16 DISCOVERY OF INSURANCE FILES AND DISCOVERY IN GENERAL

With some important exceptions discussed below, the Alaska Supreme Court has held that insurance files pertaining to claims, including the insurer's investigative materials, are ordinary business records that are subject to discovery in a civil action relating to that claim.

The Alaska Supreme Court has required the production of statements made by an insured to an insurance company's claim adjuster concerning an accident and held that such records were not protected by the attorney-client privilege unless it can be established that the adjuster, in receiving such statements, was acting under the express direction of counsel for the insured.[1] The court also held that materials in an insurer's file are conclusively presumed to have been compiled in the ordinary course of business, absent a showing they were prepared at the request of the insured's attorney. Consequently, prior to attorney involvement on behalf of the insured, materials held by insurers are subject to discovery without regard to any work product restrictions.

However, the court did note that under Rule 26(b)(1) of the Alaska Rules of Civil Procedure, the trial court is still required to protect against the disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation. Presumably this would protect such things as memoranda containing opinions as to liability and settlement value, since the court cited with approval an Indiana case that denied discovery of such records on the grounds they were neither admissible at trial nor reasonably calculated to lead to the discovery of admissible evidence.[2]

Important changes were made to the rules pertaining to discovery in Alaska by orders of the Alaska Supreme Court in 1997 and 1998. Perhaps most significantly, these new rules provide for mandatory disclosures by each party (without the necessity of discovery requests) of the factual basis of all claims or defenses; the names, addresses, and telephone numbers of individuals likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings (and identifying the subjects of the information and whether the attorney-client privilege applies); copies (or a description by category and location) of all documents and tangible things relevant to disputed facts alleged with particularity in the pleadings; relevant photographs, diagrams, and videotapes; pertinent insurance policies under which an insurer may be liable to satisfy some or all of a judgment, and a description of the categories of damages being claimed.[3] A copy of revised Civil Rule 26 is attached.

---

[1] *Langdon v. Champion*, 752 P.2d 999 (Alaska 1988).

[2] *Tronitech v. NCR Corp.*, 108 F.R.D. 655, 655-56 (S.D. Ind. 1985).

[3] Alaska R. Civ. P. 26(a).

There are various other provisions controlling the nature and timing of discovery, including discovery regarding expert witnesses. Until the parties have conducted their planning conference (required under Rule 26[f]), the parties are not to send out discovery requests other than interrogatories (initially limited to no more than 10 interrogatories).[4]

It has become increasingly more common to see claims where the plaintiff seeks damages of less than $100,000, for the express purpose of restricting discovery to Initial Disclosures (as Rule 26(a) now requires) and the taking by each party of the deposition of one or more opposing parties and of one additional non-party person. These restrictions on discovery are contained in District Court Civil Rule 1(a)(1), but they also apply to cases in Superior Court where the demand for personal injury or property damages involves less than $100,000 in damages.[5]

There are a multitude of issues pertaining to discovery in civil cases here in Alaska and it is impossible to cover them all in a short summary. One of the most contentious areas involves a defendant's desire to have an independent medical examination conducted on the plaintiff. A copy of Civil Rule 35, pertaining to the physical and mental examinations of parties, is attached. The Supreme Court has held that a party has the right to have his or her attorney present during an examination by a physician retained by the defendant and to tape the examination (it is not clear whether this can be limited to an audiotape or whether it must include the right to videotape the examination).[6] A related issue pertains to conversations or communications between the defense attorney and a physician retained to conduct the IME. To avoid arguments that improper influence has been applied to the physician -- rendering his or her evaluation something less than objective -- it is advisable for the defense attorney to have no contact with the IME physician between the date of the IME and the generation of the physician's IME report.

Under certain circumstances, a retained and testifying expert may have to disclose his/her income tax returns in the course of discovery.[7] The odds that the expert will have to make such a disclosure increase if he/she was retained for the purpose of testifying at trial, since the tax returns may possibly demonstrate bias.[8]

---

[4] Alaska R. Civ. P. 26(d)(1).

[5] Alaska R. Civ. P. 26(g).

[6] *Langfeldt-Haaland v. Saupe*, 768 P.2d 1144 (Alaska 1989).

[7] *Noffke v. Perez*, 178 P.3d 1141 (Alaska 2007).

