

## ESSAY QUESTION NO. 6

### Answer this question in booklet No. 6

Penny is injured in a motor vehicle collision with Dirk. Penny files a timely personal injury lawsuit in Alaska Superior Court. Penny's claims arising from the accident include costs of her medical care to date, pain and suffering, and emotional distress. Dirk has admitted liability for causing the accident. Accordingly, the job for the jury will be limited to determining damages.

Dirk serves Penny with extensive discovery requests, including the following interrogatory:

Please identify every medical, mental health and substance abuse provider you have seen, both since the accident and for 10 years preceding the accident of May 10, 2010, for any treatment or condition. In your answer, please state the inclusive dates of care and the treatment or condition for which you obtained care.

Penny responds to Dirk's Interrogatory with the following:  
Objection, the request violates the physician-patient privilege. The request is also irrelevant, invasive, and intended only to inconvenience and embarrass plaintiff. This is a car accident case and plaintiff will not disclose her personal affairs or anything related to private matters such as counseling. Without waiving these objections:

James Symborski, DDS, 1994-present, dental care.  
City General Hospital, 2010, car accident, 2011, surgery for car accident injuries.  
Mountain Orthopedics, 2010-2011, injuries from the 2010 car accident.  
Wilson Physical Therapy, 2010, car accident injuries.

In fact, Penny has seen mental health care providers and has had substance abuse treatment.

Dirk immediately files a motion to compel Penny to respond fully, and for sanctions against Penny. Dirk's motion argues that under Alaska law Penny must fully comply with his Interrogatory; that Penny's claims necessitate that he be able to discover the requested information to investigate the issues; that Penny and her counsel knew the law but willfully and in bad faith obstructed and delayed discovery; and that Penny's intentional non-compliance justifies court-ordered sanctions. Penny opposes.

1. Should the Court grant or deny Dirk's motion to compel? Explain your answer, and provide the pertinent procedural and legal grounds for your answer.

2. Should the Court grant or deny Dirk's motions for sanctions? If sanctions are granted, what sanctions might be appropriate? Explain your answers, and discuss the pertinent procedural and legal grounds.

**GRADERS' GUIDE**  
**\*\*\* QUESTION NO. 6 \*\*\***  
**CIVIL PROCEDURE**

**I. Motion to Compel (60%)**

**Should the Court grant or deny Dirk's motion to compel? Explain your answer, and provide the pertinent procedural and legal grounds for your answer.**

**A. Introduction.**

The questions raise both procedural and legal issues. Applicants should address both. Procedurally, the questions implicate primarily Civil Rules 26 and 37. Evidence Rule 504 is pertinent to Penny's privilege claim. Legally, the questions require applicants to know that the Alaska Supreme Court has repeatedly endorsed broad pretrial discovery, and that it only reluctantly limits its scope. Procedurally, they should identify the steps a party must take in preparing a proper Rule 37 motion.

There is less case law to be found on Motions to Compel, more on Motions for Sanctions, which are more frequently appealed.

**B. Procedural Requirements for Dirk's motion.**

Rule 37 addresses both motions to compel, and motions for sanctions. In either instance it requires that the movant show meaningful efforts to gain compliance before it seeks the court's help: 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 order to secure the disclosure without court action." Rule 37(a)(2)(A) and (B). This is the key procedural requirement of any Rule 37 motion.

On Dirk's motion to compel, the record does not show that he tried to confer with Penny (he "immediately" filed his motion,) or that he filed his required certification. The court is unlikely to grant an order compelling as it stands.

**C. Legal Principles Governing Dirk's Motion.**

**1. Rule 26 – Relevance for Civil Discovery in Alaska is Broad, but not Unlimited.**

Rule 26 states,

In General. Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible

things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 26(b)(1). Pursuant to the Rule, the Supreme Court has said that discovery is not limited to what is “directly related to the pleadings;” it is broader.

[D]iscovery rules are to be broadly construed and “relevance for purposes of discovery is broader than for purposes of trial.” Lee is therefore incorrect in asserting that the superior court should have limited discovery to information directly related to the pleadings.

Lee v. State, 141 P.2d 342, 347 (Alaska 2006) (footnote with citation omitted).

Penny has objected, calling the requests not only irrelevant but also “invasive” and intended only to “embarrass.” She could seek a Protective Order under Rule 26(c) to protect her from “embarrassment,” or ask to limit Dirk’s discovery into “certain matters.”

