CHAPTER 4000. DEPOSITIONS AND DISCOVERY

PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY FOR INSPECTION AND OTHER ACTIVITIES

PRODUCTION OF DOCUMENTS AND THINGS

GENERAL PROVISIONS

REQUEST UPON A PARTY

SUBPOENA UPON A PERSON NOT A PARTY

(361795) No. 454 Sep. 12

ENTRY UPON PROPERTY FOR INSPECTION AND OTHER ACTIVITIES

Explanatory Note

The 1978 amendments to the Deposition and Discovery Rules represent the culmination of a continuing and comprehensive review of the operation of the 1950 Rules and of the Federal Discovery and Deposition Rules as completely revised in 1970.

The Pennsylvania Rules have never been identical with the Federal Rules. From the beginning, it was felt that the differences between federal and state practice did not permit any such identity. Also, the difference in the amounts involved in federal cases and in state cases had an important effect twenty-five years ago. The 1970 federal revisions effected even wider differences, particularly in the discovery of reports, memoranda, statements or other things secured in anticipation of litigation or in preparation for trial.

More than twenty-five years of experience and the general acceptance of the philosophy of discovery justify bringing the Pennsylvania system into as close conformity as possible with the federal system. The differences between state and federal practice still prevent absolute identity.

The Federal Rules as last revised have been used as a model, but the Civil Procedural Rules Committee has not hesitated to depart from Federal language where it has acquired a questionable gloss or has received inconsistent interpretations in the courts.

It was considered important to retain as far as possible the rule numbering and the internal arrangement of the Pennsylvania Rules. Since 1950, the Rules have been the subject of numerous decisions, commentary, and articles. Many of the Rules are left unchanged. The advantages of retaining the present Rule numbers as closely as possible far outweigh any benefits of a so-called ''functional'' rearrangement which would require a complete new numbering system.

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New material is introduced by the use of decimal numbering. Certain Rules have been subdivided, e.g., 4003.1, 4003.2, etc. This retains the numbering of Rules dealing with particular subject matter. Federal source material is identified in the detailed discussion of the amendments which follows.

The amendments recognize that no effective system of discovery can be designed which is not subject to abuse, resulting in delay, expense and the burden on judges of disposing of dilatory motions, petitions and objections without real merit.

The amendments have not ignored the recent criticisms directed to the federal discovery procedures, particularly the capacity for abusive discovery with its escalation of costs and delay of adjudication. Nor have they ignored the recent proposals of the American Bar Association's Special Committee of the Section of Litigation. These proposals, even if ultimately adopted by the United States Supreme Court, would not appear to be of sufficient significance, in view of the differences between state and federal practice, to delay the promulgation of these amendments. If any of the proposals of the American Bar Association should ultimately be adopted as amendments to the Federal Rules and found appropriate to Pennsylvania practice, further amendments to these Rules can easily be made.

Most of these problems can be avoided by self discipline of the bar and by more effective judicial administration. Sanctions are available for disobedience of an order compelling compliance with the Rules. Although there is an understandable reluctance on the part of bench and bar to request or to impose sanctions, particularly sanctions against counsel, it may be necessary to do so from time to time to make the system work. Also, assignment to an individual judge who would regulate the entire course of the discovery proceedings, especially in large and complex cases, could help prevent dilatory, burdensome or oppressive conduct. It will also serve to reduce the possibility of inconsistent rulings by different judges during the course of discovery. Frequent pre-trial conferences in complex cases should help.

The final text of the amendments profited from the many valuable criticisms and suggestions which followed the circulation of Recommendation No. 44. All suggestions received from the bench and bar were reviewed by the Civil Procedural Rules Committee and many of them were incorporated in the amendments.

Before proceeding to a detailed analysis of the amendments, a brief outline of some of the major changes may be helpful.

First, the scope of discovery is broadened to conform closely to the Federal Rules. The scope of discovery under our 1950 Rules was limited to ''any matter, not privileged, which is relevant to the subject matter involved in the action and will substantially aid in the preparation of the pleadings or the preparation or trial of the case.''

Under the Federal Rules, discovery may be obtained as to ''any matter, not privileged, relevant to the subject matter'' and it ''is not ground for objection that the information sought'' is not itself relevant if it ''appears reasonably calculated to lead to the discovery of admissible evidence.''

The amendments do not include the recent proposal of the American Bar Association's Section of Litigation for an amendment to Fed. R. Civ.P. 26(b) to restrict discovery to matters ''relevant to the issues'' rather than ''relevant to the subject matter.'' It has been suggested that the proposal for amendment would prevent fishing expeditions. Adequate machinery already exists under both the Federal and our Rules to prevent such abuse. Further, the ABA proposal runs the risk of increasing preliminary disputes over the propriety of discovery, since the ''issues'' may not be subject to accurate definition until after discovery is complete.

Second, Rule 4011(d), which has prohibited discovery of the existence or location of reports, memoranda, statements, information or other things made or secured in anticipation of litigation or in preparation for trial, has been rescinded.

Trial preparation material, including statements of witnesses whether taken by a lawyer or investigator, will now be fully discoverable, except that the mental impressions of a party's attorney or his

conclusions, opinions, memoranda, notes or summaries, legal research or legal theories are protected from discovery. The representatives of a party other than the party's attorney are protected from disclosure of mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

A witness will now be entitled, merely upon request, to receive a copy of his own statement from the party in possession of it, and a party will now be entitled to a copy of his own statement plus copies of all statements of all witnesses in the possession of an adverse party.

Third, Rules 4011(f) which has regulated discovery of expert testimony has also been rescinded. In its place, Rule 4003.5 provides for discovery from expert witnesses and limits the use at trial of expert witnesses whose identity has been withheld or of testimony which is inconsistent with the disclosures in the discovery proceedings.

Fourth, present Rule 4009 governing the production of documents and things and inspection of property is revised to conform to Fed. R.Civ.P. 34. A written request for production or inspection will now suffice; a court order is no longer required to initiate a production or inspection.

Fifth, the burden of ascertaining the proper officers, agents or employees of large organizations to be deposed is substantially reduced. If the party seeking discovery discloses with reasonable particularity the matter on which he seeks to depose the witnesses, the organization is required to designate the officers, directors, agents or others who will testify as to those matters.

Sixth, the burden of answering interrogatories requesting information to be derived or ascertained from the records of the answering party may be met by specifying the records which contain the information and offering the inquiring party reasonable opportunity to inspect and copy the same, if the burden of deriving the information from the records would be substantially the same for both parties. This enlarges the Federal Rule by making it applicable to all records; the Federal Rule applies only to ''business'' records.

Seventh, the federal provisions for sequence and timing of discovery, not now dealt with in our prior Rules, are included in the amended Rules.

Eighth, the scope of requests for admissions and interrogatories to parties is enlarged. They are no longer objectionable if they require an answer which involves an opinion or contention that relates to a fact or the application of law to fact. This follows the Federal Rule. The effect of failure to admit is clarified and pre-trial procedures for determining the extent of an admission are provided.

Ninth, the use at trial of an oral deposition of a medical witness, other than a party, is broadened to permit its use whether or not the witness is available to testify. The prior practice permitted this only as to videotape depositions.

Tenth, the time periods prescribed by the prior Rule for the doing of any act are revised to conform to those prescribed by the Federal Rules.

Finally, the Rules are expressly made applicable to eminent domain proceedings. They are also applicable in divorce and in support and custody proceedings to the extent provided by the rules governing those proceedings.

The details of the amendments follow.

[Detailed notes follow their respective Rules.]

Rule 4001. Scope. Definitions.

(a) The rules of this chapter apply to any civil action or proceeding brought in or appealed to any court which is subject to these rules including any action pursuant to the Eminent Domain Code of 1964 or the Municipal Claims Act of 1923.

Official Note: Rule 1701(b)(4) of the Pennsylvania Rules of Appellate Procedure permits a lower court to authorize the taking of depositions or the preservation of testimony in the interest of justice after an appeal is taken. The procedure under these rules is applicable to such depositions.

See Rule 1930.5 governing discovery in domestic relations matters and specifying when leave of court is and is not required. See also Rules 1910.9 and 1915.5(c) governing discovery in actions for support and custody, respectively.

(b) As used in this chapter, unless the context clearly indicates otherwise,

''court'' means the court in which the action is pending;

''deposition'' includes a deposition upon written

''trial'' includes a hearing before arbitrators or viewers.

Official Note: These rules apply to an action pending in the court of common pleas and referred to compulsory arbitration under Section 7361 of the Judicial Code, 42 Pa.C.S. § 7361.

(c) Subject to the provisions of this chapter, any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery, or for preparation of pleadings, or for preparation or trial of a case, or for use at a hearing upon petition, motion or rule, or for any combination of the foregoing purposes.

Official Note: See Rule 4003.8 governing pre-complaint discovery.

(d) Subject to the provisions of this chapter, any party may obtain discovery by one or more of the following methods: depositions upon oral examination (Rule 4007.1) or written interrogatories (Rule 4004); written interrogatories to a party (Rule 4005); production of documents and things and entry for inspection and other purposes (Rule 4009); physical and mental examinations (Rule 4010); and requests for admission (Rule 4014).

Official Note: Under subdivision (d), for example, a party may discover documents and things in the possession of a person not a party by means of a subpoena duces tecum issued in connection with a deposition upon oral examination under Rule 4007.1, a subpoena for the production of documents and things under Rule 4009.21 et seq., and an independent action.

Explanatory Note

The amendments to Rule 4001 are designed to achieve three principal purposes. First, to designate specifically the actions and proceedings subject to the Rules. Second, to designate the purposes of a deposition and of discovery. Third, to provide at the outset as does amended Fed. R.Civ.P. 26(a), a catalogue of the armory of discovery procedures available. (Rule 4001(d))

Before the amendment, Rule 4001(a) stated a scope which included ''any civil action or proceeding at law or in equity brought in or appealed to any court which is subject to these rules.'' Taken literally, these words embrace every conceivable form of action. They are unchanged by these amendments. However, the application of the Rules to eminent domain and to divorce, custody and support proceedings was not uniform. The amendments clarify the application of the Rules to those proceedings.

Viewers' proceedings to assess damages in eminent domain actions were historically brought in the Courts of Quarter Sessions, which were courts not originally subject to the Rules of Civil Procedure. Even after the enactment of the Eminent Domain Code of 1963, vesting jurisdiction over eminent domain proceedings in the unified Common Pleas Court, Sec. 703(2) of the Eminent Domain Code

provided only for limited discovery of experts' valuation reports on appeal to the Common Pleas, provided they had not already testified before the viewers. The Code made no provision whatsoever for discovery for use in the initial proceedings before viewers. The viewers' proceedings were the discovery proceedings. This often left litigants at a disadvantage before the viewers, in some cases leading to needless appeals.

The amendment to Rule 4001(a) makes clear that the entire chapter of deposition and discovery proceedings applies at all stages of an eminent domain action.

''Trial'' is defined in Rule 4001(b) specifically to include proceedings before ''viewers'' and also ''arbitrators.''

Control of the deposition and discovery procedure at the viewers' and arbitrators' stage will remain in the court. The viewers and arbitrators are not empowered to grant protective orders, impose sanctions or to take other action authorized by the Rules. The court in its order appointing viewers might consider establishing a cut-off date for completion of discovery so that the viewers' hearings will not be unduly delayed. Or the viewers could set a cut-off date for hearing to afford opportunity for discovery.

In the Orphans' Court Division, Supreme Court Orphans' Court Rule 3.6 provides that the local Orphans' Courts by general rule or special order may prescribe the practice relating to depositions, discovery, production of documents, and perpetuation of testimony. To the extent not provided by general rule or special order, the Orphans' Court Rule provides that the practice relating to such matters shall conform to the practice in the trial or civil division of the local Court of Common Pleas. As a result, some courts have adopted local rules which require leave of court in all Orphans' Court Division cases. Others limit discovery in varying degrees. Others have adopted no local rules, thereby incorporating these Rules in toto. Under a unified court system and statewide practice, this lack of uniformity is undesirable. However, the Orphans' Court Rules are independent and cannot be regulated by the Civil Procedural Rules.

Where leave of court is required, application for leave is required in each individual proceeding. A local rule authorizing discovery in all cases without an individual application and a hearing would be inconsistent with the Rule. Further, it would be inconsistent with statewide practice and would permit non-uniformity of practice in the important area of discovery and depositions.

Leave of court is further discussed in Rule 4007.2.

The Committee considered but rejected the radical suggestion that all depositions and discovery, except depositions of aged, infirm, or going witnesses, should require leave of court. While this suggestion would undoubtedly limit the possibility of abusive discovery, it would add enormously to the burden on court and counsel. Multiple petitions, answers, briefs and hearings would be required in practically every case. This is unjustifiable. The courts, through protective orders and sanctions, should be able to control abuse of the discovery process. The limited use of leave of court in specific actions strikes a more equitable balance.

Sub-divisions (c) and (d), which state the permissible purposes of depositions and discovery, and list the procedural devices available, effect no change. They consolidate stylistically the existing practice.

Explanatory Note—1999

Rule of Civil Procedure 4001(a) was amended in 1997 to eliminate reference to discovery in the domestic relations actions of support, custody of minor children and divorce or annulment of marriage. Discovery in those actions is governed by Rule 1930.5.

Source

The provisions of this Rule 4001 amended November 20, 1978, effective April 16, 1979, 8 Pa.B. 3551; amended June 27, 1980, effective July 1, 1980, 10 Pa.B. 2957; amended December 27, 1995, effective January 1, 1996, 26 Pa.B. 227; amended May 5, 1997, effective July 1, 1997, 27 Pa.B. 2732; amended March 19, 1999, effective July 1, 1999, 29 Pa.B. 1715; amended December 1, 1999, effective January 1, 2000, 29 Pa.B. 6327; amended December 16, 2003, effective July 1, 2004, 34 Pa.B. 9; amended September 20, 2007, effective November 1, 2007, 37 Pa.B. 5374. Immediately preceding text appears at serial pages (302589) to (302590) and (262135) to (262136).

Rule 4002. Agreement Regarding Discovery or Deposition Procedure.

The parties may by agreement (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner, and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for methods of discovery.

Official Note: See Rule 201 for advisability of writing.

Explanatory Note

The amendments of this Rule make two changes in present practice.

First, they enlarge the rights of the parties by permitting them to agree to modify the procedures for discovery as well as for the taking of depositions. This will be broader than Fed. R. Civ.P. 29 as amended in 1970. The Federal Rule requires court approval of any agreement to extend the time for responses in three instances during the discovery stage. The amendments to Rule 4002 do not incorporate this limitation. The need for leave of court to extend time may act as a spur to prompt responses but it must be balanced against the need for conservation of judicial manpower of already overburdened courts. Busy judges normally approve stipulations of counsel with respect to extra-judicial matters at the early stages of litigation. Little will be gained as a practical matter by requiring leave, and the need for hearing could actually accentuate delay. If one party agrees to give his opponent extra time to answer, why should the judge intervene and refuse?

