

M.R. 3140

IN THE
SUPREME COURT
OF
THE STATE OF ILLINOIS

Order entered March 17, 2023.

(Deleted material is struck through, and new material is underscored.)

Effective immediately, Illinois Supreme Court Rule 17 is adopted, and Rules 201 and 204 are amended, as follows.

New Rule 17

Rule 17. Foreign Subpoenas.

(a) Application. This Rule applies to any request for subpoena pursuant to the Uniform Interstate Depositions and Discovery Act (735 ILCS 35/1 *et seq.*) The definitions contained in the Uniform Interstate Depositions and Discovery Act shall apply in this Rule.

(b) Issuance of Subpoena. To request issuance of a subpoena pursuant to the Uniform Interstate Depositions and Discovery Act, a person shall submit to a clerk of the circuit court in the county in which discovery is sought to be conducted the following:

(1) a foreign subpoena;

(2) an attestation form fully completed under penalty of perjury in the form authorized by the Supreme Court and found in the Article I Forms Appendix;

(3) any other documentation required by local circuit court rule; and

(4) any other document required by the Uniform Interstate Depositions and Discovery Act.

Upon receipt of all required documentation and in accordance with the circuit court's procedure, the clerk of the circuit court shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed unless prohibited under paragraph (c) of this rule. The clerk of the circuit court shall maintain records as required by the Manual on Recordkeeping.

(c) The clerk of the circuit court shall not issue a subpoena if the person requesting the subpoena fails to submit all documents as required by paragraph (b) of this rule. The clerk of the circuit court shall not issue a subpoena if the request for issuance is not in compliance with section 3.5 of the Uniform Interstate Depositions and Discovery Act (735 ILCS 35/3.5).

(d) A subpoena under paragraph (b) shall:

(1) incorporate the terms used in the foreign subpoena;

(2) contain or be accompanied by the names, addresses, e-mail addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any

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party not represented by counsel;

(3) comply with all local circuit court rules; and

(4) comply with all requirements of the Uniform Interstate Depositions and Discovery Act.

(e) Service. A person serving a subpoena issued pursuant to the Uniform Interstate Depositions and Discovery Act shall file a certificate of service with the clerk of the circuit court and serve the recipient of the subpoena with the certificate of service, subpoena issued by the clerk of the circuit court, and a copy of all documents submitted to the clerk of the circuit court. Service shall be made in compliance with Rules 204 and 237 and section 2-1101 of the Code of Civil Procedure.

Committee Comment

Rule 17 and its corresponding authorized attestation form were created in response to the amendments to the Uniform Interstate Depositions and Discovery Act (735 ILCS 35/1 et seq.) contained in Public Act 102-1117 (eff. Jan. 13, 2023).

Adopted Mar. 17, 2023, eff. immediately.

Amended Rule 201

Rule 201. General Discovery Provisions

(a) Discovery Methods. Information is obtainable as provided in these rules through any of the following discovery methods: depositions upon oral examination or written questions, written interrogatories to parties, discovery of documents, objects or tangible things, inspection of real estate, requests to admit and physical and mental examination of persons. Duplication of discovery methods to obtain the same information and discovery requests that are disproportionate in terms of burden or expense should be avoided.

(b) Scope of Discovery.

(1) *Full Disclosure Required.* Except as provided in these rules, a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking disclosure or of any other party, including the existence, description, nature, custody, condition, and location of any documents or tangible things, and the identity and location of persons having knowledge of relevant facts. The word “documents,” as used in Part E of Article II, includes, but is not limited to, papers, photographs, films, recordings, memoranda, books, records, accounts, communications and electronically stored information as defined in Rule 201(b)(4).

(2) *Privilege and Work Product.* All matters that are privileged against disclosure on the trial, including privileged communications between a party or his agent and the attorney for the party, are privileged against disclosure through any discovery procedure. Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party’s attorney. The court may apportion the cost involved in originally securing the discoverable material, including when appropriate a reasonable attorney’s fee, in such manner as is just.

