reasoning applies here, where the collateral source bill is allegedly higher than what was charged by the providers.

So with that in mind, here's what I'm going to allow. Starting with the subpoena to Canyon Crest Surgical Center, in paragraph No. 1, I am -- I am going to order Canyon Crest Surgical Center to turn over any invoice or bill they may have

given to IMS for a charge for the surgery that was performed on the plaintiff on the date in question here.

What I'm essentially going to be ordering as we go through these is I'm going to order the non-parties here to basically turn over their file as it pertains to Mr. Javier Vigueras Amezcua, the plaintiff in this case. So I am going to allow that second one there. I'm not going to require that the check be turned over right -- I don't know that that's pertinent or necessary. I think it's sufficient that the bill was sent, and that should be the defendant (inaudible).

With No. 2, 3, 4, 5, 6 and 7, I'm going to grant that the motion -- the objections and the protective order and the discovery statement with respect to those, I'm not going to order Canyon Crest to turn over any of its financial documents beyond what is pertinent to the plaintiff in this case. So all of the tax records that have been requested for 2015 I'm not going to require them to turn over.

MR. COOPER: Did you say 2 through 7, Judge?

THE COURT: Nos. 2 through 7. I am not going to order those to be turned over. I'm going to strike those from the subpoena. With respect to 8, 9, 10 and 11, those seem to me to be rather un-burdensome to turn over, if in fact they exist. They do go somewhat to the bias that the defendant is alleging. I assume that these are stock forms, again if they exist, that Canyon Crest keeps around and shows to a patient when they come

in. They may not exist if there is no ownership or investment relationship, but to the extent that those forms may exist, I'll direct that they be turned over to the -- to the defense.

Then No. 12, again, I don't see a huge burden on Canyon Crest in turning over its licenses, just copies of its licenses. I don't know how relevant that is at trial, but it doesn't seem to me to be terribly burdensome to have them do that. Again, I am also -- and if you'll please include this, Mr. Cooper -- I'm going to direct the defense in this case to pay -- to pay reasonable costs in copying this material. So you will be -- you will be paying a little bit for -- a little bit for this.

Moving onto the subpoena for Dr. Huntsman, I'm going to make essentially the same order. I'm going to require that he turn over his invoice or bill that he gave to IMS for the surgery. I'm not going to require the check. I'm not going to require 2 through 8.

I'll note with that that at this point where there's been a very clear statement from Dr. Huntsman that he does not have any ownership interest in IMS or Canyon Crest, I don't -- I think that the burden of digging into his tax records and the invasion of privacy and the burden it would put on him to retrieve and copy those outweighs the -- what I think is really kind of nominal probative value here.

If the defense can later on get some evidence to show

that there is some financial relationship beyond just being a doctor and an independent contractor, I will absolutely reconsider that, but for now I'm not going to let anyone get into his tax records or Canyon Crest's tax records.

Then the same as I did for Canyon Crest, I'm going to allow 9 and 10 --

MR. COOPER: Does that include 8?

THE COURT: Yes, so I said 2 through 8 on the subpoena to Dr. Huntsman will not be allowed. Nos. 9 and 10 will be allowed.

MR. COOPER: Well, that was my point. I think it's -- No. 8 is the form used to disclose ownership. So it's 2 through 7 that are the financial --

MR. KENDALL: Not from my notes.

THE COURT: My No. 8 says it's a 1099 received --

MR. KENDALL: Right.

THE COURT: -- by the Salt Lake Orthopedic Clinic.

MR. KENDALL: We're on Huntsman.

MR. COOPER: I'm using the ones that he put in, and it's in the other case. Okay.

THE COURT: So and I should be clear.

MR. COOPER: I apologize, I'm looking at the wrong number.

THE COURT: I'm looking at the copies that were provided in the binder.

MR. KENDALL: Right.

THE COURT: At the very beginning, your subpoena duces tecum requesting production. These are the copies I'm looking at, but I think I got it from --

MR. COOPER: Yeah.

THE COURT: -- plaintiffs and -- or Mr. Evans, were you the one that provided that?

MR. EVANS: Yes, and --

THE COURT: Thank you. That was very helpful to have those. Appreciate that.

MR. EVANS: You're welcome.

THE COURT: Okay, so No. 8 will not be allowed. No. 9 and 10 will be allowed, and then No. 11 and 12 I don't see any relevance in providing those, so I'm not going to allow those.

MR. KENDALL: So if I --

THE COURT: Yes.

MR. KENDALL: -- my understanding that you were saying No. 9 was not allowed for now unless they can show -- because of the affidavit from Dr. Huntsman saying he doesn't have --

THE COURT: Well, I'm not going to let them get into his tax records, but if there is a document that discloses a financial relationship --

MR. KENDALL: Oh, okay.

THE COURT: --then I'm going to allow that with respect to Intermountain Surgical Center and Canyon Crest. I think the

defense is entitled to have that. Again, it's a very simple -- it should not take much to get that document if it exists.

MR. KENDALL: Right.

MR. COOPER: Then no on 11 and 12?

THE COURT: I think you have it attached to clipboards in the lobby, so --

MR. KENDALL: Right.

THE COURT: Then what was that?

MR. COOPER: Then no on 11 and 12?

THE COURT: No on 11 and 12. Lastly, with the subpoena to Intermountain Surgical, as I understand it, the first three bullets under No. 1 have already been provided.

MR. KENDALL: Yes.

THE COURT: I'm going to order that -- and now I've got to count here, one, two, three, four, five, six -- so the seventh bullet down, the Canyon Crest Surgical invoice bill for the facility charge, that that be turned over. The ninth bullet down, the Salt Lake Orthopedic Clinic, Dr. Kay T. Huntsman bill, be provided.

The -- on the next page, which I think now we're at the eleventh bullet point, the anesthesiologist invoice or bill; the thirteenth bullet point which is the physician's assistant invoice or bill; and the fifteenth which is the invoice or bill for any medical services or supplies paid by Intermountain Surgical. I'm going to order that to be turned

over as well. I will not require that -- I'm not going to order that two, three, four or five be turned over.

So essentially what I'm ordering is that the non-parties turn over their file as it relates to the plaintiff, and I think that the defendants, at least for purposes of discovery, are entitled to at least look at the costs that IMS incurred in coordinating those services for the plaintiff. We're not getting into the tax records at this time, but I think they get to just look at the costs.

I am also going to grant the motion for a protective order to the extent that it is seeking to just deem these documents private, and protect -- prevent the parties from disclosing them or using them outside of this litigation. Mr. Evans, I'll ask you to draft up a separate order on that point, a protective order.

What I'd like to see is an order that, first off, deems these private, and if they were filed with the Court, they were to be done -- they are to be filed under seal, and the clerk is to be directed to mark them "Private." I think we usually do that with a motion at the time they are filed. Second, that --

COURT CLERK: They're automatic --

THE COURT: Are they automatically pre (inaudible)?

COURT CLERK: They can put them in prior to putting them in the file.

THE COURT: Right, you put them in prior, there's a motion that's filed, I grant it --

COURT CLERK: Right.

THE COURT: -- and then they're deemed -- and then they're marked "Private."

COURT CLERK: You guys mark them "Private." Don't rely on me to do that.

MR. COOPER: Right.

THE COURT: Yeah, okay. Second, that the documents are not to leave the possession of the attorneys without prior order of the Court. So if you decide that you need to give them to an expert or someone like that, then you need to do so by a motion to the Court, Mr. Cooper, okay?

MR. COOPER: That's going to be all of these documents that are produced here?

THE COURT: Yes, all the documents that are produced here, okay? Essentially I want to make sure that we know who gets these documents, okay? I want to publi -- I want a record in the case of who is getting these documents. So I'm not going to put up a bit fight if you want to have one of your medical billing experts look at this document, but I want to know, and I want there to be an order in place that protects it when they get it, and that we know who has it.

MR. COOPER: That will be part of the protective order?

THE COURT: That will be part of the protective order.

MR. COOPER: Okay.

THE COURT: Yeah, so the parties are not to disburse these documents outside of their own law firms, their own -- their own attorneys. They are not to be used in any way outside of this litigation without prior order of the Court, okay? Then once the litigation is concluded, the parties will be directed to either return the documents to the non-parties or to destroy them. Anything I missed?

MR. KENDALL: Question on the Intermountain Surgical subpoena.

THE COURT: Uh-huh.

MR. KENDALL: We addressed bullet points one, two, three, we've already satisfied. Then you went through seven, nine, I think eleven, thirteen and fifteen said yes, I'm going to allow it.

THE COURT: Yeah.

MR. KENDALL: I take that to mean, then, for example, four, five, six --

THE COURT: Yes.

MR. KENDALL: -- you're not allowing?

THE COURT: So basically I'm allowing the invoices for Canyon Crest, Dr. Huntsman, the anesthesiologist, the physician's assistant, and then sort of the catchall here for any medical services.

I'm not going to require that the checks be turned

over, and I'm not going to require that they provide invoices for any of the medical -- the Med Ser supplies or the DME supplies. Part of the reason for not requiring those is that seems to me to be something that is commonly used across the board with lots of providers.

I'm sure there is plenty of information out there about what these generally cost. Your experts probably know what they cost. So I don't think we need to -- we need to have IMS turn over its invoices on that -- on that particular point.

I think the relationship between IMS and Canyon Crest, Salt Lake Orthopedic, the anesthesiologist, I think the defense does need to at least see the bills, the invoices that went back and forth, so they can see what's going on.

Okay, anything else?

MR. COOPER: Two things. Because this motion to compel did not result in the provision of the medical records themselves, because I've already disbursed those to experts --

THE COURT: Okay, and that's fine.

MR. COOPER: -- so I'm assuming that that's not --

THE COURT: That's fine.

MR. COOPER: -- considered to be a violation, your Honor?

THE COURT: No, what I'm worried about here are what I see as the non-parties proprietary business records. These are records that given -- given their business model, I suspect

they have some interest in keeping quiet how much they're paying their partic -- you know, Canyon Crest and the doctor. That's something they -- those are relationships they've developed, and I think that while you're entitled to look at them, I don't want them disbursed outside to anybody else without them knowing who it's going to and having a protection in place.

MR. COOPER: The next issue really is just to prevent us from having to come back here, and that is this --

THE COURT: Oh, we're coming back here, I'm sure, but--

MR. COOPER: Well, with this --

THE COURT: -- let's minimize the number of times we can.

MR. COOPER: Exactly, and I mean, we've already heard that as between Canyon Crest and IMS, I think they're telling us that there is no bill. So even though I'm not going to get it by subpoena, am I going to be prohibited from deposing somebody at Canyon Crest and IMS to try to et to the difference between the costs and the finance charges?

THE COURT: Right.

MR. COOPER: This is the biggest issue in the case.

THE COURT: Right. You're kind of asking me to sort of pre-rule --

MR. KENDALL: Right, I was going to say --

THE COURT: -- on something?

MR. KENDALL: -- we don't give advisory opinions, do

we?

THE COURT: Well, they don't.

MR. KENDALL: Okay.

THE COURT: I sometimes do just to help move the case along.

MR. KENDALL: We would object, of course --

THE COURT: Sure.

MR. KENDALL: -- for the same reasons.

THE COURT: Sure.

MR. KENDALL: Yeah.

THE COURT: Sure. I imagine you probably would. My intent with this ruling today was to allow Mr. Cooper and his client to at least understand a little bit the costs. I don't want them getting down onto a line-by-line, but at least know, you know, this is how much it costs -- it actually costs IMS to have that surgical room.

As I was looking at the subpoenas and looking at the briefing, it occurred to me that there may not be a charge or an invoice for this particular surgery, especially when you told me that this was -- they had exclusive use of a surgery room at Canyon Crest.

MR. KENDALL: Right, it's a lease.

THE COURT: It's probably a year-long lease, is what I would guess, or a lease.

MR. KENDALL: Whatever it is.

THE COURT: So I-- here's what -- what I would probably be inclined to rule, just so you know. Based on what I have in front of me is I would -- I would likely allow Mr. Cooper to ask an IMS witness -- maybe if it was like a 30(b)-6 witness -- I would allow him to inquire into if there is a cost associated -- if there's an identifiable cost related to this specific surgery. So if this was leased for a few hours or a day or something like that, then I would definitely allow that.

If the question -- if there's no way to separate that out -- and what we're talking about is a lease for a period of time -- we'll probably have to come back and have a chat about that. I'm not sure how to rule on that.

So maybe -- hopefully the two of you can talk a little bit about this, and you know, maybe -- maybe Mr. Evans could proffer what might be said so we know whether or not we need to come back and have another statement of discovery issues.

MR. KENDALL: Okay.

MR. COOPER: Okay.

THE COURT: So I'll leave that to the two of you; but that's -- that's where I'm leaning now, and that was -- that represents sort of the intent of my ruling today, is just to allow Mr. -- if it's -- if there's a very simple bill that Mr. Cooper can look at where he can see the difference between IMS's Canyon Crest's cost and bill and IMS-- not Canyon Crest's costs, but Canyon Crest's costs and IMS's, you know, total

bill, then I think he's entitled to know that. If it's going to get more complicated than that, then I think we need to come back and discuss it.

MR. KENDALL: Okay.

THE COURT: Okay. All right, anything else?

MR. COOPER: No, your Honor. Thank you.

MR. KENDALL: Thank you.

THE COURT: Okay, thank you, and enjoy the rest of your day. We'll be in recess.

MR. KENDALL: You, too, your Honor.

(Hearing concluded)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UTAH)

I, Wendy Haws, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these meetings.

That I have been authorized by Beverly Lowe to prepare said transcript, as an independent contractor working under her court reporter's license, appropriately authorized under Utah statutes.

That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 12th day of December 2016.

My commission expires:
January 12, 2020

Wendy Haws, CCT
NOTARY PUBLIC
Residing in Utah County

Signed: _____
Beverly Lowe, CCR/CCT

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UTAH)

I, Wendy Haws, a Notary Public in and for the State of Utah, do hereby certify:

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WITNESS MY HAND AND SEAL this 12th day of December 2016.

My commission expires:
January 12, 2020

Wendy Haws, CCT
NOTARY PUBLIC
Residing in Utah County

WENDY HAWS
NOTARY PUBLIC-STATE OF UTAH
COMMISSION# 686630
COMM. EXP. 01-12-2020

Signed: _____
Beverly Lowe, CCR/CCT

ADDENDUM 3

DEPOSITION TRANSCRIPT OF KADE T. HUNTSMAN, M.D. TAKEN ON APRIL 27, 2017

In The Matter Of:

BUENROSTRO v.

NESBITT

KADE T. HUNTSMAN

April 27, 2017

Q & A Reporting, Inc.

1872 South Main Street

Salt Lake City, Utah 84115

801.484.2929

Original File 04-27-17 - Huntsman, Kade.txt

Min-U-Script® with Word Index

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

IGNACIO BUENROSTRO AND ESTHER BUENROSTRO,
Plaintiffs,
vs.
WHITNEY A. NESBITT AND JACOB C. LOVELAND,
Defendants.

Case No. 160902137 PI
Judge: Royal I. Hansen

DEPOSITION OF: KADE T. HUNTSMAN, M.D.

April 27, 2017

7:01 a.m. - 7:55 a.m.

Location: SALT LAKE ORTHOPAEDIC CLINIC
1160 East 3900 South, Suite 5000
Salt Lake City, Utah 84124

Reporter: Dawn Brunner-Hahn, RPR
Notary Public in and for the State of Utah

Q&A Reporting, Inc.
801.484.2929

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FOR DR. HUNTSMAN:

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Salt Lake City, Utah 84111
(801) 323-5000
Stephen.kelson@chrisjen.com

INDEX

PROCEEDINGS

(Exhibit-10, Exhibit-11, Exhibit-14, Exhibit-15, Exhibit-16, Exhibit-17, Exhibit-18, Exhibit-19, and Exhibit-20 were marked for identification.)

KADE T. HUNTSMAN, M.D.,
having been first duly sworn to tell the truth,
was examined and testified as follows:

EXAMINATION

BY MR. COOPER:

Q. The record should reflect that this is the time and place for taking the deposition of Dr. Kade Huntsman. It's being taken pursuant to notice and Utah Rules of Civil Procedure and may be used for all purposes consistent with those rules.

Would you state your name and professional address for the record, please.

A. Yes. It's Kade, middle initial T., Huntsman. And Salt Lake Orthopaedic Clinic, 1160 East 3900 South, Suite 5000, Salt Lake, Utah.

