IN THE SUPREME COURT FOR THE STATE OF ALASKA

ORDER NO. 1172

Amending Civil Rules 16, 16.1, 26, 29, 30, 31, 32, 33, 34, 36, 37, 40, and 72.1, Evidence Rule 702, Administrative Rule 7, and Civil Rules 5 and 90.1 concerning pretrial procedure and discovery and disclosure in civil cases.

IT IS ORDERED:

1. Civil Rule 16 is amended to provide:

Rule 16. ~~**Pre-Trial Procedure — Formulating Issues**~~ **Pretrial Conferences; Scheduling; Management**.

~~(a) **In General.** In any action a pre-trial conference on a day certain may be ordered pursuant to the motion of any party, or by the court upon its own motion, to consider the following:~~

~~(1) The simplification of the issues;~~

~~(2) The necessity or desirability of amendments to the pleadings;~~

~~(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;~~

~~(4) The limitation of the number of expert witnesses;~~

~~(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;~~

~~(6) Settlement of the case;~~

~~(7) Such other matters as may aid in the disposition of the action.~~

(a) **Pretrial Conferences; Objectives.** In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as:

(1) expediting the disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation; and

(5) facilitating the settlement of the case.

~~(b) **Pre-Trial Calendar.**~~

~~(1) The judge in whose court any action or proceeding, jury or non-jury, is pending, may place the same, whether or not at issue, on the calendar for pre-trial procedure at such time and for such purpose or purposes as he may deem proper, upon at least 20 days' notice to the parties thereto or their attorneys of record.~~

~~(2) At any time after any pending action or proceeding is at issue, any party thereto may request the judge in writing to place the same upon the calendar for such pre-trial procedure as may be indicated in such request and as permitted by this rule. Upon the granting by the judge of such request, the clerk shall serve and file, not less than five days prior to the hearing, unless otherwise ordered by the court, a written notice thereof to all parties theretofore appearing in such action.~~

(b) **Scheduling Order; Mandatory Scheduling Conference.**

(1) Except in categories of actions exempted by rule as inappropriate, the judge shall, after receiving the report from the parties under Rule 26(f), enter a scheduling order that limits or establishes the time

(A) to join other parties and to amend the pleadings;

(B) to file motions;

(C) to disclose expert witnesses and reports required under Rule 26(a)(2);

(D) to supplement disclosures required under Rule 26(a);

(E) to identify witnesses and exhibits;

(F) to complete discovery; and

(G) for trial or the trial setting conference.

The scheduling order may also address

(H) modification of the discovery limitations contained in these rules, including the length of depositions in light of the factors listed in Rule 30(d)(2), and the extent of discovery to be permitted;

(I) the date or dates for conferences before trial; and

(J) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in any event within 90 days after the appearance of the defendants. A schedule shall not be modified except upon a showing of good cause and by leave of court.

(2) The judge shall meet with the attorneys for the parties and any unrepresented parties prior to entering the scheduling order unless the parties have waived this conference in their report and the judge determines that a conference is unnecessary. The court shall distribute notice of the conference date as soon as practicable after the appearance of the defendants.

~~(c) **Pre-Trial Memorandum.** No later than 3 days prior to the pre-trial conference each attorney shall serve and file a typewritten~~

~~memorandum covering such of the following items as are appropriate:~~

~~(1) A brief statement of what the plaintiff expects to prove in support of his claim.~~

~~(2) A brief statement of what the defendant expects to prove as a defense thereto.~~

~~(3) Similar statements as to any counterclaim or cross-claim of a defendant.~~

~~(4) Any amendments required of the pleadings.~~

~~(5) Any tender of issue in the pleadings that is to be abandoned.~~

~~(6) Any stipulation of facts, as to liability or damages, that the attorney is willing to make, or on which he requests an admission.~~

~~(7) The details of the damages claimed, or of any other relief sought, as of the date of the pre-trial conference.~~

~~(8) The documents and records to be offered in evidence at the trial which will be conceded to be genuine, or as to which a concession is requested.~~

~~(9) The names and specialties of experts to be called as witnesses.~~

~~(10) Any other pre-trial relief which the court or attorney may request.~~

~~In preparing for the pre-trial conference, attorneys are requested to discuss with each other the matters listed herein.~~