(3) *Consultant*. A consultant is a person who has been retained or specially employed in anticipation of litigation or preparation for trial but who is not to be called at trial. The identity, opinions, and work product of a consultant are discoverable only 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 matter by other means.

(4) *Electronically Stored Information*. (“ESI”) shall include any writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations in any medium from which electronically stored information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form.

(c) Prevention of Abuse.

(1) *Protective Orders*. The court may at any time on its own initiative, or on motion of any party or witness, make a protective order as justice requires, denying, limiting, conditioning, or regulating discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression.

(2) *Supervision of Discovery*. Upon the motion of any party or witness, on notice to all parties, or on its own initiative without notice, the court may supervise all or any part of any discovery procedure.

(3) *Proportionality*. When making an order under this Section, the court may determine whether the likely burden or expense of the proposed discovery, including electronically stored information, outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues.

(d) Time Discovery May Be Initiated. Prior to the time all defendants have appeared or are required to appear, no discovery procedure shall be noticed or otherwise initiated without leave of court granted upon good cause shown.

(e) Sequence of Discovery. 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 shall not operate to delay any other party’s discovery.

(f) Diligence in Discovery. The trial of a case shall not be delayed to permit discovery unless due diligence is shown.

(g) Discovery in Small Claims. Discovery in small claims cases is subject to Rule 287.

(h) Discovery in Ordinance Violation Cases. In suits for violation of municipal ordinances where the penalty is a fine only no discovery procedure shall be used prior to trial except by leave of court.

(i) Stipulations. If the parties so stipulate, discovery may take place before any person, for any purpose, at any time or place, and in any manner.

(j) Effect of Discovery Disclosure. Disclosure of any matter obtained by discovery is not conclusive, but may be contradicted by other evidence.

(k) Reasonable Attempt to Resolve Differences Required. The parties shall facilitate discovery under these rules and shall make reasonable attempts to resolve differences over

discovery. Every motion with respect to discovery shall incorporate a statement that counsel responsible for trial of the case after personal consultation and reasonable attempts to resolve differences have been unable to reach an accord or that opposing counsel made himself or herself unavailable for personal consultation or was unreasonable in attempts to resolve differences.

(l) Discovery Pursuant to Personal Jurisdiction Motion.

(1) While a motion filed under section 2-301 of the Code of Civil Procedure is pending, a party may obtain discovery only on the issue of the court's jurisdiction over the person of the defendant unless: (a) otherwise agreed by the parties; or (b) ordered by the court upon a showing of good cause by the party seeking the discovery that specific discovery is required on other issues.

(2) An objecting party's participation in a hearing regarding discovery, or in discovery as allowed by this rule, shall not constitute a waiver of that party's objection to the court's jurisdiction over the person of the objecting party.

(m) Filing Materials with the Clerk of the Circuit Court. No discovery may be filed with the clerk of the circuit court except by order of court or when authorized by Supreme Court Rule. Local rules shall not require the filing of discovery. Any party serving discovery shall file a certificate of service of discovery document. Service of discovery shall be made in the manner provided for service of documents in Rule 11.

(n) Claims of Privilege. When information or documents are withheld from disclosure or discovery on a claim that they are privileged pursuant to a common law or statutory privilege, any such claim shall be made expressly and shall be supported by a description of the nature of the documents, communications or things not produced or disclosed and the exact privilege which is being claimed.

(o) Filing of Discovery Requests to Nonparties. Notwithstanding the foregoing, a copy of any discovery request under these rules to any nonparty shall be filed with the clerk in accord with Rule 104(b).

(p) Asserting Privilege or Work Product Following Discovery Disclosure. If information inadvertently produced in discovery is subject to a claim of privilege or of work-product protection, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, each receiving party must promptly return, sequester, or destroy the specified information and any copies; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the receiving party disclosed the information to third parties before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must also preserve the information until the claim is resolved.