Second, the phrase ''stipulate in writing'' in the prior Rule is changed to read ''by agreement.'' This will validate the common practice during the taking of oral depositions of dictating various stipulations to the reporter for inclusion in the transcript. Technically such a stipulation is not an

''agreement in writing'' within the meaning of the Business of the Court Rule 201 and is not an agreement ''at bar'' since no judge is present and the deposition is not taken in a courtroom.

Counsel will be well advised to confirm such agreements in writing to avoid misunderstandings.

Source

The provisions of this Rule 4002 amended November 20, 1978, effective April 16, 1979, 8 Pa.B. 3551. Immediately preceding text appears at serial page (16015).

Rule 4002.1. Filing Discovery Material.

Discovery material shall not be filed unless relevant to a motion or other pretrial proceeding, ordered by the court or required by statute.

Source

The provisions of this Rule 4002.1 adopted November 7, 1988, effective January 1, 1989, 18 Pa.B. 5338.

Rule 4003. Right to Take Depositions. Notice.

[Rescinded].

Official Note: The subject matter of former Rule 4003 has been transferred to Rules 4001(c), 4007.1 and 4007.2.

Source

The provisions of this Rule 4003 rescinded November 20, 1978, effective April 16, 1979, 8 Pa.B. 3551. Immediately preceding text appears at serial page (16015).

Rule 4003.1. Scope of Discovery Generally. Opinions and Contentions.

(a) Subject to the provisions of Rules 4003.2 to 4003.5 inclusive and Rule 4011, a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, content, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

(b) It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(c) Except as otherwise provided by these rules, it is not ground for objection that the information sought involves an opinion or contention that relates to a fact or the application of law to fact.

Official Note: Interrogatories that generally require the responding party to state the basis of particular claims, defenses or contentions made in pleadings or other documents should be used sparingly and, if used, should be designed to target claims, defenses or contentions that the propounding attorney reasonably suspects may be the proper subjects of early dismissal or resolution or, alternatively, to identify and to narrow the scope of claims, defenses and contentions made where the scope is unclear.

Explanatory Note

Prior Rule 4003 has been deleted. It had embodied a number of disparate subjects, including the deposition of aged, infirm and going witnesses, the deposition of witnesses more than 100 miles from the courthouse, depositions for use at a hearing on a petition, motion or rule, and notice of depositions on oral examination. These subjects have been functionally rearranged and transposed to other Rules.

Depositions of aged, going and infirm witnesses and witnesses more than 100 miles from the courthouse are now regulated by Rule 4007.2(b). The use of depositions at a hearing on petition, motion or rule is authorized by Rule 4001(c). Notice of depositions on oral examination is now regulated by Rule 4007.1.

Under the prior practice, an argument might have been made that there was no sanction available against a party who refused to appear for a deposition for use in connection with a petition, motion or rule. The amendments preclude any such argument, since there is now a unified notice system for all oral depositions for all purposes. See Rules 4001(c), 4007.1 and 4019(a)(1).

To use the place vacated by Rule 4003, new Rules 4003.1 through 4003.5 have been added. They deal with the scope of discovery. Rule 4003.1 delineates generally the scope of discovery. It is taken almost verbatim from Fed.R.Civ.P. 26(b).

Rules 4003.2 through 4003.5 deal with specific aspects of the scope of discovery, such as discovery of insurance, discovery of trial preparation material generally, discovery of statements of parties or witnesses, and discovery of facts known and opinions held by experts. They are based closely on Fed. R.Civ.P. 26(b)(2), (3) and (4). Separate comment on each new Rule follows.

Rule 4003.1 incorporates the broad Federal discovery rule and replaces former Rule 4007(a), which had provided a more limited scope of discovery. Rule 4007(a) limited discovery to any matter not privileged which is relevant to the subject matter involved in the action and ''will substantially aid in the preparation of the pleadings or the preparation or trial of the case.'' Fed. R.Civ.P. 26(b)(1), from which Rule 4003.1 is taken almost verbatim, permits discovery of all relevant matter not privileged, whether it relates to a claim or defense. It is not restricted to preparation of pleadings or the trial of the case. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to discovery of admissible evidence.

Further widening of the scope of discovery follows from the deletion of former Rules 4011(d) and 4011(f), which restricted discovery of material prepared for trial or in anticipation of litigation and discovery of expert opinions. The effect of these omissions is discussed in the comments to Rules 4003.3, 4003.4 and 4003.5.

Source

The provisions of this Rule 4003.1 adopted November 20, 1978, effective April 16, 1979, 8 Pa.B. 3551; amended December 14, 1989, effective January 1, 1990, 20 Pa.B. 11; amended April 8, 2008, effective July 1, 2008, 38 Pa.B. 1814. Immediately preceding text appears at serial pages (209473) to (209474).

Rule 4003.2. Scope of Discovery. Insurance.

A party may obtain discovery of the existence and terms of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of such disclosure admissible in evidence at trial. For the purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

Explanatory Note

Proposed Rule 4003.2 is taken almost verbatim from Fed. R.Civ.P. 26(b)(2). It codifies the decision of the Pennsylvania Supreme Court in *Szarmack v. Welch,* 456 Pa. 293, 318 A.2d 707 (1974), permitting discovery of insurance. It makes no change in present practice.

Source

The provisions of this Rule 4003.2 adopted November 20, 1978, effective April 16, 1979, 8 Pa.B. 3551.

Rule 4003.3. Scope of Discovery. Trial Preparation Material Generally.

Subject to the provisions of Rules 4003.4 and 4003.5, a party may obtain discovery of any matter discoverable under Rule 4003.1 even though prepared in anticipation of litigation or trial by or for another party or by or for that other party's representative, including his or her attorney, consultant, surety, indemnitor, insurer or agent. The discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

Explanatory Note

The amended Rule radically changes the prior practice as to discovery of documents, reports and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative, including his attorney, consultant, surety, indemnitor, insurer or agent.

Former Rule 4011(d) expressly prohibited such discovery. The amended Rule permits it, subject to the limitation that discovery of the work product of an attorney may not include disclosure of the mental impressions, conclusions, opinions, memoranda, notes, legal research or legal theories of an attorney. As to any other representative of a party, it protects the representative's disclosure of his mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics. Memoranda or notes made by the representative are not protected.

The essential purpose of the Rule is to keep the files of counsel free from examination by the opponent, insofar as they do not include written statements of witnesses, documents or property which belong to the client or third parties, or other matter which is not encompassed in the broad category of the ''work product'' of the lawyer. Documents, otherwise subject to discovery, cannot be immunized by depositing them in the lawyer's file. The Rule is carefully drawn and means exactly what it says. It immunizes the lawyer's mental impressions, conclusions, opinions, memoranda, notes, summaries, legal research and legal theories, nothing more.

There are, however, situations under the Rule where the legal opinion of an attorney becomes a relevant issue in an action; for example, an action for malicious prosecution or abuse of process where the defense is based on a good faith reliance on a legal opinion of counsel. The opinion becomes a relevant piece of evidence for the defendant, upon which defendant will rely. The opinion, even though it may have been sought in anticipation of possible future litigation, is not protected against discovery. A defendant may not base his defense upon an opinion of counsel and at the same time claim that it is immune from pre-trial disclosure to the plaintiff.

As to representatives of a party, and sometimes an attorney, there may be situations where his conclusions or opinion as to the value or merit of a claim, not discoverable in the original litigation,

should be discoverable in subsequent litigation. For example, suit is brought against an insurance carrier for unreasonable refusal to settle, resulting in a judgment against the insured in an amount in excess of the insurance coverage. Here discovery and inspection should be permitted in camera where required to weed out protected material.

In two respects the amended Rule differs materially from Fed. R.Civ.P. 26(b)(3). First, the Federal Rule permits discovery only when the party seeking discovery shows substantial need of the materials in the preparation of his case and is unable, without undue hardship, to obtain a substantial equivalent of the materials by other means. Under the general provisions of Rule 4003.3, such a showing of substantial need and undue hardship will not be required. Note, however, that under Rule 4003.5(a)(3), governing discovery of opinions of an expert who is not expected to be called as a witness at trial, a showing of exceptional circumstances under which it is impracticable to obtain facts or opinions on the subject matter by other means is required.

The federal draftsmen have justified the special showing of need on the ground that ''each side's informal evaluation of its case should be protected, that each side should be encouraged to prepare independently, and that one side should not automatically have the benefit of the detailed preparatory work of the other side.'' The Committee, after long and careful deliberation, rejected this view which would impose more court time on lawyers and additional burdens on judges in the motion court. At the same time it also rejected a proposal to go to the opposite extreme and direct the mandatory exchange of all pretrial material, statements, medical reports and experts' reports under penalty of sanctions.

Second, the work product protection of the Rule distinguishes between that afforded the attorney and that afforded the party's representative. They are on an equal footing under the Federal Rules. The Committee viewed the work product privilege enunciated by the United States Supreme Court in *Hickman v. Taylor,* 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), as stating a special rule applicable to lawyers which need not necessarily be the same as that applied to other representatives, particularly insurance investigators. Under the Rule, a lawyer's notes or memoranda of an oral interview of a witness, who signs no written statement, are protected but the same notes or memoranda made by an insurance investigator will not be protected. A signed statement of the witness is, of course, always discoverable, no matter who took it or where it is filed.

Source

The provisions of this Rule 4003.3 adopted November 20, 1978, effective April 16, 1979, 8 Pa.B. 3551; amended April 12, 1999, effective July 1, 1999, 29 Pa.B. 2281. Immediately preceding text appears at serial pages (209475) to (209476).

Rule 4003.4. Scope of Discovery. Trial Preparation Material. Statements.

Upon written request, a party is entitled to immediate receipt of a photostatic copy or like reproduction of a statement concerning the action or its subject matter previously made by that party, any other party or a witness. Upon written request, a person not a party is entitled to immediate receipt of a photostatic copy or like reproduction of a statement concerning the action or its subject matter previously made by that person. If the statement is not so provided, the party or person may move for a court order. For purposes of this rule, a statement previously made is

(1) a written statement signed or otherwise adopted or approved by the person making it, or

(2) a stenographic, mechanical, electrical or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

Explanatory Note

Rule 4003.4 resolves a problem not covered in the prior practice, and which has troubled the courts. It provides that any party may, upon request, obtain from his opponent a copy of the party's own statement or the statement of any witness in the possession of the opponent. Further, any witness may obtain a copy of his own statement upon request. If refused, the party or witness may move for a court order for compliance.

The Rule differs markedly in scope from Fed. R.Civ.P. 26(b)(3). The Federal Rule permits a party to obtain only his own statement; the production of statements of witnesses obtained by an adverse party in anticipation of litigation or preparation for trial requires a showing of substantial need in the preparation of the inquiring party's case and that he is unable without undue hardship to obtain a substantial equivalent of the materials by other means.

There are no restrictions on the timing of the request. Under prior practice, some lower courts ruled that the statement of a party given to his opponent could be withheld until after the party had testified. Others held that the party could demand a copy of his statement before he testified. Some held that no witness could have a copy of his own statement because this would prevent a test of his veracity.

The amended Rule does not deal with the substantive problem of admissibility in evidence or use of the statements. Their admissibility is governed by the rules of evidence.

Two statutes are relevant. Section 7101 of the Judicial Code, 42 Pa.C.S. § 7101, prohibits the use of statements obtained from an injured person within fifteen days of admission to a hospital or sanitarium, unless he acknowledges before an independent notary public his willingness to give the statement.

Likewise, the Peer Review Protection Act of 1974, 63 P. S. § 425.1 et seq., imposes restrictions on discovery and use of the proceedings and records of health care peer review organizations for the purpose of evaluating the quality of health care.

The Rule covers all forms of statements, including signed statements, recordings and transcriptions.

Source

The provisions of this Rule 4003.4 adopted November 20, 1978, effective April 16, 1979, 8 Pa.B. 3551, amended December 14, 1979, effective January 5, 1980, 10 Pa.B. 34; amended December 27, 1995, effective January 1, 1996, 26 Pa.B. 227. Immediately preceding text appears at serial pages (134399) to (134400).

Rule 4003.5. Discovery of Expert Testimony. Trial Preparation Material.

(a) Discovery of facts known and opinions held by an expert, otherwise discoverable under the provisions of Rule 4003.1 and acquired or developed in anticipation of litigation or for trial, may be obtained as follows:

(1) A party may through interrogatories require

(A) any other party to identify each person whom the other party expects to call as an expert witness at trial and to state the subject matter on which the expert is expected to testify and

(B) subject to the provisions of subdivision (a)(4), the other party to have each expert so identified state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. The party answering the interrogatories may file as his or her answer a report of the expert or have the interrogatories answered by the expert. The answer or separate report shall be signed by the expert.

(2) Upon cause shown, the court may order further discovery by other means, subject to

(A) such restrictions as to scope and such provisions concerning fees and expenses as the court may deem appropriate, and

(B) the provisions of subdivision (a)(4) of this rule.

(3) A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, except a medical expert as provided in Rule 4010(b) or except on order of court as to any other expert 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 by other means, subject to such restrictions as to scope and such provisions concerning fees and expenses as the court may deem appropriate.

Official Note: For additional provisions governing the production of expert reports in medical professional liability actions, see Rule 1042.26 et seq. Nothing in Rule 1042.26 et seq. precludes the entry of a court order under this rule.

(4) A party may not discover the communications between another party's attorney and any expert who is to be identified pursuant to subdivision (a)(1)(A) or from whom discovery is permitted under subdivision (a)(3) regardless of the form of the communications, except in circumstances that would warrant the disclosure of privileged communications under Pennsylvania law. This provision protects from discovery draft expert reports and any communications between another party's attorney and experts relating to such drafts.

(b) An expert witness whose identity is not disclosed in compliance with subdivision (a)(1) of this rule shall not be permitted to testify on behalf of the defaulting party at the trial of the action. However, if the failure to disclose the identity of the witness is the result of extenuating circumstances beyond the control of the defaulting party, the court may grant a continuance or other appropriate relief.

(c) To the extent that the facts known or opinions held by an expert have been developed in discovery proceedings under subdivision (a)(1) or (2) of this rule, the direct testimony of the expert at the trial may not be inconsistent with or go beyond the fair scope of his or her testimony in the discovery proceedings as set forth in the deposition, answer to an interrogatory, separate report or supplement thereto. However, the expert shall not be prevented from testifying as to facts or opinions on matters on which the expert has not been interrogated in the discovery proceedings.

