

## Supreme Court

In re Superior Court Rules of Civil Procedure :

### ORDER

The revisions below to the Superior Court Rules of Civil Procedure, approved by the judicial officers of the Superior Court pursuant to G.L. 1956 (2012 Reenactment) § 8-6-2, are hereby approved by the Rhode Island Supreme Court.

Super.R.Civ.P. 16 is hereby amended to read as follows:

#### **Rule 16. Pre-Trial Procedure - Formulating Issues**

In any action the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:

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(4) The limitations of the number of expert witnesses; ~~and/or~~

(5) Matters related to electronically stored information; and/or

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

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, issues relating to electronically stored information, 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; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.

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Super.R.Civ.P. 26 is hereby amended to read as follows:

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

**(a) Discovery Methods.**

(1) In General. Parties may obtain discovery by one (1) or more of the following methods: depositions upon oral examinations or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a) for inspection and other purposes; physical and mental examinations; and requests for admission. In accordance with Rule 5(d), discovery requests and responses shall not be filed with the court until they are used in the proceeding or the court orders their filing.

(2) Electronically Stored Information.

(A) In these rules:

(i) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities; and

(ii) “Electronically stored information” means information stored in an electronic medium and is retrievable in perceivable format.

(B) If the parties so agree or if the court so orders upon motion by any party, all parties that have appeared in the proceeding shall confer concerning whether discovery of electronically stored information is reasonably likely to be sought in the proceeding. If discovery of electronically stored information is reasonably likely to be sought, the parties at the conference shall discuss:

(i) Any issues relating to preservation of the information;

(ii) The format in which each type of the information will be produced;

(iii) The period within which the information will be produced;

(iv) The method for asserting or preserving claims of privilege or of protection of the information as trial preparation materials, including whether such claims may be asserted after production;

(v) The method for asserting or preserving confidentiality and proprietary status of information relating to a party or a person not a party to the proceeding;

(vi) Whether allocation among the parties of the expense of production is appropriate; and

- (vii) Any other issue relating to discovery of the information.
- (C) If discovery of electronically stored information is reasonably likely to be sought, then:
- (i) The parties shall develop and memorialize a proposed plan relating to discovery of the information; and
  - (ii) If the court so orders, submit to the court a written report that summarizes the plan and states the position of each party as to any issue about which they are unable to agree.
- (D) The court may issue an order governing the discovery of electronically stored information pursuant to:
- (i) A motion by a party seeking discovery of the information or by a party or person from which discovery of the information is sought;
  - (ii) A stipulation of the parties and of any person not a party from which discovery of the information is sought; or
  - (iii) The court's own motion, after reasonable notice to, and an opportunity to be heard from, the parties and any person not a party from which discovery of the information is sought.
- (E) An order or plan governing discovery of electronically stored information may address:
- (i) Whether discovery of the information is reasonably likely to be sought in the proceeding;
  - (ii) Preservation of the information;
  - (iii) The format in which each type of the information is to be produced;
  - (iv) The time within which the information is to be produced;
  - (v) The permissible scope of discovery of the information;
  - (vi) The method for asserting or preserving claims of privilege or of protection of the information as trial-preparation material after production;
  - (vii) The method for asserting or preserving confidentiality and the proprietary status of information relating to a party or a person not a party to the proceeding;

(viii) Allocation of the expense of production; and

(ix) Any other issue relating to discovery of the information.

(F) Any motion under Rule 26(a)(2) must include a certification that the movant has in good faith conferred or attempted to confer with the other party or parties in an effort to agree upon a plan relating to the discovery of electronically stored information without court action.

**(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,~~ electronically stored information, 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 information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

\* \* \*

(3) *Trial Preparation: Materials.* Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivisions (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.

\* \* \*

(6) Electronically Stored Information.

(A) A party may object to discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or expense. In the party's objection, the party shall identify the reason for the undue burden or expense. On motion to compel discovery or for a protective order relating to the discovery of electronically stored information, a party objecting to

discovery under Rule 26(b)(6) bears the burden of showing that the information is from a source that is not reasonably accessible because of undue burden or expense.

(B) The court may order discovery of electronically stored information that is from a source that is not reasonably accessible because of undue burden or expense if the party requesting discovery shows that the likely benefit of the proposed discovery outweighs the likely burden or expense, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.