(c) **Subjects for Consideration at Pretrial Conferences.** At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumulative evidence, and limitations or restrictions on the use of testimony under Evidence Rule 702;

(5) the appropriateness and timing of summary adjudication under Rule 56;

(6) the control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to Rule 26 and Rules 29 through 37;

(7) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

(8) the advisability of referring matters to a master;

(9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule;

(10) the form and substance of the pretrial order;

(11) the disposition of pending motions;

(12) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(13) an order for a separate trial pursuant to Rule 42(b) with respect to a claim, counterclaim, cross-claim, or third-party claim, or with respect to any particular issue in the case;

(14) an order directing a party or parties to present evidence early in the trial with respect to a manageable issue that could, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a);

(15) an order establishing a reasonable limit on the time allowed for presenting evidence; and

(16) such other matters as may facilitate the just, speedy, and inexpensive disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.

~~(d) **The Conference.**~~

~~(1) All pre-trial conference shall be held before the judge in open court or in chambers. The attorneys appearing at the pre-trial conference shall be prepared to discuss the action and shall be authorized to act for their clients. If an attorney for a party fails to appear at a pre-trial conference, the pre-trial judge may act as in the case of a non-appearance for trial.~~

~~(2) The matter of a settlement may be discussed at the pre-trial conference, but the discussion shall not be made a part of the court record and shall not be mentioned in the order entered on the pre-trial conference. The judge assigned to the case may request the presiding~~

~~judge to assign another judge for the purpose of conducting a settlement conference.~~

(d) **Final Pretrial Conference.** Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

(e) ~~**Pre-Trial**~~ **Pretrial Orders.** ~~The judge shall make~~ After any conference held pursuant to this rule, an order ~~(to be drawn and submitted by counsel) which~~ shall be entered reciteing the action taken ~~at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel~~. ~~The attorneys shall affix their signatures to the order with respect to the stipulations and agreements set forth in the order.~~ Theis order ~~when entered~~ shall control the subsequent course of the action unless modified by ~~the judge to prevent manifest injustice~~ a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

~~(f) **Continuances.** All actions set for pre-trial shall be heard on the date set, unless continued by order of the court for cause shown.~~

(f) **Sanctions.** If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

(g) **Actions Exempted from Rule 16(b).** The following categories of actions are exempted from Rule 16(b): special proceedings listed in Part XII of these rules and paternity actions.

2. Civil Rule 16.1 is amended to provide:

Rule 16.1. Special Procedures for Reducing Litigation Delay.

* * * *

(d)(1) *Witness and Exhibit List and Exhibit Copies.* A party desiring to file a ~~Motion~~ motion to ~~Set Trial~~ set trial must first serve on all

other parties and file with the court a list of witnesses and exhibits expected to be used at trial. Exhibit lists and exhibit copies must be served on all other parties, but exhibit copies are not filed with the court. Evidence to be used solely for impeachment is excepted. This service and filing may not occur until (A) 90 days after service of the summons and complaint and (B) the party filing the motion has made the disclosures required under Rule 26(a) and (e). Within 15 days after service of the witness and exhibit ~~list~~ lists and exhibit copies all other parties shall file and serve their lists of witnesses and exhibits, and serve their exhibit copies. For good cause shown, the trial court may extend the foregoing time period. After all necessary filings and service under this section are made or the time for such filings has expired, any party may serve and file a motion to set trial and certificate under paragraph (c) of this rule.

(2) *Witness Lists.*

* * * *

~~(k) **Discovery.** Each party shall furnish to the other parties, without formal request or motion or court order therefor, the following items or information otherwise discoverable under Civil Rule 34, and shall do so not later than 75 days after service of the summons and complaint.~~

~~(1) All relevant contracts and all written and recorded communications, memoranda and notes which contain evidence relevant to the~~

~~interpretation of such contracts and any claimed breaches thereof;~~

~~(2) All written documents evidencing any general, special, and consequential damages being claimed;~~

~~(3) All written and recorded statements from parties and witnesses;~~

~~(4) All investigative reports;~~

~~(5) All photographs of persons, objects, scenes and occurrences in issue;~~

~~(6) All diagrams prepared by parties, witnesses and investigators, which portray objects, scenes and occurrences in issue;~~

