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Navigating Utah's Expanded Peer Review Privilege: A Roadmap for Healthcare Providers

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The term “peer review privilege” generally refers to a discovery and evidentiary privilege that can be asserted by hospitals and other healthcare entities to protect the confidentiality of credentialing, quality improvement, and similar peer review activities. While the specific scope, application, and requirements of the peer review privilege vary by state, the underlying purpose is consistent: to foster a protected environment where healthcare professionals and institutions can engage in honest, constructive dialogue and conduct thorough inquiry aimed at improving patient care and clinical performance—without fear that such discussions or findings will be used against them in court.

To gain peer review privilege, healthcare institutions and professionals must ensure that their peer review processes strictly align with the requirements of their state's peer review privilege laws. Otherwise, in a legal proceeding (*e.g.*, a medical malpractice case involving an underlying incident for which a hospital conducted peer review), a judge may rule that peer review privilege is inapplicable and allow sensitive and unfavorable peer review information and documents to be introduced into evidence. Accordingly, it is imperative for those involved to clearly understand their state's peer review privilege laws.

Understanding the scope of Utah's peer review protections can be particularly difficult, given the complex legal landscape shaped by (i) the historical use of different terminology to describe Utah's peer review privilege (*i.e.*, the “care review privilege”), (ii) multiple relevant statutes and rules—including a significant 2012 expansion of the state's peer review privilege, and (iii) limited case law since 2012 interpreting the broadened privilege, leaving many questions unanswered. This article aims to clarify the current state of Utah's peer review protections by tracing the historical development of relevant laws and rules, analyzing the limited but important case law, and offering practical guidance for peer review bodies as they develop or update their procedures.

History of Peer Review Privilege under Utah Law

In Utah, prior to 2012, the discovery and evidentiary privilege for peer review activities was commonly referred to in case law as the “care-review privilege,” being derived from Utah Code Ann. § 26B-1-229, *et seq.* (2023) (referred to herein as the “**Care Review Statute**”). The Care Review Statute provided not only limited immunity for those involved in peer/care review activities, but also established a discovery and evidentiary

privilege. *Id.* at § 26B-1-229(2), (4)-(6). (This specific statutory discovery and evidentiary privilege is referred to herein as the "**Care Review Privilege**.")

In contrast, what is commonly referred to in Utah case law as the "peer review privilege" stems from the Health Care Providers Immunity from Liability Act, codified at Utah Code Ann. § 58-13-1, *et seq*. (1996) (referred to hereafter as the "**Immunity Act**"). Importantly, the Immunity Act does not create a discovery or evidentiary privilege. Instead, it provides limited immunity from liability—referred to hereafter as "**Peer Review Immunity**"—to individuals and entities involved in peer review activities. Specifically, this immunity extends to: (i) individuals who submit reports to Utah's Division of Professional Licensing about certain adverse actions, events, or findings concerning licensed healthcare providers; (ii) individuals who furnish information used by peer review committees; (iii) participants in peer review committees; and (iv) board members who act based on peer review findings. Utah Code Ann. § 58-13-4.

Prior to 2012, Utah case law involving disputes over the discovery or admissibility of peer review documents/information focused exclusively on the two statutes discussed above. Courts consistently held that only the Care Review Statute conferred a discovery and evidentiary privilege—commonly referred to as the Care Review Privilege.[1]

However, in 2012, the Utah Legislature amended Rule 26 of the Utah Rules of Civil Procedure—later adopted by the Utah Supreme Court—to effectively codify the Care Review Privilege and extend discovery and evidentiary protections to peer review activities covered under the Immunity Act.[2] Although there has been limited case law interpreting the 2012 amendment to U.R.C.P. 26(b)(2), the Utah Supreme Court has made clear that the privileges now in effect are broader and distinct from those previously provided under the Care Review Statute and the Immunity Act. In *Allred v. Saunders*, 342 P.3d 204 (Utah 2014), the Court held that the district court erred in relying solely on those statutes to determine the discoverability of a physician's credentialing and incident files. The Court emphasized that the Legislature, through the amendment of U.R.C.P. 26, intended to establish a new and expanded evidentiary privilege. For clarity, this article refers to the discovery and evidentiary privilege created by U.R.C.P. 26(b)(2)(A)–(B)—which incorporates and builds upon the protections found in the Care Review Statute and the Immunity Act—as the "**Expanded Care Review Privilege**."