Q. And you're an orthopedic surgeon practicing here in Salt Lake, correct?

A. Yes.

Q. Have you seen either Ignacio or Esther Buenrostro in your capacity as an orthopedic surgeon?

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A. Yes. I've seen them both.
Q. I'm going to show you what's been marked as depositions Exhibit-10 and -11.
Do you recognize those documents?
A. Yes.
Q. And what do you recognize these as?
A. These -- it's a statement of account for Intermountain Surgical indicating a bill of $500 for seeing me in consultation, one for both Esther and Ignacio.
Q. So did you understand, when you saw these two people, that you were seeing them as a result of a referral by Intermountain Surgical?
A. I don't know who referred the patient to see me, but I assume that we knew that there was involvement of Intermountain Surgical at the time I saw the patient, but I don't know who referred them to me.
Q. And I asked you to bring your files today and you've brought those. You have one on Ignacio and one on Esther, correct?
A. Yes, sir.
Q. When you saw them, did you see them together or separately?
A. I don't recall. I think I saw them on the same day, but I don't know if I saw them together in the same

Page 6

room or not.
Q. What is your relationship with Intermountain Surgical?
A. I see some patients that they pay the bills for, and we do some surgeries that they pay the bills for.
Q. So these bills that I've marked as Exhibit-10 and -11, based on those bills, do you believe that Intermountain Surgical paid your consultation fee of $500 and then billed somebody else for it?
A. Yes.
Q. Okay. How many patients do you see for Intermountain Surgical a year?
A. I've -- I don't keep track of that. I'd have to go back and sort through it. But I would guess 60, 70, 80 patients a year.
Q. And then do you perform surgeries on at least some of those patients that you see?
A. Yes.
Q. Do you have an estimate of how many surgeries you've performed on patients that Intermountain Surgical is involved in?
A. Same thing. I've never counted, but I would guess that it's maybe on half or two-thirds of those, so probably, I don't know, 40, 50.

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Q. Do you perform all of those surgeries at Canyon Crest Surgical Center?
A. No. The vast majority of them are done there.
Q. When you say "vast majority," can you give us an idea?
A. 90-plus percent.
Q. Why?
A. Why what?
Q. Why do you perform them at Canyon Crest rather than some other facility?
A. I would assume that Intermountain has a relationship with Canyon Crest, and so they have a complete setup for me to do spinal surgery out there; so we take the patients out there for those cases that we deem appropriate for that setting. If it's a bigger case, then we'll take that patient to a hospital.
Q. And if you take it to a hospital, do you generally do it here at St. Mark's or does it vary?
A. Generally here at St. Mark's.
Q. What is the relationship when you see these patients on a consultation basis when you do this surgical consult? Do you -- are they your patients at that point, or are you just doing it to perform a consultation for Intermountain Surgical?
A. They're my patients at that point.

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Q. When you performed the evaluations on Ignacio and Esther Buenrostro, did you understand that the purpose was to determine whether or not surgery would be performed?
A. When I'm seeing any patient, including patients Esther and Ignacio, I see them and make recommendations as to treatment options. That's the purpose of the visit. So if -- that includes, you know, surgery, if needed.
Q. Do you understand that Intermountain Surgical finances surgeries for people?
A. I don't know exactly what their business arrangement is, but I know that they pay these bills.
Q. And so do you know that your surgical consultation is a part of their vetting process or due diligence to determine whether or not they're going to finance the surgery for these people?
A. I don't know how that works.
Q. When you see a patient for Intermountain Surgical, you know that as a part of that evaluation is to make a causation opinion, correct?
A. Yes.
Q. And so when you saw Ignacio and Esther, you knew that part of the request from Intermountain Surgical was that you evaluate whether or not this was related to

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an accident that they were involved in on June 27th of 2011?
A. That's accurate.
Q. Okay. How do you get this information in advance of the surgical consultation?
A. I don't get the information myself in advance until I'm about to walk into the patient's room and my office staff, who schedules appointments, will let me know that this is a patient that I need to make that determination on, a causation determination.
Q. Okay. So in this case, the accident in question is one that happened on June 27th of 2011, and you were seeing them over three years later, on December 15th of 2014; so did you know that that -- that it was an accident that happened on June 27th of 2011 that you needed to evaluate causation?
A. Yes.
Q. And that's -- again, how did you know that? Was there a form or something that came with the patient so that you knew that this was the accident?
A. I'm notified by my office, as I'm going in the room, that the patient is here and needs me to determine causation. And so as I go in to see the patient, I find that information out. And I go in, and I talk to the patient and sort through all of those issues, and then

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come to a determination.
Q. In the case of Ignacio and Esther, were you provided records from any other providers?
A. Not at the time that I'd seen them, with the exception of Brent Felix, who works in this office as well. His chart and my chart are the same, and Esther had seen Dr. Felix in the past; so I had his records.
Q. So on Esther's file that you brought with you, do you have Dr. Felix's records as well?
A. Yes.
Q. Okay. Are these your original files or did you make copies?
A. These are original files.
Q. All right. I'm going to mark those. After the deposition, we'll make arrangements to make copies, and I'll mark them as exhibits at that time.
So to get back to my question, I'm not sure I totally understood it, did you get records from any providers other than Dr. Felix on Esther?
A. At the time of that visit, no, I did not.
Q. Did you at any other time?
A. I did get some records later on, and I can't remember if it was on Ignacio or Esther, about some previous conservative treatment that they had had.
Q. Do you have those records in your file?

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A. I don't.
Q. Do you still have those records?
A. I'm sure that my office does. I don't know.
Q. Who provided those records to you?
A. I believe they're the attorney for Esther or Ignacio.
Q. When?
A. I'm not certain. Within the last month or so.
Q. Okay. Did you issue a report on either one of them with those records?
A. I did.
Q. And is that record in the file?
A. No, it's not. It's not in the office chart.
MR. COOPER: Do you have that?
MR. BOULTON: Do I have his report?
MR. COOPER: Yes.
MR. BOULTON: Yes.
MR. COOPER: Can I see that?
MR. BOULTON: Sure. I'm surprised you don't have these.
MR. COOPER: Yeah. Me, too.
MR. BOULTON: I believe we've disclosed those.
MR. COOPER: I don't remember seeing these, so whatever. Are these copies that I could mark as exhibits?

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MR. BOULTON: Yeah. I have copies, obviously, at my office. Those are the only ones I have today, but we could use them as exhibits.
MR. COOPER: Okay. Great.
(Exhibit-21 and Exhibit-22 were marked for identification.)
Q. (BY MR. COOPER) Okay. I've marked two reports here, one as Exhibit-21, which is on Esther, and the other, which is Exhibit-22, which is on Ignacio.
Are those the two reports that you authored recently on the Buenrostros?
A. Yes.
Q. If you don't mind, if I can just take a look at these real quick. Thank you.
Did you use interpreters or an interpreter when you evaluated either or both of the Buenrostros?
A. I don't recall. It's fairly common with Spanish speakers that we have an interpreter help us, but I don't recall specifically here.
Q. Did the Buenrostros fill out a history form or any kind of thing like that to help you in evaluating the history?
A. Yes. They both did.
Q. Okay. Do you know whether they filled it out or somebody else helped them fill it out?

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A. I don't know how that was filled out.
Q. Could I see it in their files?
A. Yes. This is Ignacio's. And there's a few pages behind that first page that the patient fills out.
Q. The handwriting on that form, is it all Ignacio's?
A. I don't know.
Q. Is it any of it yours?
A. No.
Q. It's the same sort of form that you have on Esther?
A. Yes.
Q. Okay. Is that the only intake history form that you have for both of them?
A. Yes. There's a questionnaire and then there's another page; so there's basically two forms.
Q. Okay. I've marked the report that you prepared as Exhibit-14. I think you have it there in front of you. You can -- and this is on -- we'll take Esther first. How much of this was taken from the forms as opposed to getting a verbal history from them?
A. I get the verbal history from them, and then that information is combined with the information on the form. I don't know what percentage it is, but it's basically a -- both sets of information that are included here.
Q. Would you just explain how you prepared that, then? Is this you dictating this report, or is there somebody else that incorporates some of this information into your report?
A. Some of this information gets put into the report based on that form in the back, and then as I dictate, it fills in the rest of the template. So I dictate certain boxes on an electronic medical record that then creates the report.
Q. Under "Chief Complaint" in Esther's, you state that she had a sudden onset of, I guess, symptoms. When you say "sudden onset" in relationship to this accident that happened on June 27, 2011, what does that mean?
A. It means that shortly after the accident she began to have pain; so it isn't something that happened slowly over a period of time. It was relatively soon after the accident.
Q. Did she tell you how soon after the accident that she had the onset of pain?
A. I don't recall.
Q. In your report, you state that she had pain. And then down lower under "Chief Complaint" you say "no arm numbness." Can you explain that?
A. It's very possible for patients to have pain from a pinched nerve in their neck that shoots down into their arm. If it gets a little bit more severe, that can become numbness, and that can become weakness as well. So we're looking at three different things: pain, numbness, and weakness.
Q. And in her case, did you understand that it was pain rather than numbness or weakness that was the primary complaint that she had?
A. I documented in my note that she had some numbness as well. But my understanding was that her biggest complaint was the pain.
Q. And where did you understand that she had numbness, or where did you document that she had numbness?
A. On page 3 of my note it says sensation in left arm decreased in the C6 and C7 nerve root distributions.
Q. In that same note you say, "She is very clearly decreased in C7."
What does that mean versus decreased? What's the significance?
A. We're trying to make sure that what we're seeing on an MRI scan or X-ray is consistent with what the complaints of the patient are. And she was complaining of a very specific distribution of the pain, which correlated well with the C7 nerve root.
Q. But when you say it's clearly decreased in C7, does that mean some really significant decrease?
A. It means it's significant, yes, but it also means that it's very clear-cut, that it's not -- the opposite of the situation would be somebody that says, you know, "My arm is numb," but they can't really tell you exactly where on the arm it's numb.
Q. Okay. In the records that you were provided recently, did you get a copy of the ER report from August 1st of 2011?
A. I believe I did, yes.
Q. Okay. I'm going to show you what's been marked as Exhibit-15. Is that a document that you've seen previously?
A. Yes.
Q. You, then, read the portion of Exhibit-15 that relates to "History of Present Illness"?
A. Yes.
Q. Do you ascribe any significance to the fact that she said that after a chiropractor visit last Thursday, which would be the Thursday before August 3rd -- or August 1st of 2011, that two days later she had much worsening symptoms in the left arm, especially pain in the left neck?
A. Yes. I see that.

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Q. Is that significant to you in terms of causation?
A. It indicates that she had some symptoms prior to this emergency report.
Q. Yes, but it also indicates that they became severe enough now that she went to the emergency room after a chiropractor visit. Is that significant in terms of causation?
A. Yes, it is.
Q. And why is it significant?
A. It just indicates that she had had some pain, like I said, after going to the chiropractor; so it's another contributing factor to her having neck and arm pain.
Q. The chiropractor adjustment is?
A. Possibly, yes.
Q. Okay. And so in terms of determining whether something is related to the auto accident, how did you take this into account?
A. Well, she had the auto accident. I'm trying to see the date of that accident.
Q. It's June 27th of 2011.
A. So my understanding, from discussing this with her, was prior to that she didn't have any problems. After that she's having problems and she's seeking

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treatment. And a chiropractic visit made those symptoms worse.
Q. And so could the chiropractor have aggravated her condition?
A. Yes. It's possible that the chiropractor aggravated her condition.
Q. Okay. Were you able to determine this late in the game how much of her present condition was due to that aggravation versus the auto accident?
A. Well, I think it's a minor contributor because, of course, she's seeking treatment from the chiropractor in the first place because of the problem. And now he's made it worse. And then any of these injuries like this wax and wane; so they get worse, they get better, they get worse, they get better. That's just routine. And so I take all that into consideration. And there's a slight possibility that the chiropractor made her situation worse, but my understanding was that that would be for a short period of time.
Q. And did you review the chiropractor's records?
A. I did.
Q. And do you recall that she didn't complain of any left arm or hand symptoms to the chiropractor?
A. I don't recall that.
Q. Would that be significant to you?

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A. If she...
Q. If she hadn't complained of left hand and arm symptoms until after the adjustment or adjustments?
A. That could be significant information, yes.
Q. Okay. And why would it be significant?
A. If that's the case and she truly didn't have any, then it would make me think that possibly the chiropractor did more aggravation.
Q. At page 2 of your report, you identified and described her neck rotation and forward flexion.
A. Yes.
Q. Are those all normal?
A. Her neck rotation is a little bit less than normal but not much, and the forward flexion was normal.
Q. And then am I not seeing it? Was there -- did you evaluate her extension?
A. No.
Q. Why?
A. I did evaluate it. I should clarify. Part of the next line there it says "Spurling's test." And the Spurling's test is where you extend the neck and put compression on it to see if you can pinch the nerve root. And in her case, it was strongly positive. In other words, if I put her into extension, her arm would hurt.
Q. And was it her left arm that did?

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A. I would assume so, but all I said in that section was that it was positive; so it was causing arm pain.
Q. On the next page under "Reflexes," you identify the Hoffmann's test, and you say it's strongly positive. Explain how you determine a finding on a Hoffmann's test?
A. So what we're looking for in a situation like this with severe stenosis is if there are any reflex changes, and she had definite reflex changes. A Hoffmann's test is where you flip a finger -- kind of flick the finger and watch for a reflex in the thumb. And I could make her thumb jump quite easily by just flicking a different finger. That's a reflex that's pathologic.
Q. For irritation where?
A. Of the spinal cord.
Q. At the time you saw Esther, did you have Dr. Felix's notes --
A. Yes.
Q. -- available?
A. Yes, I did.
Q. I marked what I think are Dr. Felix's records as Exhibit-16. Are those the same records that you had? So Dr. Felix saw her, what, about three years before you saw her?

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A. Correct.
Q. When he saw her, one of the things that he noted was that her arm pain is in the entire arm and radiates to the hand, including the ring and small finger. Now, that's somewhat different than what she complained to you because it was middle and ring finger when she saw you, correct?
A. Correct.
Q. What's the significance of that, if any?
A. It's a little bit of a different nerve distribution. It's very close to the same, but just a slightly different nerve distribution.
Q. So in her case, is it significant that this is changed over a period of three years?
A. No. I would expect it to change over that much time. And she has problems at multiple levels; so it's not surprising that she's got some different levels of nerve impingement at different times, depending on which nerve root happens to be irritated at that point.
Q. And then he also noted that she reports numbness in the inside of the arm and in the outside of the hand, and she does not report any weakness. Is that similar to the findings that you made?
A. Yes. It is similar.
Q. He also discussed her sensation findings. He

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said "Sensation in the neck was intact, but decreased on the left at C8."
A. Yes.
Q. Now, that's different than what you found, correct?
A. Slightly, yes.
Q. Well, slightly. You didn't find any decrease in sensation at C8?
A. Correct. When I saw her it was more in the C7 distribution.
Q. So, again, is that significant when you're evaluating causation?
A. Not when you have injury at multiple levels in the neck. She has injury at multiple levels. And the significance here is that it's not just a nerve being pinched but the spinal cord itself. And when you're pinching the cord, you can get all kinds of different symptoms. So when I saw her, her biggest complaint was in the C7 distribution. When Felix saw her three years prior, her biggest complaint was in the C8 distribution. Both of those fit with the findings on her MRI scan of severe central spinal stenosis.
Q. So when a person has severe stenosis in an injury of the kind that you think that she had, would you expect that that would show up on an EMG or NCV test?

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A. It depends. So a nerve conduction study it, early on, will be negative, and then later will become positive. And it's only good to measure how much motor loss there is. So there has to be gross loss of motor function before they're able to pick anything up. So you can have a lot of pain and numbness before -- excuse me -- and still have a normal EMG and nerve conduction study.
Q. So when you got these records recently, did you see this EMG report of January 24th of 2012?
A. Yes.
Q. And it does show that there is no evidence of active or chronic denervation changes that are sometimes observed in cervical radiculopathy, correct?
A. Correct.
Q. Okay. Did she have another EMG/NCV later?
A. Not that I'm aware of.
Q. And I think Dr. Felix determined that she needed additional -- or he needed additional information to determine if surgery was necessary to treat her condition. Last sentence of his report.
A. Yes. He indicates that he discussed surgical and nonsurgical treatments, and that he had requested the EMG to see if she was a candidate for the surgery, and asked her to return if her symptoms were getting worse.

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Q. And did she ever return?
A. Not to Dr. Felix, no.
Q. And did Dr. Felix get this EMG/NCV report that we marked as Exhibit-17?
A. It's in the chart; so I would assume so.
Q. Okay. Did he make any recommendation after seeing that?
A. Not that I saw.
Q. If you had been the surgeon instead of Dr. Felix, would you have recommended surgery at that point when -- based on the results of this EMG-NVC study, Exhibit-17?
A. It would be difficult for me to say whether or not I would have recommended surgery. At that stage she hadn't had a whole lot of conservative treatment. I think he indicated no injections and things like that. So we probably would have treated her conservatively, and if the conservative treatment failed, then moved to surgery.
Q. And have you seen the treatment that she had after she saw Dr. Felix?
A. I have seen some of that treatment, yes.
Q. What have you seen?
A. I'd have to go back to my report.
Q. Is it going to be in -- referenced in your

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report that we marked as Exhibit what?
A. This is Exhibit-21. And I noted in that report when I reviewed the records, I reviewed some from Injury Recovery Center; Intermountain Medical Center; Salt Lake MRI; Salt Lake Orthopaedic Clinic-Dr. Felix; and my own records; records from Dr. Joseph Watkins; Dr. Stewart Porter; Shannon Nelson, who's a chiropractor; Alta Sports and Pain Medicine; Michael Chen; and Patrick Garcia. I don't have specific recollections of each of those reports, but that's what I reviewed at the time.
Q. And if we want to see those reports, you have them somewhere here; is that correct?
A. Yes.
Q. When we finish this deposition, would you ask your office to make a copy of those reports?
A. Yes.
Q. Thank you. We'll mark those as a separate exhibit as well.
Back to your report on Esther, you make a reference under "Assessment" to something called hyperreflexia.
A. Yes.
Q. What are you referring to there? In other words, what findings supported your indication of hyperreflexia?