[8] *Id.*

However, the trial court may alternatively allow the retained expert to provide a summary of his/her income from forensic services along with the percentage of the expert's total income earned from forensic services.

While preparing disclosures, one needs to take caution in determining what materials to withhold or redact in light of an apparently new tort endorsed by the Alaska Supreme Court. In response to a case where plaintiff alleged that opposing counsel wrongfully redacted notions on photographs and withheld adjustors notes, the court set forth the elements for the cause of action of "fraudulent concealment of evidence" as follows:

> The elements we adopt for the tort of fraudulent concealment of evidence are: (1) the defendant concealed evidence material to plaintiff's cause of action; (2) plaintiff's underlying cause of action was viable; (3) the evidence could not reasonably have been procured from another source; (4) the evidence was withheld with the intent to disrupt or prevent litigation; (5) the withholding caused damage to the plaintiff from having to rely on an incomplete evidentiary record; and, (6) the withheld evidence was discovered at a time when the plaintiff lacked another available remedy.[9]

E-Discovery

The Alaska Supreme Court amended the Civil Rules to specifically address production of E-Discovery. In particular, Civil Rule 26(a)(1)(D) requires parties to produce a copy, or at least a description and location, of all "electronically stored information" (hereinafter, ESI) at the time they exchange Initial Disclosures. Therefore, parties must be prepared to produce, or at least locate and identify, any relevant ESI in their possession early in the litigation process.

Alaska Civil Rule 26(b)(2)(B) also addresses E-Discovery, it reads:

> A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering

[9] *Allstate Ins. Co. v. Dooley*, 243 P.3d 197, 204 (Alaska 2010)

the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

This provision will allow parties to raise the undue burden or cost argument with regard to the production of ESI. However, by the very language of the Rule, the court may still require production of the ESI regardless of the undue burden on the producing party.

The revisions to the Alaska Civil Rules mirror the ESI provisions of the Federal Rules of Civil Procedure. Therefore, until guidance is provided by the Alaska Supreme Court, we can expect the trial courts to look to cases interpreting the Federal Rules for guidance in addressing ESI issues.

What do the Rule changes mean?

The changes to the Rules require litigants to contemplate ESI early in the litigation process -- possibly even before a complaint is filed. Parties need to determine what ESI may be relevant to the litigation, where it may be stored, who has access to the ESI, how to retrieve the ESI, and who should be tasked with collecting (on a rolling basis, if appropriate) and preserving ESI. After determining what ESI is relevant and where it is located, the best way to preserve potentially relevant ESI is to issue a Litigation Hold Memo (example enclosed with appendices) to individuals who may possess ESI, including any relevant IT personnel.

In addition to preserving and collecting ESI for production, parties should also consider the form in which they want ESI provided to them. Alaska Civil Rule 34 allows the party seeking production to "specify the form or forms in which electronically stored information is to be produced." Similarly, Civil Rule 26(f)(3) requires the report of parties planning meeting to include the parties' views and proposals regarding "disclosure or discovery of electronically stored information, including the form or forms in which it should be produced." However, objection to the requested form of ESI does not excuse production of ESI, but only shifts the choice of the form to ESI to the producing party.

Cost and burden considerations

The nature of ESI production leads to unique burden issues, particularly cost considerations. Applying the traditional proportionality analysis of production, production will likely be required if the sought material is relevant and the ESI is available to the responding party in the ordinary course of business, in other words -- is the ESI quickly accessible? The outcome of a balancing determination is more difficult to determine when hard-to-access information or voluminous data is sought. When harder to collect ESI is sought, the courts are apt to adopt "a two-tiered approach in

which they first [have the parties] sort through the information that can be provided from easily accessed sources and then determine whether it is necessary to search the less-accessible sources."[10] This two-tier approach may also help refine and, therefore, lower the cost of a search of less accessible information, if it is still necessary.

Another way to address burden issues is cost shifting. However, "accessible data must be produced at the cost of the producing party; cost-shifting does not even become a possibility unless there is first a showing of inaccessibility."[11] In order to determine if cost shifting is appropriate, courts have set forth multi-factor tests, including:

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production, compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties of obtaining the information.[12]

Based on a balancing of these factors, the court may shift all or only part of the costs in collecting hard to access data.

How safe is the "safe harbor" provision?