Amended effective September 1, 1974; amended September 29, 1978, effective November 1, 1978; amended January 5, 1981, effective February 1, 1981; amended May 28, 1982, effective July 1, 1982; amended June 19, 1989, effective August 1, 1989; amended June 1, 1995, effective January 1, 1996; amended March 28, 2002, effective July 1, 2002; amended Oct. 24, 2012, effective Jan. 1, 2013; amended Nov. 28, 2012, eff. Jan. 1, 2013; amended May 29, 2014, eff. July 1, 2014; corrected July 30, 2014, *nunc pro tunc* to May 29, 2014; amended Mar. 17, 2023, eff. immediately.

Committee Comments
(Revised May 29, 2014)

Paragraph (b)

Paragraph (b), subparagraph (1) was amended to conform with the definition in newly added paragraph (b), subparagraph (4) and complies with the Federal Rules of Civil Procedure.

Paragraph (b), subparagraph (4) was added to provide a definition of electronically stored information that comports with the Federal Rule of Civil Procedure 34 (a)(1)(a) and is intended to be flexible and expansive as technology changes.

Paragraph (c)

Subparagraph (3) was added to address the production of materials when benefits do not outweigh the burden of producing them, especially in the area of electronically stored information (“ESI”).

The proportionality analysis called for by subparagraph (3) often may indicate that the following categories of ESI should not be discoverable; (A) “deleted,” “slack,” “fragmented,” or “unallocated” data on hard drives; (B) random access memory (RAM) or other ephemeral data; (C) on-line access data; (D) data in metadata fields that are frequently updated automatically; (E) backup data that is substantially duplicative of data that is more accessible elsewhere; (F) legacy data; (G) information whose retrieval cannot be accomplished without substantial additional programming or without transforming it into another form before search and retrieval can be achieved; and (H) other forms of ESI whose preservation or production requires extraordinary affirmative measures. *See* Seventh Circuit Electronic Discovery Committee, “Principles Relating to the Discovery of Electronically Stored Information,” Principle 2.04(d). In other cases, however, the proportionality analysis may support the discovery of some of the types of ESI on this list. Moreover, this list is not static, since technological changes eventually might reduce the cost of producing some of these types of ESI. Subparagraph (3) requires a case-by-case analysis. If any party intends to request the preservation or production of potentially burdensome categories of ESI, then that intention should be addressed at the initial case management conference in accordance with Supreme Court Rule 218(a)(10) or as soon thereafter as practicable.

Paragraph (p)

This provision is referred to as the “clawback” provision and comports with the new Code of Ethics requirement that if an attorney receives privileged documents, he or she must notify the other side.

Committee Comments
(October 24, 2012)

Paragraph (m) was amended in 2012 to eliminate the filing of discovery with the clerk of the

circuit court absent leave of court granted in individual cases based on limited circumstances. The rule is intended to minimize any invasion of privacy that a litigant may have by filing discovery in a public court file.

Committee Comments
(March 28, 2002)

Paragraph (1)

The words “special appearance,” which formerly appeared in paragraph (1) of Rule 201(l), were replaced in 2002 with the word “motion” in order to conform to changes in terminology in section 2-301 of the Code of Civil Procedure (735 ILCS 5/2-301 (West 1998)).

Since the amendment to section 2-301 allows a party to file a combined motion, it is possible that discovery could proceed on issues other than the court’s jurisdiction over a party’s person prior to the court ruling on the objection to jurisdiction. While the court may allow discovery on issues other than the court’s jurisdiction over the person of the defendant prior to a ruling on the defendant’s objection to jurisdiction, it is expected that in most cases discovery would not be expanded by the court to other issues until the jurisdictional objection is ruled upon. It sometimes may be logical for the court to allow specific, requested discovery on other issues, for example, where a witness is about to die or leave the country, when the party requesting the additional discovery makes a prima facie showing that the party will suffer substantial injustice if the requested discovery is not allowed.

Paragraph (2) recognizes that discovery may proceed on other than jurisdictional issues before the court rules on the objecting party’s motion objecting to jurisdiction. Participation in discovery by the objecting party does not constitute a waiver by the objecting party’s challenge to jurisdiction.