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A. The positive Spurling's test that we talked about earlier. Excuse me. That's not indicative of hyperreflexia. It's the Hoffmann's test that was strongly positive. That is indicative of hyperreflexia.
Q. Would you expect somebody that had a positive Hoffmann's test, that they would continue to have that even up to the present?
A. It can wax and wane, but it usually -- once you have it, it usually persists.
Q. If she doesn't have it now, would that be significant to you?
A. No. Because really what it is is just indicative of what we see on the MRI scan, which is that she has severe stenosis impinging on her cord. And if the cord is irritated at that moment in time that you're examining her, you should see reflex changes. So it's significant, but not as significant as what you see on the MRI scan.
Q. The MRI scan that you were looking at, is that the one of September 30, 2011?
A. I have both the scan from 2011 as well as the scan from November of 2014.
Q. Well, I guess my question is: Did you have both of those scans when you saw her in December of 2014?
A. Yes.

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Q. Did you have the actual films?
A. I had the actual films of the 2014 study, and I don't recall if I had the 2011 actual films or not. I know that I had the report.
Q. Have you ever had the opportunity to compare the two?
A. Yes. I have had the opportunity to compare the two.
Q. I'm talking about the films.
A. The -- I don't specifically recall reviewing the films of the 2011.
Q. And so when you compared, what did you compare, then?
A. I -- the two reports. So the report from 2011 and the report from 2014, I had both of those at the time I saw her. I had the 2014 films, but I don't recall if I had the 2011 films.
Q. The reason I'm asking this is because you made a diagnosis of progressive myelopathy.
A. Yes.
Q. And I assume that that was based upon a comparison of the 2011 scan with the 2014 scan; am I correct?
A. Correct. But it also includes comparison of Dr. Felix's exam and then my exam.

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Q. Okay. So help me understand what it was from both the films and Dr. Felix's exam that you felt supported the finding of progressive myelopathy.
A. On the MRI scan of 2011, she has a description of --
Q. Let me just stop you for a second. Is that the one I marked as Exhibit-18?
A. Yes.
Q. Okay.
A. She -- that report shows that she has stenosis secondary to a disc herniation, broad-based at C4-5, at C5-6 with just a millimeter of cord compression, and at C6-7. So at multiple levels in her neck she's got some disc herniations and some stenosis.
Then when you compare that with the MRI scan of 2014, she now has severe central spinal stenosis. And the canal measurement there should be at least 10 or greater, and hers is 7.3 at C5-6 and 7 millimeters at C6-7. So that indicates it's very tight on the spinal cord itself, and it's the pressure on the spinal cord that causes myelopathy. And my examination confirmed what I saw on the MRI, which is she had a positive Hoffmann's test, which is one of the indications of myelopathy.
Q. And she didn't have that when she saw

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Dr. Felix?
A. He didn't note that, no.
Q. Well, if he didn't note it, do you believe he tested it and it was negative?
A. Yes.
Q. Based on these two scans, what was it that caused the difference in compression between 2011 and 2014? Was it -- let me just ask a little bit further. Was it advancement of the disc herniation, or was it bony growth, or a combination?
A. A combination of both. She developed -- on the first MRI scan, she had soft disc herniations. On the later examination, she has disc herniations with bone spurs, which are typical to see in progression after you have a disc herniation.
Q. Did you feel in her case that any more testing was necessary --
A. No.
Q. -- for making the determination to recommend surgery?
A. No. With that MRI scan and some hyperreflexia, by definition she has myelopathy, and she's a surgical candidate at that stage.
Q. Let's go to Ignacio, if you would, please. And I marked his report as Exhibit-19, if you want to just

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compare the two and make sure they're the same.
A. Yes. That's the same.
Q. So you saw him on the same day?
A. Yes.
Q. In his case, you recommended a -- well, let's -- I'm sorry. Let's go back to Esther for a second.
You recommended what on her?
A. I recommended surgical intervention on her.
Q. And the -- it was a two-level surgical fusion; is that right?
A. Yes. She's got problems at more than two levels, but those two levels are very severe, and I felt like they were the major contributors to her problem.
Q. And, I'm sorry, the two levels that you felt needed fused were what?
A. 5-6 and 6-7.
Q. All right. On Ignacio, you recommended a three-level cervical fusion, correct?
A. Yes.
Q. C3-4, C4-5, and C5-6?
A. Correct.
Q. And you indicated in your report that his need for that surgery and the symptoms that he was exhibiting when you saw him were all due to this motor vehicle

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accident. But you didn't indicate what motor vehicle accident. I assume you meant the June 27, 2011, accident; is that correct?
A. Yeah. My note indicates he was involved in a motor vehicle accident in 2011.
Q. Were you aware that he was involved in an accident on April 19th of 2010?
A. I don't have a recollection of that.
Q. You got records later. Did you get records that indicated that he had been involved in this auto accident on April 19th of 2010?
A. I don't recall seeing that accident, but I'm not certain.
Q. Okay. So you weren't aware that he had a neck injury in the April 19, 2010, accident?
A. At this time, I don't recall that. No. I don't believe I did.
Q. If you had the additional history that he had an auto accident on April 19th of 2010, and that he treated for a neck injury, and that at least part of his symptoms were left-handed numbness, would that be significant in determining causation in this case?
A. Yes.
Q. How would that be significant?
A. It may indicate possibly that there were other

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factors that contributed to his current level of stenosis.
Q. I'm going to hand you what I have marked as Exhibit-20. This is a report from a Dr. Bova.
Have you ever heard of Dr. Bova?
A. Yes, I have.
Q. Okay. What do you know about Dr. Bova?
A. He does conservative spinal treatment. I think I've actually seen this report.
Q. Okay. If you would turn to page 2.
A. Yes.
Q. At the top of that, he is evaluating this accident, which happened on June 27th of 2011. And he makes this note, at the end of that second paragraph, "Mr. Buenrostro reported that following this treatment" -- that is, the treatment from June 28th to July 7th of 2011 -- "his symptoms from this accident improved to his pre-June 27, 2011, condition."
Were you aware of that history when you made your causation opinion?
A. When I made my second report, yes, I was aware of that. Prior to that, I was not.
Q. And, again, I just got that report today; so I haven't had a chance to review it.
How did you evaluate this information from

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Dr. Bova in determining causation in Mr. Ignacio Buenrostro's case?
A. It is one small bit of information. And like I said earlier, the natural history of these is for the symptoms to wax and wane. And so if he gets treatment, you would expect him to get somewhat better, but that doesn't mean that the anatomical injury has gone away. It just means that it's settled down at that point in time; so you would expect the pain to return.
Q. And as you read Dr. Buenrostro -- or Dr. Bova's report, it's clear that Ignacio had the same or similar symptoms from the April 2010 accident.
A. It's -- my understanding of this report is that he has -- or he had similar symptoms, but, obviously not as severe as they were after the June 2011 accident.
Q. In what way were they not as severe?
A. Well, he indicates that the patient had an aggravation, was worse after the accident, and had to come in for treatment. That indicates that symptoms were worse.
Q. Could also indicate that he was still suffering symptoms from the April 2010 accident, couldn't it?
A. Yes. That's possible.
Q. Were you aware that Mr. Buenrostro had an MRI in June of 2010? I'll show you what's been previously

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marked as Exhibit-2 in this case.
A. At my first evaluation, I wasn't aware of this.
Q. Okay. And you were later?
A. Yes.
Q. Okay. And the MRI that you reviewed was one that was taken on November 8th of 2014; is that correct?
A. Yes.
Q. And that's the one -- the report at least is the one I've marked as Exhibit-7; is that right?
A. That's correct.
Q. Were you aware that we took the deposition of the radiologist who read the November 8, 2018 -- excuse me -- November 8, 2014, MRI?
A. Was I aware that you had a -- took his deposition?
Q. Yes.
A. No.
Q. We took his deposition, and he compared the actual films from November 8, 2014, with the films from the MRI on June 15th of 2010. And he testified that the images on November 8th of 2014 are not significantly different from the images on June 15th of 2010.
Would that be significant to you in formulating your causation opinion?
A. No, because I had a chance to review these and,

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you know --
Q. Did you review the actual films or just the reports?
A. Just the reports. And the report does sound like it's progressed, that it's worse on the 2014 film, but he did have a lot of abnormalities on the 2010 MRI as well.
Q. Okay. So with this additional information that you received -- and, again, I'll ask you to make copies of that -- is it still your opinion that Mr. Ignacio Buenrostro's symptoms and the need for surgery are causally related to the accident on June 27th of 2011?
A. Yes.
Q. Do you apportion any of the need for that surgery to the earlier accident in April of 2010?
A. Apportionment is very difficult because clearly he had anatomic changes on his MRI scan prior to that. And so for him, he's either had a permanent aggravation of his preexisting condition or he's had, you know, a causal injury that's made that worse. And so by either of those definitions, you know, I think it's had a problem. It's significantly worse after the accident; so I was apportioning everything to that accident because prior to that he kind of had a neck like most people have that has to get treated once in a while.

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Q. As far as you know, neither Ignacio nor Esther have had surgery, correct?
A. As far as I know, they have not.
Q. Have you seen them again?
A. No, sir.
Q. So when you were provided records, you didn't evaluate them again?
A. No.
Q. So now we're, what, a little over two years since you saw them?
A. Yes.
Q. Okay. Given the conditions that you've diagnosed in both of them, what would you expect their present condition to be?
A. I would expect them to slowly progress and deteriorate over time, meaning worse pain, worse numbness, and worsening weakness. That waxes and wanes, but overall is a progressive negative trend.
Q. In the case of Ignacio, you recommended the three-level ACDF at C3-6. What is your full nondiscounted fee for that surgery?
A. I don't know. I would have to go ask the office what that amount is.
Q. When you do these surgeries for IMS, do you discount your fee at all?

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A. Slightly.
Q. How much do you discount your fee?
MR. KELSON: I would object to the extent this is collateral source and irrelevant for the current litigation. It's confidential and proprietary.
Q. (BY MR. COOPER) How much do you discount --
A. I don't know exactly how much.
Q. Is the discount that you provide to IMS the same or similar that you do to insurance companies like Blue Cross?
MR. KELSON: Same objections.
THE WITNESS: I have different contracts with different insurance carriers, and so the amount of a discount that varying insurance companies get is different. So Blue Cross, Cigna, Aetna, they all have different rates and different discounts that I negotiate with them. So none of them are the same; so I would say that it's a different amount than Intermountain.
Q. Do you know whether the discount to IMS is a greater discount or a smaller discount than what you give to Blue Cross, Aetna, or Cigna?
MR. KELSON: Same objections.
THE WITNESS: I would make the assumption that it's less, but I would have to actually look at the amounts.

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Q. (BY MR. COOPER) Who in your office would be most knowledgeable about the discounts in the full nondiscounted fee that you have for various surgeries?
MR. KELSON: Same objections.
THE WITNESS: I would have to ask the coding and billing and collecting office. I don't know that there's any one person. There's a team of people that do that, and I would have to ask one of them if they could research that and get that information.
Q. (BY MR. COOPER) But it would be somebody in your billing office; is that right?
A. Yes.
Q. Who's the main person in your billing office?
A. I don't know.
Q. When I say "your billing office," I assume we're talking about Salt Lake Orthopaedic Clinic, correct?
A. Correct.
Q. Okay. All of this evaluation, and if you had done the surgery that we're talking about, would have been done through Salt Lake Orthopaedic Clinic?
A. Yes.
Q. In the case of Esther, you recommended the two-level ACDF at C5-7. What is your full nondiscounted fee for that surgery?

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MR. KELSON: Objection. It's irrelevant and confidential and proprietary.
THE WITNESS: Same. I don't know exactly what the amount is.
Q. (BY MR. COOPER) And, again, with patients that are referred through IMS, you discount that full nondiscounted fee somewhat, but you don't know the amount of the discount, correct?
A. Correct.
Q. And you don't know whether it's more or less than the discount that you give to Blue Cross, Aetna, Cigna, those?
MR. KELSON: Same objections.
THE WITNESS: Correct.
Q. (BY MR. COOPER) If I could just see those two reports. I think we marked them as Exhibits --
MR. BOULTON: 21 and 22.
THE WITNESS: You've got the one.
Q. (BY MR. COOPER) I have 21. Let's talk about 21 for a second. At page 4, you estimated what the surgery would cost in Esther Buenrostro's case. Where did you get that information from?
A. Just my experience seeing patient bills and so forth.
Q. Where did -- how many bills did you look at to

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come up with that estimate?
A. I don't know how many bills I've looked at through the years, but --
Q. In other words, if I wanted to see the bills that you are relying upon to make that cost range, would I be able to find them?
A. No.
Q. I mean, could you produce them?
A. No. We'd have to pull varying bills and see what the average is, but I don't know exactly what that amount is. That's my estimation.
Q. All right. So to come up with this amount, you didn't go pull particular bills; this is just something that you had off the top of your head; am I following correctly?
A. Yes. With some experience.
Q. Well, I understand that. But, I mean, if we wanted to see the source of this, I can't go have you pull the same bills that you used; these are just numbers that you kind of came up with over time; is that right?
A. Yes.
Q. Okay. Did you look at any of the bills from any of the other providers?
A. To make this estimate?
Q. No. No. I'm sorry. I'm off on something

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different.
You say that the treatment described in the enclosed medical records was reasonable, necessary, and related to the June 28, 2011, auto collision. Did you look at their bills as well?
A. No.
Q. So you didn't offer any opinion as to whether their bills were reasonable and customary?
A. Correct.
Q. On Exhibit-22, which is Ignacio, you made an estimate of the cost of surgery for the three-level ACDF. Same basis as you described in Esther; this is just information that you have kind of formulated over time, but you couldn't go find specific bills that support this; is that right?
A. Correct.
Q. And, again, in her case, you didn't look at any of the bills from any of the other providers that saw her?
A. No, I did not.
Q. Okay. Thank you. I have no further questions at this time.
MR. BOULTON: I have no questions.
MR. KELSON: It's my understanding you generally don't read; is that correct?

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THE WITNESS: That's correct.
(The deposition concluded at 7:55 a.m.)
(Exhibit-12, Exhibit-13, Exhibit-23, and Exhibit-24 were marked for identification.)

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C E R T I F I C A T E

State of Utah)
ss.
County of Salt Lake)

I, Dawn Brunner-Hahn, a Registered Professional Reporter and Notary Public in and for the State of Utah, do hereby certify:
That the deposition of Kade T. Huntsman, M.D., the witness in the foregoing deposition named, was taken on April 27, 2017; that said witness was by me, before examination, duly sworn to testify the truth, the whole truth, and nothing but the truth in said cause;
That the testimony of said witness was reported by me in stenotype and thereafter transcribed into typewriting and that a full, true, and correct transcription of said testimony so taken and transcribed is set forth in the preceding pages;
That the witness waived his/her right to review the transcript, the Original transcript has been sealed and returned to the attorney noticing the deposition.
I further certify that I am not of kin or otherwise associated with any of the parties of said cause of action and that I am not interested in the event thereof.
WITNESS MY HAND at Salt Lake City, Utah, this 4th day of April, 2017.

Dawn Brunner-Hahn

Dawn Brunner-Hahn, RPR
Utah License No. 564205
Notary Public Commission Expires:
May 14, 2018

ADDENDUM 4

EXCERPTS OF DEPOSITION TRANSCRIPT OF ALAN TAYLOR MCDONALD TAKEN ON FEBRUARY 2, 2017

In The Matter Of:

VIGUERAS-AMEZCUA v.

SHOEMAN

ALAN TAYLOR MCDONALD

February 2, 2017

30(b)(6) OF INTERMOUNTAIN SURGICAL

Q & A Reporting, Inc.

1872 South Main Street

Salt Lake City, Utah 84115

801.484.2929

Original File 02-02-17 Macdonald_Alan.txt

Min-U-Script® with Word Index

THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JAVIER VIGUERAS-AMEZCUA,
Plaintiff,
vs.
NOAH SHOEMAN,
Defendant.

Case No. 160903969
Judge: Matthew Bates

THE 30(B)(6) DEPOSITION OF INTERMOUNTAIN SURGICAL BY AND THROUGH ITS AGENT, ALAN TAYLOR MCDONALD

February 2, 2017

11:09 a.m. - 1:22 p.m.

Location: LAW OFFICES OF LLOYD R. JONES & ASSOCIATES
230 South 500 East, Suite 400
Salt Lake City, Utah 84102

Reporter: Dawn Brunner-Hahn, RPR
Notary Public in and for the State of Utah

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EXHIBITS

PROCEEDINGS

ALAN TAYLOR MCDONALD,
having been first duly sworn to tell the truth,
was examined and testified as follows:

MR. COOPER: The record should reflect that this is the time and place for taking the 30(b)(6) and 30(b)(4) deposition of Intermountain Surgical, LLC, being taken pursuant to notice and may be used for all purposes under the Utah civil rules.