(C) If the court orders discovery of electronically stored information under paragraph (B), the court may set conditions for discovery of the information, including allocation of the expense of discovery.

(D) The court shall limit the frequency or extent of discovery of electronically stored information, even from a source that is reasonably accessible, if the court determines that:

(i) The information may be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) The discovery sought is unreasonably cumulative or duplicative;

(iii) The party seeking discovery has had ample opportunity by discovery in the proceeding to obtain the information sought; or

(iv) The likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.

(7) Claim of Privilege or Protection after Production of Electronically Stored Information.

(A) If electronically stored information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for the claim.

(B) After being notified of a claim of privilege or of protection under paragraph (A), a party shall immediately sequester the specified information and any copies it has and:

(i) Return or destroy the information and all copies and not use or disclose the information until the claim is resolved; or

(ii) Present the information to the court under seal for a determination of the claim and not otherwise use or disclose the information until the claim is resolved.

(C) If a party that received notice under paragraph (B) disclosed the information subject to the notice before being notified, the party shall take reasonable steps to retrieve the information.

\* \* \*

Super.R.Civ.P. 33 is hereby amended to read as follows:

### **Rule 33. Interrogatories to Parties**

\* \* \*

**(d) Option to Produce Business Records.** If the answer to an interrogatory may be derived or ascertained from the business records (including electronically stored information) of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and identify, as readily as can the party served, the records from which the answer may be ascertained.

Super.R.Civ.P. 34 is hereby amended to read as follows:

### **Rule 34. Production of Documents ~~and Things~~, Electronically Stored Information, and Things; Entry Upon Land for Inspection for Other Purposes**

**(a) Scope.** Any party may serve on any other party a request within the scope of Rule 26(b):

(1) To produce and permit the party making the request, or someone acting on the party's behalf, to inspect, copy, test, or sample the following items in the responding party's possession, custody or control:

(A) Any designated documents or electronically stored information (including writings, drawings, graphs, charts, photographs, sound ~~audio~~ recordings, images, and other data or data compilations) stored in any medium from which information can be obtained either directly or, if necessary, after translation, by the responding party into a reasonably usable form or format; or

(B) Any designated tangible things ~~which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served.~~

- (2) To permit entry upon designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation thereon, ~~within the scope of Rule 26(b).~~

**(b) Procedure.**

- (1) 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, complaint, Language Assistance Notice, and all other required documents upon that party. The request shall set forth the items to be inspected, copied, tested, or sampled either by individual item or by category, and describe each item and category with reasonable particularity. A party requesting production of electronically stored information may specify the format in which each type of electronically stored information is to be produced. The request shall specify a reasonable time, place, and manner of making the inspection, copy, test, or sample ~~and performing the related acts.~~

- (2) The party upon whom the request is served shall serve a written response within forty (40) days after the service of the request, except that a defendant may serve a response within sixty (60) days after service of the summons, complaint, Language Assistance Notice, and all other required documents upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection, copying, testing, or sampling ~~and related activities~~ will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection, copying, testing, or sampling 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.~~ Any response to a request for production of any electronically stored information shall also state, with respect to each item or category in the request:

(A) That inspection, copying, testing, or sampling of the information will be permitted as requested; or

(B) Any objection to the request and the reasons for the objection.

- (3) 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.

- (4) If a party responding to a request for production of electronically stored information objects to a specified format for producing the information, or if a format is not specified in the request, the responding party shall state in the response the format for production of each type of electronically stored information. Unless the parties

otherwise agree or the court otherwise orders:

(A) If a request for production does not specify a format for producing a type of electronically stored information, the responding party shall produce the information in a format in which it is ordinarily maintained or in a format that is reasonably usable; and

(B) A party need not produce the same electronically stored information in more than one format.

(5) 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, copying, testing, or sampling as requested.

\* \* \*

Super.R.Civ.P. 37 is hereby amended to read as follows:

**Rule 37. Failure to make or cooperate in discovery: Sanctions.**

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

\* \* \*

*(4) Expenses and Sanctions.*

\* \* \*

(D) Absent exceptional circumstances, the court may not impose sanctions on a party under these rules for failure to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.