Explanatory Note

Rule 4011(f), which had protected a deponent, whether or not a party, from giving an opinion as an expert witness over his objection, has been rescinded. Discovery of these matters is now permitted by Rule 4003.5, which closely parallels Fed. R.Civ.P. 26(b)(4).

The Rule distinguishes carefully between an expert expected to be called as a witness and an expert not expected to be called.

With respect to the expert expected to be called, discovery of facts known and opinions held by him, acquired or developed in anticipation of litigation or for trial, may be obtained as follows:

(1) First, the inquirer can by interrogatories require his opponent to disclose the identity of expert witnesses he expects to call at trial. The opponent must not only identify such experts but also state the subject matter on which each is expected to testify.

If a party, in his answer to interrogatories, states that he has not yet retained his experts, he is under a duty to supplement his answer as provided by Rule 4007.4(1). In addition, the inquirer may obtain a stipulation that the party will supplement his response or ask the court for an order under Rule 4007.4(3) requiring the party to file a supplemental response when such experts are retained.

(2) In addition, the inquirer can require each expert to be called at the trial whose identity is disclosed to state the substance of the facts and opinion to which he will testify, and a summary of the grounds for his opinion. The answering party has the option of having the expert answer the interrogatories himself on this issue or prepare a separate report which the answering party may attach to his answers. The answer or separate report must be signed by the expert.

(3) If the answering party or the expert does not fully comply with the foregoing, the court under subdivision (b) or (c) may exclude or limit the testimony of such expert if offered at the trial. Sanction Rule 4019(i) also provides an independent sanction, excluding the testimony of a witness whose identity has not been revealed, unless the trial court determines there are extenuating circumstances beyond the control of the defaulting party.

(4) Supplemental oral questioning of the expert may be permitted only upon cause shown, and upon payment of such fees and expenses as the court may fix. The Rule specifically provides no fees and expenses to the expert for the time spent in preparing answers to interrogatories or his report. He will be entitled to fees and expenses only if the inquirer seeks further oral discovery after the answer or report has been filed.

(5) It should be emphasized that Rule 4003.5 is not applicable to discovery and deposition procedure where a defendant is himself an expert, such as a physician, architect or other professional person, and the alleged improper exercise of his professional skills is involved in the action. Such a defendant can be examined by written interrogatories under Rule 4005 or by oral deposition under Rule 4007.1. If so examined, a defendant cannot assert that his opinion may not be discovered without his consent.

(6) To prevent incomplete or ''fudging'' of reports which would fail to reveal fully the facts and opinions of the expert or his grounds therefor, subdivision (c) provides that an expert's direct testimony at the trial may not be inconsistent with or go beyond the fair scope of his testimony as set forth in his deposition and answer to interrogatories, separate report or supplements thereto. However, he may testify to anything regarding matters in which he was never questioned in the discovery proceedings. This is a new provision not expressly found in the Federal Rule. It is implicit in the Federal Rule.

Where the full scope of the expert's testimony is presented in the answer to interrogatories or the separate report, as provided in subdivisions (a)(1) and (2), this will fix the permissible limits of his testimony at the trial. But, if the inquirer limits his inquiry to one or more specific issues only, the expert is free to testify at trial as to any other relevant issues not included in the discovery. Therefore, what happens at the trial may depend upon the manner in which the expert is interrogated. The inquirer may be well advised to conduct his discovery broadly, by paraphrasing the language of 4003.5(a), which will require the expert to state all his opinions and grounds, thus preventing surprise testimony at trial concerning grounds never raised during the discovery.

All of the foregoing discussion relates to the expert expected to be called at the trial.

If the expert is not expected to be called at the trial, the situation is quite different. The special procedures listed above will not be applicable. Under subdivision (a)(3) of the Rule, no discovery of such a witness is permitted, except discovery of a medical expert under Rule 4010(b) infra, unless there is an order of court. To obtain this order of court, the inquirer must prove ''exceptional circumstances'' under which there is no practical way to find the facts or opinions by some other means.

Therefore, even if the inquirer knows the name of this expert, or knows that there is a report, he is forbidden to seek discovery of facts known or opinions held, unless he convinces the court that he must have the discovery. This is a heavy burden, which explains the small use of this provision under the Federal Rule. We can anticipate an equally small use in Pennsylvania.

One instance would be where an object is given by a plaintiff to an expert for the defendant for testing and is destroyed in the testing. Then, if the defendant elects not to call that expert at the trial, the plaintiff must get his testimony since the object is destroyed.

The Rule provides no special procedures in this instance. It is anticipated that ordinary discovery will suffice. If the inquirer does not know the name of the expert, he can ask for it by conventional interrogatory or oral deposition. If he knows there is a report, he can ask for it under Rule 4009.

Another difference is that the court may require the inquirer to pay the expert for his fees and expenses in the discovery. In the case of the expert who is expected to be called at the trial, there is no such provision in subsections (a)(1) and (2).

The Rule says nothing about the rare situation when the inquirer is an indigent party and cannot pay the expenses of the expert. Any such situation will have to be handled by the courts ad hoc, under the general principles of litigation in forma pauperis.

This subdivision is not intended, as pointed out by the federal draftsmen, to permit discovery of experts who may have been informally consulted by a party. Finally, it applies only to experts ''retained or specially employed.'' A regular employe of a party who may have collected facts, prepared reports and rendered opinions, and who may be qualified as an expert, is not covered by this sub-section and has no immunity from discovery, simply because the party elects not to call him at the trial. He is not an ''expert'' within the meaning of the Rule; he is simply a witness, an employe of a party.

Source

The provisions of this Rule 4003.5 adopted November 20, 1978, effective April 16, 1979, 8 Pa.B. 3551; amended April 12, 1999, effective July 1, 1999, 29 Pa.B. 2281; amended March 29, 2004, effective immediately, 34 Pa.B. 1926; amended July 10, 2014, effective August 9, 2014, 44 Pa.B. 4996. Immediately preceding text appears at serial pages (303597) to (303600).

Rule 4003.6. Discovery of Treating Physician.

Information may be obtained from the treating physician of a party only upon written consent of that party or through a method of discovery authorized by this chapter. This rule shall not prevent an attorney from obtaining information from:

(1) the attorney's client,

(2) an employee of the attorney's client, or

(3) an ostensible employee of the attorney's client.

Source

The provisions of this Rule 4003.6 adopted April 29, 1991, effective July 1, 1991, 21 Pa.B. 2337.

Rule 4003.7. Punitive damages.

A party may obtain information concerning the wealth of a defendant in a claim for punitive damages only upon order of court setting forth appropriate restrictions as to the time of the discovery, the scope of the discovery, and the dissemination of the material discovered.

Official Note: Discovery may also proceed pursuant to the agreement of the parties. See Rule 4002.

Source

The provisions of this Rule 4003.7 adopted August 11, 1997, effective December 1, 1997, 27 Pa.B. 4462.

Rule 4003.8. Pre-Complaint Discovery.

(a) A plaintiff may obtain pre-complaint discovery where the information sought is material and necessary to the filing of the complaint and the discovery will not cause unreasonable annoyance, embarrassment, oppression, burden or expense to any person or party.

(b) Upon a motion for protective order or other objection to a plaintiff's pre-complaint discovery, the court may require the plaintiff to state with particularity how the discovery will materially advance the preparation of the complaint. In deciding the motion or other objection, the court shall weigh the importance of the discovery request against the burdens imposed on any person or party from whom the discovery is sought.

Source

The provisions of this Rule 4003.8 adopted September 20, 2007, effective November 1, 2007, 37 Pa.B. 5374.

Rule 4004. Procedure on Depositions by Written Interrogatories.

(a)(1) A party taking a deposition by written interrogatories shall serve a copy of the interrogatories upon each party or the attorney of record of each party. Within thirty days thereafter the party so served may serve cross interrogatories upon each party or the attorney of record of each party. Subsequent interrogatories shall be similarly served within ten days.

(2) The interrogatories shall contain a notice stating the name or descriptive title and address of the officer before whom the deposition is to be taken, the time and place of taking the deposition and the name and address of each person to be examined if known, and, if the name is not known, a general description sufficient to identify each person to be examined or the particular class or group to which each person belongs. A deposition upon written interrogatories may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 4007.1(e).

(b) Objections to the form of interrogatories are waived unless filed and served upon the party propounding them within the time allowed for serving the succeeding cross or other interrogatories or within ten days after service of the last interrogatories. All other objections may be made at the trial except as otherwise provided by Rule 4016.

(c) A copy of all interrogatories for the taking of a deposition shall be transmitted to the person designated to take the deposition, who shall promptly give notice to the witness and thereafter propound the interrogatories to the witness and complete, certify and send the deposition by registered mail to the party taking the deposition, attaching thereto the copy of the interrogatories.

(d) When the deposition is received by the party taking the deposition, the party shall promptly give notice thereof to all other parties.

(e) After the service of interrogatories and prior to the taking of the testimony of the deponent, the court in which the action is pending, on motion promptly made by a party or a deponent, may make an order in accordance with Rule 4012, or an order that the deposition shall not be taken before the officer designated in the notice, or that it not be taken except upon oral examination.

Explanatory Note

The amendments make two major changes in the prior practice. First, in subdivision (a) the time period for filing cross-interrogatories is extended from ten days to thirty days and the time period for filing redirect interrogatories is extended from five days to ten days. These time periods follow the Federal Rules. In subdivision (b) the time period for filing objections to the form of interrogatories is extended from five days to ten days.

Second, subdivision (a) is further amended by adding a new subparagraph (2) providing for a notice identifying the officer, the time and place, and the name and address of each witness. If a name is unknown, it is sufficient to identify the witness or the particular class or group to which he belongs. This was previously permitted only as to notice of oral depositions under Rule 4007(c) and written interrogatories to a party under Rule 4005(a). It was not permitted as to written interrogatories to a witness under Rule 4004.

This new subparagraph (2) also incorporates by reference the provisions of new Rule 4007.1(e). This follows Fed. R.Civ.P. 30(b)(6) and 31(a) and permits a party to name a corporation, partnership, association, or governmental agency as the deponent and to designate the matter on which the opponent requests examination. The organization is then required to name one or more of its officers, directors, or managing agents, or other person who consents to appear as the person to be examined. If a person who has knowledge of the facts is not an officer, director or managing agent but is an employe and he refuses his consent, discovery may be used to ascertain his identity and he may thereafter be subpoenaed to appear.

As stated by the draftsmen of the amendments to the Federal Rules, these provisions reduce the difficulties previously encountered in determining, prior to the submission of written interrogatories or the taking of a deposition, the identity of the proper person to testify. The provision will avoid the necessity of deposing large numbers of officers, directors, agents or others, only to find in turn that they have no knowledge, or incomplete knowledge, of the information sought.

Present subdivisions (c), (d) and (e) of this Rule remain unchanged.

Source

The provisions of this Rule 4004 amended November 20, 1978, effective April 16, 1979, 8 Pa.B. 3551; amended November 7, 1988, effective January 1, 1989, 18 Pa.B. 5338; amended April 12, 1999, effective July 1, 1999, 29 Pa.B. 2281. Immediately preceding text appears at serial pages (234015) and (209481) to (209482).

Rule 4005. Written Interrogatories to a Party.

(a) Subject to the limitations provided by Rule 4011, any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or similar entity or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may be served upon any party at the time of service of the original process or at any time thereafter. Interrogatories which are to be served prior to service of the complaint shall be limited to the purpose of preparing a complaint and shall contain a brief statement of the nature of the cause of action. Interrogatories shall be prepared in such fashion that sufficient space is provided immediately after each interrogatory or subsection thereof for insertion of the answer or objection.

Official Note: Rule 440 requires the party serving interrogatories upon any other party to serve a copy upon every party to the action.

Interrogatories that generally require the responding party to state the basis of particular claims, defenses or contentions made in pleadings or other documents should be used sparingly and, if used, should be designed to target claims, defenses or contentions that the propounding attorney reasonably suspects may be the proper subjects of early dismissal or resolution or, alternatively, to identify and to narrow the scope of claims, defenses and contentions made where the scope is unclear.

See Rule 4003.8 governing pre-complaint discovery.

(b) Rescinded.

Official Note: The subject matter governed by former Rule 4005(b) has been transferred to Rule 4006(a).

(c) Interrogatories may relate to any matters which can be inquired into under Rules 4003.1 through 4003.5 inclusive and the answers may be used to the same extent as provided in Rule 4020 for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be taken after interrogatories have been answered, but the court, on motion of the party interrogated, may make such protective order as justice requires. The number of interrogatories or of sets of interrogatories to be served may be limited as justice requires to protect the party from unreasonable annoyance, embarrassment, oppression, burden or expense.

Explanatory Note

The amendments to Rule 4005 make a number of stylistic changes, and three important changes of substance.

First, the word ''adverse'' has been deleted to permit interrogatories to be addressed to any other party to the action, whether or not adverse to the inquiring party. This is the same change which was made in Fed. R. Civ.P. 33 in 1970. The amendment clarifies the right to file interrogatories to additional defendants or co-defendants. Some lower court decisions held that additional defendants were not adverse parties and that interrogatories must be addressed to them as witnesses. Similarly, an additional defendant could not be compelled to respond to requests for admission under Rule 4014 since that likewise was restricted to adverse parties.

In a marked departure from the prior practice, amended Rules 4005 and 4006 require that the interrogatories and the answers thereto be contained in one document, with the answer immediately following the interrogatory to which it is responsive. Rule 4005 requires the inquiring party to leave sufficient space after each interrogatory for insertion of the answer. The original and two copies are served upon the answering party. The original is not filed until the answers have been inserted and the document signed and verified as provided by Rule 4006. It is recognized that in some cases it will be difficult to estimate the amount of space required for an answer. Rule 4006 provides that the answering party may continue his answer to an individual interrogatory on a supplemental sheet, identifying the number of the interrogatory to which it is responsive. Of course, the answering party may desire, as a matter of style, to retype the page rather than attach a supplemental sheet.

The time restriction in the former Rule, requiring leave of court if the interrogatories are to be served within 20 days of the commencement of the action, has been eliminated. Interrogatories may be filed with the complaint or writ or at any time thereafter.

Finally, the last sentence of subdivision (c), which does not appear in Fed. R. Civ.P. 33(b), permits the court to order a limitation upon the number of interrogatories or sets of interrogatories as justice requires to protect a party from unreasonable annoyance, expense, embarrassment or oppression. It is adapted from prior Rule 4005(c). Suggestions that the Rule specifically fix the number of interrogatories which can be submitted without leave of court was considered and rejected in favor of a more flexible limitation.