EXAMINATION

BY MR. COOPER:

Q. Would you state your name, address, and position with Intermountain Surgical.

A. Alan Taylor McDonald. 11762 South State Street, No. 315, Draper, Utah 84020. Chief executive officer of Intermountain Surgical, LLC.

Q. And the address that you gave, that's the address -- the office address of Intermountain Surgical, correct?

A. Correct.

Q. I may, just because I've got into the habit of it, refer to Intermountain Surgical as IMS. You'll understand what I'm talking about if I do that?

A. Yes.

Q. Okay. Thank you.

If you would, turn to Exhibit-47. I think these are all in order right now. Exhibit-47 is the amended notice of deposition in this matter. Have you seen that before today?

A. Yes.

Q. And you've had an opportunity to look at the various subparts of it and consider those, correct?

A. Yes.

Q. Have you had sufficient opportunity to review that matter and -- so that you can come here and testify about each of those issues?

A. Yes.

Q. Thank you. Did you --

MR. EVANS: You received my objections?

MR. COOPER: I did.

MR. EVANS: So just subject to those objections, yes.

MR. COOPER: You bet. And I understand, as we get into this, that there may be objections to the scope of those questions, and we'll deal with that when we come to it.

Q. (BY MR. COOPER) Although this may be obvious, would you just explain what there is about your position at IMS that gives you the ability to respond to all of these subissues?

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A. I've been the chief executive officer of IMS since July 2012, and am probably the person most knowledgeable in the business to answer the topics that are contained here in this notice of deposition.
Q. Okay. What did you do to prepare for this deposition, besides review this notice?
A. Reviewed -- well, besides reviewing the notice, I had discussions and conferences with my legal counsel.
Q. Okay. Did you consult with anybody else in the organization in order to familiarize yourself with background or facts so that you could answer questions concerning IMS?
A. No.
Q. Did you review any documents in preparation for the deposition?
A. Yes.
Q. What documents did you review?
A. Oh, I reviewed the invoice for the services that were rendered to Mr. Vigueras-Amezcua. I reviewed whatever documents had been produced in this matter, and just basically the underlying documents to Mr. Vigueras-Amezcua's surgical procedure.
Q. The documents that you reviewed, do you understand that all of those have been supplied in discovery to me and other counsel involved in this

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matter?
A. Yes. Subject to the -- to whatever my legal counsel supplied.
Q. I'm not sure I understand that answer.
A. Well, ask me your question again.
Q. Okay. Do you believe that all of the documents that you reviewed have been produced to me and other counsel in this matter?
A. Yes. I believe so.
Q. Does IMS maintain a file on Mr. Vigueras?
A. Yes.
Q. Have all of the documents in that file been produced?
MR. EVANS: Objection. Subject to the court's order.
MR. COOPER: Well, here's where I'm going, Scott. I'm not asking you to produce or talk about something that was not produced as a result of the court order, but I just want to understand if there are documents that haven't been produced, just by way of identity --
MR. EVANS: I can say there are a couple of documents that are internal accounting documents that don't deal specifically with him, the patient, and the court addressed that.

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MR. COOPER: Well, remember, my question was about Mr. Vigueras's file. Are those documents part of Mr. Vigueras's file?
MR. EVANS: No. No.
MR. COOPER: Then --
MR. EVANS: Mr. Vigueras's file has been produced.
MR. COOPER: That was my question, if I remember correctly.
MR. EVANS: Yeah. Well, yes, kind of.
MR. COOPER: Well, I don't want to go back and have it reread. Let me ask it again.
MR. EVANS: Okay.
Q. (BY MR. COOPER) IMS maintains a file on Mr. Vigueras?
A. Yes.
Q. And all of the documents in Mr. Vigueras's file have been produced, as far as you know?
A. Yes.
Q. Do you know when Intermountain Surgical, LLC, was formed?
A. I think it was -- I think it was initially formed in 2009.
Q. Who are the current owners of Intermountain Surgical, LLC?

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MR. EVANS: I'm going to object, like I did yesterday, but in this instance, the ownership of Intermountain hasn't been identified as a subject matter, and, really, the ownership of Intermountain is not really relevant to any issue in this case.
MR. COOPER: I understand.
Q. (BY MR. COOPER) Go ahead.
MR. EVANS: So I'm going to instruct him not to answer.
Q. (BY MR. COOPER) Okay. Do you know who the owners of Intermountain Surgical, LLC, are?
A. Yes.
Q. How many owners are there?
A. One.
Q. Is -- or does Canyon Crest Surgical II, LLC, have an ownership interest in IMS?
A. No.
Q. Does Dr. Huntsman have an ownership interest in IMS?
A. No.
Q. Going back to January of 2016, so a year ago, in January of 2016, did IMS have a license from the Utah Department of Health to operate an ambulatory surgical facility?
A. No.

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Q. Has it ever had such a license, to your knowledge?
A. No.
Q. Can you just describe for me what the business of Intermountain Surgical, LLC, is?
A. Yeah. IMS facilitates a healthcare opportunity, particularly orthopedic surgical consults and procedures for personal injury victims, or victims who don't typically otherwise have access to high-end healthcare because they have no health insurance.
Q. How does IMS identify potential clients, if you will?
A. Typically attorneys who represent those personal injury victims will contact Intermountain Surgical seeking to access our network of physicians in seeking -- in helping their clients seek quality medical care.
Q. The network of physicians, can you explain what you mean by that?
A. Yes. We have multiple orthopedic surgeons who work with Intermountain Surgical and who perform the surgical consults and, if necessary, the procedures for personal injury victims that they see that are introduced to them by Intermountain Surgical.
Q. So let me follow up on that to make sure I

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understand.
In some cases -- and I recognize that there may be variances to this -- but in some cases, an attorney contacts IMS to determine if it might be interested in financing the surgery for a client of theirs; am I correct?
A. It's more they will contact us, understanding that we have a network of qualified and quality orthopedic surgeons who will see their clients with no out-of-pocket costs up front to their clients.
Q. Does Intermountain Surgical vet these referrals, or does it take everyone that's referred?
A. Yeah. We vet the referrals.
Q. In what way?
A. We ask the attorney about the underlying -- it's basically an intake process. In other words, we'll ask the attorney about the underlying case, what happened, what are the facts, and basically is there insurance, ultimately, on the other end of this thing, whether it's uninsured, underinsured, or bodily injury coverage by a tortfeasor, and if the answer to those questions is satisfactory, then we will go ahead and green light a consult with one of the physicians that we work with, that we contract with.
Q. Who at IMS is responsible for that vetting

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process?
A. Kristi Jones, my compliance manager.
Q. What is a compliance manager in this context?
A. An individual who essentially vets a case like I just described.
Q. Does Kristi Jones have a staff, or does she do all of this herself?
A. Yeah. She has staff. She does a lot of it herself. She delegates some of it.
Q. How many employees does Intermountain Surgical have?
A. Intermountain Surgical has three employees.
Q. And those are whom?
A. Tyson DowDell, James Henrichsen, and Luica Becerra.
Q. You didn't include yourself or Kristi Jones. Are they additional employees or are they employed by -- well, that's my question. You didn't include them why?
A. Because they are not employees of Intermountain Surgical.
Q. But you are, correct?
A. No.
Q. Who are you employed with?
A. Well, I am the CEO of Intermountain Surgical. My wages are paid by a different company.

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Q. What company pays your wages?
MR. EVANS: Again, not on the list. Not relevant. Instruct him not to answer.
Q. (BY MR. COOPER) Does the same company that pays your wages pay Kristi Jones' wages?
A. Yes.
Q. Why the disconnect there? I mean, why does somebody -- another company pay your wages and those of Kristi Jones?
MR. EVANS: Again, I'm not sure that -- it's not on the list. It's not really relevant to anything in the case. I don't think he -- I'm going to instruct him not to answer.
Q. (BY MR. COOPER) What does Tyson DowDell do for IMS?
A. Tyson's description is a -- is a market manager, and Tyson markets to personal injury lawyers and law firms, cultivates and maintains those relationships, works as a liaison with our physicians and their scheduling people, their staff, the staff at Canyon Crest Surgical Center, and their scheduling people, et cetera, to just make the Intermountain Surgical process go.
Q. James Hendricks, what's his position?
A. Same description.
Q. And Luica Becerra?

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A. She is an administrative assistant to both James and Tyson.
Q. Based on your review of Mr. Vigueras's file, do you know how Mr. Vigueras was referred to IMS?
A. No, not specifically.
Q. I'm going to hand you what's been marked as Exhibit-12 in Mr. Vigueras's deposition. This is the earliest contact between Mr. Vigueras and Intermountain Surgical that I've been able to find. Do you know if there's any earlier contact?
A. There would likely have been an earlier contact which would precede this, which would be a request from the law firm to Luica or James or Tyson that they represent Mr. Vigueras. He has ongoing neck pain, cervical pain. He hasn't responded to conservative care. He has what appears to be a positive finding on his MRI, and would Intermountain Surgical have a physician who could see him, more or less. I'm kind of generalizing the process. So there would likely have been some kind of a contact between Intermountain Surgical and a representative of Mr. Vigueras's law firm to initiate the process.
Q. Okay. And the reason I asked that question is in other cases, I've actually seen a communication between the law office and Intermountain Surgical, and I

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think specifically with Ms. Becerra, in which there is a list of criteria, if you will, that's contained in that correspondence. Is there something similar in Mr. Vigueras's case?
A. Possibly. I mean, sometimes that's verbal, and sometimes there's a fax or an e-mail.
Q. Okay. The other reason I'm asking it is I want to make certain in this case that I have all of the records that pertain to Mr. Vigueras. And at least my recollection -- and sometimes I get confused because I get these records from various locations -- but I don't recall that this communication between Dr. Huntsman's office and Intermountain Surgical came from Intermountain Surgical. And so I still kind of question whether I got the full file from Mr. Vigueras. Do you remember, from looking at the file, whether there are communications, like Exhibit-12, or communications from the law office that communicated the criteria that was vetted before the green light was given for Mr. Vigueras to have a consult?
A. I don't recall. I suppose I could check, but I don't recall.
Q. Would you mind doing that? Provide that -- I mean, you have those things available, correct? Excuse me. I don't mean that you have that available because you don't know, but you have the file available?

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A. Yes. I have a file.
Q. And if there were such communications, you would expect it to be in that file?
A. Yes.
Q. Okay. So would you provide the full context of that file to counsel so that he can review it, and if it is something that can be produced, then presumably, he will produce it; otherwise, you'll advise that there are documents in there that are going to be objected to?
MR. EVANS: Right. And we have produced what we believe is in the file.
MR. COOPER: Okay. And that is exhibit what?
MR. EVANS: Well, there's Intermountain Surgical's first response back in October.
MR. COOPER: And I'm sorry, Scott, that's attached to which exhibit?
MR. EVANS: It's not attached to any of your exhibits. I brought it.
MR. COOPER: So let me just see what you're talking about.
MR. EVANS: It may be attached to an exhibit. I don't know. I just brought it.
MR. COOPER: Well, let's just check. So I think that's Exhibit-46, Scott.
MR. EVANS: Okay. Yeah. Exhibit-46. And then

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there was November --
MR. COOPER: But which document are you talking about?
MR. EVANS: This contained the treatment files or, you know -- this contained -- I mean, if you look at it, it talks -- it has --
MR. COOPER: I understand, but Exhibit-12 isn't in there, is it?
MR. EVANS: Exhibit-12?
MR. COOPER: The document we were just looking at.
MR. EVANS: Okay. And then there was the supplement on November 1st. It's not in there. All I'm saying is that we have produced what we believe was the file, so if we can go back and -- what is that? Yeah. If that's in our file, then we'll -- if that is in the file, we'll produce it. That's the -- you can look at all of them.
MR. COOPER: Well, the November 1st response is Exhibit-44.
MR. EVANS: Uh-huh.
MR. COOPER: I don't see it in there.
MR. EVANS: What I'm saying is in addition to what we produced, which we thought was the file, we'll go back and look. As you well know, sometimes files are not

ADDENDUM 5

HEALTH CARE FACILITY LICENSING AND INSPECTION ACT, TITLE 26, CHAPTER 21, UTAH CODE

West's Utah Code Annotated
Title 26. Utah Health Code
Chapter 21. Health Care Facility Licensing and Inspection Act

U.C.A. 1953 T. 26, Ch. 21, Refs & Annos
Currentness

U.C.A. 1953 T. 26, Ch. 21, Refs & Annos, UT ST T. 26, Ch. 21, Refs & Annos
Current through the 2017 First Special Session.

End of Document

West's Utah Code Annotated
Title 26. Utah Health Code
Chapter 21. Health Care Facility Licensing and Inspection Act (Refs & Annos)
Part 1. General Provisions

U.C.A. 1953 § 26-21-1

§ 26-21-1. Title

Currentness

This chapter is known as the "Health Care Facility Licensing and Inspection Act."

Credits
Laws 1981, c. 126, § 20; Laws 1990, c. 114, § 3; Laws 1997, c. 209, § 2, eff. May 5, 1997.

U.C.A. 1953 § 26-21-1, UT ST § 26-21-1
Current through the 2017 First Special Session.

End of Document

West's Utah Code Annotated
Title 26. Utah Health Code
Chapter 21. Health Care Facility Licensing and Inspection Act (Refs & Annos)
Part 1. General Provisions

U.C.A. 1953 § 26-21-2

§ 26-21-2. Definitions

Currentness

As used in this chapter:

(1) "Abortion clinic" means a type I abortion clinic or a type II abortion clinic.

(2) "Activities of daily living" means essential activities including:

(a) dressing;

(b) eating;

(c) grooming;

(d) bathing;

(e) toileting;

(f) ambulation;

(g) transferring; and

(h) self-administration of medication.

(3) "Ambulatory surgical facility" means a freestanding facility, which provides surgical services to patients not requiring hospitalization.

(4) "Assistance with activities of daily living" means providing of or arranging for the provision of assistance with activities of daily living.

(5)(a) "Assisted living facility" means:

(i) a type I assisted living facility, which is a residential facility that provides assistance with activities of daily living and social care to two or more residents who:

(A) require protected living arrangements; and

(B) are capable of achieving mobility sufficient to exit the facility without the assistance of another person; and

(ii) a type II assisted living facility, which is a residential facility with a home-like setting that provides an array of coordinated supportive personal and health care services available 24 hours per day to residents who have been assessed under department rule to need any of these services.

(b) Each resident in a type I or type II assisted living facility shall have a service plan based on the assessment, which may include:

(i) specified services of intermittent nursing care;

(ii) administration of medication; and

(iii) support services promoting residents' independence and self sufficiency.

(6) "Birthing center" means a freestanding facility, receiving maternal clients and providing care during pregnancy, delivery, and immediately after delivery.

(7) "Committee" means the Health Facility Committee created in Section 26-1-7.

(8) "Consumer" means any person not primarily engaged in the provision of health care to individuals or in the administration of facilities or institutions in which such care is provided and who does not hold a fiduciary position, or have a fiduciary interest in any entity involved in the provision of health care, and does not receive, either directly or through his spouse, more than 1/10 of his gross income from any entity or activity relating to health care.

(9) "End stage renal disease facility" means a facility which furnishes staff-assisted kidney dialysis services, self-dialysis services, or home-dialysis services on an outpatient basis.

(10) "Freestanding" means existing independently or physically separated from another health care facility by fire walls and doors and administrated by separate staff with separate records.

(11) "General acute hospital" means a facility which provides diagnostic, therapeutic, and rehabilitative services to both inpatients and outpatients by or under the supervision of physicians.

(12) "Governmental unit" means the state, or any county, municipality, or other political subdivision or any department, division, board, or agency of the state, a county, municipality, or other political subdivision.

(13)(a) "Health care facility" means general acute hospitals, specialty hospitals, home health agencies, hospices, nursing care facilities, residential-assisted living facilities, birthing centers, ambulatory surgical facilities, small health care facilities, abortion clinics, facilities owned or operated by health maintenance organizations, end stage renal disease facilities, and any other health care facility which the committee designates by rule.

(b) "Health care facility" does not include the offices of private physicians or dentists, whether for individual or group practice, except that it does include an abortion clinic.

(14) "Health maintenance organization" means an organization, organized under the laws of any state which:

(a) is a qualified health maintenance organization under 42 U.S.C. Sec. 300e-9; or

(b)(i) provides or otherwise makes available to enrolled participants at least the following basic health care services: usual physician services, hospitalization, laboratory, x-ray, emergency, and preventive services and out-of-area coverage;

(ii) is compensated, except for copayments, for the provision of the basic health services listed in Subsection (14)(b)(i) to enrolled participants by a payment which is paid on a periodic basis without regard to the date the health services are provided and which is fixed without regard to the frequency, extent, or kind of health services actually provided; and

(iii) provides physicians' services primarily directly through physicians who are either employees or partners of such organizations, or through arrangements with individual physicians or one or more groups of physicians organized on a group practice or individual practice basis.

(15)(a) "Home health agency" means an agency, organization, or facility or a subdivision of an agency, organization, or facility which employs two or more direct care staff persons who provide licensed nursing services, therapeutic services of physical therapy, speech therapy, occupational therapy, medical social services, or home health aide services on a visiting basis.