The revisions also added Civil Rule 37(f), it reads:

> **Electronically Stored Information.** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

This provision appears to be a "safe harbor" from sanctions. However, courts that have applied the identical Federal Rule have applied it very narrowly.

---

[10] *See* Managing Discovery of Electronic Information: A Pocket Guide for Judges, Barbara J. Rothstein, Ronald J. Hedges, and Elizabeth C. Wiggins, p. 8. Available on-line.

[11] *Peskoff v. Faber*, 240 F.R.D. 26, 31 (D.D.C. 2007).

[12] *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 322 (S.D.N.Y. 2003).

"As a general matter, it is beyond question that a party to civil litigation has a duty to preserve relevant information, including ESI, when that party has notice that the evidence is relevant to litigation or should have known that the evidence may be relevant to future litigation."[13] Therefore, a party needs to make efforts to preserve ESI, even from deletion through "routine" maintenance, as soon as it has reason to believe a claim may be filed. As discussed above, this is best accomplished by issuing a litigation hold memo immediately upon learning of potential litigation. However, simply issuing a litigation hold may not be sufficient if the memo is not provided to the appropriate people and compliance is not monitored.[14]

The additions to the discovery rules require early thought to preserving ESI. The more prepared a party is to address ESI at the start of the litigation process, the more likely they will be able to avoid sanctions or other ESI related issues.

Appendices:

Alaska R. Civ. P. 26

Alaska R. Civ. P. 35

Example Litigation Hold Memo

[13] *John B. v. Goetz*, 531 F.3d 448, 459 (Tenn. 2008) (internal citations omitted).

[14] *See Treppel v. Biovail Corp.*, 249 F.R.D. 111, 119 (S.D.N.Y. 2008)(holding that issuing a notice without providing it to all employees who potentially had information, or following though with compliance was insufficient).

July 15, 1994; and by SCO 1396 effective October 15, 2000)

Note: Chapter 115 SLA 00 adopts AS 32.06.906 relating to the merger of partnerships. This section is effective January 1, 2001. Under AS 32.06.906(a)(4), an action or proceeding pending against a partnership or limited partnership that is a party to a merger may be continued as if the merger had not occurred, or the surviving entity may be substituted as a party to the action or proceeding. According to section 9 of the act, this provision has the effect of amending Civil Rule 25(c) by allowing certain substitutions of parties as a matter of right.

Annotations

Cases

Where judgment was entered against originally named defendant state officers, trial court would be directed to substitute successor incumbent or parties on remand. **McGinnis v. Stevens,** Op. No. 3094, 570 P2d 735 (Alaska 1977).

This rule applies to post-judgment proceedings to enforce a judgment. **State v. 18,018 Square Feet,** Op. No. 2232, 621 P2d 887 (Alaska 1981).

Whether or not a party should be substituted for another rests in the sound discretion of the trial court. **State v. 18,018 Square Feet,** Op. No. 2232, 621 P2d 887 (Alaska 1981).

Mechanic's lien claimant was entitled to amend his complaint to add as a defendant to the action the subsequent purchaser of the burdened real property. **First National Bank of Anchorage v. Dent,** Op. No. 2839, 683 P2d 722 (Alaska 1984).

Where bank went into receivership during the pendency of a suit against the bank in state court, the receiver did not become a party to the action until the court exercised its discretion to substitute the receiver as a party defendant. **Interior Glass Service, Inc. v. FDIC,** 691 FS 1255 (D. Alaska 1988).

Trial court did not abuse its discretion in enlarging time for decedant's estate to substitute in as plaintiff for decedant. **Estate of Lampert v. Estate of Lampert,** Op. No. 4203, 896 P2d 214 (Alaska 1995).

PART V. DEPOSITIONS AND DISCOVERY

Rule 26. General Provisions Governing Discovery; Duty of Disclosure.

(a) **Required Disclosures; Methods to Discover Additional Matter.** Disclosure under subparagraphs (a)(1), (2), and (3) of this rule is required in all civil actions, except those categories of cases exempted from the requirement of scheduling conferences and scheduling orders under Civil Rule 16(g), adoption proceedings, and prisoner litigation against the state under AS 09.19.