Explanatory Note—2008

Civil Discovery Standard No. 8 of the American Bar Association (2004) establishes a guideline for the use of contention interrogatories. This standard has been added as a note to Rule 4003.1(c) governing discovery of opinions and contentions and as the second paragraph to the present note to Rule 4005(a) governing written interrogatories to a party.

The rationale for the proposal is succinctly set forth in the Comment to Civil Discovery Standard No. 8:

* * * Contention interrogatories, like all forms of discovery, can be susceptible to abuse. Among other things, they can be used as an attempt to tie up the opposing party rather than to obtain discovery. The legitimate purpose of contention interrogatories is to narrow the issues for trial, not to force the opposing side to marshal all its evidence on paper. * * *

The potential for overreaching is particularly present when interrogatories seeking the detailed underpinnings of the opposing party's allegations are served early in the case. Although, when used with discretion, interrogatories served near the outset of the case can be useful in narrowing the issues to define the scope of necessary discovery, contention interrogatories ordinarily are more appropriate

after the bulk of discovery has already taken place. At that point, the party on whom the interrogatories are served should have the information necessary to give specific, useful responses. [Citations omitted.]

Source

The provisions of this Rule 4005 amended November 20, 1978, effective April 16, 1979, 8 Pa.B. 3551; amended June 16, 1994, effective September 1, 1994, 24 Pa.B. 3217; amended September 20, 2007, effective November 1, 2007, 37 Pa.B. 5374; amended April 8, 2008, effective July 1, 2008, 38 Pa.B. 1814. Immediately preceding text appears at serial pages (330306) to (330307).

Rule 4006. Answers to Written Interrogatories by a Party.

(a)(1) Answers to interrogatories shall be in writing and verified. The answers shall be inserted in the spaces provided in the interrogatories. If there is insufficient space to answer an interrogatory, the remainder of the answer shall follow on a supplemental sheet.

(2) Each interrogatory shall be answered fully and completely unless objected to, in which event the reasons for the objection shall be stated in lieu of an answer. The answers shall be signed by the person making them, and the objections shall be signed by the attorney making them. The statement of an objection shall not excuse the answering party from answering all remaining interrogatories to which no objection is stated. The answering party shall serve a copy of the answers, and objections if any, within thirty days after the service of the interrogatories. The party submitting the interrogatories may move the court to dismiss an objection and direct that the interrogatory be answered.

Official Note: Rule 440 requires the answering party to serve a copy of the answers upon every party to the action.

(3) [Rescinded].

Official Note: See Rule 4003.1 for the general scope of discovery.

(b) Where the answer to an interrogatory may be derived or ascertained from the records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of that party's records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer would be substantially the same for the party serving the interrogatory as for the party served, a sufficient answer to such an interrogatory shall be to specify the records from which the answer may be derived or ascertained and to afford the party serving the interrogatory reasonable opportunity to examine, audit or inspect those records and to obtain copies, compilations, abstracts or summaries.

Explanatory Note

The prior Rule has been completely rewritten to incorporate substantial parts of Fed. R. Civ.P. 33 and to conform to Rule 4005.

(1) The restriction in the prior Rule to ''adverse'' parties is deleted.

(2) The answering party will respond to each interrogatory in the space provided. If the space is inadequate, he may retype the interrogatories or he may use a supplemental sheet for the remainder of his response.

(3) The amendment requires the answering person to sign the answer and the attorney to sign any objections. This follows Fed. R. Civ.P. 33. Present practice provides only for signing the answer.

(4) An interrogatory which is otherwise proper is not objectionable because the answer will require an opinion or the application of law to fact. This conforms to Fed. R. Civ.P. 33(b) and the rescission of former Rule 4011(f).

(5) Subdivision (b) copies Fed. R. Civ.P. 33(c) by providing that, where the requested information may be derived or ascertained from a party's records, he has an option to produce the records for inspection by the inquiring party rather than detailing the information in his answer.

The amendment, however, goes beyond Fed. R. Civ.P. 33(c) by making the option applicable to all records. The Federal Rule restricts the option to ''business'' records. This expansion of the option to all records is not intended to give an answering party carte blanche to foist upon the inquiring party a jumble of personal records. The option can be used only where the burden would be substantially the same for both parties and never where it will be an undue burden on the inquiring party. The amendment also goes beyond the Federal Rule in requiring the inquiring party who has made compilations, abstracts or summaries from the records to furnish a copy to the party who has produced the records. This will help facilitate agreements as to their accuracy for use at trial and prevent surprise.

(6) The time periods for answer are extended to 30 days after service of the interrogatories to conform to the time period of the Federal Rule.

(7) Under the amendment, as under the Federal Rule, the statement of an objection will not excuse the answering party from answering all remaining interrogatories to which no objection is stated.

Source

The provisions of this Rule 4006 amended October 16, 1981, effective October 16, 1981, 11 Pa.B. 3687; amended November 7, 1988, effective January 1, 1989, 18 Pa.B. 5338; amended December 14, 1989, effective January 1, 1990, 20 Pa.B. 11; amended April 7, 1997, effective July 1, 1997, 27 Pa.B. 1921. Immediately preceding text appears at serial pages (209483) to (209485).

Rule 4007. Discovery. Depositions. Scope of Examination. Notice.

[Rescinded].

Official Note: The subject matter of former Rule 4007 has been transferred to Rules 4001(c), 4003.1, 4007.1 and 4007.2.

Source

The provisions of this Rule 4007 rescinded November 20, 1978, effective April 16, 1979, 8 Pa.B. 3551. Immediately preceding text appears at serial page (16017) and (16018).

Rule 4007.1. Procedure in Deposition by Oral Examination.

(a) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action, except that no notice need be given a defendant who was served by publication and has not appeared in the action. A party noticed to be deposed shall be required to appear without subpoena.

(b) The notice shall conform with the requirements of subdivision (c) of this rule and of Rule 4007.2(b) and (c) where appropriate and shall state the time and place of taking the deposition and the name and address of each person to be examined if known, and, if the name is not known, a general description sufficient to identify the deponent or the particular class or group to which the deponent belongs.

Official Note: The court upon cause shown may make a protective place of taking the deposition. See Rule 4012.

(c) The purpose of the deposition and matters to be inquired into need not be stated in the notice unless the action has been commenced by writ of summons and the plaintiff desires to take the deposition of any person upon oral examination for the purpose of preparing a complaint. In such case the notice shall include a brief statement of the nature of the cause of action and of the matters to be inquired into.

Official Note: See Rule 4003.8 governing pre-complaint discovery.

(d)(1) If the person to be examined is a party, the notice may include a request made in compliance with Rule 4009.1 et seq., for the production of documents and tangible things at the taking of the deposition.

(2) If the person to be examined is not a party, and is to be served with a subpoena duces tecum to produce designated materials, the notice shall specify the materials to be produced. The materials shall be produced at the deposition and not earlier, except upon the consent of all parties to the action.

(e) A party may in the notice and in a subpoena, if issued, name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters to be inquired into and the materials to be produced. In that event, the organization so named shall serve a designation of one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which each person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The person or persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (e) does not preclude taking a deposition by any other procedure authorized in these rules.

(f) An application for an order pursuant to Section 5326(a) of the Judicial Code may be filed only in the county in which the person who is the subject of the order resides, is employed or regularly transacts business in person.

Official Note: Section 5326 of the Judicial Code, 42 Pa.C.S. § 5326, a part of the Uniform Interstate and International Procedure Act, provides for assistance to tribunals and litigants outside the Commonwealth.

Explanatory Note

Former Rule 4007 has been rescinded. The subject matter of former subdivision (a), dealing with the scope of discovery, has been enlarged and transposed to Rule 4003.1, supra. The provisions of former subdivision (b), dealing with the requirement of leave of court, have been transposed to Rule 4007.2. The provisions of former subdivision (c), dealing with notice, are enlarged in Rule 4007.1. The provisions of former subdivision (d)(1), authorizing local option rules for the content of the notice, are deleted and all local rules under former subdivision (d) will be invalid. The provisions of former subdivision (d)(2) for the filing of objections are deleted. A protective order under Rule 4012 is available.

In place of former Rule 4007 are new Rule 4007.1, which prescribes the procedure in deposition by oral examination, Rule 4007.2 which prescribes when leave of court is required, and Rules 4007.3

and 4007.4, which govern the sequence and timing of discovery and supplementary responses, subjects not previously governed by the Rules. These new Rules will be commented on separately.

Subdivisions (a) and (b) repeat the substance of former Rule 4007(c). A provision has been added to make it clear that a party noticed to be deposed need not be subpoenaed. The notice is sufficient to support subsequent sanction procedures under Rule 4019 for failure to appear.

Subdivision (c) is new. It provides that the purpose of the deposition and the matters to be inquired into need not be stated in the notice, except in the relatively infrequent case where the action has been commenced by a writ of summons and the plaintiff desires to take a deposition upon oral examination for the purpose of preparing a complaint. In this situation the inquirer must provide a brief statement of the nature of the cause of action and of the matters to be inquired into. The reason for the Rule is obvious. The party who has not yet been served with a complaint may in some instances not be aware of the nature of the action and thus be totally unprepared to submit to oral examination.

Subdivision (d) clarifies the practice for the production of documents in connection with an oral deposition. Under it, a simple request to a party to produce documents is sufficient. No subpoena is needed. But if the person examined is a witness and not a party, a subpoena duces tecum to produce specified materials and documents must be served.

Subdivision (e) is adapted, almost verbatim, from Fed. R.Civ.P. 30(b)(6). It provides, as an optional alternative to other forms of discovery, that the notice may name as a deponent a public or private corporation or a partnership or association or governmental agency. In this situation, however, the notice must describe with reasonable particularity the matters to be inquired into and the materials to be produced. The organization, if it is a party, is then required to serve on the inquirer a designation of the officers, directors, managing agents or other persons who will testify on its behalf. The purpose of the Rule is to avoid the wholesale subpoenaing of named directors, officers, and others where the inquirer does not know the identity of the exact person or persons who will be able to testify as to the requested information.

If it develops that the designated persons reveal others whose testimony may be relevant, they can also be deposed. The procedure is not exclusive and the inquirer may resort to any other method of discovery and subpoena available.

The reference to the ''consent to testify'' is limited to persons other than officers, directors or managing agents. The latter may not frustrate the discovery by declining to testify; their position requires them to testify. A subordinate employe is not in the same position and the organization cannot designate such a subordinate employe unless it certifies that he will testify.

Source

The provisions of this Rule 4007.1 adopted November 20, 1978, effective April 16, 1979, 9 Pa.B. 3551; amended April 7, 1997, effective July 1, 1997, 27 Pa.B. 1921; amended August 4, 1998, effective January 1, 1999, 28 Pa.B. 4175; amended April 12, 1999, effective July 1, 1999, 29 Pa.B. 2281; amended September 20, 2007, effective November 1, 2007, 27 Pa.B. 5374. Immediately preceding text appears at serial pages (255401) to (255402) and (295865).

Rule 4007.2. When Leave of Court Required.

(a) Except as provided by Rules 1042.5 and 4003.5(a)(2) and by subdivisions (b) and (d) of this rule, a deposition may be taken without leave of court.

Official Note: Rule 1042.5 governs discovery in a professional liability action prior to the filing of a certificate of merit.

See Rule 1930.5(a) providing that there shall be no discovery in specified domestic relations matters unless authorized by the court. See also Rules 1910.9 and 1915.5(c) governing discovery in actions for support and custody, respectively.

(b) Leave of court must be obtained if a plaintiff's notice schedules the taking of a deposition prior to the expiration of thirty days after service of the original process and the defendant has not served a notice of taking a deposition or otherwise sought discovery, unless the party or person to be examined is

(1) aged or infirm, or

(2) about to leave the county in which the action is pending for a place outside the Commonwealth or a place more than one hundred miles from the courthouse in which the action is pending.

(c) If the plaintiff proceeds under subdivision (b)(1) or (2) of this rule the notice of taking the deposition shall set forth the facts which support taking it without leave of court. The plaintiff's attorney shall sign the notice and this signature shall constitute a certification that to the best of the attorney's knowledge, information and belief the statement of facts is true.

Official Note: The court upon cause shown may make a protective order with respect to the time and place of taking the deposition. See Rule 4012.

(d) The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

Explanatory Note

This Rule consolidates in one Rule various provisions for leave of court which are now scattered through the prior Rules. It substantially follows present practice.

Rule 4003.5(a)(2), incorporated by reference, requires leave of court for further examination of experts whose opinions or reports have already been disclosed in response to the interrogatories.

Leave of court will also be required, under subdivision (d), to take the deposition of a person confined in prison. This follows the practice under prior Rule 4007(b).

Subdivision (b) states a general rule that leave of court is required where a plaintiff seeks to take an oral deposition prior to the expiration of 30 days after service of original process, if the defendant has not within such period sought discovery or noticed a deposition of his own. This is adapted from prior Rule 4007(b) with an extension of the time from 20 to 30 days.

However, subdivision (b) contains a special exception for aged, infirm or going witnesses. This was not in prior Rule 4007. No leave of court is required if the plaintiff's notice to take the deposition sets forth the facts respecting the witness and the notice is signed by the plaintiff's attorney. This constitutes a certification by him that the statement is true to the best of his knowledge, information and belief. The court, however, upon cause shown may under Rule 4012, on motion of an objecting party, enter a protective order changing the time or place.

Explanatory Note—1999

Rule 4007.2(a) has been amended to delete the reference to Rule 4001(a). Rule 4001(a) was amended in 1997 by the deletion of the reference to domestic relations actions, the rules of which formerly contained a broad prohibition against discovery except upon leave of court. That broad prohibition has now been narrowed and discovery is available to the extent provided by Rule 1930.5 governing discovery in domestic relations matters generally and Rules 1910.9 and 1915.5 governing discovery in the actions of support and custody, respectively. At the same time, those rules continue to require leave of court in specified instances.

Source

The provisions of this Rule 4007.2 adopted November 20, 1978, effective April 16, 1979, 8 Pa.B. 3551; amended March 19, 1999, effective July 1, 1999, 29 Pa.B. 1715; amended April 12, 1999, effective July 1, 1999, 29 Pa.B. 2281; amended January 27, 2003, effective immediately, 33 Pa.B. 748. Immediately preceding text appears at serial pages (255403) to (255405).

Rule 4007.3. Sequence and Timing 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, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

Explanatory Note

Neither the Federal Rules, prior to their amendment in 1970, nor prior Rule 4007 dealt with this subject. Some courts held that a party who first gave notice obtained a priority which would prevent depositions or discovery by other parties until the first party had completed his own depositions and discovery. This led to a ''race to the courthouse.'' The proposed Rule, which is taken almost verbatim from Fed. R.Civ.P. 26(d), is designed to reverse these decisions.