~~(7) Federal income tax returns for the preceding five years from all parties claiming past or future damages for lost income or income producing ability;~~

~~(8) Insurance policies and binders.~~

~~All other discovery shall be governed by the provisions of the Alaska Civil Rules, and shall have been completed by the deadline set forth in the pretrial order issued in each case.~~

(k) **Disclosure and Discovery.** Disclosure and discovery shall be governed by Rules 26 through 37, except that

(1) the time for initial disclosures required under Rule 26(a)(1) shall be 75 days after service of the summons and complaint;

(2) the time for disclosure of expert witnesses and reports required under Rule 26(a)(2) shall be 90 days after service of the summons and complaint;

(3) the appropriate interval for supplementation of disclosure under Rule 26(e)(1) shall be no longer than 30 days;

(4) Rule 26(f), which requires the parties to meet and to frame a discovery plan, shall not apply; and

(5) except by order of the court or agreement of the parties, a party may not seek discovery from any source before the party has made the initial disclosures required under Rule 26(a)(1).

Disclosure and discovery shall have been completed by the deadline set forth in the pretrial order issued in each case.

* * * *

(n) **Pretrial Order.** In lieu of a scheduling order under Rule 16(b), the court shall issue a pretrial order reciting the action taken at the trial setting conference required under this rule.

~~(n)~~ (o) **Forms.** The clerk's office shall develop and disseminate all appropriate forms for the implementation of this rule.

Such forms shall include the case characterization form, notice of transfer to inactive calendar and of intent to dismiss, order of dismissal with prejudice, motion to set trial, certificate of readiness, order invoking Civil Rule 16.1, and modified pretrial order.

3. Civil Rule 26 is amended to provide:

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

(a) **Required Disclosures; ~~Discovery~~ Methods to Discover Additional Matter.** Disclosure under subparagraphs (a)(1) and (2) of this rule is required in all civil actions except domestic relations and adoption proceedings.

(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; and

(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.

Unless otherwise directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under paragraph (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 ~~on~~ or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. ~~Written interrogatories pursuant to Rule 33 of these rules are limited to thirty questions, which shall include paragraphs and subparagraphs. Upon application to the court, the court may with good cause appearing, permit further written interrogatories.~~

(b) ~~Scope of~~ **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. ~~It is not ground for objection that the~~ The information sought ~~will be inadmissible~~ 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 ~~set forth in paragraph (a)~~ 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 ~~is unduly burdensome or expensive~~ outweighs its likely benefit, 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, 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).

~~(2) Insurance Agreement. A party may obtain discovery of the existence and contents of any 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. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for~~

~~insurance shall not be treated as part of an insurance agreement.~~

(3) *Trial Preparation: Materials.* Subject to the provisions of ~~subdivision~~ subparagraph (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under ~~subdivision~~ 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 ~~his~~ 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 ~~his~~ the party's case and that ~~he~~ 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.* ~~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~~ 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.

~~(ii) Upon motion, the court may order further discovery by other means subject to such reductions as to scope and such provisions, pursuant to subdivision (b) (4) (C) of this rule concerning~~

~~fees and expenses as the court may deem appropriate.~~

(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 ~~subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule~~ this subparagraph; and (ii) with respect to discovery obtained under ~~subdivision (b)(4)(A)(ii)~~ section (b)(4)(B) of this rule the court ~~may~~ shall require~~, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require,~~ the party seeking discovery to pay the other party a fair ~~s~~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 ~~disclosed~~ revealed or be ~~disclosed~~ revealed only ~~by~~ 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 ~~and Timing~~ of Discovery.** Except when authorized under these rules or 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). 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 responded to a request for discovery with a disclosure or response ~~that was complete when made~~ is under ~~no~~ a duty to supplement or correct the disclosure or response to include information thereafter acquir~~inged, except as~~

~~follows~~ if ordered by the court or in the following circumstances:

(1) A party is under a duty ~~seasonably~~ to supplement ~~the response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.~~ 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 ~~obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstance are such that a failure to amend the response is in substance a knowing concealment~~ 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.