(b) "Home health agency" does not mean an individual who provides services under the authority of a private license.

(16) "Hospice" means a program of care for the terminally ill and their families which occurs in a home or in a health care facility and which provides medical, palliative, psychological, spiritual, and supportive care and treatment.

(17) "Nursing care facility" means a health care facility, other than a general acute or specialty hospital, constructed, licensed, and operated to provide patient living accommodations, 24-hour staff availability, and at least two of the following patient services:

(a) a selection of patient care services, under the direction and supervision of a registered nurse, ranging from continuous medical, skilled nursing, psychological, or other professional therapies to intermittent health-related or paraprofessional personal care services;

(b) a structured, supportive social living environment based on a professionally designed and supervised treatment plan, oriented to the individual's habilitation or rehabilitation needs; or

(c) a supervised living environment that provides support, training, or assistance with individual activities of daily living.

(18) "Person" means any individual, firm, partnership, corporation, company, association, or joint stock association, and the legal successor thereof.

(19) "Resident" means a person 21 years of age or older who:

(a) as a result of physical or mental limitations or age requires or requests services provided in an assisted living facility; and

(b) does not require intensive medical or nursing services as provided in a hospital or nursing care facility.

(20) "Small health care facility" means a four to 16 bed facility that provides licensed health care programs and services to residents.

(21) "Specialty hospital" means a facility which provides specialized diagnostic, therapeutic, or rehabilitative services in the recognized specialty or specialties for which the hospital is licensed.

(22) "Substantial compliance" means in a department survey of a licensee, the department determines there is an absence of deficiencies which would harm the physical health, mental health, safety, or welfare of patients or residents of a licensee.

(23) "Type I abortion clinic" means a facility, including a physician's office, but not including a general acute or specialty hospital, that:

(a) performs abortions, as defined in Section 76-7-301, during the first trimester of pregnancy; and

(b) does not perform abortions, as defined in Section 76-7-301, after the first trimester of pregnancy.

(24) "Type II abortion clinic" means a facility, including a physician's office, but not including a general acute or specialty hospital, that:

(a) performs abortions, as defined in Section 76-7-301, after the first trimester of pregnancy; or

(b) performs abortions, as defined in Section 76-7-301, during the first trimester of pregnancy and after the first trimester of pregnancy.

Credits

Laws 1981, c. 126, § 20; Laws 1985, c. 21, § 11; Laws 1990, c. 114, § 4; Laws 1994, c. 47, § 1; Laws 1996, c. 79, § 45, eff. April 29, 1996; Laws 1997, c. 209, § 3, eff. May 5, 1997; Laws 1998, c. 13, § 25, eff. May 4, 1998; Laws 1998, c. 192, § 2, eff. July 1, 1998; Laws 2000, c. 1, § 46, eff. May 1, 2000; Laws 2005, c. 31, § 1, eff. July 1, 2005; Laws 2011, c. 161, § 1, eff. July 1, 2011.

U.C.A. 1953 § 26-21-2, UT ST § 26-21-2
Current through the 2017 First Special Session.

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U.C.A. 1953 § 26-21-2.1

§ 26-21-2.1. Services

Currentness

(1) General acute hospitals and specialty hospitals shall remain open and be continuously ready to receive patients 24 hours of every day in a year and have an attending medical staff consisting of one or more physicians licensed to practice medicine and surgery under Title 58, Chapter 67, Utah Medical Practice Act, or Title 58, Chapter 68, Utah Osteopathic Medical Practice Act.

(2) A specialty hospital shall provide on-site all basic services required of a general acute hospital that are needed for the diagnosis, therapy, or rehabilitation offered to or required by patients admitted to or cared for in the facility.

(3)(a) A home health agency shall provide at least licensed nursing services or therapeutic services directly through the agency employees.

(b) A home health agency may provide additional services itself or under arrangements with another agency, organization, facility, or individual.

Credits
Laws 1990, c. 114, § 5; Laws 1997, c. 209, § 4, eff. May 5, 1997.

U.C.A. 1953 § 26-21-2.1, UT ST § 26-21-2.1
Current through the 2017 First Special Session.

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U.C.A. 1953 § 26-21-3

§ 26-21-3. Health Facility Committee--Members--Terms--Organization--Meetings

Currentness

(1) The Health Facility Committee created by Section 26-1-7 consists of 15 members appointed by the governor with the consent of the Senate. The appointed members shall be knowledgeable about health care facilities and issues. The membership of the committee is:

(a) one physician, licensed to practice medicine and surgery under Title 58, Chapter 67, Utah Medical Practice Act, or Title 58, Chapter 68, Utah Osteopathic Medical Practice Act, who is a graduate of a regularly chartered medical school;

(b) one hospital administrator;

(c) one hospital trustee;

(d) one representative of a freestanding ambulatory surgical facility;

(e) one representative of an ambulatory surgical facility that is affiliated with a hospital;

(f) two representatives of the nursing care facility industry;

(g) one registered nurse, licensed to practice under Title 58, Chapter 31b, Nurse Practice Act;

(h) one professional in the field of intellectual disabilities not affiliated with a nursing care facility;

(i) one licensed architect or engineer with expertise in health care facilities;

(j) two representatives of assisted living facilities licensed under this chapter;

(k) two consumers, one of whom has an interest in or expertise in geriatric care; and

(l) one representative from either a home health care provider or a hospice provider.

(2)(a) Except as required by Subsection (2)(b), members shall be appointed for a term of four years.

(b) Notwithstanding the requirements of Subsection (2)(a), the governor shall, at the time of appointment or reappointment, adjust the length of terms to ensure that the terms of committee members are staggered so that approximately half of the committee is appointed every two years.

(c) When a vacancy occurs in the membership for any reason, the replacement shall be appointed for the unexpired term by the governor, giving consideration to recommendations made by the committee, with the consent of the Senate.

(d) A member may not serve more than two consecutive full terms or 10 consecutive years, whichever is less. However, a member may continue to serve as a member until he is replaced.

(e) The committee shall annually elect from its membership a chair and vice chair.

(f) The committee shall meet at least quarterly, or more frequently as determined by the chair or five members of the committee.

(g) Eight members constitute a quorum. A vote of the majority of the members present constitutes action of the committee.

Credits

Laws 1981, c. 126, § 20; Laws 1990, c. 114, § 6; Laws 1996, c. 243, § 67, eff. April 29, 1996; Laws 1997, c. 209, § 5, eff. May 5, 1997; Laws 1999, c. 21, § 31, eff. May 3, 1999; Laws 2007, c. 158, § 1, eff. April 30, 2007; Laws 2008, c. 74, § 1, eff. May 5, 2008; Laws 2011, c. 366, § 29, eff. May 10, 2011.

U.C.A. 1953 § 26-21-3, UT ST § 26-21-3
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U.C.A. 1953 § 26-21-4

§ 26-21-4. Per diem and travel expenses of committee members

Currentness

A member may not receive compensation or benefits for the member's service, but may receive per diem and travel expenses in accordance with:

(1) Section 63A-3-106;

(2) Section 63A-3-107; and

(3) rules made by the Division of Finance pursuant to Sections 63A-3-106 and 63A-3-107.

Credits
Laws 1996, c. 243, § 68, eff. April 29, 1996; Laws 2010, c. 286, § 60, eff. May 11, 2010.

U.C.A. 1953 § 26-21-4, UT ST § 26-21-4
Current through the 2017 First Special Session.

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U.C.A. 1953 § 26-21-5

§ 26-21-5. Duties of committee

Currentness

The committee shall:

(1) with the concurrence of the department, make rules in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act:

(a) for the licensing of health-care facilities; and

(b) requiring the submission of architectural plans and specifications for any proposed new health-care facility or renovation to the department for review;

(2) approve the information for applications for licensure pursuant to Section 26-21-9;

(3) advise the department as requested concerning the interpretation and enforcement of the rules established under this chapter; and

(4) advise, consult, cooperate with, and provide technical assistance to other agencies of the state and federal government, and other states and affected groups or persons in carrying out the purposes of this chapter.

Credits

Laws 1981, c. 126, § 20; Laws 1990, c. 114, § 7; Laws 1991, c. 202, § 2; Laws 1991, c. 275, § 2; Laws 1992, c. 30, § 56; Laws 1993, c. 4, § 68; Laws 1993, c. 234, § 17; Laws 1995, c. 28, § 12, eff. May 1, 1995; Laws 1997, c. 209, § 6, eff. May 5, 1997; Laws 2008, c. 382, § 309, eff. May 5, 2008; Laws 2016, c. 74, § 6, eff. May 10, 2016.

U.C.A. 1953 § 26-21-5, UT ST § 26-21-5
Current through the 2017 First Special Session.

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U.C.A. 1953 § 26-21-6

§ 26-21-6. Duties of department

Currentness

(1) The department shall:

(a) enforce rules established pursuant to this chapter;

(b) authorize an agent of the department to conduct inspections of health care facilities pursuant to this chapter;

(c) collect information authorized by the committee that may be necessary to ensure that adequate health care facilities are available to the public;

(d) collect and credit fees for licenses as free revenue;

(e) collect and credit fees for conducting plan reviews as dedicated credits;

(f)(i) collect and credit fees for conducting clearance under Chapter 21, Part 2, Clearance for Direct Patient Access; and

(ii) beginning July 1, 2012:

(A) up to $105,000 of the fees collected under Subsection (1)(f)(i) are dedicated credits; and

(B) the fees collected for background checks under Subsection 26-21-204(6) and Section 26-21-205 shall be transferred to the Department of Public Safety to reimburse the Department of Public Safety for its costs in conducting the federal background checks;

(g) designate an executive secretary from within the department to assist the committee in carrying out its powers and responsibilities;

(h) establish reasonable standards for criminal background checks by public and private entities;

(i) recognize those public and private entities that meet the standards established pursuant to Subsection (1)(h); and

(j) provide necessary administrative and staff support to the committee.

(2) The department may:

(a) exercise all incidental powers necessary to carry out the purposes of this chapter;

(b) review architectural plans and specifications of proposed health care facilities or renovations of health care facilities to ensure that the plans and specifications conform to rules established by the committee; and

(c) in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, make rules as necessary to implement the provisions of this chapter.

Credits

Laws 1981, c. 126, § 20; Laws 1990, c. 114, § 8; Laws 1991, c. 202, § 3; Laws 1993, c. 4, § 69; Laws 1993, c. 234, § 18; Laws 1997, c. 209, § 7, eff. May 5, 1997; Laws 1998, c. 169, § 1, eff. July 1, 1998; Laws 2012, c. 328, § 1, eff. May 8, 2012; Laws 2016, c. 74, § 7, eff. May 10, 2016.

U.C.A. 1953 § 26-21-6, UT ST § 26-21-6
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U.C.A. 1953 § 26-21-6.5

§ 26-21-6.5. Licensing of an abortion clinic--Rulemaking authority--Fee

Currentness

(1) Beginning on April 1, 2012, a type I abortion clinic may not operate in the state without a license issued by the department to operate a type I abortion clinic.

(2) A type II abortion clinic may not operate in the state without a license issued by the department to operate a type II abortion clinic.

(3)(a) The department shall make rules establishing minimum health, safety, sanitary, and recordkeeping requirements for:

(i) a type I abortion clinic; and

(ii) a type II abortion clinic.

(b) The rules established under Subsection (3)(a) shall take effect on April 1, 2012.

(4) Beginning on April 1, 2012, in order to receive and maintain a license described in this section, an abortion clinic shall:

(a) apply for a license on a form prescribed by the department;

(b) satisfy and maintain the minimum health, safety, sanitary, and recordkeeping requirements established under Subsection (3)(a) that relate to the type of abortion clinic licensed;

(c) comply with the recordkeeping and reporting requirements of Subsection 76-7-305.6 (4) and Section 76-7-313;

(d) comply with the requirements of Title 76, Chapter 7, Part 3, Abortion;

(e) pay the annual licensing fee; and

(f) cooperate with inspections conducted by the department.

(5) Beginning on April 1, 2012, the department shall, at least twice per year, inspect each abortion clinic in the state to ensure that the abortion clinic is complying with all statutory and licensing requirements relating to the abortion clinic. At least one of the inspections shall be made without providing notice to the abortion clinic.

(6) Beginning on April 1, 2012, the department shall charge an annual license fee, set by the department in accordance with the procedures described in Section 63J-1-504, to an abortion clinic in an amount that will pay for the cost of the licensing requirements described in this section and the cost of inspecting abortion clinics.

(7) The department shall deposit the licensing fees described in this section in the General Fund as a dedicated credit to be used solely to pay for the cost of the licensing requirements described in this section and the cost of inspecting abortion clinics.

Credits

Laws 2011, c. 161, § 2, eff. July 1, 2011.

U.C.A. 1953 § 26-21-6.5, UT ST § 26-21-6.5
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U.C.A. 1953 § 26-21-7

§ 26-21-7. Exempt facilities

Currentness

This chapter does not apply to:

(1) a dispensary or first aid facility maintained by any commercial or industrial plant, educational institution, or convent;

(2) a health care facility owned or operated by an agency of the United States;

(3) the office of a physician or dentist whether it is an individual or group practice, except that it does apply to an abortion clinic;

(4) a health care facility established or operated by any recognized church or denomination for the practice of religious tenets administered by mental or spiritual means without the use of drugs, whether gratuitously or for compensation, if it complies with statutes and rules on environmental protection and life safety;

(5) any health care facility owned or operated by the Department of Corrections, created in Section 64-13-2; and

(6) a residential facility providing 24-hour care:

(a) that does not employ direct care staff;

(b) in which the residents of the facility contract with a licensed hospice agency to receive end-of-life medical care; and

(c) that meets other requirements for an exemption as designated by administrative rule.

Credits
Laws 1981, c. 126, § 20; Laws 1990, c. 114, § 9; Laws 1995, c. 353, § 1, eff. Jan. 1, 1996; Laws 2004, c. 141, § 1, eff. May 3, 2004; Laws 2011, c. 161, § 3, eff. July 1, 2011.

U.C.A. 1953 § 26-21-7, UT ST § 26-21-7
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U.C.A. 1953 § 26-21-8

§ 26-21-8. License required--Not assignable or transferable--Posting--Expiration and renewal--Time for compliance by operating facilities

Currentness

(1)(a) A person or governmental unit acting severally or jointly with any other person or governmental unit, may not establish, conduct, or maintain a health care facility in this state without receiving a license from the department as provided by this chapter and the rules adopted pursuant to this chapter.

(b) This Subsection (1) does not apply to facilities that are exempt under Section 26-21-7.

(2) A license issued under this chapter is not assignable or transferable.

(3) The current license shall at all times be posted in each health care facility in a place readily visible and accessible to the public.

(4)(a) The department may issue a license for a period of time not to exceed 12 months from the date of issuance for an abortion clinic and not to exceed 24 months from the date of issuance for other health care facilities that meet the provisions of this chapter and department rules adopted pursuant to this chapter.

(b) Each license expires at midnight on the day designated on the license as the expiration date, unless previously revoked by the department.

(c) The license shall be renewed upon completion of the application requirements, unless the department finds the health care facility has not complied with the provisions of this chapter or the rules adopted pursuant to this chapter.

(5) A license may be issued under this section only for the operation of a specific facility at a specific site by a specific person.

(6) Any health care facility in operation at the time of adoption of any applicable rules as provided under this chapter shall be given a reasonable time for compliance as determined by the committee.

Credits

Laws 1981, c. 126, § 20; Laws 1990, c. 114, § 10; Laws 1993, c. 201, § 1; Laws 1997, c. 209, § 8, eff. May 5, 1997; Laws 2003, c. 155, § 1, eff. May 5, 2003; Laws 2011, c. 161, § 4, eff. July 1, 2011; Laws 2016, c. 74, § 8, eff. May 10, 2016.

U.C.A. 1953 § 26-21-8, UT ST § 26-21-8
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U.C.A. 1953 § 26-21-9

§ 26-21-9. Application for license--Information required--Public records

Currentness

(1) An application for license shall be made to the department in a form prescribed by the department. The application and other documentation requested by the department as part of the application process shall require such information as the committee determines necessary to ensure compliance with established rules.

(2) Information received by the department in reports and inspections shall be public records, except the information may not be disclosed if it directly or indirectly identifies any individual other than the owner or operator of a health facility (unless disclosure is required by law) or if its disclosure would otherwise constitute an unwarranted invasion of personal privacy.

(3) Information received by the department from a health care facility, pertaining to that facility's accreditation by a voluntary accrediting organization, shall be private data except for a summary prepared by the department related to licensure standards.

Credits

Laws 1981, c. 126, § 20; Laws 1983, c. 132, § 1; Laws 1990, c. 114, § 11; Laws 2000, c. 86, § 27, eff. May 1, 2000; Laws 2011, c. 297, § 181, eff. May 10, 2011.

U.C.A. 1953 § 26-21-9, UT ST § 26-21-9
Current through the 2017 First Special Session.

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U.C.A. 1953 § 26-21-9.5

§ 26-21-9.5. Repealed by Laws 2012, c. 328, § 18, eff. May 8, 2012

Currentness

U.C.A. 1953 § 26-21-9.5, UT ST § 26-21-9.5
Current through the 2017 First Special Session.