(1) *Initial Disclosures.* Except to the extent otherwise directed by order or rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the factual basis of each of its claims or defenses;

(B) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information and whether the attorney-client privilege applies;

(C) the name and, if known, the address and telephone number of each individual who has made a written or recorded statement and, unless the statement is privileged or otherwise protected from disclosure, either a copy of the statement or the name and, if known, the address and telephone number of the custodian;

(D) subject to the provisions of Civil Rule 26(b)(3), a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are relevant to disputed facts alleged with particularity in the pleadings;

(E) subject to the provisions of Civil Rule 26(b)(3), all photographs, diagrams, and videotapes of persons, objects, scenes and occurrences that are relevant to disputed facts alleged with particularity in the pleadings;

(F) each insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment;

(G) all categories of damages claimed by the disclosing party, and a computation of each category of special damages, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such claims are based, including materials bearing on the nature and extent of injuries suffered; and

(H) the identity, with as much specificity as may be known at the time, of all potentially responsible persons within the meaning of AS 09.17.080, and whether the party will choose to seek to allocate fault against each identified potentially responsible person.

Unless otherwise directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subsection (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has

not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) *Disclosure of Expert Testimony.*

(A) In addition to the disclosures required by subparagraph (a)(1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Evidence Rules 702, 703, or 705.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness 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, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. The parties shall supplement these disclosures when required under subparagraph (e)(1).

(D) No more than three independent expert witness may testify for each side as to the same issue in any given case. For purposes of this rule, an independent expert is an expert from whom a report is required under section (a)(2)(B). The court, upon the showing of good cause, may increase or decrease the number of independent experts to be called.

(3) *Pretrial Disclosures.* In addition to the disclosures required in the preceding paragraphs, a party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

These disclosures shall be made at the times and in the sequence directed by the court. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B), and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(4) *Form of Disclosures.* Unless otherwise directed by the court, all disclosures under subparagraphs (a)(1) and (2) shall be made in writing, signed, and served in accordance with Rule 5.

(5) *Methods to Discover Additional Matter.* 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; and requests for admission.

(b) **Discovery Scope and Limits.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Limitations.* The court may alter the limits in these rules on the number of depositions and interrogatories, the length of depositions under Rule 30, and the number of requests under Rule 36. The

frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under paragraph (c).

(3) *Trial Preparation: Materials.* Subject to the provisions of subparagraph (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subparagraph (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 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 person making it and contemporaneously recorded.

(4) *Trial Preparation: Experts.*

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under section (a)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, 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 this subparagraph; and (ii) with respect to discovery obtained under section (b)(4)(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) *Claims of Privilege or Protection of Trial Preparation Materials.* 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.

(c) **Protective Orders.** Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the judicial district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the disclosure or discovery not be had; (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by

the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition, after being sealed, be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) **Timing and Sequence of Discovery.**

(1) *Timing of Discovery — Non-Exempted Actions.* In an action in which disclosure is required under Rule 26(a), a party may serve up to ten of the thirty interrogatories allowed under Rule 33(a) at the times allowed by section (d)(2)(C) of this rule. Otherwise, except by order of the court or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by paragraph (f).

(2) *Timing of Discovery — Exempted Actions.* In actions exempted from disclosure under Rule 26(a), discovery may take place as follows:

(A) For depositions upon oral examination under Civil Rule 30, a defendant may take depositions at any time after commencement of the action. The plaintiff must obtain leave of court if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service by publication if authorized, except that leave is not required (i) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (ii) the plaintiff seeks to take the deposition under Civil Rule 30(a)(2)(C).

(B) For depositions upon written questions under Civil Rule 31, a party may serve questions at any time after commencement of the action.

(C) For interrogatories, requests for production, and requests for admission under Civil Rules 33, 34, and 36, discovery requests may be served upon the plaintiff at any time after the commencement of the action, and upon any other party with or after service of the summons and complaint upon that party.

(3) *Sequence of Discovery.* Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) **Supplementation of Disclosures and Responses.** A party who has made a disclosure under paragraph (a) or Civil Rule 26.1(b) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its disclosures under paragraph (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) **Meeting of Parties; Planning for Discovery and Alternative Dispute Resolution.** Except when otherwise ordered and except in actions exempted from disclosure under Rule 26(a), the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, including whether an alternative dispute resolution procedure is appropriate, to make or arrange for the disclosures required by subparagraph (a)(1), and to develop a proposed discovery plan and a proposed alternative dispute resolution plan. The plan shall indicate the parties' views and proposals concerning:

(1) what changes should be made in the timing or form of disclosures under paragraph (a), including

a statement as to when the disclosures under subparagraph (a)(1) were made or will be made and what are appropriate intervals for supplementation of disclosure under Rule 26(e)(1);

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) what changes should be made in the limitations on discovery imposed under these rules and what other limitations should be imposed;

(4) the plan for alternative dispute resolution, including its timing, the method of selecting a mediator, early neutral evaluator, or arbitrator, or an explanation of why alternative dispute resolution is inappropriate;

(5) whether a scheduling conference is unnecessary; and

(6) any other orders that should be entered by the court under paragraph (c) or under Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the plan.