~~(3) A duty to supplement responses may be imposed by order of the court, an agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.~~

(f) **Meeting of Parties; Planning for Discovery ~~Conference~~.** ~~At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes~~ Except when otherwise ordered, 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, to make or arrange for the disclosures required by subparagraph (a)(1), and to develop a proposed discovery plan. The plan shall indicate the parties' views and proposals concerning:

(1) ~~a statement of the issues as they then appear~~ 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) ~~a proposed plan and schedule of discovery~~ 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) ~~any limitations proposed to be placed on discovery~~ what changes should be made in the limitations on discovery imposed under these rules and what other limitations should be imposed;

(4) whether a scheduling conference is unnecessary; and

~~(4)~~ (5) any other ~~proposed~~ orders ~~with respect to discovery; and~~ any other orders that should be entered by the court under paragraph (c) or under Rule 16(b) and (c).

~~(5) a statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and each party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.~~

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. ~~Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. Any order may be altered or amended whenever justice so requires.~~

~~Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Civil Rule 16.~~

4. Civil Rule 29 is amended to provide:

Rule 29. Stipulations Regarding Discovery ~~Procedure.~~ Practice.

Unless otherwise directed by the court ~~orders otherwise~~, the parties may by written stipulation~~:~~ (1) provide ~~the~~ that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and that when so taken may be used like other depositions~~;~~, and (2) modify ~~the procedures provided by these rules for other methods of discovery~~ other procedures governing or limitations placed upon discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may, if

they would interfere with any time set for filing of motions, for hearing of a motion, or for trial, be made only with the approval of the court.

5. Civil Rule 30 is amended to provide:

Rule 30. Depositions Upon Oral Examination.

(a) **When Depositions May ~~b~~Be Taken; When Leave is Required.**

(1) ~~After commencement of an action, any~~ party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2). ~~Leave of court, granted with or without notice, must be obtained only 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 made under Rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b)(2) of this rule.~~ The attendance of witnesses may be compelled by subpoena as provided in Rule 45. ~~The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.~~

(2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties,

(A) a proposed deposition would result in more than three depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by third-party defendants, of witnesses other than

(i) parties, which means any individual identified as a party in the pleadings and any individual whom a party claims in its disclosure statements is covered by the attorney-client privilege;

(ii) independent expert witnesses expected to be called at trial;

(iii) treating physicians; and

(iv) document custodians whose depositions are necessary to secure the production of documents or to establish an evidentiary foundation for the admissibility of documents;

(B) the person to be examined already has been deposed in the case; or

(C) a party seeks to take a deposition before the time specified in Rule 26(d) unless the notice contains a certification, with supporting facts, that the person to be examined is expected to leave Alaska and be unavailable for examination in this state unless deposed before that time.

(b) **Notice of Examination: General Requirements; ~~Special Notice; Nonstenographic~~ Method of Recording; Production of Documents and**

Things; Deposition of Organization; Deposition by Telephone.

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify ~~him~~ the person or the particular class or group to which ~~he~~ the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to, or included in, the notice.

(2) ~~Leave of court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person to be examined is about to go out of the judicial district where the action is pending and more than 100 miles from the place of trial, or is about to go out of the state, or is bound on a voyage to sea, and will be unavailable for examination unless his deposition is taken before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true.~~

~~If a party shows that when he was served with notice under this subdivision (b) (2) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.~~ Reserved.

(3) ~~The court may for cause shown enlarge or shorten the time for taking the deposition.~~ Reserved.

(4) Reserved.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

~~(5)~~ (6) A party may in ~~his~~ the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which ~~he~~ the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subparagraph (b) ~~(5)~~ (6)

does not preclude taking a deposition by any other procedure authorized in these rules.

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic means. For purposes of this rule and Rules 28(a), 37(a)(1), and 37(b)(1), a deposition taken by such means is taken in the judicial district and at the place where the deponent is to answer questions.