Committee Comments
(Revised June 1, 1995)

Paragraph (a)

Paragraph (a) of this rule sets forth the four discovery methods provided for and cautions against duplication. The committee considered and discarded a provision requiring leave of court before a party could request by one discovery method information already obtained through another. The committee concluded that there are circumstances in which it is justifiable to require answers to the same or related questions by different types of discovery procedures but felt strongly that the rules should discourage time-wasting repetition; hence the provision that duplication should be avoided. This language is precatory but in the application of the medical examination rule, and in the determination of what is unreasonable annoyance under paragraph (c) of this rule, dealing with prevention of abuse, such a phrase has the beneficial effect of drawing particular attention to the question whether the information sought has already been made available to the

party seeking it so that further discovery should be curtailed.

Paragraph (b)

Paragraph (b), subparagraph (1), sets forth generally the scope of discovery under the rules. The language “any matter relevant to the subject matter involved in the pending action” is the language presently employed in Federal Rule 26. The Federal rule also contains the sentence: “It is not ground for objection that the testimony will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” The Joint Committee Comments that accompanied former Illinois Rule 19-4 indicate that a similar sentence appearing in the pre-1970 Federal rule was deliberately omitted from the Illinois rule and suggest that perhaps the language “relating to the merits of the matter in litigation” was intended to limit discovery to evidence. This language was not construed in this restrictive fashion, however. (See *Monier v. Chamberlain*, 31 Ill. 2d 400, 202 N.E.2d 15 (1964), 66 Ill. App. 2d 472, 213 N.E.2d 425 (3d Dist. 1966), aff’d, 35 Ill. 2d 351, 221 N.E.2d 410 (1966); *People ex rel. Terry v. Fisher*, 12 Ill. 2d 231, 145 N.E.2d 588 (1957); *Krupp v. Chicago Transit Authority*, 8 Ill. 2d 37, 132 N.E.2d 532 (1956).) The only other effect the term “merits” could have would be to prevent discovery of information relating to jurisdiction, a result the committee thought undesirable. Accordingly, the phrase “relevant to the subject matter” was substituted for “relating to the merits of the matter in litigation” as more accurately reflecting the case law.

The phrase “identity and location of persons having knowledge of relevant facts,” which appears in both former Rule 19-4 and Federal Rule 26, was retained. This language has been interpreted to require that the interrogating party frame his request in terms of some stated fact rather than simply in the language of the rule, because the use of the broad term “relevant facts” places on the answering party the undue burden of determining relevancy. See *Reske v. Klein*, 33 Ill. App. 2d 302, 305-06, 179 N.E.2d 415 (1st Dist. 1962); *Fedors v. O’Brien*, 39 Ill. App. 2d 407, 412-13, 188 N.E.2d 739 (1st Dist. 1963); *Nelson v. Pals*, 51 Ill. App. 2d 269, 273-75, 201 N.E.2d 187 (1st Dist. 1964); *Grant v. Paluch*, 61 Ill. App. 2d 247, 210 N.E.2d 35 (1st Dist. 1965).

The definition of “documents” in subparagraph (b)(1) has been expanded to include “all retrievable information in computer storage.” This amendment recognizes the increasing reliability on computer technology and thus obligates a party to produce on paper those relevant materials which have been stored electronically.

The first sentence of subparagraph (b)(2) is derived from the first sentence of former Rule 19-5(1). The second sentence was new. It constituted a restatement of the law on the subject of work product as it had developed in the cases decided over the previous decade. See *Monier v. Chamberlain*, 35 Ill. 2d 351, 221 N.E.2d 410 (1966), aff’g 66 Ill. App. 2d 472, 213 N.E.2d 425 (3d Dist. 1966); *Stimpert v. Abdnour*, 24 Ill. 2d 26, 179 N.E.2d 602 (1962); *Day v. Illinois Power Co.*, 50 Ill. App. 2d 52, 199 N.E.2d 802 (5th Dist. 1964); *Oberkircher v. Chicago Transit Authority*, 41 Ill. App. 2d 68, 190 N.E.2d 170 (1st Dist. 3d Div. 1963); *Haskell v. Siegmund*, 28 Ill. App. 2d 1, 170 N.E.2d 393 (3d Dist. 1960); see also *City of Chicago v. Harrison-Halsted Building Corp.*, 11 Ill. 2d 431, 435, 143 N.E.2d 40 (1957), and *City of Chicago v. Shayne*, 46 Ill. App. 2d 33, 40, 196 N.E.2d 521 (1st Dist. 1964). The final sentence of this subparagraph was new and is intended to prevent penalizing the diligent and rewarding the slothful.