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U.C.A. 1953 § 26-21-10

§ 26-21-10. Repealed by Laws 1997, c. 209, § 18, eff. May 5, 1997

Currentness

U.C.A. 1953 § 26-21-10, UT ST § 26-21-10
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U.C.A. 1953 § 26-21-11

§ 26-21-11. Violations--Denial or revocation of license--Restricting or prohibiting new admissions--Monitor

Currentness

If the department finds a violation of this chapter or any rules adopted pursuant to this chapter the department may take one or more of the following actions:

(1) serve a written statement of violation requiring corrective action, which shall include time frames for correction of all violations;

(2) deny or revoke a license if it finds:

(a) there has been a failure to comply with the rules established pursuant to this chapter;

(b) evidence of aiding, abetting, or permitting the commission of any illegal act; or

(c) conduct adverse to the public health, morals, welfare, and safety of the people of the state;

(3) restrict or prohibit new admissions to a health care facility or revoke the license of a health care facility for:

(a) violation of any rule adopted under this chapter; or

(b) permitting, aiding, or abetting the commission of any illegal act in the health care facility;

(4) place a department representative as a monitor in the facility until corrective action is completed;

(5) assess to the facility the cost incurred by the department in placing a monitor;

(6) assess an administrative penalty as allowed by Subsection 26-23-6(1)(a); or

(7) issue a cease and desist order to the facility.

Credits

Laws 1981, c. 126, § 20; Laws 1990, c. 114, § 13; Laws 1997, c. 209, § 9, eff. May 5, 1997.

U.C.A. 1953 § 26-21-11, UT ST § 26-21-11
Current through the 2017 First Special Session.

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U.C.A. 1953 § 26-21-11.1

§ 26-21-11.1. Failure to follow certain health care claims practices--Penalties

Currentness

(1) The department may assess a fine of up to $500 per violation against a health care facility that violates Subsection 31A-26-301.5(4).

(2) The department shall waive the fine described in Subsection (1) if:

(a) the health care facility demonstrates to the department that the health care facility mitigated and reversed any damage to the insured caused by the health care facility's violation; or

(b) the insured does not pay the full amount due on the bill that is the subject of the violation, including any interest, fees, costs, and expenses, within 120 days after the day on which the health care facility makes a report to a credit bureau or uses the services of a collection agency in violation of Subsection 31A-26-301.5(4).

Credits
Laws 2017, c. 321, § 1, eff. May 9, 2017.

U.C.A. 1953 § 26-21-11.1, UT ST § 26-21-11.1
Current through the 2017 First Special Session.

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U.C.A. 1953 § 26-21-12

§ 26-21-12. Issuance of new license after revocation--Restoration

Currentness

(1) If a license is revoked, the department may issue a new license only after it determines by inspection that the facility has corrected the conditions that were the basis of revocation and that the facility complies with all provisions of this chapter and applicable rules.

(2) If the department does not renew a license because of noncompliance with the provisions of this chapter or the rules adopted under this chapter, the department may issue a new license only after the facility complies with all renewal requirements and the department determines that the interests of the public will not be jeopardized.

Credits
Laws 1981, c. 126, § 20; Laws 1990, c. 114, § 14; Laws 1997, c. 209, § 10, eff. May 5, 1997.

U.C.A. 1953 § 26-21-12, UT ST § 26-21-12
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U.C.A. 1953 § 26-21-13

§ 26-21-13. License issued to facility in compliance or substantial compliance with chapter and rules

Currentness

(1) The department shall issue a standard license for a health care facility which is found to be in compliance with the provisions of this chapter and with all applicable rules adopted by the committee.

(2) The department may issue a provisional or conditional license for a health care facility which is in substantial compliance if the interests of the public will not be jeopardized.

Credits
Laws 1981, c. 126, § 20; Laws 1990, c. 114, § 15.

U.C.A. 1953 § 26-21-13, UT ST § 26-21-13
Current through the 2017 First Special Session.

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U.C.A. 1953 § 26-21-13.5

§ 26-21-13.5. Intermediate care facilities for people with an intellectual disability--Licensing

Currentness

(1)(a) It is the Legislature's intent that a person with a developmental disability be provided with an environment and surrounding that, as closely as possible, resembles small community-based, homelike settings, to allow those persons to have the opportunity, to the maximum extent feasible, to exercise their full rights and responsibilities as citizens.

(b) It is the Legislature's purpose, in enacting this section, to provide assistance and opportunities to enable a person with a developmental disability to achieve the person's maximum potential through increased independence, productivity, and integration into the community.

(2) After July 1, 1990, the department may only license intermediate care beds for people with an intellectual disability in small health care facilities.

(3) The department may define by rule "small health care facility" for purposes of licensure under this section and adopt rules necessary to carry out the requirements and purposes of this section.

(4) This section does not apply to the renewal of a license or the licensure to a new owner of any facility that was licensed on or before July 1, 1990, and that licensure has been maintained without interruption.

Credits
Laws 1989, c. 48, § 1; Laws 1993, c. 201, § 2; Laws 2011, c. 366, § 31, eff. May 10, 2011.

U.C.A. 1953 § 26-21-13.5, UT ST § 26-21-13.5
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U.C.A. 1953 § 26-21-13.6

§ 26-21-13.6. Rural hospital--Optional service designation

Currentness

(1) The Legislature finds that:

(a) the rural citizens of this state need access to hospitals and primary care clinics;

(b) financial stability of remote-rural hospitals and their integration into remote-rural delivery networks is critical to ensure the continued viability of remote-rural health care; and

(c) administrative simplicity is essential for providing large benefits to small-scale remote-rural providers who have limited time and resources.

(2) After July 1, 1995, the department may grant variances to remote-rural acute care hospitals for specific services currently required for licensure under general hospital standards established by department rule.

(3) For purposes of this section, "remote-rural hospitals" are hospitals that are in a county with less than 20 people per square mile.

Credits
Laws 1995, c. 321, § 5, eff. May 1, 1995.

U.C.A. 1953 § 26-21-13.6, UT ST § 26-21-13.6
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U.C.A. 1953 § 26-21-14

§ 26-21-14. Closing facility--Appeal

Currentness

(1) If the department finds a condition in any licensed health care facility that is a clear hazard to the public health, the department may immediately order that facility closed and may prevent the entrance of any resident or patient onto the premises of that facility until the condition is eliminated.

(2) Parties aggrieved by the actions of the department under this section may obtain an adjudicative proceeding and judicial review.

Credits
Laws 1981, c. 126, § 20; Laws 1987, c. 161, § 65; Laws 1990, c. 114, § 16.

U.C.A. 1953 § 26-21-14, UT ST § 26-21-14
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U.C.A. 1953 § 26-21-15

§ 26-21-15. Action by department for injunction

Currentness

Notwithstanding the existence of any other remedy, the department may, in the manner provided by law, upon the advice of the attorney general, who shall represent the department in the proceedings, maintain an action in the name of the state for injunction or other process against any person or governmental unit to restrain or prevent the establishment, conduct, management, or operation of a health care facility which is in violation of this chapter or rules adopted by the committee.

Credits
Laws 1981, c. 126, § 20; Laws 1990, c. 114, § 17.

U.C.A. 1953 § 26-21-15, UT ST § 26-21-15
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U.C.A. 1953 § 26-21-16

§ 26-21-16. Operating facility in violation of chapter a misdemeanor

Currentness

In addition to the penalties in Section 26-23-6, any person owning, establishing, conducting, maintaining, managing, or operating a health care facility in violation of this chapter is guilty of a class A misdemeanor.

Credits

Laws 1981, c. 126, § 20; Laws 1990, c. 114, § 18; Laws 1991, c. 241, § 18; Laws 1997, c. 209, § 11, eff. May 5, 1997; Laws 2009, c. 347, § 4, eff. May 12, 2009.

U.C.A. 1953 § 26-21-16, UT ST § 26-21-16
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U.C.A. 1953 § 26-21-17

§ 26-21-17. Department agency of state to contract for certification of facilities under Social Security Act

Currentness

The department is the sole agency of the state authorized to enter into a contract with the United States government for the certification of health care facilities under Title XVIII and Title XIX of the Social Security Act, [1] and any amendments thereto.

Credits
Laws 1981, c. 126, § 20; Laws 1990, c. 114, § 19.

Footnotes
1 42 U.S.C.A. § 1395 et seq. and 42 U.S.C.A. § 1396 et seq.
U.C.A. 1953 § 26-21-17, UT ST § 26-21-17
Current through the 2017 First Special Session.

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U.C.A. 1953 § 26-21-18

§ 26-21-18. Repealed by Laws 1990, c. 114, § 25, eff. April 23, 1990

Currentness

U.C.A. 1953 § 26-21-18, UT ST § 26-21-18
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U.C.A. 1953 § 26-21-19

§ 26-21-19. Life and Health Insurance Guaranty Association Act not amended

Currentness

The provisions of this chapter do not amend, affect, or alter the provisions of Title 31A, Chapter 28, Guaranty Associations.

Credits
Laws 1981, c. 126, § 20; Laws 1985, c. 242, § 3.

U.C.A. 1953 § 26-21-19, UT ST § 26-21-19
Current through the 2017 First Special Session.

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U.C.A. 1953 § 26-21-20

§ 26-21-20. Requirement for hospitals to provide statements of itemized charges to patients

Currentness

(1) For purposes of this section, "hospital" includes:

(a) an ambulatory surgical facility;

(b) a general acute hospital; and

(c) a specialty hospital.

(2) A hospital shall provide a statement of itemized charges to any patient receiving medical care or other services from that hospital.

(3)(a) The statement shall be provided to the patient or the patient's personal representative or agent at the hospital's expense, personally, by mail, or by verifiable electronic delivery after the hospital receives an explanation of benefits from a third party payer which indicates the patient's remaining responsibility for the hospital charges.

(b) If the statement is not provided to a third party, it shall be provided to the patient as soon as possible and practicable.

(4) The statement required by this section:

(a) shall itemize each of the charges actually provided by the hospital to the patient;

(b)(i) shall include the words in bold "THIS IS THE BALANCE DUE AFTER PAYMENT FROM YOUR HEALTH INSURER"; or

(ii) shall include other appropriate language if the statement is sent to the patient under Subsection (3)(b); and

(c) may not include charges of physicians who bill separately.

(5) The requirements of this section do not apply to patients who receive services from a hospital under Title XIX of the Social Security Act. [1]

(6) Nothing in this section prohibits a hospital from sending an itemized billing statement to a patient before the hospital has received an explanation of benefits from an insurer. If a hospital provides a statement of itemized charges to a patient prior to receiving the explanation of benefits from an insurer, the itemized statement shall be marked in bold: "DUPLICATE: DO NOT PAY" or other appropriate language.

Credits

Laws 1989, c. 196, § 2; Laws 1990, c. 114, § 20; Laws 1997, c. 209, § 12, eff. May 5, 1997; Laws 2000, c. 86, § 28, eff. May 1, 2000; Laws 2009, c. 11, § 1, eff. May 12, 2009.

Footnotes

1 42 U.S.C.A. § 1936 et seq.

U.C.A. 1953 § 26-21-20, UT ST § 26-21-20

Current through the 2017 First Special Session.

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U.C.A. 1953 § 26-21-21

§ 26-21-21. Authentication of medical records

Currentness

Any entry in a medical record compiled or maintained by a health care facility may be authenticated by identifying the author of the entry by:

(1) a signature including first initial, last name, and discipline; or

(2) the use of a computer identification process unique to the author that definitively identifies the author.

Credits
Laws 1992, c. 31, § 1.

U.C.A. 1953 § 26-21-21, UT ST § 26-21-21
Current through the 2017 First Special Session.

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U.C.A. 1953 § 26-21-22

§ 26-21-22. Reporting of disciplinary information--Immunity from liability

Currentness

A health care facility licensed under this chapter which reports disciplinary information on a licensed nurse to the Division of Occupational and Professional Licensing within the Department of Commerce as required by Section 58-31b-702 is entitled to the immunity from liability provided by that section.

Credits
Laws 1998, c. 288, § 1, eff. July 1, 1998.

U.C.A. 1953 § 26-21-22, UT ST § 26-21-22
Current through the 2017 First Special Session.

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U.C.A. 1953 § 26-21-23

§ 26-21-23. Licensing of a new nursing care facility--Approval for a licensed bed in an existing nursing care facility--Fine for excess Medicare inpatient revenue

Currentness

(1) Notwithstanding Section 26-21-2, as used in this section:

(a) "Medicaid" means the Medicaid program, as that term is defined in Section 26-18-2.

(b) "Medicaid certification" means the same as that term is defined in Section 26-18-501.

(c) "Nursing care facility" and "small health care facility":

(i) mean the following facilities licensed by the department under this chapter:

(A) a skilled nursing facility;

(B) an intermediate care facility; or

(C) a small health care facility with four to 16 beds functioning as a skilled nursing facility; and

(ii) do not mean:

(A) an intermediate care facility for the intellectually disabled;

(B) a critical access hospital that meets the criteria of 42 U.S.C. 1395i-4(c)(2)(1998);

(C) a small health care facility that is hospital based; or

(D) a small health care facility other than a skilled nursing care facility with no more than 16 beds.

(d) "Rural county" means the same as that term is defined in Section 26-18-501.

(2) Except as provided in Subsection (6) and Section 26-21-28, a new nursing care facility shall be approved for a health facility license only if:

(a) under the provisions of Section 26-18-503 the facility's nursing care facility program has received Medicaid certification or will receive Medicaid certification for each bed in the facility;

(b) the facility's nursing care facility program has received or will receive approval for Medicaid certification under Subsection 26-18-503(5), if the facility is located in a rural county; or

(c)(i) the applicant submits to the department the information described in Subsection (3); and

(ii) based on that information, and in accordance with Subsection (4), the department determines that approval of the license best meets the needs of the current and future patients of nursing care facilities within the area impacted by the new facility.

(3) A new nursing care facility seeking licensure under Subsection (2) shall submit to the department the following information:

(a) proof of the following as reasonable evidence that bed capacity provided by nursing care facilities within the county or group of counties that would be impacted by the facility is insufficient:

(i) nursing care facility occupancy within the county or group of counties:

(A) has been at least 75% during each of the past two years for all existing facilities combined; and

(B) is projected to be at least 75% for all nursing care facilities combined that have been approved for licensure but are not yet operational;

(ii) there is no other nursing care facility within a 35-mile radius of the new nursing care facility seeking licensure under Subsection (2); and

(b) a feasibility study that:

(i) shows the facility's annual Medicare inpatient revenue, including Medicare Advantage revenue, will not exceed 49% of the facility's annual total revenue during each of the first three years of operation;

(ii) shows the facility will be financially viable if the annual occupancy rate is at least 88%;

(iii) shows the facility will be able to achieve financial viability;

(iv) shows the facility will not:

(A) have an adverse impact on existing or proposed nursing care facilities within the county or group of counties that would be impacted by the facility; or

(B) be within a three-mile radius of an existing nursing care facility or a new nursing care facility that has been approved for licensure but is not yet operational;

(v) is based on reasonable and verifiable demographic and economic assumptions;

(vi) is based on data consistent with department or other publicly available data; and

(vii) is based on existing sources of revenue.

(4) When determining under Subsection (2)(c) whether approval of a license for a new nursing care facility best meets the needs of the current and future patients of nursing care facilities within the area impacted by the new facility, the department shall consider:

(a) whether the county or group of counties that would be impacted by the facility is underserved by specialized or unique services that would be provided by the facility; and

(b) how additional bed capacity should be added to the long-term care delivery system to best meet the needs of current and future nursing care facility patients within the impacted area.

(5) The department may approve the addition of a licensed bed in an existing nursing care facility only if:

(a) each time the facility seeks approval for the addition of a licensed bed, the facility satisfies each requirement for licensure of a new nursing care facility in Subsections (2)(c), (3), and (4); or

(b) the bed has been approved for Medicaid certification under Section 26-18-503 or 26-18-505.

(6) Subsection (2) does not apply to a nursing care facility that:

(a) has, by the effective date of this act, submitted to the department schematic drawings, and paid applicable fees, for a particular site or a site within a three-mile radius of that site;

(b) before July 1, 2016:

(i) filed an application with the department for licensure under this section and paid all related fees due to the department; and

(ii) submitted to the department architectural plans and specifications, as defined by the department by administrative rule, for the facility;

(c) applies for a license within three years of closing for renovation;

(d) replaces a nursing care facility that:

(i) closed within the past three years; or

(ii) is located within five miles of the facility;

(e) is undergoing a change of ownership, even if a government entity designates the facility as a new nursing care facility; or

(f) is a state-owned veterans home, regardless of who operates the home.

(7)(a) For each year the annual Medicare inpatient revenue, including Medicare Advantage revenue, of a nursing care facility approved for a health facility license under Subsection (2)(c) exceeds 49% of the facility's total revenue for the year, the facility shall be subject to a fine of $50,000, payable to the department.

(b) A nursing care facility approved for a health facility license under Subsection (2)(c) shall submit to the department the information necessary for the department to annually determine whether the facility is subject to the fine in Subsection (7)(a).