\* \* \*

Super.R.Civ.P. 45 is hereby amended to read as follows:

**Rule 45. Subpoena.**

**(a) Form; Issuance.**

(1) Every subpoena shall:

\* \* \*



(D) Command each person to whom it is directed to attend and give testimony or to produce and permit inspection, copying, testing, or sampling and ~~copying~~ of designated ~~books~~, documents, electronically stored information, or tangible things in the possession, custody, or control of that person or to permit inspection of premises at a time and place therein specified; and

\* \* \*

A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. A subpoena may specify the format in which electronically stored information is to be produced.

\* \* \*

**(c) Protection of Persons Subject to Subpoenas.**

\* \* \*

(2) (A) A person commanded to produce and permit inspection, ~~and copying, testing, or sampling~~ of designated ~~books, papers,~~ documents, electronically stored information, or tangible things or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing, or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection ~~and copying, testing, or sampling~~ may, within fourteen (14) days after service of the subpoena or before the time specified for compliance if such time is less than fourteen (14) days after service, serve upon the self-represented litigant or attorney designated in the subpoena written objection to inspection ~~or copying, testing, or sampling~~ of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect, ~~and copy, test, or sample~~ the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection, ~~and copying, testing, or sampling~~ commanded.

(C) If a person responding to a subpoena for production of electronically stored information objects to a specified format for producing the information, or if a format is not specified in the subpoena, production by the person shall be in a format which is ordinarily maintained or one that is reasonably usable. A person need not produce the same electronically stored information in more than one (1) format.

(D)(i) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or expense. On motion to compel discovery or for a protective order, the person objecting to discovery bears the burden of showing that the information is from a source that is not reasonably accessible because of undue burden or expense.

(ii) The court may order discovery of electronically stored information that is from a source that is not reasonably accessible because of undue burden or expense if the party requesting discovery shows that the likely benefit of the proposed discovery outweighs the likely burden or expense, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.

(iii) If the court orders such discovery, the court may set conditions for discovery of the information, including allocation of the expense of discovery.

(iv) The court shall limit the frequency or extent of discovery of electronically stored information, even from a source that is reasonably accessible, if the court determines that:

(I) The information may be obtained from some other source that is more convenient, less burdensome, or less expensive;

(II) The discovery sought is unreasonably cumulative or duplicative;

(III) The party seeking discovery has had ample opportunity by discovery in the proceeding to obtain the information sought; or

(IV) The likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it:

(i) Fails to allow reasonable time for compliance;

(ii) Requires disclosure of privileged or other protected matter and no exception or waiver applies; or

(iii) Subjects a person to undue burden or expense.

\* \* \*

(C) If electronically stored information produced in response to a subpoena is subject to a claim of privilege or of protection as trial preparation material, the person making the claim may notify any party that received the information of the claim and the basis for the claim. After being notified of a claim of privilege or of protection, a party shall immediately sequester the specified information, including any copies, and:

(i) Return or destroy the information and all copies and not use or disclose the information until the claim is resolved; or

(ii) Present the information to the court under seal for a determination of the claim and not otherwise use or disclose the information until the claim is resolved.

If a party that received notice of a claim of privilege or of protection disclosed the information subject to the notice before being notified, the party shall take reasonable steps to retrieve the information.

**(d) Duties in Responding to Subpoena.**

(1) A person responding to a subpoena to produce documents and/or electronically stored information 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 demand.

\* \* \*

Super.R.Civ.P. 56 is hereby amended to read as follows:

**Rule 56. Summary Judgment**

\* \* \*

**(c) Motion and Proceedings Thereon.** The motion shall be served at least ten (10) days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, documents, electronically stored information, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

\* \* \*

Entered as an Order of this Court this *6<sup>th</sup> day of November 2017.*

\_\_\_\_\_/s/\_\_\_\_\_  
Suttell, C. J.

\_\_\_\_\_/s/\_\_\_\_\_  
Goldberg, J.

\_\_\_\_\_/s/\_\_\_\_\_  
Flaherty, J.

\_\_\_\_\_/s/\_\_\_\_\_  
Robinson, J.

\_\_\_\_\_/s/\_\_\_\_\_  
Indeglia, J.