

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

**IN RE: AMENDMENT TO SUPERIOR COURT CIVIL RULES TO
 AMEND RULE 26(b)**

This 30th day of September, 2026, **IT IS HEREBY ORDERED** that:

1. Superior Court Civil Rule 26 (b) is amended by adding the underlined text and deleting the strikethrough text:

Rule 26. General provisions governing discovery.

(3) *Litigation-funding agreements.*

(A) For purposes of this rule, a litigation-funding agreement means an agreement between a party and a counterparty, other than an attorney representing the party, in which the counterparty agrees to pay the party's litigation expenses and has:

- (i) a contractual right to repayment contingent on the outcome of the case; and
- (ii) a contractual right to control aspects of the litigation for the party, such as the right to approve any settlement.

(B) A party may obtain discovery into:

- (i) the existence of the litigation-funding agreement,
- (ii) the parties to the litigation-funding agreement,
- (iii) in what respect the litigation-funding agreement satisfies the definition in Rule 26(b)(3)(A), and
- (iv) if applicable, the aspects of the litigation that the counterparty has the right to control.

(C) Subject to subpart (D), a party may not obtain discovery into:

- (i) the litigation-funding agreement itself or the contents of the litigation-funding agreement;
- (ii) any case-related information that the party provided to the counterparty; or
- (iii) the mental impressions, opinions, conclusions, or other work product of an attorney or other representative of the counterparty.

(D) For cause, the Court may order production of the portion of a litigation-funding agreement that provides a contractual right to control an aspect of the litigation, such as the right to approve any settlement.

(E) A litigation-funding agreement is not admissible at trial.

(3 4) *Trial preparation: Materials.* Subject to the provisions of subdivision (b)(4 5) of this Rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this Rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering the discovery of such materials when the required showing has been made, the Court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing 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 concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the party making it and contemporaneously recorded.

(4 5) *Trial preparation: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this Rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the Court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4 5)(C) of this Rule, concerning fees and expenses as the Court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the Court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4 5)(A)(ii) and (b)(4 5)(B) of this Rule; and (ii) with respect to discovery obtained under subdivision (b)(4 5)(A)(ii) of this Rule the Court may require, and with respect to discovery obtained under subdivision (b)(4 5)(B) of this Rule the Court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5 6) Protection for draft reports or disclosures. Rule 26(b)(3 4) protects drafts of any report or disclosure required under Rule 26 regardless of the form in which a draft is recorded.

(6 7) Protection of communication between a party's attorney and expert witnesses. Rule 26 protects communications between the party's attorney and

any witness required to provide an opinion under Rule 26(b)(4 5) regardless of the form of the communications, except to the extent that communications:

- (i) relate to compensation for the expert study or testimony;
- (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
- (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(7 8) Claims of privilege or protection of trial material. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

2. These Rule changes shall take effect September 30, 2026.

BY THE COURT:

/s/ Eric M. Davis
President Judge

oc: Prothonotaries
cc: Superior Court Judges
Superior Court Commissioners
Kathleen M. Jennings, Attorney General
Kevin O'Connell, Public Defender
Court Administrators
Michael Ferry, Director of Operations
Charlene Wickman, Lexis Nexus
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