(c) **Examination and Cross-Examination; Record ~~on~~ of Examination; Oath; Objections.** Examination and cross-examination of witnesses may proceed as permitted at the trial under provisions of the Rules of Evidence. The officer before whom the deposition is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under ~~his~~ the officer's direction and in ~~his~~ the officer's presence, record the testimony of the witness. For an audio or audio-visual deposition, any officer authorized by the laws of this state to administer oaths shall swear the witness. The recording machinery may be operated by such officer, or someone acting under ~~his~~ the officer's direction and in ~~his~~ the officer's presence, even where such officer is also an attorney in the case. The testimony shall be taken stenographically or recorded by audio or audio-visual means. A party may arrange at ~~his~~ the party's own expense to have any portion of the record typewritten.

All objections made at the time of the examination to the qualifications of the officer

taking the deposition, ~~or~~ to the manner of taking it, ~~or~~ to the evidence presented, ~~or~~ to the conduct of any party, ~~and any other objection to~~ or to any other aspect of the proceedings, shall be noted by the officer upon the record of the deposition. ~~Evidence objected to shall be~~; but the examination shall proceed, with the testimony being taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and ~~he~~ the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) **Schedule and Duration; Motion to Terminate or Limit Examination.**

(1) Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. No specification of the defect in the form of the question or the answer shall be stated unless requested by the party propounding the question. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (3). Continual and unwarranted off the record conferences between the deponent and counsel following the propounding of questions and prior to the answer or at any time during the deposition are prohibited.

(2) Depositions shall be of reasonable length. Oral depositions shall not, except

pursuant to stipulation of the parties or order of the court, exceed six hours in length for parties, independent expert witnesses, and treating physicians and three hours in length for other deponents. The court shall allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another party impedes or delays the examination. In deciding whether to allow additional time for fair examination of a deponent or class of deponents, the court may take into account, among other factors, the complexity of the case, the number of parties likely to examine a deponent, and the extent of relevant information possessed by the deponent. If the court finds that there has been an impediment, delay, or other conduct that has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.

(3) At any time during ~~the taking of the~~ a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the judicial district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only

upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) ~~Submission to~~ Review by Witness; Changes; Signing. ~~When a stenographic deposition is taken and the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.~~ If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days in which to review the

transcript or recording after being notified by the officer that the transcript or recording is available and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by subparagraph (f)(1) whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.

(f) **Certification and Filing by Officer; Exhibits; Copies; Notice of Filing.**

(1) The officer shall certify ~~on the deposition~~ that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. This certificate shall be in writing and accompany the record of the deposition. The officer shall ~~then~~ securely seal the deposition in an envelope or package ~~e~~indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly send it to the ~~party who requested that the deposition be transcribed~~ attorney who arranged for the transcript or recording, who shall store it under conditions that will protect it against loss, destruction, tampering, or deterioration. ~~If requested, the officer shall also send a copy of the deposition to the other party for the reasonable cost of postage and copying.~~

Documents and things produced for inspection during the examination of the witness, shall, upon

the request of a party, be marked for identification and annexed to ~~and returned with~~ the deposition, and may be inspected and copied by any party, except that if the person producing the materials desires to retain them the person may (A) ~~the person producing the materials may substitute~~ offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals~~,~~ if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, ~~and~~ or (B) ~~if the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and~~ offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to ~~and returned with~~ the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Unless otherwise ordered by the court or agreed by the parties, the officer shall retain stenographic notes of any deposition taken stenographically or a copy of the recording of any deposition taken by another method. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(4) A party dismissed from an action shall deliver original depositions in the party's possession to the plaintiff or another party remaining in the action and shall promptly certify to the court that all depositions have been delivered and identify the party now responsible for their safekeeping.

(g) **Failure to Attend or to Serve Subpoena; Expenses.**

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by ~~him and his~~ that party and that party's attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon ~~him~~ the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because ~~he~~ that party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by ~~him and his~~ that party and that party's attorney in attending, including reasonable attorney's fees.

Note to Rule 30(a)(2)(A): Evidence Rule 702(b) limits the number of expert witness who may be called to testify at trial.

6. Civil Rule 31 is amended to provide:

Rule 31. Depositions ~~on~~ Upon Written Questions.