Discovery of consultants as provided by Rule 201(b)(3) will be proper only in extraordinary cases. In general terms, the “exceptional circumstances” provision is designed to permit discovery of consultants only when it is “impracticable” for a party to otherwise obtain facts or opinions on the same subject. Discovery under the corresponding Federal provision, Rule 26(b)(4)(B) of the Federal Rules of Civil Procedure, has generally been understood as being appropriate, for example, in cases in which an item of physical evidence is no longer available because of destructive testing and the adversary’s consultant is the only source of information about the item, or in cases in which all the experts in a field have been retained by other parties and it is not possible for the party seeking discovery to obtain his or her own expert.

Paragraph (c)

Subparagraph (c)(1) covers the substance of former Rule 19-5(2). That rule listed a number of possible protective orders, ending with the catchall phrase, “or *** any other order which justice requires to protect party or deponent from annoyance, embarrassment, or oppression.” Subparagraph (c)(2) substitutes the language “denying, limiting, conditioning, or regulating discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression.” The list of possible discovery orders was deleted as unnecessary in view of the broader language of the new rule. The change in language is by way of clarification and was not intended to effect any change in the broad discretion to make protective orders that was provided by former Rule 19-5(2). See *Stowers v. Carp*, 29 Ill. App. 2d 52, 172 N.E.2d 370 (2d Dist. 1961).

Subparagraph (c)(2), like subparagraph (c)(1), is designed to clarify rather than change the Illinois practice. The committee was of the opinion that under certain circumstances it might be desirable for the trial court to direct that discovery proceed under its direct supervision, and that this practice might be unusual enough to call for special mention in the rule. The language was taken from section 3104 of the New York Civil Practice Act.

Paragraph (d)

Paragraph (d) of this rule makes it clear that except by order of court discovery procedures may not be initiated before the defendants have appeared or are required to appear. Former Rule 19-1 provided that depositions could not be taken before the defendants had appeared or were required to appear, and former Rule 19-11 made the time requirements for taking depositions applicable to the serving of interrogatories. The former rules, however, left the plaintiff free to serve notice at any time after the commencement of the action of the taking of a deposition, just as long as the taking was scheduled after the date on which the defendants were required to appear, a practice which the bar has found objectionable.

Paragraph (e)

Paragraph (e), as adopted in 1967, provided that unless otherwise ordered “depositions and other discovery procedures shall be conducted in the sequence in which they are noticed or otherwise initiated.” The effect of this provision was to give the last defendant served priority in discovery, since he could determine the date of his appearance. In 1978, this paragraph was

amended to adopt the practice followed in the Federal courts since 1970, permitting all parties to proceed with discovery simultaneously unless the court orders otherwise. While empirical studies conducted preliminary to the proposals for amendment of the Federal discovery rules adopted in 1970 indicate that both defendants and plaintiffs are so often dilatory in beginning their discovery that a race for priority does not occur very frequently, affording a priority based on first notice in some cases can result in postponing the other parties' discovery for a very long time. (See Advisory Committee Note to Fed. R. Civ. P. 26.) In most cases it appears more efficient to permit each party to proceed with its discovery, whether by deposition or otherwise, unless in the interests of justice the establishment of priority seems to be called for. The amended rule reserves to the court the power to make such an order. In most instances, however, problems of timing should be worked out between counsel. See paragraph (k).

Paragraph (f)

Paragraph (f) of this rule is derived from the last sentence of former Rule 19-1. The language is unchanged except that it is made applicable to all discovery proceedings.