In principle, a party first initiating discovery gets no priority whatever. Nothing prevents other parties from proceeding simultaneously with their discovery.

Further, all methods of discovery may be used in any sequence; for example, interrogatories may precede oral depositions, or oral depositions may be followed by interrogatories or requests for admissions or requests for production of documents.

All this, however, is subject to the control of the court, which may enter special orders ''for the convenience of parties and witnesses and in the interest of justice.''

Source

The provisions of this Rule 4007.3 adopted November 20, 1978, effective April 16, 1979, 8 Pa.B. 3551.

Rule 4007.4. Supplementing Responses.

A party or an expert witness who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to the identity and location of persons having knowledge of discoverable matters and the identity of each person expected to be called as an expert witness at trial, the subject matter on which each person is expected to testify and the substance of each person's testimony as provided in Rule 4003.5(a)(1).

(2) A party or an expert witness is under a duty seasonably to amend a prior response if he or she obtains information upon the basis of which he or she knows

(i) the response was incorrect when made, or

(ii) the response though correct when made is no longer true.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests to supplement prior responses.

Explanatory Note

The prior Rules contained no provisions imposing any continuing obligation on an answering party to supplement his responses to interrogatories or oral depositions if he becomes aware of subsequent facts which make his prior answers incorrect when made or no longer true in the light of new circumstances.

Rule 4007.4 is adapted from Fed. R.Civ.P. 26(e) to provide such an automatic obligation. The automatic obligation is limited to (a) disclosure by a party of the identity and location of additional persons having knowledge of discoverable facts and the identity of persons expected to be called at trial as expert witnesses, and (b) amendment of a prior answer if a party or expert witness obtains information on the basis of which he knows that the original response was incorrect, or, if correct when originally made, is no longer true. Additional obligations to supplement may be imposed by (1) an order of court; or (2) an agreement of the parties; or (3) supplemental interrogatories.

Fed. R.Civ.P. 26(e) has not been adopted verbatim. It restricts the duty to cases where ''the circumstances are such that a failure to amend the response is in substance a knowing concealment.'' This limitation has been rejected. It would introduce collateral issues. The test in new Rule 4007.4 is whether the party or the expert witness knows that the response was incorrect or is no longer correct in the light of intervening events of which he has knowledge. If he knows this, he must correct the response. If he does not know it, he need do nothing. Whether a failure to correct it is a ''knowing concealment'' introduces a different issue.

The Rule operates in several different ways as a practical matter.

First, it is quite common, when an oral deposition is complete, for the inquirer to request, and obtain, an agreement from the opponent or from an expert witness to supplement the response within the scope of the Rule. This also can be accomplished by appropriate closing questions in interrogatories.

Second, the inquirer, if such an agreement is refused, may move the court to enter an appropriate order.

Third, the inquirer may, at any time, force a review of prior responses by filing supplementary interrogatories or noticing a supplementary oral examination to discover whether the respondent has become aware of any information which requires an amendment of any prior response.

The Rule also expands the Federal Rule by including ''a party or an expert witness''; the Federal Rule includes ''a party'' only.

Source

The provisions of this Rule 4007.4 adopted November 20, 1078, effective April 16, 1979, 8 Pa.B. 3551; amended April 12, 1999, effective July 1, 1999, 29 Pa.B. 2281. Immediately preceding text appears at serial pages (247872) to (247873) and (228825).

Rule 4008. Oral Examination. Limitation.

If a deposition is to be taken by oral examination more than one hundred miles from the courthouse, the court upon motion may make an order requiring the payment of reasonable expenses, including attorney's fees, as the court shall deem proper.

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Explanatory Note

This Rule remains unchanged.

It applies only where a deposition is to be taken by oral examination more than 100 miles from the courthouse. It does not apply to other situations or to other forms of discovery. Other kinds of limitations are prescribed in Rule 4012, *infra,* which provides for protective orders in all forms of discovery, in Rule 4010(a) which provides for limitations of physical or mental examinations and Rule 4009(b)(2) which provides for objections to production of documents and things and entry for inspection.

Source

The provisions of this Rule 4008 amended November 20, 1978, effective April 16, 1979, 8 Pa.B. 3551; amended April 12, 1999, effective July 1, 1999, 29 Pa.B. 2281. Immediately preceding text appears at serial pages (228825) to (228826).

Rule 4009. Production of Documents and Things and Entry for Inspection and Other Purposes. [Rescinded].

Source

The provisions of this Rule 4009 amended November 20, 1978, effective April 16, 1979, 8 Pa.B. 3551; rescinded April 7, 1997, effective July 1, 1997, 27 Pa.B. 1921. Immediately preceding text appears at serial pages (209490 and (209491).

PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY FOR INSPECTION AND OTHER ACTIVITIES

PRODUCTION OF DOCUMENTS AND THINGS

GENERAL PROVISIONS

Explanatory Comment—Electronically Stored Information

A. *No Importation of Federal Law*

Though the term ''electronically stored information'' is used in these rules, there is no intent to incorporate the federal jurisprudence surrounding the discovery of electronically stored information. The treatment of such issues is to be determined by traditional principles of proportionality under Pennsylvania law as discussed in further detail below.

B. *Proportionality Standard*

As with all other discovery, electronically stored information is governed by a proportionality standard in order that discovery obligations are consistent with the just, speedy and inexpensive determination and resolution of litigation disputes. The proportionality standard requires the court, within the framework of the purpose of discovery of giving each party the opportunity to prepare its case, to consider: (i) the nature and scope of the litigation, including the importance and complexity of the issues and the amounts at stake; (ii) the relevance of electronically stored information and its importance to the court's adjudication in the given case; (iii) the cost, burden, and delay that may be imposed on the parties to deal with electronically stored information; (iv) the ease of producing electronically stored information and whether substantially similar information is available with less burden; and (v) any other factors relevant under the circumstances.

C. *Tools for Addressing Electronically Stored Information*

Parties and courts may consider tools such as electronic searching, sampling, cost sharing, and non-waiver agreements to fairly allocate discovery burdens and costs. When utilizing non-waiver agreements, parties may wish to incorporate those agreements into court orders to maximize protection vis-à-vis third parties. *See*, *e.g.*, Fed. R. Evid. 502(c).

D. *Eliminating References to "Depositions"*

The elimination of specific references to "depositions" in Rule 4011 is not intended to exclude depositions from the scope of this rule. The reference was eliminated because there was no reason to call out this one form of traditional discovery among many.

Rule 4009.1. Production of Documents and Things. General Provisions.

(a) Any party may serve a request upon a party pursuant to Rules 4009.11 and 4009.12 or a subpoena upon a person not a party pursuant to Rules 4009.21 through 4009.27 to produce and permit the requesting party, or someone acting on the party's behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, and electronically stored information), or to inspect, copy, test or sample any tangible things or electronically stored information, which constitute or contain matters within the scope of Rules 4003.1 through 4003.6 inclusive and which are in the possession, custody or control of the party or person upon whom the request or subpoena is served, and may do so one or more times.

(b) A party requesting electronically stored information may specify the format in which it is to be produced and a responding party or person not a party may object. If no format is specified by the requesting party, electronically stored information may be produced in the form in which it is ordinarily maintained or in a reasonably usable form.

Official Note: These rules do not prevent a court from entering an order under its common law power preserving or protecting a document or thing.

Parties to an action and persons not parties but served with a subpoena or request pursuant to these rules have the protective and enforcement provisions of the discovery rules available to them. See Rule 4012 governing protective orders and Rule 4019 governing enforcement and sanctions for failure to make discovery.

The remedy of a protective order is available to the party to whom a request is directed to prevent abuse.

These rules do not preclude (1) the issuance under Rule 234.1 et seq. of a subpoena or request for the production of documents or things at a deposition pursuant to Rule 4007.1(d) or (2) an independent action against a person not a party for production of documents or things.

For additional provisions governing the production of expert reports in medical professional liability actions, see Rule 1042.26 et seq.

Source

The provisions of this Rule 4009.1 adopted April 7, 1997, effective July 1, 1997, 27 Pa.B. 1921; amended March 29, 2004, effective immediately, 34 Pa.B. 1926; amended June 6, 2012, effective August 1, 2012, 42 Pa.B. 3574. Immediately preceeding text appears at serial pages (255407) to (255408) and (303601).

REQUEST UPON A PARTY

Rule 4009.11. Request Upon a Party for Production of Documents and Things.

(a) The request may be served without leave of court upon the plaintiff after commencement of the action and upon any other party with or after service of the original process upon that party.

(b) The request shall set forth in numbered paragraphs the items to be produced either by individual item or by category, and describe each item or category with reasonable particularity. Each paragraph shall seek only a single item

or a single category of items. The request shall be prepared in such fashion that sufficient space is provided immediately after each paragraph for insertion of the answer.

Official Note: A request seeking electronically stored information should be as specific as possible. Limitations as to time and scope are favored, as are agreements between the parties on production formats and other issues.

See also Rule 4009.1 generally regarding electronically stored information.

Source

The provisions of this Rule 4009.11 adopted April 7, 1997, effective July 1, 1997, 27 Pa.B. 1921; amended June 6, 2012, effective August 1, 2012, 42 Pa.B. 3574. Immediately preceding text appears at serial page (303601).

Rule 4009.12. Answer to Request Upon a Party for Production of Documents and Things.

(a) The party upon whom the request is served shall within thirty days after the service of the request

(1) serve an answer including objections to each numbered paragraph in the request, and

(2) produce or make available to the party submitting the request those documents and things described in the request to which there is no objection.

(i) Where the documents may be identified only after review of a larger group of documents, and the burden of identifying the documents would be substantially the same for the party serving the request as for the party served, the party served may afford the party serving the request reasonable opportunity to identify the documents, to examine or inspect them and to obtain copies.

(b) The answer shall be in the form of a paragraph-by-paragraph response which shall

(1) identify all documents or things produced or made available;

(2) identify all documents or things not produced or made available because of the objection that they are not within the scope of permissible discovery under Rule 4003.2 through Rule 4003.6 inclusive and Rule 4011(c). Documents or things not produced shall be identified with reasonable particularity together with the basis for non-production;

(3) specify a larger group of documents or things from which the documents or things to be produced or made available may be identified as provided by subdivision (a)(2)(i);

(4) object to the request on the grounds set forth in Rule 4011(a), (b), and (e) or on the ground that the request does not meet the requirements of Rule 4009.11;

(5) state that after reasonable investigation, it has been determined that there are no documents responsive to the request.

Official Note: The party who is requested to produce documents or things is encouraged to identify the documents or things produced and the documents or things withheld through a system of numbering. The party producing the documents and things and the party receiving them

are encouraged to keep a current list of the documents and things produced and withheld based on the numbering system. This procedure will assist the court in resolving disputes arising out of production of documents.

Ordinarily, each page of a document should receive a separate number. However, a document may be assigned a number as a whole if it is bound or if it contains pages which are sequentially numbered.

The court may require numbering.

(c) The answer shall be signed and verified by the party making it and signed also by the attorney making an objection if one is set forth.

(d) If a request if reasonably susceptible to one construction under which documents sought to be produced are within the scope of the request and another construction under which the documents are outside the scope of the request, the answering party shall either produce the documents or identify with reasonable particularity the documents not produced together with the basis for non-production.

Official Note: See Rule 4009.1 regarding electronically stored information.

Source

The provisions of this Rule 4009.12 adopted April 7, 1997, effective July 1, 1997, 27 Pa.B. 1921; amended June 6, 2012, effective August 1, 2012, 42 Pa.B. 3574. Immediately preceding text appears at serial pages (303601) to (303602).

SUBPOENA UPON A PERSON NOT A PARTY

Rule 4009.21. Subpoena Upon a Person Not a Party for Production of Documents and Things. Prior Notice. Objections.

(a) A party seeking production from a person not a party to the action shall give written notice to every other party of the intent to serve a subpoena at least twenty days before the date of service. A copy of the subpoena proposed to be served shall be attached to the notice.

Official Note: For the form of the written notice, see Rule 4009.24(a).

These rules do not preclude (1) the issuance under Rule 234.1 et. seq. of a subpoena or request for the production of documents or things at a deposition pursuant to Rule 4007.1(d) or (2) an independent action against a person not a party for production of documents or things.

(b) The written notice shall not be given to the person named in the subpoena.

(c) Any party may object to the subpoena by filing of record written objections and serving a copy of the objections upon every other party to the action.

Official Note: For the form of the objections, see Rule 4009.24(b).

The requirement of filing with the prothonotary the objections under this rule and the certificate under Rule 4009.23(a) provides a more formal procedure for the participation of a person not a party in the discovery process.

(d)(1) If objections are received by the party intending to serve the subpoena prior to its service, the subpoena shall not be served. The court upon motion shall rule upon the objections and enter an appropriate order.

Official Note: Subdivision (a) of this rule provides a twenty-day notice period during which a subpoena may not be served.

(2) If objections are not received as provided in paragraph (1), the subpoena may be served subject to the right of any party or interested person to seek a protective order.

Official Note: Rule 4009.22(a) requires the filing of a certificate as a prerequisite to service.

See Rule 4009.1 regarding electronically stored information.

Source

The provisions of this Rule 4009.21 adopted April 7, 1997, effective July 1, 1997, 27 Pa.B. 1921; amended August 4, 1998, effective January 1, 1999, 28 Pa.B. 4175; amended June 6, 2012, effective August 1, 2012, 42 Pa.B. 3574. Immediately preceding text appears at serial pages (303602) and (247877).

Rule 4009.22. Service of Subpoena.

(a) The party seeking production may serve on the person named in the subpoena a copy of the subpoena only if it is identical to the subpoena attached to the notice of intent to serve the subpoena and if the party seeking production has filed of record a certificate that

(1) the notice of intent to serve a subpoena was mailed or delivered to each party at least twenty days prior to the date on which the subpoena is sought to be served,

(2) a copy of the notice of intent, including the proposed subpoena attached to the notice of intent, is attached to the certificate,

(3) no objection to the subpoena has been received, and

(4) the subpoena which will be served is identical to the subpoena which is attached to the notice of intent to serve the subpoena.

Official Note: For the form of the certificate, see Rule 4009.25.

The twenty-day advance notice is for the benefit of the parties and not the person served. The twenty-day notice period may be waived and the certificate modified accordingly.

(b) The subpoena shall be issued as provided by Rule 234.2(a) and shall be served in the manner provided by Rule 234.2(b).

Official Note: Rule 234.2(a) governs the issuance by the prothonotary of a subpoena to testify. Rule 234.2(b) governs service of a subpoena to testify.

For the form of a subpoena to produce, see Rule 4009.26.