(a) **Serving Questions; Notice.**

(1) ~~After commencement of the action, any~~ A party may take the testimony of any person, including a party, by deposition upon written questions without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. ~~The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.~~

(2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties,

(A) a proposed deposition would result in more than three depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by third-party defendants, of witnesses other than

(i) parties, which means any individual identified as a party in the pleadings and any

individual whom a party claims in its disclosure statements is covered by the attorney-client privilege;

(ii) independent expert witnesses expected to be called at trial;

(iii) treating physicians; and

(iv) document custodians whose depositions are necessary to secure the production of documents or to establish an evidentiary foundation for the admissibility of documents;

(B) the person to be examined already has been deposed in the case; or

(C) a party seeks to take a deposition before the time specified in Rule 26(d).

(3) A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify ~~him~~ the person or the particular class or group to which ~~he~~ the person belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b) ~~(5)~~ (6).

(4) Within 30 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

* * * *

7. Civil Rule 32 is amended to provide:

Rule 32. Use of Depositions in Court Proceedings.

(a) **Use of Depositions.** At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

* * *

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

(A) that the witness is dead; or

(B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used; or

(F) that the witness' testimony has been recorded on video tape.

A deposition taken without leave of court pursuant to a notice under Rule 30(a)(2)(C) shall not be used against a party who demonstrates that, when served with the notice, the party was unable through the exercise of diligence to obtain counsel to represent the party at the taking of the deposition.

* * * *

8. Civil Rule 33 is amended to provide:

Rule 33. Interrogatories to Parties.

(a) **Availability~~; Procedures for Use~~.** Without leave of court or written stipulation, a~~A~~ny party may serve upon any other party written interrogatories, not exceeding 30 in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation, a partnership, an association, or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(2). Without leave of court or written stipulation, i~~I~~nterrogatories may~~, leave of court,~~ not be served ~~upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party~~ before the time specified in Rule 26(d). There shall be sufficient space provided so that answers to the interrogatories propounded may be inserted thereon.

(b) **Answers and Objections.**

(1) Each interrogatory shall be answered separately and fully in writing~~,~~ under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection ~~shall be stated in lieu of an answer~~ and shall answer to the extent the interrogatory is not objectionable.

(2) The answers are to be signed by the person making them, and the objections signed by the attorney making them.

(3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within ~~30~~ 40 days after the service of the interrogatories~~, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a~~. A shorter or longer time~~ may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29.

(4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.

(5) The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

~~(b)~~ (c) **Scope; Use at Trial.** Interrogatories may relate to any matters which can be inquired into under Rule 26(b)(1), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or

contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

~~(c)~~ (d) **Option to Produce Business Records.**

* * * *

9. Civil Rule 34 is amended to provide:

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes.

* * * *

(b) **Procedure.** ~~The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.~~ The request shall set forth ~~the items to be inspected,~~ either by individual item or by category, the items to be inspected, and describe each ~~item and category~~ with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d).

The party upon whom the request is served shall serve a written response within 30 days after

the service of the request~~, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a~~A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

* * * *

10. Civil Rule 36 is amended to provide:

Rule 36. Requests for Admission.

(a) **Request for Admission.** A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of

Rule 26(b)(1) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. ~~The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.~~ Without leave of court or written stipulation, requests for admission may not be served before the time specified in Rule 26(d).

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing, subject to Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by ~~his~~ the party's attorney~~, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him~~. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires

that a party qualify ~~his~~ an answer or deny only a part of the matter of which an admission is requested, ~~he~~ the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless ~~he~~ the party states that ~~he~~ the party has made reasonable inquiry and that the information known or readily obtainable by ~~him~~ the party is insufficient to enable ~~him~~ the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; ~~he~~ the party may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why ~~he~~ the party cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) **Effect of Admission.**

* * * *

11. Civil Rule 37 is amended to provide:

Rule 37. Failure to Make Disclosure or Cooperate in Discovery: Sanctions.

(a) **Motion for Order Compelling Disclosure or Discovery.** A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows:

(1) *Appropriate Court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the judicial district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the judicial district where the deposition is being taken.

(2) *Motion.*

(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(B) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a

corporation or other entity fails to make a designation under Rule ~~30(b)(5)~~ 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before ~~he applies~~ applying for an order.

~~If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).~~

(3) *Evasive or Incomplete Disclosure, Answer, or Response*. For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(4) ~~*Award of*~~ *Expenses* ~~*of Motion*~~ *and Sanctions*.

