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ILLINOIS LAW MANUAL

CHAPTER I
CIVIL PROCEDURE

E. DISCOVERY RULES

1. Basic Law

Except as otherwise limited, each party may obtain full disclosure of any matter relevant to a pending action. Ill. Sup. Ct. Rule 201. This information may be obtained through any of the following methods: oral questioning (deposition), written interrogatories to parties, inspection of documents or property, or physical or mental examinations of persons. Ill. Sup. Ct. Rule 201(a). Unless the court directs otherwise, methods of discovery may be used in any sequence. Ill. Sup. Ct. Rule 201(c). One party's discovery may not be used to delay another party's discovery. Id.

Any party may take the testimony of another party to the action, or any other person, for the purpose of discovery or for use as evidence. Ill. Sup. Ct. Rule 202. A party seeking to depose another party need only give that party notice of the intent to depose. Ill. Sup. Ct. Rule 204(a)(3). The deposition of a non-party requires a subpoena from the circuit court, which is issued upon request of an attorney. Ill. Sup. Ct. Rule 204(a)(1). The subpoena may also require the deponent to bring with him to the deposition relevant documents or tangible things for use during the

deposition. Ill. Sup. Ct. Rule 204(a)1-2. A deponent having actual knowledge of the subpoena must honor it, but he is entitled to receive a fee and mileage reimbursement for his attendance at the deposition. Ill. Sup. Ct. Rule 204(a)(2).

Depositions of physicians and surgeons in their professional capacity are permissible only by agreement of the parties and the deponent or by court order. Ill. Sup. Ct. Rule 204(c). The physician or surgeon is entitled to a reasonable fee for his time spent testifying at the deposition. Id. Unless the physician or surgeon is another party's expert witness, or unless the court orders otherwise, the party wishing to take the deposition must pay that fee. Ill. Sup. Ct. Rule 204(c).

A discovery deposition may be used in any one of the following ways:

(1) to impeach the deponent's subsequent testimony as a prior inconsistent statement;

(2) as an admission;

(3) as an exception to the hearsay rule, if it is otherwise admissible;

(4) for any purpose for which an affidavit may be used; and

(5) upon reasonable notice to all parties, as evidence against a party who appeared at the deposition or was given proper notice. However, other requirements must be met: the court must find that the deponent is neither a controlled expert witness nor a party; the deponent's evidence deposition has not been taken; and the deponent is unable to attend or testify because of death or infirmity. The court, based on its discretion must further find that the evidence will do substantial justice between or among the parties.

Ill. Sup. Ct. Rule 212(a).

In an evidence deposition, the deponent is examined and cross-examined as if he were testifying at trial. Ill. Sup. Ct. Rule 206(c)(2). Evidence depositions can also be used in any of the ways a discovery deposition can be used and may be used by a party as a replacement for the party's testimony if at the time of trial:

(a) the deponent is dead or unable to testify because of age, sickness, infirmity or imprisonment;

(b) the deponent is out of the county (unless the absence was procured by the proponent of the deposition); or

(c) the proponent of the deposition has exercised due diligence but is unable to procure the deponent's attendance at trial, or some exceptional circumstance justifies its use.

Ill. Sup. Ct. Rule 212(b).

The evidence deposition of a physician or surgeon may be used by either party at trial, regardless of the deponent's availability. However, either party still has the right to call that deponent for attendance at trial. Ill. Sup. Ct. Rule 212(b).

A party may direct written interrogatories to any other party, and a copy of the interrogatories must be served on all parties. Ill. Sup. Ct. Rule 213(a). A party shall not propound upon another party more than 30 interrogatories, including sub-parts, unless otherwise agreed upon by the parties. Ill. Sup. Ct. Rule 213(c). Answers to the interrogatories are due within 28 days. In addition, answers to interrogatories may be used to the same extent as discovery depositions, as discussed above. Ill. Sup. Ct. Rule 213(d). (See Chapter XV for rules of discovery regarding experts.)

Any party may, by written request, direct another party to produce for inspection, copying, testing or sampling specified documents, objects or tangible things, or to permit access to real estate for the purpose of making inspections, surveys, etc. Ill. Sup. Ct. Rule 214. The request must set a reasonable date for compliance (at least 28 days) and the place and manner in which the request is to be satisfied. Id.

Any party may serve on any other party a request to admit that a fact specified is true or that a document produced is genuine. Ill. Sup. Ct. Rule 216. The fact is taken as true or the document as genuine unless, within 28 days of the request, the party to whom the request is made either:

(a) denies the truth of the fact or the genuineness of the document or gives a detailed explanation for why he cannot admit or deny the truth or genuineness; or

(b) the party objects in writing to the request on the basis of some privilege, or because the request is irrelevant or otherwise improper.

An admission under this rule can only be used in the action in which it was made. Ill. Sup. Ct. Rule 216.

If a party refuses to comply with another party's discovery request, the requesting party may bring a motion for an order compelling compliance. Ill. Sup. Ct. Rule 219(a). The prevailing party may be entitled to the costs of bringing or defending against the motion, including reasonable attorney's fees. Id. If any party, or any person in collusion with a party, unreasonably refuses to comply with a discovery request or court order related thereto, the court may, upon a motion:

(a) suspend the proceedings until the rule or order is complied with;

(b) bar the offending party from filing any pleading on the issue to which the refusal relates;

(c) bar the offending party from bringing any claim, counterclaim, thirdparty complaint or defense relating to that issue;

(d) bar the offending party from testifying about that issue;

(e) enter a default judgment on or dismiss with or without prejudice the claim or defense relating to that issue; or

(f) strike any portion of the pleadings relating to that issue and, if appropriate, enter judgment as to that issue.