Comparison of the Care Review Privilege versus Expanded Care Review Privilege

A. Care Review Privilege

The Utah legislature enacted the Care Review Privilege to encourage physicians and healthcare professionals to participate in care review proceedings and provide accurate information for the betterment of hospital and healthcare.[3] The Care Review Statute authorizes "[a]ny person, health facility,[4] or other organization" to provide enumerated "persons and entities" with a variety of information, including "interviews,"

"reports," "statements," "memoranda," and "other data relating to the condition and treatment of any person."[5]

The enumerated entities that can be provided with the above information are:

1. the Utah Department of Health and Human Services and local Utah health departments;
2. the Division of Integrated Healthcare within the Utah Department of Health and Human Services;
3. scientific and healthcare research organizations affiliated with institutions of higher education;
4. the Utah Medical Association or any of its allied medical societies;
5. peer review committees;
6. professional review organizations;
7. professional societies and associations; and
8. any health facility's in-house staff committee.[6]

Without incurring liability, the disclosing party may share the information described above with the listed authorized individuals or entities, solely for the following two purposes:

1. study and advancing medical research, with the purpose of reducing the incidence of disease, morbidity, or mortality," and
2. "the evaluation and improvement of hospital and health care rendered by hospitals, health facilities, or health care providers." [7,8]

The information outlined above—such as interviews and reports related to a person's condition and treatment—when received by an authorized individual or organization (*e.g.*, peer review committees or in-house hospital staff committees), must be held in strict confidence. Any use, release, or publication of such information is permitted only for the purposes expressly identified in the Care Review Statute: namely, to support medical research aimed at reducing disease, morbidity, or mortality, or to evaluate and improve the quality of care provided by hospitals, health facilities, or healthcare providers.[9]

Additionally, the statute provides that any person may, without incurring liability, furnish information relating to the ethical conduct of a healthcare provider to peer review bodies, professional societies or associations, or in-hospital staff committees, specifically for use in intraprofessional disciplinary processes.[10]

Any unauthorized use, release, or publication of this information in violation of the Care Review Statute constitutes a class B misdemeanor.[11]

Further, in addition to the liability immunity previously discussed, the statute provides that all such information, as well as any findings or conclusions resulting from peer review studies, are considered privileged communications. As such, they are not subject to discovery, use, or admissibility in any legal proceeding of any kind.[12]

B. Expanded Care Review Privilege

As previously discussed, the 2012 amendment to Rule 26 of the Utah Rules of Civil Procedure expanded the discovery and evidentiary privilege—originally limited to the activities covered under the Care Review Statute—to include additional activities, including those addressed in the Immunity Act. This marked a significant broadening of the scope of protected peer review activities. Then, during the 2022 Utah legislative session, U.R.C.P. 26(b) was further amended to extend this privilege to communications made under the newly enacted Utah Medical Candor Act, Utah Code Ann. § 78B-3-451 *et seq*., which establishes a voluntary alternative process for resolving potential medical malpractice claims.[13]

Thus, U.R.C.P. 26(b)(2), in relevant part, now states that the following matters are privileged "and are not discoverable or admissible in any proceeding of any kind or character":

> (A) 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[14] as defined in Utah Code Title 78B, Chapter 3, Part 4, 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; and
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> (B) except as provided in paragraph (b)(2)(C), (D), or (E), all communications, materials, and information in any form specifically created for or during a medical candor process under Utah Code Title 78B, Chapter 3, Part 4a, Utah Medical Candor Act, including any findings or conclusions from the investigation and any offer of compensation.

URCP 26(b)(2)(A)–(B).

The evidentiary privilege provided under the Expanded Care Review Privilege is significantly broader and more flexible than that afforded by the original Care Review Privilege. Under the Care Review Statute, the privilege applies only (i) to specific types of information (ii) when provided to designated entities (iii) for narrowly defined purposes.

In contrast, U.R.C.P. 26 adopts broad and general language, extending protection to “all information in any form” related to peer review, care review, or quality assurance activities carried out by healthcare providers or entities. Additionally, U.R.C.P. 26 is silent as to the types of entities or people to whom such information can be provided. The only limitation is that the information must be “provided during and created specifically as part of” these peer/care review or quality assurance processes with “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 those protected processes[.]” Last, in not defining the terms 'peer review' 'care review,' or 'quality assurance processes,' it allows healthcare entities to classify various improvement processes under these broad categories, in order to try and obtain peer review privilege protection.

Click here to view the chart, "Care Review Privilege vs. URCP Rule 26," for a visual comparison between Care Review Privilege and U.R.C.P. Rule 26.

Asserting the Statutory Care Review Privilege and/or the Expanded Care Review Privilege

The burden of establishing the applicability of the Care Review Privilege or the Expanded Care Review Privilege rests with the party seeking to assert the privilege.[15] To properly withhold documents or information under either privilege, the asserting party must provide adequate foundational evidence demonstrating that each withheld item clearly falls within one of the statutorily or rule-defined categories. A privilege log containing vague or generic descriptions, without explaining how each document qualifies for protection, is insufficient to establish the privilege.[16]

Furthermore, Utah courts have consistently held that these privileges apply only to documents that are specifically prepared, compiled, created, or submitted for the purpose of care or peer review. Materials generated for other purposes—even if they are tangentially related to the improvement of patient care—do not fall within the scope of the Care Review or Expanded Care Review Privileges.[17]