(c) The department:

(i) shall make rules, in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, specifying the information a nursing care facility shall submit to the department under Subsection (7)(b);

(ii) shall annually determine whether a facility is subject to the fine in Subsection (7)(a);

(iii) may take one or more of the actions in Section 26-21-11 or 26-23-6 against a facility for nonpayment of a fine due under Subsection (7)(a); and

(iv) shall deposit fines paid to the department under Subsection (7)(a) into the Nursing Care Facilities Provider Assessment Fund, created by Section 26-35a-106.

Credits

Laws 2007, c. 24, § 2, eff. Feb. 28, 2007; Laws 2008, c. 382, § 311, eff. May 5, 2008; Laws 2013, c. 60, § 3, eff. May 14, 2013; Laws 2016, c. 276, § 5, eff. March 25, 2016; Laws 2016, c. 357, § 1, eff. May 10, 2016; Laws 2017, c. 443, § 4, eff. July 1, 2017.

U.C.A. 1953 § 26-21-23, UT ST § 26-21-23
Current through the 2017 First Special Session.

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U.C.A. 1953 § 26-21-24

§ 26-21-24. Prohibition against bed banking by nursing care facilities for Medicaid reimbursement

Currentness

(1) For purposes of this section:

(a) "bed banking" means the designation of a nursing care facility bed as not part of the facility's operational bed capacity; and

(b) "nursing care facility" is as defined in Subsection 26-21-23(1).

(2) Beginning July 1, 2008, the department shall, for purposes of Medicaid reimbursement under Chapter 18, Part 1, Medical Assistance Programs, prohibit the banking of nursing care facility beds.

Credits
Laws 2008, c. 347, § 3, eff. Mar. 18, 2008.

U.C.A. 1953 § 26-21-24, UT ST § 26-21-24
Current through the 2017 First Special Session.

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U.C.A. 1953 § 26-21-25

§ 26-21-25. Patient identity protection

Currentness

(1) As used in this section:

(a) "EMTALA" means the federal Emergency Medical Treatment and Active Labor Act.

(b) "Health professional office" means:

(i) a physician's office; or

(ii) a dental office.

(c) "Medical facility" means:

(i) a general acute hospital;

(ii) a specialty hospital;

(iii) a home health agency;

(iv) a hospice;

(v) a nursing care facility;

(vi) a residential-assisted living facility;

(vii) a birthing center;

(viii) an ambulatory surgical facility;

(ix) a small health care facility;

(x) an abortion clinic;

(xi) a facility owned or operated by a health maintenance organization;

(xii) an end stage renal disease facility;

(xiii) a health care clinic; or

(xiv) any other health care facility that the committee designates by rule.

(2)(a) In order to discourage identity theft and health insurance fraud, and to reduce the risk of medical errors caused by incorrect medical records, a medical facility or a health professional office shall request identification from an individual prior to providing in-patient or out-patient services to the individual.

(b) If the individual who will receive services from the medical facility or a health professional office lacks the legal capacity to consent to treatment, the medical facility or a health professional office shall request identification:

(i) for the individual who lacks the legal capacity to consent to treatment; and

(ii) from the individual who consents to treatment on behalf of the individual described in Subsection (2)(b)(i).

(3) A medical facility or a health professional office:

(a) that is subject to EMTALA:

(i) may not refuse services to an individual on the basis that the individual did not provide identification when requested; and

(ii) shall post notice in its emergency department that informs a patient of the patient's right to treatment for an emergency medical condition under EMTALA;

(b) may not be penalized for failing to ask for identification;

(c) is not subject to a private right of action for failing to ask for identification; and

(d) may document or confirm patient identity by:

(i) photograph;

(ii) fingerprinting;

(iii) palm scan; or

(iv) other reasonable means.

(4) The identification described in this section:

(a) is intended to be used for medical records purposes only; and

(b) shall be kept in accordance with the requirements of the Health Insurance Portability and Accountability Act of 1996.

Credits
Laws 2009, c. 36, § 1, eff. May 12, 2009; Laws 2010, c. 218, § 15, eff. May 11, 2010.

U.C.A. 1953 § 26-21-25, UT ST § 26-21-25
Current through the 2017 First Special Session.

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U.C.A. 1953 § 26-21-26

§ 26-21-26. General acute hospital to report prescribed controlled substance poisoning or overdose

Currentness

(1) If a person who is 12 years of age or older is admitted to a general acute hospital for poisoning or overdose involving a prescribed controlled substance, the general acute hospital shall, within three business days after the day on which the person is admitted, send a written report to the Division of Occupational and Professional Licensing, created in Section 58-1-103, that includes:

(a) the patient's name and date of birth;

(b) each drug or other substance found in the person's system that may have contributed to the poisoning or overdose, if known;

(c) the name of each person who the general acute hospital has reason to believe may have prescribed a controlled substance described in Subsection (1)(b) to the person, if known; and

(d) the name of the hospital and the date of admission.

(2) Nothing in this section may be construed as creating a new cause of action.

Credits
Laws 2010, c. 290, § 1, eff. May 11, 2010; Laws 2016, c. 99, § 1, eff. May 10, 2016.

U.C.A. 1953 § 26-21-26, UT ST § 26-21-26
Current through the 2017 First Special Session.

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U.C.A. 1953 § 26-21-27

§ 26-21-27. Consumer access to health care facility charges

Currentness

Beginning January 1, 2011, a health care facility licensed under this chapter shall, when requested by a consumer:

(1) make a list of prices charged by the facility available for the consumer that includes the facility's:

(a) in-patient procedures;

(b) out-patient procedures;

(c) the 50 most commonly prescribed drugs in the facility;

(d) imaging services; and

(e) implants; and

(2) provide the consumer with information regarding any discounts the facility provides for:

(a) charges for services not covered by insurance; or

(b) prompt payment of billed charges.

Credits
Laws 2010, c. 68, § 2, eff. March 22, 2010.

U.C.A. 1953 § 26-21-27, UT ST § 26-21-27
Current through the 2017 First Special Session.

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U.C.A. 1953 § 26-21-28

§ 26-21-28. Pilot program for managed care model with a small health care facility operating as a skilled nursing facility

Currentness

(1) Notwithstanding the requirement for Medicaid certification under Chapter 18, Part 5, Long Term Care Facility--Medicaid Certification, and Section 26-21-23, a small health care facility with four to 16 beds, functioning as a skilled nursing facility, may be approved for licensing by the department as a pilot program in accordance with this section, and without obtaining Medicaid certification for the beds in the facility.

(2)(a) The department shall establish one pilot program with a facility that meets the qualifications under Subsection (3). The purpose of the pilot program is to study the impact of an integrated managed care model on cost and quality of care involving pre- and post-surgical services offered by a small health care facility operating as a skilled nursing facility.

(b) The small health care facility that is operating as a skilled nursing facility and is participating in the pilot program, shall, on or before November 30, 2020, issue a report to the Legislative Health and Human Services Interim Committee on patient outcomes and cost of care associated with the pilot program.

(3) A small health care facility with four to 16 beds that functions as a skilled nursing facility may apply for a license under the pilot program if the facility will:

(a) be located in:

(i) a county of the second class that has at least 1,800 square miles within the county; and

(ii) a city of the fifth class; and

(b) limit a patient's stay in the facility to no more than 10 days.

Credits
Laws 2016, c. 357, § 2, eff. May 10, 2016.

U.C.A. 1953 § 26-21-28, UT ST § 26-21-28
Current through the 2017 First Special Session.

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U.C.A. 1953 § 26-21-29

§ 26-21-29. Birthing centers--Regulatory restrictions

Currentness

(1) For purposes of this section:

(a) "Certified nurse midwife" means an individual who is licensed under Title 58, Chapter 44a, Nurse Midwife Practice Act.

(b) "Direct-entry midwife" means an individual who is licensed under Title 58, Chapter 77, Direct-Entry Midwife Act.

(c) "Licensed maternity care practitioner" includes:

(i) a physician;

(ii) a certified nurse midwife;

(iii) a direct entry midwife;

(iv) a naturopathic physician; and

(v) other individuals who are licensed under Title 58, Division of Occupational and Professional Licensing Act and whose scope of practice includes midwifery or obstetric care.

(d) "Naturopathic physician" means an individual who is licensed under Title 58, Chapter 71, Naturopathic Physician Practice Act.

(e) "Physician" means an individual who is licensed under Title 58, Chapter 67, Utah Medical Practice Act, or Title 58, Chapter 68, Utah Osteopathic Medical Practice Act.

(2) The Health Facility Committee and the department may not require a birthing center or a licensed maternity care practitioner who practices at a birthing center to:

(a) maintain admitting privileges at a general acute hospital;

(b) maintain a written transfer agreement with one or more general acute hospitals;

(c) maintain a collaborative practice agreement with a physician; or

(d) have a physician or certified nurse midwife present at each birth when another licensed maternity care practitioner is present at the birth and remains until the maternal patient and newborn are stable postpartum.

(3) The Health Facility Committee and the department shall:

(a) permit all types of licensed maternity care practitioners to practice in a birthing center; and

(b) except as provided in Subsection (2)(b), require a birthing center to have a written plan for the transfer of a patient to a hospital in accordance with Subsection (4).

(4) A transfer plan under Subsection (3)(b) shall:

(a) be signed by the patient; and

(b) indicate that the plan is not an agreement with a hospital.

(5) If a birthing center transfers a patient to a licensed maternity care practitioner or facility, the responsibility of the licensed maternity care practitioner or facility, for the patient:

(a) does not begin until the patient is physically within the care of the licensed maternity care practitioner or facility;

(b) is limited to the examination and care provided after the patient is transferred to the licensed maternity care practitioner or facility; and

(c) does not include responsibility or accountability for the patient's decision to pursue an out-of-hospital birth and the services of a birthing center.

(6)(a) Except as provided in Subsection (6)(c), a licensed maternity care practitioner who is not practicing at a birthing center may, upon receiving a briefing from a member of a birthing center's clinical staff, issue a medical order for the birthing center's patient without assuming liability for the care of the patient for whom the order was issued.

(b) Regardless of the advice given or order issued under Subsection (6)(a), the responsibility and liability for caring for the patient is that of the birthing center and the birthing center's clinical staff.

(c) The licensed maternity care practitioner giving the order under Subsection (6)(a) is responsible and liable only for the appropriateness of the order, based on the briefing received under Subsection (6)(a).

(7) The department shall hold a public hearing under Subsection 63G-3-302(2)(a) for a proposed administrative rule, and amendment to a rule, or repeal of a rule, that relates to birthing centers.

Credits
Laws 2016, c. 73, § 1, eff. May 10, 2016.

U.C.A. 1953 § 26-21-29, UT ST § 26-21-29
Current through the 2017 First Special Session.

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U.C.A. 1953 § 26-21-100

§ 26-21-100. Reserved

Currentness

Reserved

Credits
Laws 2012, c. 328, § 2, eff. May 8, 2012.

U.C.A. 1953 § 26-21-100, UT ST § 26-21-100
Current through the 2017 First Special Session.

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Part 2. Clearance for Direct Patient Access

U.C.A. 1953 § 26-21-201

§ 26-21-201. Definitions

Currentness

As used in this part:

(1) "Clearance" means approval by the department under Section 26-21-203 for an individual to have direct patient access.

(2) "Covered body" means a covered provider, covered contractor, or covered employer.

(3) "Covered contractor" means a person that supplies covered individuals, by contract, to a covered employer or covered provider.

(4) "Covered employer" means an individual who:

(a) engages a covered individual to provide services in a private residence to:

(i) an aged individual, as defined by department rule; or

(ii) a disabled individual, as defined by department rule;

(b) is not a covered provider; and

(c) is not a licensed health care facility within the state.

(5) "Covered individual":

(a) means an individual:

(i) whom a covered body engages; and

(ii) who may have direct patient access;

(b) includes:

(i) a nursing assistant, as defined by department rule;

(ii) a personal care aide, as defined by department rule;

(iii) an individual licensed to engage in the practice of nursing under Title 58, Chapter 31b, Nurse Practice Act;

(iv) a provider of medical, therapeutic, or social services, including a provider of laboratory and radiology services;

(v) an executive;

(vi) administrative staff, including a manager or other administrator;

(vii) dietary and food service staff;

(viii) housekeeping and maintenance staff; and

(ix) any other individual, as defined by department rule, who has direct patient access; and

(c) does not include a student, as defined by department rule, directly supervised by a member of the staff of the covered body or the student's instructor.

(6) "Covered provider" means:

(a) an end stage renal disease facility;

(b) a long-term care hospital;

(c) a nursing care facility;

(d) a small health care facility;

(e) an assisted living facility;

(f) a hospice;

(g) a home health agency; or

(h) a personal care agency.

(7) "Direct patient access" means for an individual to be in a position where the individual could, in relation to a patient or resident of the covered body who engages the individual:

(a) cause physical or mental harm;

(b) commit theft; or

(c) view medical or financial records.

(8) "Engage" means to obtain one's services:

(a) by employment;

(b) by contract;

(c) as a volunteer; or

(d) by other arrangement.

(9) "Long-term care hospital":

(a) means a hospital that is certified to provide long-term care services under the provisions of 42 U.S.C. Sec. 1395tt; and

(b) does not include a critical access hospital, designated under 42 U.S.C. Sec. 1395i-4(c)(2).

(10) "Patient" means an individual who receives health care services from one of the following covered providers:

(a) an end stage renal disease facility;

(b) a long-term care hospital;

(c) a hospice;

(d) a home health agency; or

(e) a personal care agency.

(11) "Personal care agency" means a health care facility defined by department rule.

(12) "Resident" means an individual who receives health care services from one of the following covered providers:

(a) a nursing care facility;

(b) a small health care facility;

(c) an assisted living facility; or

(d) a hospice that provides living quarters as part of its services.

(13) "Residential setting" means a place provided by a covered provider:

(a) for residents to live as part of the services provided by the covered provider; and

(b) where an individual who is not a resident also lives.

(14) "Volunteer" means an individual, as defined by department rule, who provides services without pay or other compensation.

Credits
Laws 2012, c. 328, § 3, eff. May 8, 2012.

U.C.A. 1953 § 26-21-201, UT ST § 26-21-201
Current through the 2017 First Special Session.

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Part 2. Clearance for Direct Patient Access

U.C.A. 1953 § 26-21-202

§ 26-21-202. Clearance required

Currentness

(1) A covered provider may engage a covered individual only if the individual has clearance.

(2) A covered contractor may supply a covered individual to a covered employer or covered provider only if the individual has clearance.

(3) A covered employer may engage a covered individual who does not have clearance.

(4)(a) Notwithstanding Subsections (1) and (2), if a covered individual does not have clearance, a covered provider may engage the individual or a covered contractor may supply the individual to a covered provider or covered employer:

(i) under circumstances specified by department rule; and

(ii) only while an application for clearance for the individual is pending.

(b) For purposes of Subsection (4)(a), an application is pending if the following have been submitted to the department for the individual:

(i) an application for clearance;

(ii) the personal identification information specified by the department under Subsection 26-21-204(4)(b); and

(iii) any fees established by the department under Subsection 26-21-204(9).

Credits
Laws 2012, c. 328, § 4, eff. May 8, 2012.

U.C.A. 1953 § 26-21-202, UT ST § 26-21-202
Current through the 2017 First Special Session.

End of Document

West's Utah Code Annotated
Title 26. Utah Health Code
Chapter 21. Health Care Facility Licensing and Inspection Act (Refs & Annos)
Part 2. Clearance for Direct Patient Access

U.C.A. 1953 § 26-21-203

§ 26-21-203. Department authorized to grant, deny, or revoke clearance--Department may limit direct patient access

Currentness

(1) As provided in Section 26-21-204, the department may grant, deny, or revoke clearance for an individual, including a covered individual.

(2) The department may limit the circumstances under which a covered individual granted clearance may have direct patient access, based on the relationship the factors under Subsection 26-21-204(4)(a) and other mitigating factors may have to patient and resident protection.

Credits
Laws 2012, c. 328, § 5, eff. May 8, 2012.

U.C.A. 1953 § 26-21-203, UT ST § 26-21-203
Current through the 2017 First Special Session.

End of Document

West's Utah Code Annotated
Title 26. Utah Health Code
Chapter 21. Health Care Facility Licensing and Inspection Act (Refs & Annos)
Part 2. Clearance for Direct Patient Access

U.C.A. 1953 § 26-21-204

§ 26-21-204. Clearance

Currentness

(1) The department shall determine whether to grant clearance for each applicant for whom it receives:

(a) the personal identification information specified by the department under Subsection 26-21-204(4)(b); and

(b) any fees established by the department under Subsection 26-21-204(9).

(2) The department shall establish a procedure for obtaining and evaluating relevant information concerning covered individuals, including fingerprinting the applicant and submitting the prints to the Criminal Investigations and Technical Services Division of the Department of Public Safety for checking against applicable state, regional, and national criminal records files.