However, the facts as presented do not show how the discovery would cause her any more “annoyance, embarrassment, oppression, or undue burden or expense” than similar discovery would cause to any other personal injury plaintiff. The same applies to her objection of “invasiveness;” most personal injury plaintiffs have to face “invasive” questions and disclosures as part of the privacy loss necessary to order to prosecute their claims.

**(a) The Discovery Sought is Relevant.**

There is a real possibility Penny’s complete responses may lead to the discovery of admissible evidence going to Penny’s damages (physical or mental.) Dirk’s request would appear to be entirely appropriate on these facts.

We have repeatedly stated that Alaska’s discovery rules should be given a liberal interpretation in order to effectuate the underlying purpose of those rules.

Van Alen v. Anchorage Ski Club, Inc., 536 P.2d 784, 787 (1975.) In light of the Rule’s broad scope and the Supreme Court’s “liberal interpretation,” Dirk’s broad requests are appropriate and “relevant” under the “reasonably likely” standard, and compliance may be compelled by the court, in its discretion, where she refuses to comply.

**(b) Physician-Patient Privilege Does Not Apply.**

Penny's claim as to the physician-patient privilege (Rule 504, Alaska Rules of Evidence) will fail. Since at least 1966, the Supreme Court has held that, when a patient puts her condition at issue in a personal injury lawsuit, she waives this privilege. The Court said:

[W]e reaffirm the holding of the Mathis case and find a waiver of the physician-patient privilege based upon the filing of a personal injury lawsuit. Further, we hold that the filing of a personal injury action waives the physician-patient privilege as to all information concerning the health and medical history relevant to the matters which the plaintiff has put in issue. The scope of the waiver extends to all matters pertinent to the plaintiff's claim, including but not limited to those matters the relevancy of which is based on a historical or causal connection.

*Trans-World Investments v. Drobny*, 554 P.2d 1148 (Alaska 1976) (citations omitted.) The Supreme Court's waiver rule is broad enough to permit discovery of most medical and mental health records and information, in most personal injury cases.

**(c) Objection to Discovery of Mental Health Information will Likely Fail.**

Penny has put her mental health issues in play by claiming pain and suffering and emotional distress. *Drobny*, supra. Discovery of her mental health information is appropriate. The mental health information could affect the value of her claim. For example, does her experience of emotional distress differ significantly from before the accident? Do preexisting or continuing emotional conditions bear on whether she appropriately mitigated her damages by following medical advice to rehabilitate from her injuries and surgery? Such information could be important to evaluate her claim for settlement purposes, and for Dirk to defend at trial.

**(d) Substance Abuse Information and Records.**

The Court may consider that substance abuse treatment information is less likely than mental health treatment to "lead to the discovery of admissible evidence;" that it may fall under special legal protections, and that it is particularly sensitive. In its discretion, the Court may order its production; order in camera review to determine whether some or all of it is discoverable; or defer the issue until Dirk can better demonstrate its importance, perhaps by pointing to references in the medical or mental health records.

**D. On This Record, Court May Find a Middle Path.**

In imposing or declining to impose an Order Compelling, the Court has broad discretion. It may first seek compliance and cooperation by the parties, for example, ordering them to confer with each other and to come up with an agreed plan by a specified date.

On the other hand, the withheld information and documents are clearly discoverable, regardless whether ultimately admissible. On this record, the Court's Order might provide that, if the parties cannot agree, Dirk may file a revised Motion, this time complying with the requirements of the Rule.

**II. Motion for Sanctions (40%)**

**Should the Court grant or deny Dirk's motions for sanctions? If sanctions are granted, what sanctions might be appropriate? Explain your answers, and discuss the pertinent procedural and legal grounds.**

**A. Introduction.**

Rule 37 sanctions are generally not entered without the violation of a prior order compelling, and the record here does not involve a prior order compelling.

Even at this early stage in the dispute, however, sanctions are permitted, particularly where "outright failures to respond to discovery halt the case development process dead in its tracks, and threaten the underpinnings of the discovery system." *Hikita v. Nichiro Gyogyo Kaisha, Ltd.*, 12 P.3d 1169, 1175-1176 (2000). In *Hikita*, the Supreme Court ruled that Rule 37(d) allows sanctions for a failure to answer interrogatories, produce documents or testify at deposition, without a prior order compelling. Here, with Penny having responded partially and made her objections, her actions are not yet "outright failures to respond." It is doubtful that sanctions are within the Court's discretion at this stage; if they are, the severity and type of sanction remain to be determined.