II. Guidance

Although Utah's Expanded Care Review Privilege is broad in scope, courts have made clear that it applies only when there is a clear and specific showing that the withheld documents or information meet the strict requirements of either the Care Review Privilege or the Expanded Care Review Privilege under U.R.C.P. 26(b)(2). As such, healthcare providers and institutions should take special care to (i) explicitly identify and document which committees and internal processes they believe fall under either peer review, care review or quality assurance processes, (ii) identify in meeting minutes that the topics discussed and information reviewed is considered protected by Utah's Care Review Privilege (Utah Code Ann. § 26B-1-229, *et. seq.)* and/or U.R.C.P. 26(b)(2); (iii) place prominent headers or footers on all documents provided during and created specifically as part of any peer/care review or quality assurance processes, that such is

considered privileged under Utah's Care Review Privilege (Utah Code Ann. § 26B-1-229, *et. seq.*) and/or U.R.C.P. 26(b)(2)); (iv) retain sufficient documentation to demonstrate that each document satisfies the applicable statutory or rule-based criteria. and (v) work to ensure information discussed or reviewed within peer/care review or quality assurance processes/committees is not improperly discussed or disclosed with those not involved in such processes/committees. Last, in litigation, counsel should ensure privilege logs are thorough and specific, articulating precisely how each withheld document qualifies for protection under the Care Review Statute or U.R.C.P. 26(b)(2).

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[1] *See United States ex rel. Polukoff v. St. Mark's Hosp*., 2020 WL 291397, at n. 1 (D. Utah 2020) (stating the Immunity Act provides immunity only from liability and does not provide a discovery or evidentiary privilege) (citing *Belnap v. Howard*, 2019 UT 9, ¶ 23, 437 P.3d 355).

[2] Utah R. Civ. P. 26(b)(2)(A)–(B); *Belnap*, 2019 UT 9, ¶17, 437 P.3d 355 (discussing the history of the Care Review Privilege and the Peer Review Statute, as well as the amendment to Utah R. Civ. P. 26(b)).

[3] *Benson v. I.H.C. Hosps., Inc.*, 866 P.2d 537, 539 (Utah 1993).

[4] "Health care facility" means general acute hospitals, specialty hospitals, home health agencies, hospices, nursing care facilities, assisted living facilities, birthing centers, ambulatory surgical facilities, small health care facilities, health care facilities owned or operated by health maintenance organizations, and end stage renal disease facilities. Utah Code Ann. § 26B-2-201(13).

[5] *Id*. at § 26B-1-229(2).

[6] *Id.* at § 26B-1-229(3).

[7] "Health care provider" includes any person, partnership, association, corporation, or other facility or institution who causes to be rendered or who renders health care or professional services as a hospital, health care facility, physician, physician assistant, registered nurse, licensed practical nurse, nurse-midwife, licensed direct-entry midwife, dentist, dental hygienist, optometrist, clinical laboratory technologist, pharmacist, physical therapist, physical therapist assistant, podiatric physician, psychologist, chiropractic physician, naturopathic physician, osteopathic physician, osteopathic physician and surgeon, audiologist, speech-language pathologist, clinical social worker, certified social worker, social service worker, marriage and family counselor, practitioner of obstetrics, licensed athletic trainer, or others rendering similar care and services relating to or arising out of the health needs of persons or groups of persons and officers, employees, or agents of any of the above acting in the course and scope of their employment. Utah Code Ann. § 78B-3-403(13).

[8] *Id.* at § 26B-1-229(4).

[9] *Id.* at § 26B-1-229(9).

[10] *Id.* at § 26B-1-229(5).

[11] *Id.* at § 26B-1-229(10).

[12] *Id.* at § 26B-1-229(8).

[13] In brief, if the requirements of the Utah Medical Candor Act are followed, certain information shared (*e.g.*, information related to the investigation, investigative conclusions and offer of compensation, if any) with an affected party (*e.g.*, the patient themselves and/or their representative) are privileged and cannot be used in a judicial proceeding. Utah Code Ann. § 78B-3-454. Of course, given that the inclusion of the Utah Medical Candor Act only recently went into effect, there is no relevant case law as to that part of Rule 26(b).

[14] See footnote 7 above.

[15] *Polukoff*, 2020 WL 291397 at *4.

[16] *Id.* at 27 (finding that descriptions such as “Letter re: incomplete proctoring card,” “Email chain re: patient issues,” or “OB Staff Meeting Agenda” did not event “hint” at why the Care Review Privilege might apply).

[17] *Polukoff*, 2020 WL 291397 at *6 (citing *Wilson v. IHC Hosps., Inc.*, 2012 UT 43, 112–115, 289 P.3d 369) (citing *Benson v. I.H.C. Hosps., Inc.*, 866 P.2d 537, 540 (Utah 1993)); *see* also *Vered v. Tooele Hosp. Corp.*, 2018 UT App 15, ¶¶ 17–23, 414 P.3d 1004 (stating the Care Review Privilege protects “information compiled or created during the . . . care-review process from both discovery and receipt into evidence” but “does not extend to documents that might or could be used in the review process”); *Smith v. Terumo Cardiovascular Sys. Corp.*, 2015 U.S. Dist. LEXIS 105375 (Dist. Utah 2015) (finding that information gathered and submitted to a medical device manufacturer, for the purpose of the manufacturer's investigation and reporting for FDA purposes, did not qualify for protection under the Expanded Care Review Privilege, even if the hospital could end up using such information as part of its own quality assurance investigation).

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might affect the analysis or commentary. Similarly, the analysis may differ depending on the jurisdiction or circumstances. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.