

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

**ORDER AMENDING RULES 1, 26(b)(1) and (c),
34(b) and 37(a)(2) OF THE SUPERIOR COURT
RULES OF CIVIL PROCEDURE**

AND

**ORDER ADOPTING RULES 34(d) and 37(b)(2)(F) OF
THE SUPERIOR COURT RULES OF CIVIL PROCEDURE**

This 27th day of June, 2019, **IT IS SO ORDERED** that:

1. Superior Court Civil Rule 1 is amended by adding the underlined text:

Rule 1. Scope and purpose of Rules.

These Rules shall govern the procedure in the Superior Court of the State of Delaware with the exceptions stated in Rule 81. They shall be construed, ~~and administered,~~ and employed by the Court and the parties, to secure the just, speedy and inexpensive determination of every proceeding.

2. Superior Court Civil Rule 26 (b) and (c) are amended by adding the underlined text and deleting the strikethrough text:

Rule 26. General provisions governing discovery.

(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 non-privileged matter, not privileged, which that is relevant to any party's claim or defense and proportional to the needs of the case, ~~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 (ESI),

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.~~

The frequency or extent of use of the discovery methods set forth in ~~subdivision paragraph~~ (a) 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 discovery sought is not proportional to is unduly burdensome or expensive, taking into account 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, limitations on the parties' resources, and the importance of the discovery in resolving the issues at stake in the litigation., and whether the burden or expense of the proposed discovery outweighs its likely benefit. The Court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).¹

¹ Comment: The 2019 amendment to Delaware Superior Court Rule 26(b)(1) follows the Federal Rules of Civil Procedure in confirming that relevance is the touchstone for discovery. Under this standard, relevant evidence is discoverable, even if it may not be admissible. The 2019 amendment removes the qualification about the information appearing “reasonably calculated to lead to the discovery of admissible evidence.” As the comments to Federal Rule of Civil Procedure 26(b)(1) explain, this phrase “has been used by some, incorrectly, to define the scope of discovery.” To avoid this implication, the drafters of the federal rules removed the language and replaced it with the direct statement that information within the scope of discovery need not be admissible in evidence to be discoverable.

(c) Protective orders. -- Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the Court or alternatively, on matters relating to a deposition taken outside the State of Delaware, a court in the state 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 discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place or the allocation of expenses; (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 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

Subject to other considerations, such as privilege and proportionality, all relevant evidence is discoverable, whether or not it is admissible. This clarification is not intended to change the scope of available discovery under the Delaware rules. The scope of discovery remains “broad and far-reaching...” *Cal. Pub. Emps. Ret. Sys. v. Coulter*, 2004 WL 1238443, at *1 (Del. Ch. May 26, 2004) (citation omitted); *see also Woodstock v. Wolf Creek Surgeons, P.A.*, 2017 WL 3727019, (Del. Super. Aug. 30, 2017 at *6; *Levy v. Stern*, 687 A.2d 573, 1996 WL 742818, at *2 (Del. Dec. 20, 1996) (Table) (noting that the “discovery rules are to be afforded broad and liberal treatment”); “[T]he spirit of Rule 26(b) calls for all relevant information, however remote, to be brought out for inspection not only by the opposing party but also for the benefit of the Court” *Boxer v. Husky Oil Co.*, 1981 WL 15479, at *2 (Del. Ch. Nov. 9, 1981). Relevance “must be viewed liberally,” and discovery into relevant matters should be *permitted if there is “any possibility that the discovery will lead to relevant evidence.”* *Loretto Literary & Benevolent Inst. v. Blue Diamond Coal Co.*, 1980 WL 268060, at *4 (Del. Ch. Oct. 24, 1980); *see also Incyte Corporation v. Flexus Biosciences, Inc.*, 2017 WL 5128979, at *4 (Del. Super. Oct. 27, 2017)(as a general rule, information sought in discovery is considered relevant “if there is any possibility that the information sought may be relevant to the subject matter of the action.” (citations omitted).

disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the Court. A party has standing to move for a protective order with respect to discovery directed at a non-party on the basis of annoyance, embarrassment, oppression, or undue burden or expense that the moving party will bear. A non-party from another state from whom discovery is sought always may move for a protective order from the court in the state where discovery is sought or, alternatively, from this Court provided the non-party agrees to be bound by the decision of this Court as to the discovery in question.

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 person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the to the motion.

3. Superior Court Civil Rule 34 (b) is amended by adding the underlined text and deleting the strikethrough text:

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, 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.

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 shorter or longer time. 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 objection(s) shall be stated with specificity. An objection must state whether the responding party is withholding or intends to withhold any responsive materials on the basis of that objection, and the responding party is under a duty to supplement its response to the extent it subsequently determines that it will withhold any responsive material on the basis of an objection. 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.

Unless the document request expressly requires that the documents must be produced for inspection, the responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection, in which case the production must then be completed no later than the time for inspection specified in the request, another reasonable time specified in the response, or as otherwise agreed between the requesting and responding parties.

4. Superior Court Civil Rule 34 is amended by adopting the following new Rule 34 (d):

Rule 34(d) Requests for productions of documents or electronically stored information.

(d) Request for production of documents or electronically stored information. -- Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information: A party may state in its request the form for producing documents or electronically stored information. If a party so states, the responding party must produce electronically stored information in the form requested. If a request does not specify a form for producing documents or electronically stored information, or if the form specified is unreasonable, a party must produce it in a form or forms in which it is ordinarily maintained or in which it is reasonably usable. Absent a showing of good cause, a party need not produce the same documents or electronically stored information in more than one form.

5. Superior Court Civil Rule 37 (a) is amended by adding the underlined text:

Rule 37. Failure to make 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:

(1) Appropriate court. -- An application for an order to a party may be made to the Court, or, alternatively, on matters relating to a deposition

taken outside the State of Delaware, to a court in the state where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to a court in the state where the deposition is being taken.

(2) Motion. -- If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 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 produce documents or ESI, or 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. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

6. Superior Court Civil Rule 37 is further amended by adopting the following new Rule 37(b)(2)(F):

Rule 37. Failure to make discovery: Sanctions.

(b) Failure to comply with order. --

(1) Omitted.

(2) Sanctions by Court. -- 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, the Court may make such orders in regard to the failure as are just, and among others the following:

(F) Rule 37. Failure to preserve ESI. If ESI that should have been preserved in the reasonable anticipation of or actual notice of imminent litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted recklessly or with the intent to deprive another party of the information's use in the litigation, may, among other things: (A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.

7. These rule changes shall take effect August 1, 2019.

oc: Prothonotaries
cc: Superior Court Judges
Superior Court Commissioners
Kathleen M. Jennings, Attorney General
J. Brendan O'Neill, Public Defender
Court Administrators
Michael Ferry, Director of Operations
Caroline Meier, Lexis Nexus
Law Libraries
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