Paragraph (g)

Paragraph (g) of this rule is a cross-reference to Rule 287, which provides that discovery is not permitted without leave of court in small claims cases, defined in Rule 281 as actions for money not in excess of \$2,500, or for the collection of taxes not in excess of that amount.

Paragraph (h)

Rule 201 was amended in 1974 to add paragraph (h) and to reletter former paragraphs (h) and (i) as (i) and (j). Paragraph (h) extends to ordinance violation cases the principle applicable to small claims that discovery procedures under the rules may not be used without leave of court.

Paragraph (i)

Paragraph (i) of this rule makes the provisions of former Rule 19-3, dealing with stipulations for the taking of depositions, applicable to discovery in general. As originally adopted this paragraph was (h). It was relettered (i) in 1974, when the present paragraph (h) was added.

Paragraph (j)

Paragraph (j) of this rule is derived from the last sentence of former Rule 20. The language is unchanged. As originally adopted, this was paragraph (i). It was relettered (j) when present paragraph (h) was added in 1974.

Paragraph (k)

Paragraph (k) was added in 1974. Patterned after the practice in the United States District Courts for the Eastern and Northern Districts of Illinois, it is designed to curtail undue delay in the administration of justice and to discourage motions of a routine nature.

Paragraph (k) was amended to remedy several problems associated with discovery. Language has been added to encourage attorneys to try and resolve discovery differences on their own. Also, committee members cited the problem of junior attorneys, who are not ultimately responsible for cases, perpetuating discovery disagreements. It was agreed that many discovery differences could be eliminated if the attorneys responsible for trying the case were involved in attempts to resolve discovery differences. Reasonable attempts must be made to resolve discovery disputes prior to bringing a motion for sanctions. Counsel responsible for the trial of a case are required to have or attempt a personal consultation before a motion with respect to discovery is initiated. The last sentence of paragraph (k) has been deleted, as the consequences of failing to comply with discovery are discussed in Rule 219.

Paragraph (l)

Paragraph (l) was added in 1981 to negate any possible inference from the language of section 20 of the Civil Practice Act that participation in discovery proceedings after making a special appearance to contest personal jurisdiction constitutes a general appearance and waives the jurisdictional objection, so long as the discovery is limited to the issue of personal jurisdiction.

Paragraph (m)

Paragraph (m) was added in 1989. The new paragraph allows the circuit courts to adopt local rules to regulate or prohibit the filing of designated discovery materials with the clerk. The identity of the affected materials should be designated in the local rules, as should any procedures to compel the filing of materials that would otherwise not be filed under the local rules.

Paragraphs (n) and (o)

Regarding paragraph (n), any claim of privilege with respect to a document must be stated specifically pursuant to this rule. Pursuant to paragraph (o), all discovery filed upon a nonparty shall be filed with the clerk of the court.

Amended Rule 204

Rule 204. Compelling Appearance of Deponent

(a) Action Pending in This State.

(1) *Subpoenas.* Except as provided in paragraph (c) hereof: (i) the clerk of the court shall issue subpoenas on request; or (ii) subpoenas may be issued by an attorney admitted to practice in the State of Illinois who is currently counsel of record in the pending action. The subpoena may command the person to whom it is directed to produce documents or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted under these rules subject to any limitations imposed under Rule 201(c).

(2) *Service of Subpoenas.* A deponent shall respond to any lawful subpoena of which the deponent has actual knowledge, if payment of the fee and mileage has been tendered. Service

of a subpoena by mail may be proved prima facie by a return receipt showing delivery to the deponent or his authorized agent by certified or registered mail at least seven days before the date on which appearance is required and an affidavit showing that the mailing was prepaid and was addressed to the deponent, restricted delivery, return receipt requested, showing to whom, date and address of delivery, with a check or money order for the fee and mileage enclosed.

(3) *Notice to Parties, et al.* Service of notice of the taking of the deposition of a party or person who is currently an officer, director, or employee of a party is sufficient to require the appearance of the deponent and the production of any documents or tangible things listed in the notice.