Source

The provisions of this Rule 4009.22 adopted April 7, 1997, effective July 1, 1997, 27 Pa.B. 1921; amended April 20, 1998, effective July 1, 1998, 28 Pa.B. 2026. Immediately preceding text appears at serial pages (228829) to (228830).

Rule 4009.23. Certificate of Compliance by a Person Not a Party. Notice of Documents or Things Received.

(a) The person not a party upon whom the subpoena has been served shall, in complying with the subpoena, execute a certificate of compliance and deliver it with the documents or things produced to the party serving the subpoena within twenty days of service. A form of certificate to be executed and delivered shall be served with the subpoena.

Official Note: For the form of the certificate of compliance, see Rule 4009.27.

The requirement of filing with the prothonotary the certificate under this rule and the objections under Rule 4009.21(c) provides a more formal procedure for the participation of a person not a party in the discovery process.

(b) The party receiving documents and things pursuant to the subpoena shall give notice of receipt to every other party to the action and upon the payment of reasonable cost shall

(1) furnish a legible copy of each document to any other party who requests a copy and

(2) allow reasonable access to the things to any other party who requests access.

Official Note: See Rule 4009.1 regarding electronically stored information.

Source

The provisions of this Rule 4009.23 adopted April 7, 1997, effective July 1, 1997, 27 Pa.B. 1921; amended June 6, 2012, effective August 1, 2012, 42 Pa.B. 3574. Immediately preceding text appears at serial page (247878).

Rule 4009.24. Notice of Intent to Serve Subpoena. Objection to Subpoena. Forms.

(a) The written notice of intent to serve a subpoena required by Rule 4009.21(a) shall be substantially in the following form:

(CAPTION)

NOTICE OF INTENT TO SERVE A SUBPOENA TO PRODUCE DOCUMENTS AND THINGS FOR DISCOVERY PURSUANT TO RULE 4009.21

_____ (party) intends to serve a subpoena identical to the one that is attached to this notice. You have twenty (20) days from the date listed below in which to file of record and serve upon the undersigned an objection to the subpoena. If no objection is made, the subpoena may be served.

Date: _____ _____

Attorney for

(b) The objection to subpoena required by Rule 4009.21(c) shall be substantially in the following form:

(CAPTION)

OBJECTIONS TO SUBPOENA PURSUANT TO RULE 4009.21

_____(party) objects to the proposed subpoena that is attached to these objections for the following reasons:

_____

_____ .

Date: _____ _____

Attorney for

Source

The provisions of this Rule 4009.24 adopted April 7, 1997, effective July 1, 1997, 27 Pa.B. 1921.

Rule 4009.25. Certificate Prerequisite to Service of Subpoena. Form.

The certificate required by Rule 4009.22(a) as a prerequisite to the service of a subpoena shall be substantially in the following form:

(CAPTION)

CERTIFICATE

PREREQUISITE TO SERVICE OF A SUBPOENA

PURSUANT TO RULE 4009.22

As a prerequisite to service of a subpoena for documents and things pursuant to Rule 4009.22, _____ certifies that

(Plaintiff/Defendant)

(1) a notice of intent to serve the subpoena with a copy of the subpoena attached thereto was mailed or delivered to each party at least twenty days prior to the date on which the subpoena is sought to be served,

(2) a copy of the notice of intent, including the proposed subpoena, is attached to this certificate,

(3) no objection to the subpoena has been received, and

(4) the subpoena which will be served is identical to the subpoena which is attached to the notice of intent to serve the subpoena.

Date: _____ _____

Attorney for

Source

The provisions of this Rule 4009.25 adopted April 7, 1997, effective July 1, 1997, 27 Pa.B. 1921.

Rule 4009.26. Subpoena to Produce Documents or Things. Form.

A subpoena to produce documents or things shall be substantially in the following form:

(CAPTION)

SUBPOENA TO PRODUCE DOCUMENTS OR THINGS FOR DISCOVERY PURSUANT TO RULE 4009.22

TO: _____
(Name of Person or Entity)

Within twenty (20) days after service of this subpoena, you are ordered by the court to produce the following documents or things: _____

_____

_____

at _____ .
(Address)

You may deliver or mail legible copies of the documents or produce things requested by this subpoena, together with the certificate of compliance, to the party making this request at the address listed above. You have the right to seek in advance the reasonable cost of preparing the copies or producing the things sought.

If you fail to produce the documents or things required by this subpoena within twenty (20) days after its service, the party serving this subpoena may seek a court order compelling you to comply with it.

This subpoena was issued at the request of the following person:

_____
Attorney's Name

_____
Identification Number

_____
Address

_____
Telephone Number

Attorney for_____

BY THE COURT:

DATE: _____ By_____
(Prothonotary)

Seal of the Court

Source

The provisions of this Rule 4009.26 adopted April 7, 1997, effective July 1, 1997, 27 Pa.B. 1921.

Rule 4009.27. Certificate of Compliance. Form.

The certificate of compliance required by Rule 4009.23(a) shall be substantially in the following form:

(CAPTION)

NOTICE

To_____(Person Served with Subpoena):

You are required to complete the following Certificate of Compliance when producing documents or things pursuant to the Subpoena.

CERTIFICATE OF COMPLIANCE
WITH SUBPOENA TO PRODUCE DOCUMENTS OR
THINGS PURSUANT TO RULE 4009.23

I, _____, (person served with subpoena) certify to the best of my knowledge, information and belief that all documents or things required to be produced pursuant to the subpoena issued on _____(date of subpoena) have been produced.

Date: _____ _____

Person served with subpoena

Source

The provisions of this Rule 4009.27 adopted April 7, 1997, effective July 1, 1997, 27 Pa.B. 1921.

ENTRY UPON PROPERTY FOR INSPECTION AND OTHER ACTIVITIES

Rule 4009.31. Entry Upon Property for Inspection and Other Activities. General Provisions.

Any party may serve a request upon a party pursuant to Rule 4009.32 or a motion upon a person not a party pursuant to Rule 4009.33 to permit entry upon designated property in the possession or control of the party or person upon whom the request is served for the purpose of inspecting and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rules 4003.1 through 4003.6 inclusive.

Official Note: These rules do not prevent a court from entering an order under its common law power preserving or protecting property.

Parties to an action and persons not parties but served with a subpoena or request pursuant to these rules have the protective and enforcement provisions of the discovery rules available to them. See Rule 4012 governing protective orders and Rule 4019 governing enforcement and sanctions for failure to make discovery.

These rules do not preclude an independent action against a person not a party for permission to enter upon property.

Source

The provisions of this Rule 4009.31 adopted April 7, 1997, effective July 1, 1997, 27 Pa.B. 1921.

Rule 4009.32. Request for Entry upon Property of a Party.

(a) The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the original process upon that party. The request shall describe with reasonable particularity the property to be entered and the activities to be performed.

(b) The party upon whom the request is served shall allow the requested entry unless the request is objected to within thirty days after service of the request, in which event the reasons for objection shall be stated. If objection is made to part of a request, the part shall be specified. The party submitting the request may move for an order under Rule 4019(a) with respect to any objection to or failure to respond to the request or any part thereof, or any failure to permit entry as requested.

(c) A party may enter upon property one or more times to accomplish the activities set forth in the request.

Official Note: The remedy of a protective order is available to the party to whom the request is directed to prevent abuse.

Source

The provisions of this Rule 4009.32 adopted April 7, 1997, effective July 1, 1997, 27 Pa.B. 1921.

Rule 4009.33. Motion for Entry Upon Property of a Person Not a Party.

(a) A motion to permit entry upon property of a person not a party shall begin with the notice prescribed by subdivision (c) and shall describe with reasonable particularity the property to be entered and the activities to be performed. The motion shall be served personally by an adult in the same manner as original process. A copy of the motion shall also be served upon all other parties to the action pursuant to Rule 440.

Official Note: For general provisions governing entry upon property, see Rule 4009.31.

(b) If the person served does not affirmatively consent to the entry, the motion may be presented to the court. The moving party shall give the person served not less than fifteen days notice of the presentation of the motion. Upon proof of service of the notice of the presentation, the court, as it deems appropriate, may enter an order permitting or denying the entry or set a date for a hearing. The order permitting entry shall specify a reasonable time, manner or other condition of entry and of making the inspection and performing any related acts.

(c) The notice required by subdivision (a) shall be substantially in the following form:

(CAPTION)

IMPORTANT NOTICE

YOU HAVE PROPERTY WHICH THE PARTIES TO THE ABOVE LAWSUIT WISH TO ENTER FOR INSPECTION OR OTHER ACTIVITIES. THE MOTION ATTACHED TO THIS NOTICE ASKS THE COURT FOR AN ORDER ALLOWING THE ENTRY INTO YOUR PROPERTY. IF YOU CONSENT TO THIS ENTRY PLEASE FILL IN THE ATTACHED FORM. PLEASE CONTACT THE ATTORNEY LISTED BELOW:

_____

(Attorney filing the motion)

_____

(Address)

_____

(Telephone Number)

IF YOU DO NOT CONSENT TO THE ENTRY, YOU HAVE A RIGHT TO A HEARING ON THE MATTER. A DATE FOR PRESENTATION OF THE MOTION TO THE COURT WILL BE SET AND THE PARTY FILING THE MOTION WILL GIVE YOU FIFTEEN DAYS NOTICE OF ITS PRESENTATION. IF YOU DO NOT APPEAR AT THE PRESENTATION OF THE MOTION, THE COURT MAY ENTER AN ORDER ALLOWING ENTRY.

YOU MAY WISH TO TAKE THIS NOTICE TO A LAWYER WHO CAN ADVISE YOU. IF YOU DO NOT HAVE A LAWYER AND WISH TO OBTAIN ONE, CONTACT THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

_____

(Name of Office)

_____

(Address of Office)

_____

(Telephone Number)

Official Note: The office shall be that designated by the court under Rule 1018.1(c).

Source

The provisions of this Rule 4009.33 adopted April 7, 1997, effective July 1, 1997, 27 Pa.B. 1921; amended May 14, 1999, effective July 1, 1999, 29 Pa.B. 2767; amended June 10, 2003, effective September 1, 2003, 33 Pa.B. 2974. Immediately preceding text appears at serial pages (256310) and (256311).

Rule 4010. Physical and Mental Examination of Persons.

(a)(1) As used in this rule, ''examiner'' means a licensed physician, licensed dentist or licensed psychologist.

(2)(a) When the mental or physical condition of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by an examiner or to produce for examination the person in the party's custody or legal control.

Official Note: The examination may include blood or genetic testing.

(3) The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made.

(4)(i) The person to be examined shall have the right to have counsel or other representative present during the examination. The examiner's oral interrogation of the person to be examined shall be limited to matters specifically relevant to the scope of the examination.

Official Note: Ordinarily, the facts giving rise to liability are not germane to an examination and the information which the examiner seeks should be limited to facts of liability germane to the issue of damages.

(ii) Subdivision (a)(4)(i) shall not apply to actions for custody, partial custody and visitation of minor children.

(5)(i) The party who is being examined or who is producing for examination a person in the party's custody or legal control may have made upon reasonable notice and at the party's expense a stenographic or audio recording of the examination. Upon request and payment of reasonable cost, the party who caused the recording to be made shall provide each other party with a copy of the recording.

(ii) Subdivision (a)(5)(i) shall not apply to actions for custody, partial custody and visitation of minor children.

(b)(1) If requested by the party against whom an order is made under this rule or the person examined, the party causing the examination to be made shall deliver to the requesting party or person a copy of a detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows inability to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the court shall exclude the examiner's testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.

(3) Subdivision (b) applies to an examination made by agreement of the parties, unless the agreement expressly provides otherwise. It does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other rule.

Explanatory Note

Prior Rule 4010 has been substantially revised to conform closely to Fed. R.Civ.P. 35. It makes the following changes in the prior practice:

(1) The Federal Rule covers a party and also a person in the custody or legal control of a party. This expansion is incorporated in the amendment.

(2) The amendment introduces a specific requirement of ''good cause shown'' and notice to all parties and to the person to be examined. Actually, this makes no change in present practice. Good cause and notice were implicit in the prior Rule, which required a showing that the physical or mental condition was in controversy in the action. Good cause and notice are intended to protect parties against undue invasion of their rights to privacy.

(3) Subdivision (b)(1) gives the party against whom the order is issued the right to require the examining physician to give him a report of the results of all tests made and his diagnoses and conclusions, including like reports of all earlier examinations of the same condition to which the examining physician may have had access. This would include the results of X-rays, cardiograms or other tests. If such a report is requested and received, the recipient must reciprocate, on request, and deliver a copy of all prior or later examinations made by his physician. Sanctions are provided for refusal. This follows Fed. R.Civ.P. 35(b)(1).

(4) Subdivision (b)(2) provides that if a report is requested and received under subdivision (b)(1) or if the deposition of the examining physician is taken, the party examined waives any privilege he may have concerning the testimony of anyone who may have examined him earlier or thereafter. This follows Fed. R.Civ.P. 35(b)(2).

(5) Subdivision (b)(3) provides that examinations made by agreement of the parties may be subject to production under the Rule and that discovery of the report of an examining physician or deposing him under other Rules is not precluded. This follows Fed. R.Civ.P. 35(b)(3) as amended in 1970.

In practice, medical reports, as part of the special damages, are routinely submitted during settlement discussions, sometimes even before suit is commenced. There was little litigation over prior Rule 4010 and there should be relatively little under the amended Rule.

Source

The provisions of this Rule 4010 amended November 20, 1978, effective April 16, 1979, 8 Pa.B. 3551; amended April 24, 1998, effective July 1, 1998, 28 Pa.B. 2131. Immediately preceding text appears at serial pages (228835) to (228837).

Rule 4010.1. Evaluation of Earning Capacity.

(a) When the earning capacity of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to an evaluation by a suitably licensed or certified evaluator or to produce for evaluation the person in the party's custody or legal control.

(b) The evaluation shall be subject to the provisions of Rule 4010(a)(3) through (b)(3) inclusive.

(c) The evaluator may testify as a witness on the issue of damages only and not as a witness on the issue of liability.

Source

The provisions of this Rule 4010.1 adopted April 24, 1998, effective July 1, 1998, 28 Pa.B. 2131.

Rule 4011. Limitation of Scope of Discovery.

No discovery, including discovery of electronically stored information, shall be permitted which

(a) is sought in bad faith;

(b) would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any person or party;

(c) is beyond the scope of discovery as set forth in Rules 4003.1 through 4003.6;

(d) is prohibited by any law barring disclosure of mediation communications and mediation documents; or

Official Note: Section 5949 of the Judicial Code, 43 Pa.C.S. § 5949, provides, with specified exceptions, that all mediation communications and mediation documents are privileged. See Section 5949(c) for definitions of mediation communication and mediation document.

