

RULE 74. DEPOSITIONS FOR DISCOVERY PURPOSES¹²

(a) General: In conformity with this Rule, 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 Upon Consent Of The Parties: (1) *When Deposition May Be Taken:* Upon 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 either a party, a nonparty witness, or an expert witness. Such consent shall be set forth in a stipulation filed in duplicate with the Court, which shall contain the information required in Rule 81(d) and which otherwise shall be subject to the procedure provided in Rule 81(d).

(2) *Notice to Nonparty Witness or Expert Witness:* A notice of deposition shall be served on a nonparty witness or an expert witness. The notice shall state that the deposition is to be taken under Rule 74(b) and shall 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 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 shall also set forth the information required under that Rule, and the organization shall 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 shall serve on the parties seeking the deposition any objections to the deposition. The burden shall be upon a party seeking the deposition to move for an order with respect to such objection or other failure of the nonparty witness or expert witness, and such party shall annex to any such motion the notice of deposition with proof of service thereof, together with a copy of the response and objections, if any.

¹²The amendments merging former Rules 74, 75, and 76 into new Rule 74 are effective as of January 1, 2010.

(c) Depositions Without 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 where 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 where such 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 consent of the parties (Rule 74(b)). If such requirements are satisfied, then a deposition of a witness may be taken under this paragraph, for example, where a party is a member of a partnership and an issue in the case involves an adjustment with respect to such partnership, or a party is a shareholder of an S corporation (as described in Code section 1361(a)), and an issue in the case involves an adjustment with respect to such S corporation. See Title XXIV, relating to partnership actions, brought under provisions first enacted by the Tax Equity and Fiscal Responsibility Act of 1982.

(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 shall give notice in writing to every other party to the case and to the nonparty witness to be deposed. The notice shall state that the deposition is to be taken under Rule 74(c)(2) and shall set forth the name of the party seeking the deposition; the name and address of the person to be deposed; the time and place proposed for the deposition; the officer 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 shall also set forth the information required under that Rule, and the organization shall make the designation authorized by that Rule.

(B) *Objections:* Within 15 days after service of the notice of deposition, a party or a nonparty witness shall serve on the party seeking the deposition any objections to the deposition. The burden shall be upon the party seeking the deposition to move for an order with respect to any such objections or any failure of the nonparty witness, and such party shall annex to any such motion the notice of deposition with proof of service thereof, together with a copy of any responses and objections. Prior to a motion for such an order, neither the notice nor the responses shall be filed with the Court.

(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 shall file a written motion which shall state that the deposition is to be taken under Rule 74(c)(3) and shall set forth the name of the person to be deposed, the time and place of the deposition, and the officer before whom the deposition is to be taken. With respect to the deposition of an organization described in Rule 81(c), the motion shall also set forth the information required under that Rule, and the organization shall make the designation authorized by that Rule.

(B) *Objection:* Upon the filing of a motion to take the deposition of a party, the Court shall issue an order directing each non-moving party to file a written objection or response thereto.

(C) *Action By The Court Sue Sponte:* In the exercise of its discretion the Court may on its own motion 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 shall be 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) shall file a written motion and shall 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 officer 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, then 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 shall 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 shall 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 shall be filed with the Court within 15 days after service of the motion. If the Court approves the taking of a deposition, then it will issue an order as described in paragraph (e) (4) of this Rule. If the deposition is to be video recorded, then the Court's order will so state.

(C) Action by the Court Sua Sponte: In the exercise of its discretion the Court may on its own motion 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 not such a stipulation or order, then the costs, expenses, fees, and charges relating to the deposition shall be borne by the parties as set forth in paragraph (c)(4)(D)(ii).

(ii) Allocation of Costs, Etc.: The party taking the deposition shall 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) such 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 shall 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, then the Court may order that party to pay the witness such fees, charges, and expenses that the witness would otherwise be entitled to under paragraph (c)(4)(D)(ii) and to pay any other party such 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:* Upon 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 shall determine 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 shall be 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 shall be made of every deposition upon oral examination taken under this Rule, but the transcript and exhibits introduced in connection with the deposition generally shall not be filed with the Court. See Rule 81(h)(3). (2) *Depositions Upon Written Questions:* Depositions under this Rule may be taken upon written questions rather than upon oral examination. If the deposition is to be taken on written questions, a copy of the written questions shall be annexed to the notice of deposition or motion to take deposition. The use of such 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 shall 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) shall apply. (3) *Hearing:* A hearing on a motion for an order regarding a deposition under this Rule will be held only if directed by the Court. A motion for an order regarding a deposition may be granted by the Court to the extent consistent with Rule 70(b)(2). (4) *Orders:* If the Court approves the taking of a deposition under this Rule, then it will issue an order which includes in its terms the name of the person to be examined, the time and place of the deposition, and the officer before whom it is to be taken. (5) *Continuances:* Unless the Court shall determine 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 shall be 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(d).