(A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity ~~for hearing~~ to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in ~~obtaining the order~~ making the motion, including attorney's fees, unless the court finds that the ~~opposition to the~~ motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity ~~for hearing~~ to be heard, require the moving party or the attorney ~~advising~~ filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the

motion among the parties and persons in a just manner.

(b) **Failure to Comply With Order.**

(1) *Sanctions by Court in Judicial District Where Deposition is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the judicial district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions By Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule ~~26(f)~~ 16(e) or 26(b), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated

claims or defenses, or prohibiting ~~him~~ that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring ~~him~~ that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that ~~he~~ that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising ~~him~~ that party or both to pay the reasonable expenses, including ~~the~~ attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(3) *Standard for Imposition of Sanctions.* Prior to making an order under sections (A), (B),

or (C) of subparagraph (b)(2) the court shall consider

(A) the nature of the violation, including the willfulness of the conduct and the materiality of the information that the party failed to disclose;

(B) the prejudice to the opposing party;

(C) the relationship between the information the party failed to disclose and the proposed sanction;

(D) whether a lesser sanction would adequately protect the opposing party and deter other discovery violations; and

(E) other factors deemed appropriate by the court or required by law.

The court shall not make an order that has the effect of establishing or dismissing a claim or defense or determining a central issue in the litigation unless the court finds that the party acted willfully.

(c) **~~Expenses on~~ Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.**

(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a

motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under sections (A), (B), and (C) of subparagraph (b)(2) of this rule and may include informing the jury of the failure to make the disclosure.

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, ~~he~~ the requesting party may apply to the court for an order requiring the other party to pay ~~him~~ the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that ~~(1)~~ (A) the request was held objectionable pursuant to Rule 36(a), or ~~(2)~~ (B) the admission sought was of no substantial importance, or ~~(3)~~ (C) the party failing to admit had reasonable ground to believe that ~~he~~ the party might prevail on the matter, or ~~(4)~~ (D) there was other good reason for the failure to admit.

(d) **Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.** If a party or an officer, director, or managing agent of a party or a person designated under Rule ~~30(b)(5)~~ 30(b)(6) or

31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authoriz~~inged~~ under ~~paragraphs~~ sections (A), (B), and (C) of ~~subdivision~~ subparagraph (b)(2) of this rule. Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising ~~him~~ that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this ~~subsection~~ paragraph may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has ~~applied~~ a pending motion for a protective order as provided by Rule 26(c).

(e) Reserved.

(f) Reserved.

(g) **Failure to Cooperate in Discovery or to Participate in the Framing of a Discovery Plan.** If a party or a party's attorney engages in unreasonable, groundless, abusive, or obstructionist conduct during the course of discovery or fails to participate in good faith in the development and submission ~~framing~~ of a proposed discovery plan ~~by agreement~~ as ~~is~~ required by Rule 26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the ~~failure~~ conduct.

12. Civil Rule 40 is amended to provide:

Rule 40. Assignment and Hearing of Cases — Calendars — Continuances.

* * * *

(b) **Trial Calendar — Memorandum to Set Civil Case for Trial.**

(1) Unless otherwise ordered, a civil case shall be set for a pretrial conference, a trial setting conference, or a trial when it is at issue and when a party thereto has served and filed therein a memorandum to set civil case for trial, stating:

(a) The title and number of the case;

(b) The nature of the case;

(c) That all essential parties have been served with process or appeared herein and that the case is at issue as to all such parties;

(d) Whether the case is entitled to legal preference and, if so, the citation of the section number of the statute or other authority granting such preference;

(e) Whether or not a jury trial has been demanded;

(f) The time estimated for trial;

(g) The names, addresses and telephone numbers of the attorneys for the parties or of the parties appearing in person.

(2) Any party not in agreement with the information or estimates given in the memorandum to set civil case for trial shall within ten days after the service thereof serve and file a memorandum on his behalf.