**B. Procedural Requirements for Dirk's Motion for Sanctions.**

As with a motion to compel, the key requirement on a Motion for Sanctions is that a movant "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. . . ." Rule 37(a)(2)(A). The nature and extent of those efforts are better spelled out in the jurisprudence under the similar Rule 37 (a)(1), Federal Rules of Civil Procedure, with which applicants may be more familiar (and which were the template for many of Alaska's rules.)

The case law under the federal provision shows it has been heavily used, since its introduction in 1993, to require that parties make a good-faith effort to resolve discovery disputes outside the court, without invoking judicial intervention. An otherwise meritorious motion by a party aggrieved by an adversary's discovery violation may be denied for insufficient efforts to obtain compliance. In *Robinson v. Potter*, 453 F.3d 990 (8<sup>th</sup> Cir. 2006,) the appellate

court said the trial court did not abuse its discretion by denying a motion to compel,

because the parties did not appear to have made an effort to resolve the issue informally prior to asking the court's assistance . . . Before the court can rule on a motion, the parties must demonstrate they acted in good faith to resolve the issue among themselves.

Robinson, 453 F.3d at 995. See also *Childress v. Darby Lumber, Inc.*, 357 F.3d 1000, 1010 (9th Cir. 2004) (citing a local district rule.)

The requirement to confer, and to certify that the movant has done so, promotes cooperation and civility among counsel. It also saves the Court from having to intervene so often in discovery disputes.

**C. Whether Sanctions Are Appropriate.**

Dirk is entitled to more complete answers to his discovery requests, and Penny's objections and refusals are unreasonable. Her records could well have a bearing on aspects of her treatment and recovery from the injuries, her experience of pain, and her emotional distress. They could even contain admissions, such as that she had an accident at home just prior to the subject accident, which may have been the main cause of her new complaints.

Penny's violations are prejudicial to Dirk, Rule 37(b)(3)(B); he cannot adequately evaluate Penny's claims for pain and suffering and emotional distress without the information and records. Nor can Dirk identify the care providers or obtain their records without Penny's cooperation. He cannot prepare his defense for trial without this discovery.

But with no prior order in place, no effort by Dirk to confer, and no good-faith certification, sanctions are not in order. Liberal though Alaska's discovery system is, the Supreme Court might rule that the trial court abused its discretion if it ordered sanctions at this stage, particularly if they were severe sanctions.

**D. Sanctions, If Ordered, Will Be Modest.**

Before ordering any of the types of sanctions suggested by the Rule, the Court "shall" consider at least the factors listed, including the nature of the violation, the prejudice the violation has caused, and whether a lesser sanction would be sufficient. It will look at the record in light of the types of sanctions available, Rule 37(b)(2), and the Standard for Imposition of Sanctions, Rule 37(b)(3).

As to types of sanctions that may be entered in an appropriate case, the Rule lists, without limitation:

- an order that the subject issues (here, Penny's claims of pain and suffering and emotional distress) be "taken to be established" against Penny for all purposes in the case, Rule 37(b)(2)(A);
- an order prohibiting Penny from introducing any evidence on the subject issue (pain and suffering and emotional distress,) Rule 37(b)(2)(B); and/or
- an order to pay Dirk's reasonable expenses occasioned by Penny's failures, final paragraph of Rule 37(b)(2).

Considerations under Rule 37(b)(3) include the willfulness of the conduct and the materiality of the discovery sought; the prejudice to Dirk of not getting the discovery; the relationship between the information sought and the proposed sanction, and whether a lesser sanction would adequately protect Dirk and deter other discovery violations.

A severe sanction would be an "establishment order" as to all of Penny's claims for emotional distress. As she has not violated a prior order, however, it is unclear that she "willfully" denied the requests, so as to justify such a severe sanction; perhaps her denial was based on a misreading of what was discoverable on the facts of her case. Such a sanction would probably be considered an "abuse of discretion" because it would far outweigh the severity of her discovery violation.

A more moderate sanction might be a monetary one against Penny or her counsel (e.g., reasonable costs of bringing the motion), together with a warning that continued evasion may expose her to more severe sanctions.

There is also a middle road. If the Court cannot determine on the parties' motions alone whether some of the sensitive discovery (such as substance abuse and/or treatment) is discoverable, the Court could order in camera review of those records before deciding, again in its discretion, whether to require disclosure.