(4) *Production of Documents in Lieu of Appearance of Deponent.* The notice, order or stipulation to take a deposition may specify that the appearance of the deponent is excused, and that no deposition will be taken, if copies of specified documents or tangible things are served on the party or attorney requesting the same by a date certain. That party or attorney shall serve all requesting parties of record at least three days prior to the scheduled deposition, with true and complete copies of all documents, and shall make available for inspection tangible things, or other materials furnished, and shall file a certificate of compliance with the court. Unless otherwise ordered or agreed, reasonable charges by the deponent for production in accordance with this procedure shall be paid by the party requesting the same, and all other parties shall pay reasonable copying and delivery charges for materials they receive. A copy of any subpoena issued in connection with such a deposition shall be attached to the notice and immediately filed with the court, not less than 14 days prior to the scheduled deposition. The use of this procedure shall not bar the taking of any person's deposition or limit the scope of same.

(b) Action Pending in Another State, Territory, or Country.

(1) Any officer or person authorized by the laws of another State, territory, or country to take any deposition in this State, with or without a commission, in any action pending in a court of that State, territory, or country may petition the circuit court in the county in which the deponent resides or is employed or transacts business in person or is found for a subpoena to compel the appearance of the deponent or for an order to compel the giving of testimony by the deponent. The court may hear and act upon the petition with or without notice as the court directs.

(2) All requests for subpoenas pursuant to the Uniform Interstate Depositions and Discovery Act (735 ILCS 35/1 et seq.) shall be governed by Rule 17.

(c) Depositions of Physicians. The discovery depositions of nonparty physicians being deposed in their professional capacity may be taken only with the agreement of the parties and the subsequent consent of the deponent or under a subpoena issued upon order of court. A party shall pay a reasonable fee to a physician for the time he or she will spend testifying at any such deposition. Unless the physician was retained by a party for the purpose of rendering an opinion at trial, or unless otherwise ordered by the court, the fee shall be paid by the party at whose instance the deposition is taken.

(d) Noncompliance by Nonparties: Body Attachment.

(1) An order of body attachment upon a nonparty for noncompliance with a discovery order or subpoena shall not issue without proof of personal service of the rule to show cause or order of contempt upon the nonparty.

(2) The service of the rule to show cause or order of contempt upon the nonparty, except when the rule or order is initiated by the court, shall include a copy of the petition for rule and the discovery order or subpoena which is the basis for the petition for rule.

(3) The service of the rule to show cause or order of contempt upon the nonparty shall be made in the same manner as service of summons provided for under sections 2-202, 2-203(a)(1) and 2-203.1 of the Code of Civil Procedure.

Amended June 23, 1967, and amended October 21, 1969, effective January 1, 1970; amended September 29, 1978, effective November 1, 1978; amended July 1, 1985, effective August 1, 1985; amended November 21, 1988, effective January 1, 1989; amended June 19, 1989, effective August 1, 1989; amended June 1, 1995, effective January 1, 1996; amended June 11, 2009, effective immediately; amended December 16, 2010, effective immediately; amended May 29, 2014, eff. July 1, 2014; amended Mar. 17, 2023, eff. immediately.

Committee Comments

(Revised June 1, 1995)

Paragraph (a) of this rule was revised effective June 23, 1967, to divide it into three subparagraphs and add the material contained in subparagraph (a)(2), dealing with service of subpoenas.

The first sentence of the subparagraph (a)(2) states existing law. (*Chicago and Aurora R.R. Co. v. Dunning* (1857), 18 Ill. 494.) The second sentence simplifies proof of actual notice when service is made by certified or registered mail. It was amended in 1978 to conform its requirements to presently available postal delivery service. See Committee Comments to Rule 105.