~~(3) Cases shall be set for pretrial conference, trial setting conference or trial in accordance with procedures established by the presiding superior court judge for each judicial district. If, after four months from the date a case is filed, neither party has filed a memorandum to set under (a) of this rule, the court shall set the case for a trial setting conference to be held~~

~~not more than six months from the date the case is filed.~~

(c) **Visiting Judges.** Whenever a visiting judge may be present, assisting the judge of any judicial district, the presiding judge of that district shall be solely responsible for the assignment of cases and proceedings to the visiting judge. The judge to whom any particular action or proceeding is assigned will thereupon have charge of such action or proceeding so long as such assignment continues.

* * * *

13. Civil Rule 72.1 is amended to provide:

RULE 72.1 EXPERT ADVISORY PANELS IN HEALTH CARE PROVIDER MALPRACTICE ACTIONS.

* * * *

(c) **Submission of Medical Records.**

* * * *

(7) Within 30 days after service of the court's initial panel nominations, each party shall serve upon the panel and all other parties the information and materials required to be disclosed under Rule 26(a)(1)(A), (B), (C), and 26(a)(2).

* * * *

14. Evidence Rule 702 is amended to provide:

EVIDENCE RULE 702. TESTIMONY BY EXPERTS.

(a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion ~~of~~ or otherwise.

(b) No more than three independent expert witnesses may testify for each side as to the same issue in any given case~~, unless the judge permits an additional number of witnesses to testify as experts~~. For purposes of this rule, an independent expert is 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. The court, upon the showing of good cause, may increase or decrease the number of independent experts to be called.

15. Administrative Rule 7 is amended to provide:

ADMINISTRATIVE RULE 7. WITNESS FEES.

* * * *

(c) **Expert Witnesses.** Recovery of costs for a witness called to testify as an expert is limited to the time when the expert is employed and testifying and shall not exceed $50.00 per hour, except as otherwise provided in these rules. A

party may not recover costs for more than three <u>independent</u> expert witnesses as to the same issue in any given case, unless the judge permits recovery for an additional number of expert witnesses. <u>For purposes of this rule, an independent expert is 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.</u>

* * * *

16. Civil Rule 5 is amended to provide:

CIVIL RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS.

* * * *

(d) **Filing.**

(1) Except as provided in (2) of this paragraph, all papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter.

(2) Unless filing is ordered by the court on motion of a party or on its own motion, the following may not be filed unless and until they are used in the proceeding:

<u>(i) disclosures under Rule 26(a);</u>

~~(i)~~ (ii) notices of taking depositions and transcripts of depositions;

~~(ii)~~ (iii) interrogatories and requests for admissions and answers thereto;

~~(iii)~~ (iv) requests for production and responses thereto;

~~(iv)~~ (v) subpoenas, including subpoenas duces tecum;

~~(v)~~ (vi) offers of judgment;

~~(vii)~~ (vii) proof of service of any of the above;

~~(vii)~~ (viii) copies of correspondence between counsel'

~~(viii)~~ (ix) exhibits.

* * * *

17. Civil Rule 90.1 is amended to provide:

CIVIL RULE 90.1. DISSOLUTION OF MARRIAGE AND DIVORCE ACTIONS.

* * * *

(e) **Discovery.** In an action for divorce or dissolution of marriage, parties may obtain discovery by the methods specified in Rule 26(a)(5). All rules governing these methods of

discovery, including the limitations on the use of these methods, shall apply, except as provided in subparagraphs (e)(1) and (2) below.

(1) *Depositions.* Leave of court is not required under Rule 30(a)(2)(C) unless 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 made under Rule 4(e), except that leave is not required in these circumstances if (A) a defendant has served a notice of taking deposition or otherwise sought discovery, or (B) the notice contains a certification, with supporting facts, that the person to be examined is about to go out of the judicial district where the action is pending and more than 100 miles from the place of trial, or is about to go out of the state, or is bound on a voyage to see, and will be unavailable for examination unless deposed before that time.

(2) *Other Discovery Methods.* Interrogatories under Rule 33, requests for production or inspection under Rule 34, and requests for admissions under Rule 36 may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

18. These changes apply to cases filed on or after the effective date of this order.

DATED: June 13, 1994

EFFECTIVE DATE: July 15, 1995

/s/
Chief Justice Moore

Justice Rabinowitz

Justice Matthews

/s/
Justice Compton

/s/
Justice Eastaugh