

RULE 74. DEPOSITIONS FOR DISCOVERY PURPOSES

- (a) **General:** A party may obtain discovery by depositions with the consent of the parties under paragraph (b) and without the consent of the parties under paragraph (c). Paragraph (d) describes additional uses for depositions of expert witnesses, and paragraphs (e) and (f) set forth general provisions governing the taking of all depositions for discovery purposes.
- (b) **Depositions with the Consent of the Parties:**
- (1) *When Deposition May Be Taken:* With the consent of all the parties to a case, and within the time limits provided in Rule 70(a)(2), a deposition for discovery purposes may be taken of a party, a nonparty witness, or an expert witness. A party's consent must be set forth in a stipulation filed with the Court. The stipulation is subject to the procedure provided in Rule 81(d).
- (2) *Notice to Nonparty Witness or Expert Witness:* A party desiring to take a deposition of a nonparty witness or an expert witness must serve a notice of deposition on that nonparty witness or expert witness. The notice must state that the deposition is to be taken under Rule 74(b) and must set forth the name of the party or parties seeking the deposition; the name and address of the person to be deposed; the time and place proposed for the deposition; the name of the officer or reporting company before whom the deposition is to be taken; a statement describing any books, papers, documents, electronically stored information, or tangible things to be produced at the deposition; and a statement of the issues in controversy to which the expected testimony of the witness, or the document, electronically stored information, or thing relates, and the reasons for deposing the witness. With respect to the deposition of an organization described in Rule 81(c), the notice must also set forth the information required under that Rule, and the organization must make the designation authorized by that Rule.

- (3) *Objection by Nonparty Witness or Expert Witness:* Within 15 days after service of the notice of deposition, a nonparty witness or expert witness must serve on the parties seeking the deposition any objections to the deposition. The burden is on a party seeking the deposition to move for an order with respect to any objection or other failure of the nonparty witness or expert witness, and that party must annex to the motion the notice of deposition with proof of service thereof, together with a copy of the response and objections, if any. Before a motion for an order is filed, neither the notice nor the responses are filed with the Court.

(c) Depositions Without the Consent of the Parties:

- (1) *In General:*

(A) *When Depositions May Be Taken:* After a notice of trial has been issued or after a case has been assigned to a Judge or Special Trial Judge of the Court, and within the time for completion of discovery under Rule 70(a)(2), any party may take a deposition for discovery purposes of a party, a nonparty witness, or an expert witness in the circumstances described in this paragraph.

(B) *Availability:* The taking of a deposition of a party, a nonparty witness, or an expert witness under this paragraph is an extraordinary method of discovery and may be used only if a party, a nonparty witness, or an expert witness can give testimony or possesses documents, electronically stored information, or things which are discoverable within the meaning of Rule 70(b) and if the testimony, documents, electronically stored information, or things practicably cannot be obtained through informal consultation or communication (Rule 70(a)(1)), interrogatories (Rule 71), a request for production of documents, electronically stored information, or things (Rule 72), or by a deposition taken with the consent of the parties (Rule 74(b)). If these requirements are satisfied, a deposition of a witness may be taken under this paragraph.

- (2) *Nonparty Witnesses:* A party may take the deposition of a nonparty witness without leave of court and without the consent of all the parties as follows:
- (A) *Notice:* A party desiring to take a deposition under this subparagraph must give notice in writing to every other party to the case and to the nonparty witness to be deposed. The notice must state that the deposition is to be taken under Rule 74(c)(2) and must include the same type of information required under Rule 74(b)(2).
 - (B) *Objections:* Within 15 days after service of the notice of deposition, a party or a nonparty witness must serve on the party seeking the deposition any objections to the deposition. The procedures set forth in Rule 74(b)(3) otherwise apply.
- (3) *Party Witnesses:* A party may take the deposition of another party without the consent of all the parties as follows:
- (A) *Motion:* A party desiring to depose another party must file a written motion stating that the deposition is to be taken under Rule 74(c)(3) and setting forth the name of the person to be deposed, the time and place of the deposition, and the name of the officer or reporting company before whom the deposition is to be taken. With respect to the deposition of an organization described in Rule 81(c), the motion must also set forth the information required under that Rule, and the organization must make the designation authorized by that Rule.
 - (B) *Objection:* On the filing of a motion to take the deposition of a party, the Court will issue an order directing each non-moving party to file a written objection or response thereto.
 - (C) *Action by the Court:* In the exercise of its discretion the Court may order the taking of a deposition of a party witness and may in its order allocate the cost therefor as it deems appropriate.

(4) *Expert Witnesses:* A party may take the deposition of an expert witness without the consent of all the parties as follows:

(A) *Scope of Deposition:* The deposition of an expert witness under this subparagraph is limited to:

- (i) the knowledge, skill, experience, training, or education that qualifies the witness to testify as an expert in respect of the issue or issues in dispute;
- (ii) the opinion of the witness in respect of which the witness's expert testimony is relevant to the issue or issues in dispute;
- (iii) the facts or data that underlie that opinion; and
- (iv) the witness's analysis, showing how the witness proceeded from the facts or data to draw the conclusion that represents the opinion of the witness.

