HRCP Rule 26. GENERAL PROVISIONS GOVERNING DISCOVERY.

~~**(a) Discovery Methods.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents, electronically stored information, or tangible things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.~~

(a) Required Disclosures.

(1) INITIAL DISCLOSURE.

(A) Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to all other parties:

(i) the name and, if known, the address and telephone number of all witnesses, other than those retained or specially employed by the disclosing party to present evidence under Rule 702 of the Hawai‘i Rules of Evidence or those whose duties as the disclosing party's employee regularly involve giving such testimony, reasonably expected to be called at trial by the disclosing party, and a general statement concerning the nature of the testimony expected, unless the use would be solely for impeachment;

(ii) a copy -- or a description by category and location -- of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control that may be used to support the disclosing party's claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party -- who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34: (a) the declarations page(s) of any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for

payments made to satisfy the judgment; and (b) any reservation of rights letter(s) received by the disclosing party.

(B) Proceedings Exempt from Initial Disclosure. The following categories of civil actions are exempt from initial disclosure:

(i) foreclosure;

(ii) cases included in and not exempted from the Court Annexed Arbitration Program established by Hawai‘i Revised Statutes § 601-20;

(iii) agency appeals pursuant to Hawai‘i Revised Statutes Chapter 91;

(iv) consumer debt collection;

(v) quiet title; and

(vi) mechanic's and materialman's lien.

(C) Time for Initial Disclosures -- In General. A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the Rule 26(f) conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. During the Scheduling Conference held pursuant to Rule 16 and Rule 12 of the Rules of the Circuit Courts, the court must rule on any objection, determine what disclosures, if any, are to be made, and set the time for disclosure, if any.

(D) Time for Initial Disclosures -- For Parties Served or Joined Later. A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) Basis for Initial Disclosure; Unacceptable Excuses. A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) EXPERT DISCLOSURE.

(A) Expert Witnesses Who Must Provide a Written Report. Except in actions exempt from initial disclosure under Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to all other parties:

(i) the name and, if known, the address and telephone number of (a) all witnesses retained or specially employed by the disclosing party to present evidence at trial under Rule 702 of the Hawai‘i Rules of Evidence and (b) all witnesses whose duties as the disclosing party's employee regularly involve giving testimony under Rule 702 of the Hawai‘i Rules of Evidence and who are reasonably expected to be called at trial by the disclosing party;

(ii) a written report prepared and signed by each witness identified pursuant to this Rule 26(a)(2)(A). The report must contain:

(a) a complete statement of all opinions the witness will express and the basis and reasons for each opinion;

(b) the facts and data considered by the witness in forming the opinions;

(c) a statement of the compensation paid, and to be paid, for the witness's work in the case;

(d) the witness's qualifications, including a list of all publications authored in the previous 10 years; and

(e) the case name, docket number, and state or federal jurisdiction of each case in which the witness has provided expert opinion testimony for the 3 year period preceding the date of the report.

(B) Expert Witnesses Who Are Not Required to Provide a Written Report. Except in actions exempt from initial disclosure under Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, for witnesses who a party reasonably expects to call at trial to present evidence under Rule 702 of the Hawai‘i Rules of Evidence but who are not required to provide a written report under Rule 26(a)(2)(A), a party must disclose to all other parties, without awaiting a discovery request:

(i) the name and, if known, the address and telephone number of the witness;

(ii) the subject matter on which the witness is expected to present evidence under Rule 702 of the Hawai'i Rules of Evidence; and

(iii) a summary of the facts and opinions to which the witness is expected to testify.

(C) Time to Disclose Expert Testimony. Unless otherwise stipulated or ordered by the court, the parties must make the disclosures required by this Rule 26(a)(2) as follows:

(i) a party having the burden of proof on a claim for relief or an affirmative defense must serve the related disclosures no later than 120 days before the date set for trial;

(ii) a party opposing a claim for relief or an affirmative defense must serve the related disclosures no later than 90 days before the date set for trial;

(iii) a party intending to present evidence solely to rebut evidence on the subject matter identified for the first time by another party under this Rule 26(a)(2)(C)(ii) must serve the related dislosures no later than 60 days before the date set for trial.

(3) SUPPLEMENTING DISCLOSURES. A party who has made a disclosure under Rule 26(a) must supplement or correct its disclosure:

(A) in a timely manner if the party learns that in some material respect the disclosure 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; or

(B) as ordered by the court.

(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.~~

~~(A) 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 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 discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(1)(B) and 26(b)(2)(i), (ii), and (iii).~~

(1) SCOPE IN GENERAL.

(A) Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(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 expense. 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 expense. If that showing is made, the Court may nonetheless order disclosure or discovery from such sources if the requesting party shows good cause considering the limitations of Rule 26(b)(2). The Court may specify conditions for the disclosure of discovery.

(2) LIMITATIONS. By order, and subject to the provisions of Rule 16.1 in Tier 1 cases, the court may alter the limits in these rules on the number of depositions and interrogatories ~~or~~, the length of depositions under Rule 30~~. By order~~, ~~the court may also limit~~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, limitations on 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 Rule 26(c).

(3) INSURANCE AGREEMENTS. 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.

(4) TRIAL PREPARATION: MATERIALS. A party may obtain discovery of documents, electronically stored information, and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(5) TRIAL PREPARATION: EXPERTS.

(A) Subject to the provisions of Rule 16.1 in Tier 1 cases, a ~~A~~ party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(A) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) Trial-Preparation Protection for Draft Reports or Disclosures. Rule 26(b)(4) protects drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rule 26(b)(4) protects communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(A), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(~~B~~D) Subject to the provisions of Rule 16.1 in Tier 1 cases, a ~~A~~ party may, through interrogatories and/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~~E) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under ~~this subdivision~~Rule 26(b)(5)(A) or Rule 26 b)(5)(D); and (ii) with respect to discovery obtained under ~~subdivision~~ Rule 26(b)(5)(~~B~~D) ~~of this rule~~ the court shall require the party seeking discovery to pay the other party a fair portion of the

fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

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

(1) TIMING. A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) SEQUENCE. 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 Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his or her response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his 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 or she is expected to testify, and the substance of his or her testimony.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that (A) the response is in some material respect incomplete or incorrect or (B) the response omits information which if disclosed could lead to the discovery of additional admissible evidence.

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

(f) Conference of the Parties; Planning for Discovery.

(1) CONFERENCE TIMING. Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable -- and in any event at least 21 days before a scheduling conference is to be held under Rule 16(b).

(2) CONFERENCE CONTENT; PARTIES' RESPONSIBILITIES. In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) DISCOVERY PLAN. A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) 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 on particular issues;

(C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including -- if the parties agree on a procedure to assert these claims after production -- whether to ask the court to include their agreement in an order under Rule 502 of the Hawai‘i Rules of Evidence;

(E) what changes should be made in the limitations on discovery imposed under these rules or by the Rules of the Circuit Courts, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(fg) Discovery Conference. At any time after the 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:

(1) A statement of the issues as they then appear;

(2) A proposed plan and schedule of discovery;

(3) Any limitations proposed to be placed on discovery;

(4) Any other proposed orders with respect to discovery; and

(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. 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.

Each party and the 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 court or by the attorney for any party.

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 and the appointment of a discovery master, as are necessary for the proper management of discovery in the action. An 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 Rule 16.

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