(g) sanction the offending party by ordering them to pay interest in cases where a money judgment is entered.

Ill. Sup. Ct. Rule 219(c).

In lieu of or in addition to the above, the court may award reasonable expenses, including attorney's fees. Id.

2. Exception - Privilege and Work Product

All matters that are considered privileged at a trial, including the communications between an attorney and his client, are privileged against disclosure through discovery. Materials prepared by or for a party in preparation for trial are discoverable unless they contain the theories, mental impressions or litigation plans of the party's attorney. Ill. Sup. Ct. Rule 201(b)(2).

Although not protected by the attorney-client privilege or work product rule, discovery of certain information may be limited by a protective order. Ill. Sup. Ct. Rule 201(c)(1). The court may, on its own initiative or by a party's or witness's motion and as justice requires, deny, limit, condition or regulate discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage or oppression. Id.

3. Analysis

The general rules relating to discovery practice are relatively straightforward and easy to follow. Conversations that fall under the attorney-client privilege and what constitutes an attorney's work product have been the subject of judicial interpretation. Illinois courts adhere to a strong policy of encouraging disclosure with an eye toward ascertaining the truth, which is essential to the proper disposition of a suit. To that end, the attorney-client privilege is limited solely to those communications which the client either expressly makes confidential or which he could reasonably believe under the circumstances would be understood by the attorney as such. See, Ill. Ed. Ass'n. v. Ill. State Bd. of Ed., 204 Ill.2d 456 (2003); In Re Marriage of Johnson, 237 Ill. App. 3d 381 (4th Dist. 1992); Rounds v. Jackson Park Hospital, 319 Ill. App. 3d 280 (1st Dist. 2001). See also, Monier v. Chamberlain, 35 Ill. 2d 351 (1966) (where plaintiff and defendant in auto collision case were insured by same insurance carrier, the court held that statements given by

defendant to insurer or attorney hired by insurer before plaintiff hired independent counsel were not privileged). The privilege belongs to the client and only the client can waive it. In re Marriage of Decker, 153 Ill. 2d 298, 313 (1992). The attorney-client privilege and work product rule are separate and distinct protections. Waste Mgmt, Inc. v. Int'l Surplus Lines Ins. Co., 144 Ill.2d 178, 178-9 (1991). The waiver of one does not serve as a waiver of the other. Id.

The work product rule, which protects against disclosure of an attorney's theories, mental impressions, or litigation plans, is believed necessary to prevent complete invasion of an attorney's files and theory of the case. It protects notes, memoranda, reports or documents prepared for use at trial that reveal the shaping process by which the attorney has arranged the evidence as dictated by his training and experience. Monier v. Chamberlain, 35 Ill.2d 351 (1966); CSX Transportation, Inc. v. Lexington Insurance Co., 187 F.R.D. 555 (N.D.Ill. 1999). Other material that do not relate to this process but contains relevant and material evidentiary details remains discoverable. Monier, 35 Ill.2d at 360. So, for example, while counsel's memoranda of his impressions of a prospective witness are protected from disclosure, the verbatim statement of that witness is not protected. Counsel's notes and memoranda of a witness's oral statement are generally considered work product because they necessarily reveal, in varying degrees, the attorney's mental processes in evaluating the communications. See, Consolidation Coal Co. v. Bucyrus-Erie Co., 89 Ill.2d 103 (1983); see also, People v. Knuckles, 165 Ill.2d 125 (1995). The notes and memoranda are still considered work product even when they are inextricably intertwined with factual material. However, these notes and memoranda are discoverable if the party seeking disclosure conclusively demonstrates the absolute impossibility of securing similar information from other sources (e.g., by the opposing attorney taking his/her own statement of the witness). Miynarski v. Rush Prebyterian-St. Luke's Med. Ctr., 213 Ill. App. 3d 427, 433 (1st Dist. 1991).

4. Respondents in Discovery

Plaintiff may designate as respondents in discovery individuals or other entities, other than the named defendant(s), believed by the plaintiff to have information regarding who should be named as a defendant in the lawsuit. 735 ILCS 5/2-402. Persons or entities named as respondents must respond to discovery propounded by plaintiff as though they were named as a defendant. Id. If a basis exists, a plaintiff may motion the court to add the respondent in discovery as a named defendant. Id. In that instance, a copy of the complaint must be served upon the respondent in discovery like any other named defendant. Id. The plaintiff has six months from the date when he named the respondent in discovery in which to name the respondent as a defendant, even if the statute of limitations expired within the six-month period. Id.

5. Limited and Simplified Discovery

Supreme Court Rule 222 limits and simplifies discovery in certain cases. This rule applies to all cases subject to mandatory arbitration and civil actions seeking money damages of less than $50,000, exclusive of interest and costs. Ill. Sup. Ct. Rule 222(a). The amendments to this rule took effect on July 1, 2002. Discovery depositions are limited to three hours, unless both parties agree that a lengthier deposition is justified. Ill. Sup. Ct. Rule 222(f)(2). The number of interrogatories, including subparts, is limited to 30. Ill. Sup. Ct. Rule 222(f)(1). In addition, initial disclosure of the factual basis of the claim or defense, the legal theory of the claim or defense, identity of witnesses, lists of damages, and documents must be disclosed pursuant to Supreme Court Rule 222(c) within 120 days of the filing of a responsive pleading.