(B) *Procedure:*

- (i) *In General:* A party desiring to depose an expert witness under this subparagraph (4) must file a written motion and set forth therein the matters specified below:
 - (a) The name and address of the witness to be examined;
 - (b) a statement describing any books, papers, documents, electronically stored information, or tangible things to be produced at the deposition of the witness to be examined;
 - (c) a statement of issues in controversy to which the expected testimony of the expert witness, or the document, electronically stored information, or thing relates, and the reasons for deposing the witness;
 - (d) the time and place proposed for the deposition;

- (e) the name of the officer or reporting company before whom the deposition is to be taken;
- (f) any provision desired with respect to the payment of the costs, expenses, fees, and charges relating to the deposition (see paragraph (c)(4)(D)); and
- (g) if the movant proposes to video record the deposition, a statement to that effect and the name and address of the video recorder operator and the operator's employer. (The video recorder operator and the officer before whom the deposition is to be taken may be the same person.)

The movant must also show that prior notice of the motion has been given to the expert witness whose deposition is sought and to each other party, or counsel for each other party, and must state the position of each of these persons with respect to the motion, in accordance with Rule 50(a).

- (ii) *Disposition of Motion:* Any objection or other response to the motion for order to depose an expert witness under this subparagraph must be filed with the Court within 15 days after service of the motion. If the Court approves the taking of a deposition, it will issue an order as described in paragraph (e)(4) of this Rule. If the deposition is to be video recorded, the Court's order will so state.
- (C) *Action by the Court:* In the exercise of its discretion the Court may order the taking of a deposition of an expert witness and may in its order allocate the cost therefor as it deems appropriate.

(D) *Expenses:*

- (i) *In General:* By stipulation among the parties and the expert witness to be deposed, or on order of the Court, provision may be made for any costs, expenses, fees, or charges relating to the deposition. If there is no stipulation or order, the costs, expenses, fees, and charges relating to the deposition will be borne by the parties as set forth in paragraph (c)(4)(D)(ii).
- (ii) *Allocation of Costs, etc.:* The party taking the deposition will pay the following costs, expenses, fees, and charges:
 - (a) A reasonable fee for the expert witness, with regard to the usual and customary charge of the witness, for the time spent in preparing for and attending the deposition;
 - (b) reasonable charges of the expert witness for models, samples, or other like matters that may be required in the deposition of the witness;
 - (c) amounts as are allowable under Rule 148(a) for transportation and subsistence for the expert witness;
 - (d) any charges of the officer presiding at or recording the deposition (other than for copies of the deposition transcript);
 - (e) any expenses involved in providing a place for the deposition; and
 - (f) the cost for the original of the deposition transcript as well as for any copies thereof that the party taking the deposition might order.

The other parties and the expert witness must pay the cost for any copies of the deposition transcript that they might order.

(iii) *Failure To Attend:* If the party authorized to take the deposition of the expert witness fails to attend or to proceed therewith, the Court may order that party to pay the witness any fees, charges, and expenses that the witness would otherwise be entitled to under paragraph (c)(4)(D)(ii) and to pay any other party's expenses, including attorney's fees, that the Court deems reasonable under the circumstances.

(d) Use of Deposition of an Expert Witness for Other Than Discovery Purposes:

(1) *Use as Expert Witness Report:* On written motion by the proponent of the expert witness and in appropriate cases, the Court may order that the deposition transcript serve as the expert witness report required by Rule 143(g)(1). Unless the Court determines otherwise for good cause shown, the taking of a deposition of an expert witness will not serve to extend the date under Rule 143(g)(1) by which a party is required to furnish to each other party and to submit to the Court a copy of all expert witness reports prepared pursuant to that Rule.

(2) *Other Use:* Any other use of a deposition of an expert witness is governed by the provisions of Rule 81(i).

(e) General Provisions: Depositions taken under this Rule are subject to the following provisions.

(1) *Transcript:* A transcript must be made of every deposition on oral examination taken under this Rule, but the transcript and exhibits introduced in connection with the deposition generally should not be filed with the Court. See Rule 81(h)(3).

- (2) *Depositions on Written Questions:* Depositions under this Rule may be taken on written questions rather than on oral examination. If the deposition is to be taken on written questions, a copy of the written questions must be annexed to the notice of deposition or motion to take deposition. The use of written questions is not favored, and the deposition should not be taken in this manner in the absence of a special reason. See Rule 84(a). There will be an opportunity for cross-questions and redirect questions to the same extent and within the same time periods as provided in Rule 84(b) (starting with service of a notice of or motion to take deposition rather than service of an application). With respect to taking the deposition, the procedure of Rule 84(c) will apply.
 - (3) *Hearing:* A hearing on a motion for an order regarding a deposition under this Rule will be held only if the Court directs. The Court may grant a motion for an order regarding a deposition to the extent consistent with Rule 70(c)(1).
 - (4) *Orders:* If the Court approves the taking of a deposition under this Rule, it will issue an order including the name of the person to be examined, the time and place of the deposition, and the name of the officer or reporting company before whom it is to be taken.
 - (5) *Continuances:* Unless the Court determines otherwise for good cause shown, the taking of a deposition under this Rule will not be regarded as sufficient ground for granting a continuance from a date or place of trial theretofore set.
- (f) **Other Applicable Rules:** Unless otherwise provided in this Rule, the depositions described in this Rule generally are governed by the provisions of the following Rules with respect to the matters to which they apply: Rule 81(c) (designation of person to testify), 81(e) (person before whom deposition taken), 81(f) (taking of deposition), 81(g) (expenses), 81(h) (execution, form, and return of deposition), 81(i) (use of deposition), and Rule 85 (objections, errors, and irregularities). For Rules concerned with the timing and frequency of depositions, supplementation of answers, protective orders, effect of evasive or incomplete answers or responses, and sanctions and enforcement action, see Title X. For provisions governing the issuance of subpoenas, see Rule 147.