

RULE 27 – EXAMINATION FOR DISCOVERY

Leave of the court not required

- (1) Subject to this rule, an examination for discovery may take place without leave of the court at any time up to 14 days before the scheduled trial date.

Oral examination on oath

- (2) An examination for discovery is an oral examination on oath or affirmation.

Examination of party adverse in interest

- (3) A party to an action may examine for discovery any party adverse in interest.
 - (3.1) Unless the court otherwise orders, each party to an action must
 - (a) make themselves available, and
 - (b) if any of subrules (4), (7), (8), (9), (10) or (11) apply, make a person referred to in that subrule available,for examinations for discovery by parties who are adverse in interest.

Examination of party that is not an individual

- (4) Unless the court otherwise orders, if a party to be examined for discovery is not a person:
 - (a) the examining party may examine one representative of the party to be examined;
 - (b) the party to be examined must nominate as its representative an individual, who is knowledgeable concerning the matters in question in the action, to be examined on behalf of that party;
 - (c) the examining party may examine
 - (i) the representative nominated under paragraph (b), or
 - (ii) any other person the examining party considers appropriate and who is or has been a director, officer, employee, agent or external auditor of the party to be examined.
- (5) [repealed by O.I.C. 2022/168]
- (6) [repealed by O.I.C. 2022/168]

Examination of partners

- (7) Where a partnership is a party, one or more of the partners may be examined for discovery.

Examination of party for whose benefit action brought

- (8) Subject to subrule (11), a person for whose immediate benefit an action is brought or defended may be examined for discovery.

Examination of assignor

- (9) Where an action is brought by an assignee, the assignor may be examined for discovery.

Examination of person under a legal disability

- (10) Where a person under a legal disability is a party, their guardian or litigation guardian may be examined for discovery, but the person under a legal disability may not be examined without leave of the court.

Examination of bankrupt

- (11) Where a trustee in bankruptcy is a party, the bankrupt may be examined for discovery.

Time

- (12) An examination for discovery by a plaintiff or a defendant may take place after the expiration of time for delivery of the affidavits or lists of documents of the parties.

Place

- (13) Unless the court otherwise orders, or the parties to the examination consent, an examination for discovery shall take place in Whitehorse.

Time limitation

- (13.1) Unless the court otherwise orders, the examination for discovery of a person by all parties who are adverse in interest must not exceed in total duration
 - (a) 7 hours, or
 - (b) any greater period to which the person being examined consents.

Considerations of the court

- (13.2) In an application under subrule (13.1) to extend the examination for discovery period, the court must consider the following:

- (a) the conduct of a person who has been or is to be examined, including
 - (i) the person's unresponsiveness in any examination for discovery held in the action,
 - (ii) the person's failure to provide complete answers to questions, or
 - (iii) the person's provision of answers that are evasive, irrelevant, unresponsive or unduly lengthy;
- (b) any denial or refusal to admit, by a person who has been or is to be examined, anything that should have been admitted;
- (c) the conduct of the examining party;
- (d) whether or not it is or was reasonably practicable to complete the examinations for discovery within the period provided under subrule (2);
- (e) the number of parties and examinations for discovery and the proximity of the various interests of those parties.

Examination before reporter

- (14) An examination for discovery shall be conducted before a reporter certified by a justice of the Supreme Court of Yukon, or certified in another jurisdiction, who is empowered to administer an oath or affirmation.

Appointment

- (15) Where a party is entitled to examine a person for discovery, the party may fix a time for the examination with a certified reporter, and the person to be examined shall attend and submit to examination if
 - (a) the person is served with an Appointment to Examine for Discovery in Form 113 and the proper witness fees 7 days, not counting the day of service, before the examination, or
 - (b) the person is a party to and has a lawyer in the action and the Appointment to Examine for Discovery in Form 113 and the proper witness fees are delivered to that lawyer 7 days, not counting the day of service, before the examination,and the Appointment to Examine for Discovery has been served or delivered on the other parties of record.
- (16) In this rule "proper witness fees" shall be determined under Schedule 3 of Appendix C of these Rules.