(g) **[Applicable to cases filed on or after August 7, 1997.] Limited Discovery; Expedited Calendaring.** In a civil action for personal injury or property damage involving less than $100,000 in claims, the parties shall limit discovery to that allowed under District Court Civil Rule 1(a)(1) and shall avail themselves of the expedited calendaring procedures allowed under District Court Civil Rule 4.

(Adopted by SCO 5 October 9, 1959; amended by SCO 49 effective January 1, 1963; and by SCO 149 dated December 27, 1971, by SCO 158 effective February 15, 1973 and by Amendment No. 2 to SCO 158 dated July 30, 1973; amended by SCO 336 effective January 1, 1979; by SCO 1026 effective July 15, 1990; by SCO 1153 effective July 15, 1994; by SCO 1172 effective July 15, 1995; by SCO 1266 effective July 15, 1997; by SCO 1281 effective August 7, 1997; by SCO 1318 effective July 15, 1998; by SCO 1325 effective July 15, 1998; by SCO 1341 effective September 10, 1998; and by SCO 1569 effective October 15, 2005)

Note to SCO 1281: Paragraph (g) of this rule was added by ch. 26, § 40, SLA 1997. According to § 55 of the Act, the amendment to Civil Rule 26 applies "to all causes of action accruing on or after the effective date of this Act." The amendment to Rule 26 adopted by paragraph 1 of this order applies to all cases **filed** on or after August 7, 1997. See paragraph 17 of this order. The change is adopted for the sole reason that the legislature has mandated the amendment.

Note: Ch. 26, § 10, SLA 1997 repeals and reenacts AS 09.17.020 concerning punitive damages. New AS 09.17.020(e) prohibits parties from conducting discovery relevant to the amount of punitive damages until after the fact finder has determined that an award of punitive damages is allowed. This provision applies to causes of action accruing on or after August 7, 1997. See ch. 26, § 55, SLA 1997. According to § 48 of the Act, new AS 09.17.020(e) has the effect of amending Civil Rule 26 by limiting discovery in certain actions.

Note: Section 2 of chapter 95 SLA 1998 amends AS 09.19.050 to state that the automatic disclosure provisions of Civil Rule 26 do not apply in prisoner litigation against the state. According to section 13 of the act, this amendment has the effect of changing Civil Rule 26 "by providing that the automatic disclosure provisions of the rule do not apply to litigation against the state brought by prisoners."

Annotations

Cases

In a personal injury case, it was error to deny motion to require attending physician to testify at a deposition regarding the injuries sustained by plaintiff where waiver of privilege during trial appeared to be almost inevitable. **Mathis v. Hilderbrand,** Op. No. 349, 416 P2d 8 (Alaska 1966).

The nature of the condemnation action, standing alone, constituted "exceptional circumstances" within the meaning of this rule, justifying trial court order directing the State to furnish the condemnee appraisal reports on the condemned property made by experts whom the State had retained but did not intend to call as witnesses. **State v. Leach,** Op. No. 980, 516 P2d 1383 (Alaska 1973).

In view of the commitment to liberal pretrial discovery, the scope of the attorney-client privilege should be strictly construed in accordance with its purpose. **United Services Automobile Association v. Werley,** Op. No. 1079, 526 P2d 28 (Alaska 1974).

The attorney-client privilege cannot be used to protect a client in perpetration of a crime or other evil enterprise in concert with an attorney. **United Services Automobile Association v. Werley,** Op. No. 1079, 526 P2d 28 (Alaska 1974).

The exception to the attorney-client privilege that it cannot be used to protect a client in perpetration of a crime or other evil enterprise in concert with the attorney comes into play only when the communications between the advisor and client pertain to ongoing or future, rather than prior, wrongdoing and when advice sought is for a knowingly unlawful end. There is