(3) The department may review the following sources to determine whether an individual should be granted or retain clearance, which may include:

(a) Department of Public Safety arrest, conviction, and disposition records described in Title 53, Chapter 10, Criminal Investigations and Technical Services Act, including information in state, regional, and national records files;

(b) juvenile court arrest, adjudication, and disposition records, as allowed under Section 78A-6-209;

(c) federal criminal background databases available to the state;

(d) the Department of Human Services' Division of Child and Family Services Licensing Information System described in Section 62A-4a-1006;

(e) child abuse or neglect findings described in Section 78A-6-323;

(f) the Department of Human Services' Division of Aging and Adult Services vulnerable adult abuse, neglect, or exploitation database described in Section 62A-3-311.1;

(g) registries of nurse aids described in 42 C.F.R. Sec. 483.156;

(h) licensing and certification records of individuals licensed or certified by the Division of Occupational and Professional Licensing under Title 58, Occupations and Professions; and

(i) the List of Excluded Individuals and Entities database maintained by the United States Department of Health and Human Services' Office of Inspector General.

(4) The department shall adopt rules that:

(a) specify the criteria the department will use to determine whether an individual is granted or retains clearance:

(i) based on an initial evaluation and ongoing review of information under Subsection (3); and

(ii) including consideration of the relationship the following may have to patient and resident protection:

(A) warrants for arrest;

(B) arrests;

(C) convictions, including pleas in abeyance;

(D) pending diversion agreements;

(E) adjudications by a juvenile court of committing an act that if committed by an adult would be a felony or misdemeanor, if the individual is over 28 years of age and has been convicted, has pleaded no contest, or is subject to a plea in abeyance or diversion agreement for a felony or misdemeanor, or the individual is under 28 years of age; and

(F) any other findings under Subsection (3); and

(b) specify the personal identification information that must be submitted by an individual or covered body with an application for clearance, including:

(i) the applicant's Social Security number; and

(ii) except for applicants under 18 years of age, fingerprints.

(5) For purposes of Subsection (4)(a), the department shall classify a crime committed in another state according to the closest matching crime under Utah law, regardless of how the crime is classified in the state where the crime was committed.

(6) The Department of Public Safety, the Administrative Office of the Courts, the Department of Human Services, the Division of Occupational and Professional Licensing, and any other state agency or political subdivision of the state:

(a) shall allow the department to review the information the department may review under Subsection (3); and

(b) except for the Department of Public Safety, may not charge the department for access to the information.

(7) The department shall adopt measures to protect the security of the information it reviews under Subsection (3) and strictly limit access to the information to department employees responsible for processing an application for clearance.

(8) The department may disclose personal identification information specified under Subsection (4)(b) to the Department of Human Services to verify that the subject of the information is not identified as a perpetrator or offender in the information sources described in Subsections (3)(d) through (f).

(9) The department may establish fees, in accordance with Section 63J-1-504, for an application for clearance, which may include:

(a) the cost of obtaining and reviewing information under Subsection (3);

(b) a portion of the cost of creating and maintaining the Direct Access Clearance System database under Section 26-21-209; and

(c) other department costs related to the processing of the application and the ongoing review of information pursuant to Subsection (4)(a) to determine whether clearance should be retained.

Credits
Laws 2012, c. 328, § 6, eff. May 8, 2012.

U.C.A. 1953 § 26-21-204, UT ST § 26-21-204
Current through the 2017 First Special Session.

End of Document

West's Utah Code Annotated
Title 26. Utah Health Code
Chapter 21. Health Care Facility Licensing and Inspection Act (Refs & Annos)
Part 2. Clearance for Direct Patient Access

U.C.A. 1953 § 26-21-205

§ 26-21-205. Department of Public Safety--Retention of information--Notification of Department of Health Currentness

The Criminal Investigations and Technical Services Division within the Department of Public Safety shall:

(1) retain, separate from other division records, personal information, including any fingerprints, sent to it by the Department of Health pursuant to Subsection 26-21-204(3)(a); and

(2) notify the Department of Health upon receiving notice that an individual for whom personal information has been retained is the subject of:

(a) a warrant for arrest;

(b) an arrest;

(c) a conviction, including a plea in abeyance; or

(d) a pending diversion agreement.

Credits
Laws 2012, c. 328, § 7, eff. May 8, 2012.

U.C.A. 1953 § 26-21-205, UT ST § 26-21-205
Current through the 2017 First Special Session.

End of Document

West's Utah Code Annotated
Title 26. Utah Health Code
Chapter 21. Health Care Facility Licensing and Inspection Act (Refs & Annos)
Part 2. Clearance for Direct Patient Access

U.C.A. 1953 § 26-21-206

§ 26-21-206. Covered providers and covered contractors required to apply for clearance of certain individuals

Currentness

(1) As provided in Subsection (2), each covered provider and covered contractor operating in this state shall:

(a) collect from each covered individual it engages, and each individual it intends to engage as a covered individual, the personal identification information specified by the department under Subsection 26-21-204(4)(b); and

(b) submit to the department an application for clearance for the individual, including:

(i) the personal identification information; and

(ii) any fees established by the department under Subsection 26-21-204(9).

(2) Clearance granted for an individual pursuant to an application submitted by a covered provider or a covered contractor is valid until the later of:

(a) two years after the individual is no longer engaged as a covered individual; or

(b) the covered provider's or covered contractor's next license renewal date.

Credits
Laws 2012, c. 328, § 8, eff. May 8, 2012.

U.C.A. 1953 § 26-21-206, UT ST § 26-21-206
Current through the 2017 First Special Session.

End of Document

West's Utah Code Annotated
Title 26. Utah Health Code
Chapter 21. Health Care Facility Licensing and Inspection Act (Refs & Annos)
Part 2. Clearance for Direct Patient Access

U.C.A. 1953 § 26-21-207

§ 26-21-207. Covered providers required to apply for clearance for certain individuals other than residents residing in residential settings--Certain individuals other than residents prohibited from residing in residential settings without clearance

Currentness

(1) A covered provider that provides services in a residential setting shall:

(a) collect the personal identification information specified by the department under Subsection 26-21-204(4)(b) for each individual 12 years of age or older, other than a resident, who resides in the residential setting; and

(b) submit to the department an application for clearance for the individual, including:

(i) the personal identification information; and

(ii) any fees established by the department under Subsection 26-21-204(9).

(2) A covered provider that provides services in a residential setting may allow an individual 12 years of age or older, other than a resident, to reside in the residential setting only if the individual has clearance.

Credits
Laws 2012, c. 328, § 9, eff. May 8, 2012.

U.C.A. 1953 § 26-21-207, UT ST § 26-21-207
Current through the 2017 First Special Session.

End of Document

West's Utah Code Annotated
Title 26. Utah Health Code
Chapter 21. Health Care Facility Licensing and Inspection Act (Refs & Annos)
Part 2. Clearance for Direct Patient Access

U.C.A. 1953 § 26-21-208

§ 26-21-208. Application for clearance by individuals

Currentness

(1) An individual may apply for clearance by submitting to the department an application, including:

(a) the personal identification information specified by the department under Subsection 26-21-204(4)(b); and

(b) any fees established by the department under Subsection 26-21-204(9).

(2) Clearance granted to an individual who makes application under Subsection (1) is valid for two years unless the department determines otherwise based on its ongoing review under Subsection 26-21-204(4)(a).

Credits
Laws 2012, c. 328, § 10, eff. May 8, 2012.

U.C.A. 1953 § 26-21-208, UT ST § 26-21-208
Current through the 2017 First Special Session.

End of Document

West's Utah Code Annotated
Title 26. Utah Health Code
Chapter 21. Health Care Facility Licensing and Inspection Act (Refs & Annos)
Part 2. Clearance for Direct Patient Access

U.C.A. 1953 § 26-21-209

§ 26-21-209. Direct Access Clearance System database--Contents--Use

Currentness

(1) The department shall create and maintain a Direct Access Clearance System database, which:

(a) includes the names of individuals for whom the department has received:

(i) an application for clearance under this part; or

(ii) an application for background clearance under Section 26-8a-310; and

(b) indicates whether an application is pending and whether clearance has been granted and retained for:

(i) an applicant under this part; and

(ii) an applicant for background clearance under Section 26-8a-310.

(2)(a) The department shall allow covered providers and covered contractors to access the database electronically.

(b) Data accessible to a covered provider or covered contractor is limited to the information under Subsections (1)(a)(i) and (1)(b)(i) for:

(i) covered individuals engaged by the covered provider or covered contractor; and

(ii) individuals:

(A) whom the covered provider or covered contractor could engage as covered individuals; and

(B) who have provided the covered provider or covered contractor with sufficient personal identification information to uniquely identify the individual in the database.

(c)(i) The department may establish fees, in accordance with Section 63J-1-504, for use of the database by a covered contractor.

(ii) The fees may include, in addition to any fees established by the department under Subsection 26-21-204(9), an initial set-up fee, an ongoing access fee, and a per-use fee.

Credits

Laws 2012, c. 328, § 11, eff. May 8, 2012; Laws 2015, c. 307, § 4, eff. July 1, 2015.

U.C.A. 1953 § 26-21-209, UT ST § 26-21-209
Current through the 2017 First Special Session.

End of Document

West's Utah Code Annotated
Title 26. Utah Health Code
Chapter 21. Health Care Facility Licensing and Inspection Act (Refs & Annos)
Part 2. Clearance for Direct Patient Access

U.C.A. 1953 § 26-21-210

§ 26-21-210. No civil liability

Currentness

A covered body is not civilly liable for submitting to the department information required under this part or refusing to employ an individual who does not have clearance to have direct patient access under Section 26-21-203.

Credits
Laws 2012, c. 328, § 12, eff. May 8, 2012.

U.C.A. 1953 § 26-21-210, UT ST § 26-21-210
Current through the 2017 First Special Session.

End of Document

West's Utah Code Annotated
Title 26. Utah Health Code
Chapter 21. Health Care Facility Licensing and Inspection Act (Refs & Annos)
Part 2. Clearance for Direct Patient Access

U.C.A. 1953 § 26-21-211

§ 26-21-211. Repealed pursuant to § 63I-1-226, eff. July 1, 2013

Currentness

U.C.A. 1953 § 26-21-211, UT ST § 26-21-211
Current through the 2017 First Special Session.

End of Document

West's Utah Code Annotated
Title 26. Utah Health Code
Chapter 21. Health Care Facility Licensing and Inspection Act (Refs & Annos)
Part 3. Assisted Living Facility Surveillance Act

U.C.A. 1953 § 26-21-301

§ 26-21-301. Title

Currentness

This part is known as the "Assisted Living Facility Surveillance Act."

Credits
Laws 2016, c. 141, § 1, eff. May 10, 2016.

U.C.A. 1953 § 26-21-301, UT ST § 26-21-301
Current through the 2017 First Special Session.

End of Document

West's Utah Code Annotated
Title 26. Utah Health Code
Chapter 21. Health Care Facility Licensing and Inspection Act (Refs & Annos)
Part 3. Assisted Living Facility Surveillance Act

U.C.A. 1953 § 26-21-302

§ 26-21-302. Definitions

Currentness

As used in this part:

(1) "Facility" means an assisted living facility.

(2) "Legal representative" means an individual who is legally authorized to make health care decisions on behalf of another individual.

(3)(a) "Monitoring device" means:

(i) a video surveillance camera; or

(ii) a microphone or other device that captures audio.

(b) "Monitoring device" does not include:

(i) a device that is specifically intended to intercept wire, electronic, or oral communication without notice to or the consent of a party to the communication; or

(ii) a device that is connected to the Internet or that is set up to transmit data via an electronic communication.

(4) "Resident" means an individual who receives health care from a facility.

(5) "Room" means a resident's private or shared primary living space.

(6) "Roommate" means an individual sharing a room with a resident.

Credits
Laws 2016, c. 141, § 2, eff. May 10, 2016.

U.C.A. 1953 § 26-21-302, UT ST § 26-21-302
Current through the 2017 First Special Session.

End of Document

West's Utah Code Annotated
Title 26. Utah Health Code
Chapter 21. Health Care Facility Licensing and Inspection Act (Refs & Annos)
Part 3. Assisted Living Facility Surveillance Act

U.C.A. 1953 § 26-21-303

§ 26-21-303. Monitoring device--Installation, notice, and consent--Liability

Currentness

(1) A resident or the resident's legal representative may operate or install a monitoring device in the resident's room if the resident and the resident's legal representative, if any, unless the resident is incapable of informed consent:

(a) notifies the resident's facility in writing that the resident or the resident's legal representative, if any:

(i) intends to operate or install a monitoring device in the resident's room; and

(ii) consents to a waiver agreement, if required by a facility;

(b) obtains written consent from each of the resident's roommates, and their legal representative, if any, that specifically states the hours when each roommate consents to the resident or the resident's legal representative operating the monitoring device; and

(c) assumes all responsibility for any cost related to installing or operating the monitoring device.

(2) A facility shall not be civilly or criminally liable to:

(a) a resident or resident's roommate for the operation of a monitoring device consistent with this part; and

(b) any person other than the resident or resident's roommate for any claims related to the use or operation of a monitoring device consistent with this part, unless the claim is caused by the acts or omissions of an employee or agent of the facility.

(3) Notwithstanding any other provision of this part, an individual may not, under this part, operate a monitoring device in a facility without a court order:

(a) in secret; or

(b) with an intent to intercept a wire, electronic, or oral communication without notice to or the consent of a party to the communication.

Credits

Laws 2016, c. 141, § 3, eff. May 10, 2016.

U.C.A. 1953 § 26-21-303, UT ST § 26-21-303
Current through the 2017 First Special Session.

End of Document

West's Utah Code Annotated
Title 26. Utah Health Code
Chapter 21. Health Care Facility Licensing and Inspection Act (Refs & Annos)
Part 3. Assisted Living Facility Surveillance Act

U.C.A. 1953 § 26-21-304

§ 26-21-304. Monitoring device--Facility admission, patient discharge, and posted notice

Currentness

(1) A facility may not deny an individual admission to the facility for the sole reason that the individual or the individual's legal representative requests to install or operate a monitoring device in the individual's room.

(2) A facility may not discharge a resident for the sole reason that the resident or the resident's legal representative requests to install or operate a monitoring device in the individual's room.

(3) A facility may require the resident or the resident's legal representative to place a sign near the entrance of the resident's room that states that the room contains a monitoring device.

Credits
Laws 2016, c. 141, § 4, eff. May 10, 2016.

U.C.A. 1953 § 26-21-304, UT ST § 26-21-304
Current through the 2017 First Special Session.

End of Document

ADDENDUM 6

UTAH R. CIV. P.26
(ADVISORY COMMITTEE NOTES)

West's Utah Code Annotated
State Court Rules
Utah Rules of Civil Procedure (Refs & Annos)
Part V. Depositions and Discovery

Utah Rules of Civil Procedure, Rule 26

RULE 26. GENERAL PROVISIONS GOVERNING DISCLOSURE AND DISCOVERY

Currentness

(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, serve on the 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 served on the other parties:

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

(a)(2)(B) by the defendant within 42 days after filing of the first answer to the complaint or within 28 days 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, serve on the other parties the following information regarding any person who may be used at trial to present evidence under Rule 702 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 serve on the other parties 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 served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, 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 serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(i) is due, or (B) 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 served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(iii) If the party who bears the burden of proof on an issue wants to designate rebuttal expert witnesses it shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(ii) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(ii). 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 served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, 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 Rule 702 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 serve on the other parties 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, serve on the 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 served on the other parties 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 during and created specifically as part of a request for an investigation, the investigation, findings, or conclusions of peer review, care review, or quality assurance processes of 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 request for extraordinary discovery under Rule 37(a).

(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 serve on the other parties 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(b).

(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.

Credits

[Effective May 2, 2005; amended effective November 1, 2007; November 1, 2008; November 1, 2011; March 6, 2012; April 1, 2013; May 1, 2015.]

Editors' 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), which should include any opinion testimony that a party expects to elicit from them at trial. If a party has disclosed possible opinion testimony in its Rule 26(a)(1)(A)(ii) disclosures, that party is not required to prepare a separate Rule 26(a)(4)(E) disclosure for the witness. And if that disclosure is made in advance of the witness's deposition, those opinions should be explored in the deposition and not in a separate expert deposition. Otherwise, the timing for disclosure e of non-retained expert opinions is the same as that for retained experts under Rule 26(a)(4)(C) and depends on whether the party has the burden of proof or is responding to another expert. Rules 26(a)(4)(E) and 26(a)(1)(A)(ii) are not intended to elevate form over substance--all they require is that a party fairly inform its opponent that opinion testimony may be offered from a particular witness. And because a party who expects to offer this testimony normally cannot compel such a witness to prepare a written report, further discovery must be done by interview or by deposition.

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

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

In the past, the scope of discovery was governed by "relevance" or the "likelihood to lead to discovery of admissible evidence." These broad standards may have secured just results by allowing a party to discover all facts relevant to the litigation. However, they did little to advance two equally important objectives of the rules of civil procedure--the speedy and inexpensive resolution of every action. Accordingly, the former standards governing the scope of discovery have been replaced with the 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. A statement of discovery issues will not toll the period. Parties are expected to be reasonable and accomplish as much as they can during standard discovery. A statement of discovery issues 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 a statement of discovery issues. 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 request additional discovery. As with stipulations for extraordinary discovery, a party requesting extraordinary discovery should do so before the close of the standard discovery time limit, but only after the 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 requesting party 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 requests for an order to compel, for a protective order, and sanctions in a single rule, rather than two separate rules.

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.

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.

Notes of Decisions (225)

Rules Civ. Proc., Rule 26, UT R RCP Rule 26
Current with amendments received through September 1, 2017

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