Subparagraphs (a)(1) and (a)(3), without their present subtitles, appeared as paragraph (a) of Rule 204(a) as adopted effective January 1, 1967. New at that time was the provision now in subparagraph (a)(1) making an order of the court a prerequisite to the issuance of subpoena for the discovery deposition of a physician or surgeon. Also new in the 1967 rule was the use of the term “employee” instead of the former “managing agent” in what is now subparagraph (a)(3). The phrase “and no subpoena is necessary” which appeared in former Rule 19-8(1) (effective January 1, 1956), on which Rule 204(a) was based, was placed there to emphasize a change in practice to which the bar had been accustomed by 1967, and it was deleted in the 1967 revision as no longer needed.

Subparagraph (4) of paragraph (a) sets forth the procedures to be followed in those instances where the production of documents or tangible things by an individual may obviate the need for taking that person’s deposition. The rule recognizes that subpoenas must be directed to individuals, not inanimate objects. Existing law regarding privilege and permissible discovery in a given case is unaffected by the rule. (See *Lewis v. Illinois Central R.R. Co.*, 234 Ill. App. 3d 669 (5th Dist. 1992).) The rule requires disclosure to all parties with prompt and complete production of all materials received, regardless of whether materials in addition to those specified are furnished by

the deponent.

Paragraph (b) was not affected by the June 23, 1967, amendment. It was derived from former Rule 19-8(2) as it stood before 1967.

In 1985 paragraph (a) was amended and paragraph (c) was added to regulate the practice of compelling physicians and surgeons to appear to be deposed in their professional capacity and to set guidelines concerning professional fees which may, by agreement, be paid to physicians and surgeons for attending such depositions. Traditionally, expert witnesses are in the same position as other witnesses with respect to their fees. (*In re Estate of James* (1956), 10 Ill. App. 2d 232.) Physicians and other experts subpoenaed to testify may not refuse to do so on the ground that they are entitled to be paid some additional fee on the basis of being an expert. (*Dixon v. People* (1897), 168 Ill. 179.) Expert witnesses, like other witnesses, normally are entitled only to \$20 per day and 20 cents per mile of necessary travel. (*Falkenthal v. Public Building Com.* (1983), 111 Ill. App. 3d 703.) As a practical matter, however, physicians and surgeons usually do request a professional fee, in addition to the statutory witness fee, to reimburse them for the time they spend testifying at depositions, and the party at whose instance the physician or surgeon is subpoenaed is normally loathe to refuse. This rule is intended to regulate this practice. A party may agree to pay a reasonable professional fee to a physician or surgeon for the time he or she will spend testifying at any deposition. The fee should be paid only after the doctor has testified, and it should not exceed an amount which reasonably reimburses the doctor for the time he or she actually spent testifying at deposition. Unless the doctor was retained for the purpose of rendering an expert opinion at trial, or unless otherwise ordered by the court, the party at whose instance the deposition is being taken would be responsible for paying the professional fee, as well as other fees and expenses provided for in Rule 208.

Rule 204(c) implies that the trial court will exercise discretion in ordering the issuance of a subpoena upon a physician or surgeon and will refuse to do so unless there is some preliminary showing of good cause, regardless of whether there has been an objection by opposing counsel. At a minimum the moving party must be able to show that he has received the medical records available in the case and nevertheless has good reason to believe that a deposition is necessary. If appropriate, the court may require that such a showing of good cause be accomplished by an affidavit accompanying the motion.

Paragraph (c) was amended in 1989 to provide that a party "shall pay," rather than "may agree to pay," a reasonable fee to a physician or surgeon for the time the physician or surgeon will spend testifying at any such deposition. This change will clarify the responsibility of parties to not intrude on the time of physicians and surgeons without seeing to it that the physicians or surgeons receive reasonable compensation for the time they spend undergoing questioning on deposition.

The reference in paragraph (c) to "surgeons" has been stricken because it is redundant. Moreover, paragraph (c) is made applicable only to "nonparty" physicians. The protection afforded a physician by paragraph (c), including the payment of a fee for time spent, has no application to a physician who is a party to the suit. Such protection should likewise be unavailable to nonparty physicians who are closely associated with a party, such as physicians who are stockholders in or officers of a professional corporation named as a defendant, or a physician who is a respondent in discovery.