Delivery of notice

- (17) Where a lawyer receives a notice under this rule, the lawyer shall promptly inform the person required to attend an appointment to examine for discovery and shall pay the fees to that person.

Production of documents

- (18) Unless the court otherwise orders, a person to be examined for discovery, and the party on whose behalf the person is to be examined, shall produce for inspection on the examination all documents in their possession or control, not privileged, relating to the matters in issue in the action.

Examination and re-examination

- (19) The examination of a person for discovery shall be in the nature of a cross-examination, and the person examined may be re-examined by their lawyer or any party not adverse in interest in relation to any matter previously examined on. The examining party may cross-examine on the re-examination.

Scope of examination

- (20) Unless the court otherwise orders, a person being examined for discovery shall answer any question within their knowledge or means of knowledge regarding any matter, not privileged, relating to a matter in question in the action, and is compellable to give the names and addresses of all persons who reasonably might be expected to have knowledge relating to any matter in question in the action.
- (21) In order to comply with subrule (20), a person being examined for discovery may be required to inform themselves and the examination may be adjourned for that purpose.

Objections

- (22) Where a person under examination objects to answering a question put to them, the question and the objection shall be taken down by the certified reporter and the validity of the objection may be decided by the court, which may order the person to submit to further examination.

Refusal to answer

- (23) Where a party, or a person examined for discovery on behalf of or in place of a party, has refused to answer a proper question or to answer a question on the ground of privilege, and has failed to furnish the information in writing not later than 60 days before the trial begins, the party may not introduce the information at trial except with the leave of the trial judge.

Failure to answer in accordance with request

- (24) Where a party, or a person examined for discovery on behalf of or in place of a party, has been requested to answer a question, but has failed to furnish the information in writing not later than 60 days before the trial begins, the party may not introduce the information at trial except with leave of the trial judge.

Effect of counsel answering

- (25) Questions on an oral examination for discovery shall be answered by the person being examined but, where agreed to by the examiner, the question may be answered by their counsel and the answer shall be deemed to be the answer of the person being examined unless, before the conclusion of the examination, the person repudiates, contradicts or qualifies the answer.

Information subsequently obtained

- (26) (a) Where a party has been examined for discovery or a person has been examined for discovery on behalf of or in place of, or in addition to the party, and the party subsequently discovers that the answer to a question on the examination
- (i) was incorrect or incomplete when made, or
 - (ii) is no longer correct and complete,
- the party shall promptly provide the information in writing to every other party.
- (b) Where a party provides information in writing under subrule (a)
- (i) the writing may be treated at a hearing as if it formed part of the original examination of the person examined; and
 - (ii) any adverse party may require that the information be verified by affidavit of the party or be the subject of further examination for discovery.
- (c) Where a party has failed to comply with paragraph (a) or a requirement under clause (b)(ii), and the information subsequently discovered is
- (i) favourable to the party's case, the party may not introduce the information at the trial, except with leave of the trial judge; or
 - (ii) not favourable to the party's case, the court may make such order as is just.

How recorded

- (27) An examination for discovery shall be taken down in the form of question and answer, and copies of the transcript may be obtained on payment of the proper fee

by any party of record, the person examined or by any other person as the court for special reason may permit.

Application to persons outside Yukon

- (28) So far as is practical, this rule applies to a person residing outside of Yukon, and the court, on application on notice to the person, may order the examination for discovery of the person at a place and in the manner it thinks just and convenient, but unless the court otherwise orders, delivery of the order and the notice may be made on, and payment of the proper witness fees may be made to, the lawyer for the person.

Insurance policies

- (29) Subject to the *Insurance Act*, RSY 2002, c.119, a party may on an examination for discovery obtain disclosure of
- (a) the existence and contents of any insurance policy under which an insurer may be liable to satisfy all or part of a judgment in the action or to indemnify or reimburse a party for money in satisfaction of all or part of the judgment, and
 - (b) the amount of money available under the policy, and any conditions affecting its availability.