IN THE SUPREME COURT OF THE STATE OF ALASKA

ORDER NO. 1682

Amending Civil Rules 16, 26, 33, 34, 37, and 45 concerning Discovery of Electronic Information

IT IS ORDERED:

1. Civil Rule 16 is amended to read as follows:

Rule 16. Pretrial Conferences; Scheduling; Management.

* * * *

(b) **Scheduling Order.**

(1) Except in categories of actions exempted under Rule 16(g), the judge shall enter a scheduling order that limits or establishes the time:

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

(B) under AS 09.17.080,

(i) to specifically identify potentially responsible persons;

(ii) to move to join specifically identified potentially responsible persons; and

(iii) to move to determine whether a sufficient opportunity to join a potentially responsible person is lacking;

(C) to file motions;

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

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

(F) to identify witnesses and exhibits;

(G) to complete discovery; and

(H) for trial or the trial setting conference.

The scheduling order may also address:

(I) 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;

(J) the date or dates for conferences before trial;

(K) the use and timing of an alternative dispute resolution procedure;

(L) the time to file any challenges to the reliability of scientific evidence;

(M) any issues related to proceedings to determine the amount of punitive damages; ~~and~~

(N) disclosure or discovery of electronically stored information; and

(O~~N~~) 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 or pursuant to a local uniform pretrial order issued and adopted according to the provisions of Administrative Rule 46. A schedule shall not be modified except upon a showing of good cause and by leave of court.

* * * *

2. Civil Rule 26 is amended to read as follows:

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

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

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

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

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

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

(D) subject to the provisions of Civil Rule 26(b)(3), a copy of, or a description by category and location of, all documents, <u>electronically stored information,</u> data compilations, and tangible

things that are relevant to disputed facts alleged with particularity in the pleadings;

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

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

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

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

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

challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) *Disclosure of Expert Testimony.*

* * * *

(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:

* * * *

(2) *Limitations.*

(A) The court may alter the limits in these rules on the number of depositions and interrogatories, the length of depositions under Rule 30, and the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under paragraph (c).

(B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On

motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26 (b)(2)(C). The court may specify conditions for the discovery.

* * * *

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

(1) what changes should be made in the timing or form of disclosures under paragraph (a), including a statement as to when the disclosures under subparagraph (a)(1) were made or will be made and what are appropriate intervals for supplementation of disclosure under Rule 26(e)(1);

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should

be conducted in phases or be limited to or focused upon particular issues;

(3) disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(4~~3~~) what changes should be made in the limitations on discovery imposed under these rules and what other limitations should be imposed;

(5~~4~~) the plan for alternative dispute resolution, including its timing, the method of selecting a mediator, early neutral evaluator, or arbitrator, or an explanation of why alternative dispute resolution is inappropriate;

(6~~5~~) whether a scheduling conference is unnecessary; and

(7~~6~~) any other orders that should be entered by the court under paragraph (c) or under Rule 16(b) and (c).

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

* * * *

3. Civil Rule 33 is amended to read as follows:

Rule 33. Interrogatories to Parties.

* * * *

(d) **Option to Produce Business Records.** Where 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, or from a compilation, abstract or summary based thereon, 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 to identify, as readily as can the party served, the records from which the answer can be ascertained.

4. Civil Rule 34 is amended to read as follows:

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

(a) **Scope.** Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, ~~and~~ copy, test, or sample any designated documents or electronically stored information (including writings, drawings, graphs, charts, photographs, sound recordings, images, ~~phonorecords~~, and other data or data compilations stored in any medium from which information can be obtained) ~~,~~ translated, if necessary, by the respondent ~~through detection devices~~ into reasonably usable form~~)~~, or to inspect, ~~and~~ copy, test, or sample any 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; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) **Procedure.** The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced. 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. 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, including an objection to the requested form or forms for producing electronically stored information, stating ~~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. If objection is made to the requested form or forms for producing electronically stored information – or if no form was specified in the request – the responding party must state the form or forms it intends to

use. 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.

Unless the parties otherwise agree or the court otherwise orders:

(1) a~~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~~.~~;

(2) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained, or, if that form is not reasonably usable, it must be produced in a form or forms that are reasonably usable; and

(3) a party need not produce the same electronically stored information in more than one reasonably usable form.

* * * *

5. Civil Rule 37 is amended to read as follows:

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

* * * *

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

* * * *

6. Civil Rule 45 is amended to read as follows:

Rule 45. Subpoena.

(a) **For Attendance of Witnesses — Form — Issuance.**

* * * *

(b) **For Production of Documentary Evidence.** A subpoena may also command the person to whom it is directed to produce the books, papers, documents, electronically stored information, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) void or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents or tangible things. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(c) **Service.**

* * * *

DATED: December 19, 2008

EFFECTIVE DATE: April 15, 2009

/s/ _____
Chief Justice Fabe

/s/ _____
Justice Matthews

/s/ _____
Justice Eastaugh

/s/ _____
Justice Carpeneti

/s/ _____
Justice Winfree