(e) would require the making of an unreasonable investigation by the deponent or any party or witness.

Official Note: As with all other discovery rules, this rule governs electronically stored information. See the explanatory comment preceding Rule 4009.1.

Explanatory Note

The amendments, as already pointed out, make two important changes in present Rule 4011. They delete subdivision (d) limiting the discovery of trial preparation material, and subdivision (f) forbidding any discovery which would require a deponent, whether or not a party, to give an opinion as an expert witness over his objection. These changes have already been discussed under Rules 4003.3 to 4003.5, supra. Minor stylistic changes have been made in subdivision (b). The provision protecting trade secrets or other confidential research, development, or commercial information has been transposed from subdivision (c) to Rule 4012(a)(9).

Source

The provisions of this Rule 4011 amended November 20, 1978, effective April 16, 1979, 8 Pa.B. 3551; amended March 5, 1997, effective July 1, 1997, 27 Pa.B. 1443; amended August 20, 2004, effective October 1, 2004, 34 Pa.B. 4881; amended June 6, 2012, effective August 1, 2012, 42 Pa.B. 3574. Immediately preceding text appears at serial page (305444).

Rule 4012. Protective Orders.

(a) Upon motion by a party or by the person from whom discovery or deposition is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from unreasonable annoyance, embarrassment, oppression, burden or expense, including one or more of the following:

(1) that the discovery or deposition shall be prohibited;

(2) that the discovery or deposition shall be only on specified terms and conditions, including a designation of the time and place;

(3) that the discovery or deposition shall be only by a method of discovery or deposition other than that selected by the party seeking discovery or deposition;

(4) that certain matters shall not be inquired into;

(5) that the scope of discovery or deposition shall be limited;

(6) that discovery or deposition shall be conducted with no one present except persons designated by the court;

(7) that a deposition shall be sealed and shall be opened only by order of the court;

(8) that the parties simultaneously shall file specified documents or information enclosed in sealed envelopes to be opened as directed by the court;

(9) that a trade secret or other confidential research, development or commercial information shall not be disclosed or be disclosed only in a designated way.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

Official Note: Motions for a protective order are governed by the motion rules, Rule 208.1 et seq. A court of common pleas, by local rule numbered Local Rule 208.2(e), may require that the motion contain a certification that counsel has conferred or attempted to confer with all interested parties in order to resolve the matter without court action.

(b) At any time during the taking of a deposition, on motion of any party or of the deponent, the court may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subdivision (a). If the order made terminates the examination it shall be resumed thereafter only upon order of the court. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order and to obtain the court's ruling thereon.

Explanatory Note

Under the prior practice, protective orders were available in depositions or discovery on oral examination (Rule 4012) or on written interrogatories (Rule 4004(e)). They were not specifically included in interrogatories to parties (Rule 4005) or in general discovery (Rule 4007). The amendment provides a comprehensive Rule which covers all depositions and all discovery. This follows Fed. R.Civ.P. 26(c).

The eight subdivisions of prior Rule 4012(a) remain, with stylistic changes which broaden their scope. No major change is made in principle. A new ninth subdivision is added, transposing the provisions of former Rule 4011(c) dealing with trade secrets, research and development. The nine subdivisions are defined as examples of the broad principle of protecting against ''unreasonable annoyance, embarrassment, oppression, burden or expense.'' The power of the court should be adequate to furnish any needed protection.

A self-explanatory clause is added at the end of subdivision (a) empowering the court, if it denies the protective order, to order that discovery go forward.

The amendment permits a simple motion procedure for a protective order. This is not necessarily the exclusive procedure for obtaining relief. The various forms of protective order authorized by the Rule can be included by the court in orders entered at other stages of the litigation, if appropriate. For example, a stay of all proceedings will automatically block any pending or prospective discovery.

The last sentence of former subdivision (b) is deleted, since all provisions for expenses and attorneys' fees as sanctions are consolidated in Rule 4019, infra.

Source

The provisions of this Rule 4012 amended November 20, 1978, effective April 16, 1979, 8 Pa.B. 3551; amended October 24, 2003, effective 9 months after the date of the Order, 33 Pa.B. 5506. Immediately preceding text appears at serial pages (243960) to (243961) and (255409).

Rule 4013. Stay of Proceedings.

The filing of a motion for a protective order shall not stay the deposition, production, entry on land or other discovery to which the motion is directed unless the court shall so order. The court for good cause shown may stay any or all proceedings in the action until disposition of the motion.

Explanatory Note

Former Rule 4013 provided that the filing of any motion or application directed to a deposition or to discovery would automatically stay proceedings with respect to that deposition or discovery. Further, the court could also stay all proceedings in the action until disposition of the motion or application. It had no counterpart in the Federal Rules. Under federal practice the filing of a motion for a protective order will not constitute a stay unless a stay order is granted.

The automatic stay under former Rule 4013 presented the possibility of misuse. Assume one party notices an emergency deposition of a going, aged or infirm witness. Assume his opponent files a motion for a protective order. This will automatically stay the deposition. The witness may be dead or may have left the Commonwealth before the motion is disposed of and the stay is lifted.

If the motion, in such a case, was frivolous and filed in bad faith, simply to assure no deposition before death or departure, Rule 4019(h) authorized the imposition of counsel fees and costs. This will be a hollow benefit if the testimony of an important witness is irrevocably lost.

A number of alternative solutions for controlling misuse were suggested, including a provision for timely filing as a prerequisite to automatic stay, or limiting the automatic stay to 48 hours unless the court granted a further stay. None of these adequately solved the difficulties presented by the automatic stay procedure. Timely filing was imprecise as to time and the fixed 48-hour period failed to reach critical situations in the case of going or aged witnesses.

The amendment therefore abolishes all automatic stay and adopts the federal practice requiring a stay order in all cases. It is recognized that this will impose on the courts the creation of necessary administrative machinery to insure prompt access to and prompt action by the court. A judge must be available on short notice.

This has worked well in the federal courts and should work equally well in our courts.

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In urgent discovery and deposition matters, there is no place for motion and argument lists held only once a month or quarterly. This is not a matter limited to protective orders; it cuts across the whole field of obstructive and dilatory tactics to frustrate discovery.

In many counties the machinery already exists, with special assignment of motion judges available at all times. Most counties also provide for emergency judges assigned for weekends and holidays, so that no major changes in administrative machinery should be required.

There are, in addition, a number of other Rules which provide for the equivalent of self-executing stays without special allowance, so that the need for emergency action in many instances will be obviated.

(a) Rule 4003.4 as amended permits a party to refuse to produce the statement of a party or a witness. He needs no stay order, because the Rule puts the burden on the requesting party to move for an order for production.

(b) Rule 4006(a)(1) provides that an answer to written interrogatories to a party may include grounds for objection. This similarly puts the burden on the inquirer to move for dismissal of the objection and a direction that the interrogatory be answered.

(c) Rule 4019 contains a group of additional instances where the burden is placed on the moving party to move for relief on the basis of an unjustifiable refusal of a party or witness to respond. These include failure to answer interrogatories (under Rules 4004 and 4005), refusal of a party to appear for deposition after notice, refusal of a party to obey an order of court, inducing a person to refuse to obey an order of court, refusal to obey an order of court under Rule 4009 for production and inspection of documents or things or entry upon land, refusal to obey an order of court under Rule 4010 for a medical examination, and, generally, a failure to make discovery or to obey an order of court relating to discovery.

(d) Rule 4014, regulating requests for admission, provides that the answering party may raise objections in his answer. The burden is placed on the requesting party to move for a determination of the sufficiency of the objection. The requirement of a stay order to protect against abusive discovery should not be an excessive burden on the parties, nor should the courts be swamped with applications for a stay. The federal experience and the Pennsylvania experience suggest that there are adequate means by which counsel can protect his client and his witnesses from abusive discovery other than by seeking protective orders, and that the requirement of asking the court for a stay order in a significant case is a minor procedural act.

Source

The provisions of this Rule 4013 amended November 20, 1978, effective April 16, 1979, 8 Pa.B. 3551. Immediately preceding text appears at serial page (16021).

Rule 4014. Request for Admission.

(a) A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rules 4003.1 through 4003.5 inclusive set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness, authenticity, correctness, execution, signing, delivery, mailing or receipt of any document described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or available for inspection and copying in the county. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the original process upon that party.

(b) Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission an answer verified by the party or an objection, signed by the party or by the party's

attorney; but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of forty-five days after service of the original process upon him or her. If objection is made, the reasons therefor shall be stated. The answer shall admit or deny the matter or set forth in detail the reasons why the answering party cannot truthfully do so. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify the answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the answering party states that he or she has made reasonable inquiry and that the information known or readily obtainable by him or her is insufficient to enable him or her to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request. That party may, subject to the provisions of Rule 4019(d), deny the matter or set forth reasons why he or she cannot admit or deny it.

Official Note: The requirements of an answer are governed by this rule and not by Rule 1029(b).

(c) The party who has requested the admission may move to determine the sufficiency of the answer or objection. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial.

(d) Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 212.3 governing pre-trial conferences, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him or her in maintaining the action or defense on the merits. Any admission by a party under this rule is for the purpose of the pending action only and is not an admission by the party for any other purpose nor may it be used against the party in any other proceeding.

Explanatory Note

Prior Rule 4014 has been completely revised to conform to Fed. R.Civ.P. 36 as amended in 1970.

The amendments make the following significant changes in present practice:

(1) The scope of the requests is enlarged. The prior Rule permitted requests for admission only as to truth of any relevant matters of fact or the genuineness of any writing, agreement, or record.

The revision will cover all matters within the scope of deposition Rules 4003.1 through 4003.5. This includes all matters that relate to the truth of any matter, but also to statements or opinions of fact or of the application of law to fact.

(2) The request may be made on any party; the prior Rule limited the request to ''adverse'' parties. The plaintiff may serve a request on any defending party after the party has been served with original process. A defending party may serve a request on the plaintiff at any time after the action is commenced.

(3) The respondent must answer or object. The answer must admit or deny in whole or in part. The form of a denial is clarified. Lack of information or knowledge is an insufficient denial, unless he avers that he has made reasonable inquiry and that the information available is still insufficient to enable him to admit or deny. Subdivision (b), unlike the Federal Rule, requires a sworn answer. The answer or the objections may be signed by the attorney.

(4) The form of the denial will not be governed by Pleading Rule 1029(b). Subdivision (b) provides that a denial shall fairly meet the substance of the requested admission and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. Thus, a good faith general denial which would be insufficient under Rule 1029(b) might be sufficient here.

(5) Where the respondent believes that a request for admission involves a genuine issue of fact for trial, this alone does not make the request objectionable. He must deny the matter or set forth reasons why he cannot admit or deny it. Sanction Rule 4019(d), which is specially mentioned in subdivision (b), provides that if, at trial, a party is required to prove that which should have been admitted, the expenses, including counsel fees, of proving such matters may be imposed upon the respondent unless the admission was of no substantial importance, or the request could have been held objectionable, or the respondent reasonably believed he could prevail at trial on the issue, or there was other good reason for the failure to admit.

(6) The time periods for answer or objection are conformed to the Federal Rule and extended from 10 to 30 days or to 45 days after service of original process.

(7) A specific procedure is provided in subdivision (c) for an early determination of the sufficiency of an answer or objection. The prior Rule provided no such determination before trial, and a party often came to trial uncertain whether the answer constituted an admission or denial. The amendment provides that the court may order the matter to be admitted or an amended answer to be served, or it may postpone the final determination of this issue to pretrial conferences or a designated time prior to trial.

(8) Finally, subdivision (d) sets forth the terms under which an admission may be withdrawn or amended and the effect of possible prejudice to the inquirer from an amendment or withdrawal. It also contains the important condition that the admission is localized in the pending action and cannot be used against him in any other proceeding.

Source

The provisions of this Rule 4014 amended through October 16, 1981, effective October 16, 1981, 11 Pa.B. 3687; amended December 14, 1989, effective January 1, 1990, 20 Pa.B. 11; amended April 12, 1999, effective July 1, 1999, 29 Pa.B. 2281. Immediately preceding text appears at serial pages (228840) to (228842).

Rule 4015. Persons Before Whom Depositions May be Taken.

(a) Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of this

Commonwealth or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed shall have power to administer oaths and take testimony.

(b) In a foreign country, depositions may be taken

(1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or

(2) before a person commissioned by the court in which the action is pending, and a person so commissioned shall have the power by virtue of the commission to administer any necessary oath and take testimony, or

(3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed ''To the Appropriate Authority in (here name the country).'' Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

(c) No deposition shall be taken before a person who is a relative, employee or attorney of any of the parties, or who is a relative or employee of such attorney, or who is financially interested in the action.

Explanatory Note

The amendments conform the Rule to Fed. R.Civ.P. 28. They make the following changes in present practice:

(1) When depositions are to be taken within the United States or a territory or insular possession, the list of persons authorized to take the deposition is increased by adding a person appointed by the court in which the action is pending. That person thereby acquires the power to administer an oath. This permits the taking of depositions in isolated places where no one would ordinarily be found who is authorized to administer an oath, and where the parties do not stipulate that the oath be waived under Rule 4002.

(2) When depositions are to be taken in foreign countries, the list of persons who may take the deposition will now include any person authorized to administer an oath in the place in which the examination is held, either by the law of that place or by the law of the United States. Commissions or letters rogatory remain available, and a person commissioned by the court will have the power to administer oaths or to take testimony by virtue of his commission. It is not requisite to the issuance of a commission or a letter rogatory that the taking of a deposition in any other matter is impracticable or inconvenient and both a commission and a letter may be issued in proper cases.

In many cases international judicial assistance may be required, especially if there is a non-cooperative witness whose appearance must be compelled. A check should be made to see if the foreign country involved is a signatory to the Hague Convention for the Taking of Evidence Abroad. If

so, the procedure under that Convention may be useful. (3) Evidence obtained in response to a letter rogatory may not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the technique used in depositions taken within the United States. This provision is essential to permit the use of testimony taken in non-common law countries where testimony may be taken before a judge or other officer who questions the witness, sometimes without administering an oath and without a verbatim transcript, and who prepares a summary of the testimony which the witness has given. While the court may not exclude the evidence for this reason, its value or weight may be affected by the method of taking or recording the testimony.

Source

The provisions of this Rule 4015 amended November 20, 1978, effective April 16, 1979, 8 Pa.B. 3551; amended April 12, 1999, effective July 1, 1999, 29 Pa.B. 2281. Immediately preceding test appears at serial pages (228843) to (228844).

Rule 4016. Taking of Depositions. Objections.

