**DISCOVERY: GOOD FAITH—GOOD PRACTICES**

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**INTRODUCTION**

1. Scenarios

**THE PLAYING FIELD**

1. **C.R.C.P. 1(a)** “These rules shall be liberally construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action.”
2. **C.R.C.P. 26 through 37 govern discovery between the parties. 16.2 is a carve out.**
	1. **C.R.C.P. 45.** Primarily deals with third parties and cannot be used as a substitute for discovery on a party.
3. **C.R.C.P. 16.2**
	1. Family Members in Special Relationship and Affirmative Duty
		1. C.R.C.P. 16.2 (a) “Purpose and Scope. Family members stand in a special relationship to one another and to the court system. It is the purpose of Rule 16.2 to provide a uniform procedure for resolution of all issues in domestic relations cases that reduces the negative impact of adversarial litigation wherever possible
		2. C.R.C.P. 16.2(e)(1) Parties owe each other and the court a duty of *full and honest disclosure of all facts that materially affect their rights and interests and those of the children* involved in the case, party must *affirmatively* disclose *all* information that is material to the resolution of the case *without awaiting* inquiry from the other party. This disclosure shall be conducted in accord with the duty of candor owing among those whose domestic issues are to be resolved under this Rule 16.2.
			1. Not a client’s mouthpiece. Obligation to withdraw
4. Does this mean that we don’t have do discovery and we can all rely on each other to be totally forthcoming?
	1. No  What is material is delineated by 16.2(e)(2), and most would agree that is not sufficient.

**DISCOVERY RUT**

**1.** There are other tools in our toolbox that we don’t use often. What are we giving up by staying in rut of just issuing pattern and non-pattern written discovery?

**A. Special Masters**

i. Creature of C.R.C.P. 53

ii. Expansive powers

B. **Depositions**

**C. Shadow Experts**

**LAND MINES AND PITFALLS**

Duty to Supplement. C.R.C.P. 16.2(e)(4)’s referral to 26(e)

 “A party is under a duty to supplement its disclosures under section (a) of this Ruler when the party learns that the information disclosed is incomplete or incorrect in some material respect and if the additional or corrective information has not otherwise been made known to the other parties during the disclosure or discovery process, including information relating to anticipated rebuttal but not including information to be used solely for impeachment of a witness.”

2. Privilege

 -Fox v. Alfani, third parties in consultations

 -assert immediately, in discovery and depositions

3. Insulating oneself from a C.R.C.P. 16.2(e)(10) claim

**ALWAYS MAKING A RECORD**

**1.** Objections Must be Specific

2. Making a record from the start of the case

3. Applies to compelling compliance with discovery and disclosure requirements and to objecting discover

**DISCOVERY RULES TO BE ADDRESSED**

* C.R.C.P. 16.2(e): Mandatory disclosures
* C.R.C.P. 16.2(f): Permissible discovery
	+ Limitations on types, number, procedure for expanding
	+ Duty to supplement prior discovery (and disclosure) responses [C.R.C.P. 16.2(e)(4), 26(e)]
	+ Timing for completion of all discovery [C.R.C.P. 16.2(f)(5)]
* C.R.C.P. 16.2(g): Use of experts (joint or specially-retained) to conduct discovery [C.R.C.P. 16.2(g)(4)]
* C.R.C.P. 26(a): Required disclosures for parties and experts (joint/retained/not retained or specially employed/rebuttal)
* C.R.C.P. 26(b): Scope and Limits of Discovery
	+ C.R.C.P. 26(b)(1): Discovery applies to “parties”
	+ Same: Discovery permitted for “any matter, not privileged, that is relevant to the claim or defense of any party and proportional to the needs of the case”
	+ C.R.C.P. 26(b)(1): Proportionality factors
		- Importance of the issues at stake in the action
		- Amount in controversy
		- Parties’ relative access to relevant information
		- Parties’ resources
		- Importance of the discovery in resolving issues
		- Whether the burden or expense of the proposed discovery outweighs its likely benefit
		- “Information within the scope of discovery need not be admissible in evidence to be discoverable”
		- C.R.C.P. 16.2 overlay on general discovery rules in C.R.C.P. 26-37
* Mandatory disclosures (Forms 35.1 and 35.2)
* Mandatory supplementation (C.R.C.P. 16.2(e)(4))
* Motion for reallocation of misstated/omitted assets or debts (C.R.C.P. 16.2(e)(10))
* General disclosure and discovery obligations (C.R.C.P. 16.2(e)(1) and (2))
	+ “Full and honest disclosure of all facts that materially affect their rights and interests and those of the children involved in the case”
	+ “A party must affirmatively disclose all information that is material to the resolution of the case without awaiting inquiry [i.e., discovery] from the other party”
	+ “This disclosure shall be conducted in accord with the duty of candor owing among those whose domestic issues are to be resolved under this Rule 16.2”
	+ Consistent with the general principles of C.R.C.P. 16: robust mandatory disclosure coupled with duty to supplement, limited and narrowly-defined discovery subject to proportionality factor analysis and burden on “parties” to seek permission to conduct additional discovery
	+ Parties and counsel can take the initiative through a stipulated case management plan under C.R.C.P. 16.2(c)(1)(C) to control and define the scope for expanded discovery in a domestic relations case
* C.R.C.P. 30-32: Depositions
* C.R.C.P. Formal written discovery
	+ Interrogatories (C.R.C.P. 33 and Form 35.4)
	+ Requests for Production of Documents and Things (C.R.C.P. 34 and Form 35.5)
	+ Requests for Admission (C.R.C.P. 36)
		- If needed, must be requested (via motion) or included in a stipulated case management plan adopted by the court [C.R.C.P. 16.2(f)(4)]
		- Generally not useful in domestic relations case except to establish authenticity and genuineness of documentary exhibits for admissibility
* C.R.C.P. 37: Sanctions for Failure to Make Disclosures or to Cooperate in Discovery
* C.R.C.P. 45: Discovery of Nonparties by Subpoena
* Specific Discovery Topics and Rules
	+ Protections against discovery abuse
		- C.R.C.P. 26(c): Motions for protective orders
		- C.R.C.P. 45(c): Protections for subpoenaed non-parties
	+ Protections for experts
		- C.R.C.P. 26(b)(4)(C): Expert paid by party seeking discovery for “time spent in responding to discovery”
		- C.R.C.P. 26(b)(4)(D): Experts not required to disclose or respond to discovery relating to draft reports, disclosures, or communications with retaining party’s attorney, except as listed
	+ Preserving privilege (C.R.C.P. 26(b)(5))
		- Duty of party claiming privilege to prepare and serve a privilege log
		- For attorney-client communications that are responsive to discovery requests or for attorney-expert communications
		- For all attorney work product claims
	+ Duty to supplement mandatory disclosures and discovery responses (C.R.C.P. 26(e)and 16.2(e)(4))