(a) Objection to taking a deposition because of the disqualification of the person before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(b) Objections to the competency of a witness or to the competency, relevancy, or materiality of the testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which was known to the objecting party and which might have been obviated or removed if made at that time.

(c) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of oral questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might have been obviated, removed, or cured if objections had been promptly made, are waived unless seasonable objection is made at the taking of the deposition.

(d) All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

Official Note: Objections to the form of written interrogatories must be made as provided by Rule 4004(b).

Explanatory Note

This Rule remains unchanged.

Source

The provisions of this Rule 4016 amended November 20, 1978, effective April 16, 1979, 8 Pa.B. 3551. Immediately preceding text appears at serial page (16022).

Rule 4017. Transcript of Testimony. Objections.

(a) The person before whom the deposition is taken shall put the witness on oath or affirmation and shall personally or by someone acting under his or her direction and in his or her presence record the testimony of the witness.

(b) The testimony of the witness shall be transcribed. Objections to the manner of preparation or the correctness of the transcript are waived unless they are filed in writing with the court promptly after the grounds of objection become known or could have been discovered with reasonable diligence.

(c) When the testimony is fully transcribed a copy of the deposition with the original signature page shall be submitted to the witness for inspection and signing and shall be read to or by the witness and shall be signed by the witness, unless the inspection, reading and signing are waived by the witness and by all parties who attended the taking of the deposition, or the witness is ill or cannot be found or refuses to sign. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the person before whom it was taken with a statement of the reasons given by the witness for making the changes. If the deposition is not signed by the witness within thirty days of its submission to the witness, the person before whom the deposition was taken shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(d) The person before whom the deposition is taken shall certify on the deposition that the witness was duly sworn and that the deposition is a true record of the testimony given by the witness.

(e) In lieu of participating in the oral examination, parties served with notice of taking a deposition may transmit written interrogatories to the person taking the deposition, who shall propound them to the witness and record the answers verbatim.

(f) Upon payment of reasonable charges, the person before whom the deposition was taken shall furnish a copy thereof to any party or to the deponent.

Explanatory Note

Minor stylistic changes have been made in this Rule. In addition, a time limit of 30 days is given the witness to make any changes in the transcript of the deposition and to sign it.

Source

The provisions of this Rule 4017 amended November 20, 1978, effective April 16, 1979, 8 Pa.B. 3551; amended November 7, 1988, effective January 1, 1989, 18 Pa.B. 5338; amended April 12, 1999, effective July 1, 1999, 29 Pa.B. 2281. Immediately preceding text appears at serial pages (228844) to (228845).

Rule 4017.1. Video Depositions.

(a) Any deposition upon oral examination may be taken as a matter of course as a video deposition by means of simultaneous audio and visual electronic recording. Except as provided by this rule, the rules of this chapter governing the practice and procedure in depositions and discovery shall apply.

(1) Any party may have a video deposition recorded simultaneously by stenographic means as provided by this chapter.

(2) A video deposition may be used in court only if accompanied by a transcript of the deposition.

(b) Every notice or subpoena for the taking of a video deposition shall state

(1) that the deposition is to be taken as a video deposition,

(2) the name and address of the person whose deposition is to be taken,

(3) the name and address of the officer before whom it is to be taken,

(4) whether the deposition is to be simultaneously recorded by stenographic means, and

(5) the name and address of the video operator and of his or her employer. The operator may be an employe of the attorney taking the deposition.

(c) The deposition shall begin by the operator stating on camera (1) his or her name and address, (2) the name and address of his or her employer, (3) the date, time and place of the deposition, (4) the caption of the case, (5) the name of the witness, and (6) the party on whose behalf the deposition is being taken. The officer before whom the deposition is taken shall then identify himself or herself and swear the witness on camera. At the conclusion of the deposition the operator shall state on camera that the deposition is concluded. When the length of the deposition requires the use of more than one videotape, the end of the videotape and the beginning of each succeeding videotape shall be announced on camera by the operator.

(d) The deposition shall be timed by a digital clock on camera which shall show continually each hour, minute and second of each videotape of the deposition.

(e) No signature of the witness shall be required.

(f) The attorney for the party taking the deposition shall take custody of and be responsible for the safeguarding of the videotape and shall permit the viewing of and shall provide a copy of the videotape or the audio portion thereof upon the request and at the cost of a party.

(g) In addition to the uses permitted by Rule 4020 a video deposition of a medical witness or any witness called as an expert, other than a party, may be used at trial for any purpose whether or not the witness is available to testify.

(h) At a trial or hearing that part of the audio portion of a video deposition which is offered in evidence and admitted, or which is excluded on objection, shall be transcribed in the same manner as the testimony of other witnesses. The videotape shall be marked as an exhibit and may remain in the custody of the court.

Official Note: Local rules and practice shall regulate the procedure for handling objections to questions and answers on the videotape. Suggested devices include inter alia, previewing by the judge and counsel and withholding from the evidence material to which objections are sustained; or having the operator turn off the audio portion of the videotape at the trial or hearing to exclude objectionable material or the use of ''fast forward'' by the operator at the trial or hearing to eliminate both the image and the sound of the objectionable material.

(i) As used in this rule, ''videotape'' includes all media on which a video deposition may be recorded.

Explanatory Note

This Rule remains unchanged.

Pennsylvania was one of the first states to authorize videotape depositions. Although adopted in April, 1973 as part of a two-year experimental program, the Rule appears to have worked well in practice.

Source

The provisions of this Rule 4017.1 amended through April 23, 1985, effective July 1, 1985, 15 Pa.B. 1727; amended April 12, 1999, effective July 1, 1999, 29 Pa.B. 2281; amended April 25, 2007, effective July 1, 2007, 37 Pa.B. 2178. Immediately preceding text appears at serial pages (255416) and (301351).

Rule 4018. [Rescinded].

Official Note: See Rule 234.1 et seq. governing subpoenas.

Source

The provisions of this Rule 4018 amended November 20, 1978, effective April 16, 1979, 8 Pa.B. 3551; rescinded December 14, 1989, effective January 1, 1990, 20 Pa.B. 7. Immediately preceding text appears at serial pages (134427) to (134428).

Rule 4019. Sanctions.

(a)(1) The court may, on motion, make an appropriate order if

(i) a party fails to serve answers, sufficient answers or objections to written interrogatories under Rule 4005;

(ii) a corporation or other entity fails to make a designation under Rule 4004(a)(2) or 4007.1(e);

(iii) a person, including a person designated under Rule 4004(a)(2) to be examined, fails to answer, answer sufficiently or object to written interrogatories under Rule 4004;

(iv) a party or an officer, or managing agent of a party or a person designated under Rule 4007.1(e) to be examined, after notice under Rule 4007.1, fails to appear before the person who is to take the deposition;

(v) a party or deponent, or an officer or managing agent of a party or deponent, induces a witness not to appear;

(vi) a party or an officer, or managing agent of a party refuses or induces a person to refuse to obey an order of court made under subdivision (b) of this rule requiring such party or person to be sworn or to answer designated questions or an order of court made under Rule 4010;

(vii) a party, in response to a request for production or inspection made under Rule 4009, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested;

(viii) a party or person otherwise fails to make discovery or to obey an order of court respecting discovery.

(2) A failure to act described in subdivision (a)(1) may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has filed an appropriate objection or has applied for a protective order.

Official Note: Motions for sanctions are governed by the motion rules, Rule 208.1 et seq. A court of common pleas, by local rule numbered Local Rule 208.2(e), may require that the motion contain a certification that counsel has conferred or attempted to confer with all interested parties in order to resolve the matter without court action.

(b) If a deponent refuses to be sworn or to answer any question, the deposition shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, the proponent may apply to a proper court in the county where the deposition is being taken or to the court in which the action is pending, for an order compelling the witness to be sworn or to answer, under penalty of contempt, except that where the deposition of a witness not a party is to be taken outside the Commonwealth, the application shall be made only to a court of the jurisdiction in which the deposition is to be taken.

(c) The court, when acting under subdivision (a) of this rule, may make

(1) an order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or any other designated fact shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(2) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting such party from introducing in evidence designated documents, things or testimony, or from introducing evidence of physical or mental condition;

(3) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or entering a judgment of non pros or by default against the disobedient party or party advising the disobedience;

(4) an order imposing punishment for contempt, except that a party may not be punished for contempt for a refusal to submit to a physical or mental examination under Rule 4010;

(5) such order with regard to the failure to make discovery as is just.

(d) If at the trial or hearing, a party who has requested admissions as authorized by Rule 4014 proves the matter which the other party has failed to admit as requested, the court on motion may enter an order taxing as costs against the other party the reasonable expenses incurred in making such proof, including attorney's fees, unless the court finds that

(1) the request was or could have been held objectionable pursuant to Rule 4014, or

(2) the admission sought was of no substantial importance, or

(3) the party failing to admit had reasonable ground to believe that he or she might prevail on the matter, or

(4) there was other good reason for the failure to admit.

(e) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by such other party and his or her attorney in so attending, including attorney's fees.

(f) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and because of such failure the witness does not attend, and if another party attends in person or by attorney expecting the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by such other party and his or her attorney in so attending, including attorney's fees.

(g)(1) Except as otherwise provided in these rules, if following the refusal, objection or failure of a party or person to comply with any provision of this chapter, the court, after opportunity for hearing, enters an order compelling compliance and the order is not obeyed, the court on a subsequent motion for sanctions may, if the motion is granted, require the party or deponent whose conduct necessitated the motions or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses, including attorney's fees, incurred in obtaining the order of compliance and the order for sanctions, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

(2) If the motion for sanctions is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(3) If the motion for sanctions is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

Official Note: For other special provisions authorizing the award of expenses including attorney fees see Rule 4008 where a deposition is to be taken more than 100 miles from the courthouse; 4019(d) where a party unjustifiably refuses to admit causing the other party to incur expenses of proof at trial; 4019(e) and (f) where a party notices a deposition and fails to appear or to subpoena a witness to appear causing the other party to incur unnecessary expenses; and 4019(h) where a party files motions or applications for the purpose of delay or bad faith.

(h) If the filing of a motion or making of an application under this chapter is for the purpose of delay or in bad faith, the court may impose on the party making the motion or application the reasonable costs, including attorney's fees, actually incurred by the opposing party by reason of such delay or bad faith. A party upon whom such costs have been imposed may neither (1) take any further step in the suit without prior leave of court so long as such costs remain unpaid nor (2) recover such costs if ultimately successful in the action.

(i) A witness whose identity has not been revealed as provided in this chapter shall not be permitted to testify on behalf of the defaulting party at the trial of the action. However, if the failure to disclose the identity of the witness is the result of extenuating circumstances beyond the control of the defaulting party, the court may grant a continuance or other appropriate relief.

(j) Expenses and attorney's fees may not be imposed upon the Commonwealth under this rule.

Explanatory Note

Former Rule 4019 worked reasonably well since it was first adopted in 1950. Amendments were, however, necessary to reflect the many amendments in other Rules. Opportunity was taken to make additional amendments to approach more closely the language of Fed. R.Civ.P. 37.

(1) Subdivision (a)(viii) is a blanket authorization to the court to enter a sanction order whenever there is a failure to make discovery or to obey an order of the court. The preceding subsections of subdivision (a) set out a series of specific violations of Rules 4004, 4005, 4007.1, 4007.2, 4009 and 4010 which are included in the blanket authorization. These are only illustrations and do not limit the all-inclusive coverage of subsection (viii).

(2) Prior Rule 4019(a) required a showing that an offender had acted ''wilfully.'' This word has been deleted. The court may impose sanctions even if the failure is not wilful. Wilfulness of course may be a factor in determining the extent of the sanction but it will not be an essential condition precedent to the power to impose a sanction.

(3) A new subdivision (a)(2), taken from Fed. R.Civ.P. 37(4), provides that failure to permit deposition or discovery may not be excused on the ground that the discovery sought is objectionable, unless the party failing to act has filed an appropriate objection or has applied for a protective order.

Subdivision (b) remains unchanged, except that the procedure for imposition of expenses and counsel fees is transposed to the new subdivision (g).

Subdivision (c) remains unchanged except for the addition of a catch-all subsection (5).

Subdivision (d) permits an award of expenses including counsel fees where a party has unjustifiably failed or refused to admit requests for admissions under Rule 4014, and the inquirer is thereafter compelled to prove the unadmitted facts at the trial. This has been discussed in the commentary to Rule 4014, supra.

Subdivisions (e) and (f) are unchanged. These also permit the sanction of expenses, including counsel fees. These provisions have been rarely invoked in practice. They remind counsel that lack of professional courtesy in notifying opposing counsel that parties or witnesses may not attend a deposition may subject them to sanctions.

Subdivision (g) contains novel provisions with respect to the imposition of expenses and counsel fees in situations other than those regulated in subdivisions (d), (e), (f) and (h). These four subsections cover requests for admissions, failure of a party or a witness to attend depositions and the filing motion or application in bad faith or for purposes of delay.

These constitutes a relatively small area of deposition and discovery practice. They do not include the situations regulated in subdivisions (a), (b) and (c), which cover the more common situations of interrogatories and answers, oral depositions on notice, production of documents and things and physical and mental examinations.

The prior Rule contained no provision for expenses and counsel fees in these situations except in subdivision (b), the case where a witness refused to be sworn or to answer.

Fed. R.Civ.P. 37(a)(4) provides that, if a party is successful in obtaining an order of compliance, the court shall, at the same time and without waiting to see if the order of compliance is obeyed, award expenses including counsel fees unless the failure, refusal or objection of the offending party is found to be substantially justified. Conversely, the court shall impose counsel fees against the parties unsuccessful in seeking a compliance order unless their conduct was substantially justified. If the motion is granted in part and refused in part, the court could in its discretion apportion expenses in a just manner.

The amendment suggest a new approach. It refers generally to ''refusal, objection or failure of a party or person to comply with any provision of this chapter'' which could hardly be more all-inclusive. However, it preserves the special provisions of subdivisions (d), (e), (f) and (h) by the phrase ''except as otherwise provided in these rules.'' As to those situations not covered by subdivisions (d), (e), (f) and (h), it requires a ''two step'' procedure rather than the ''single step'' procedure of the Federal Rule.

The first step under subdivision (g)(1) is a motion to compel compliance. If, after a hearing, the motion is granted and depositions or discovery are ordered and the party against whom it is directed complies, that is the end of the matter as far as expenses and counsel fees are concerned. There can be no award of expenses and fees. If the order to comply is not obeyed, the aggrieved party may file a new motion to impose sanctions. The court, at this ''second step'' of the proceedings, may award expenses and counsel fees for either or both steps depending upon how the court views the conduct of the defaulting party and his counsel. The Rule permits the court to decline any award if the court finds that the opposition to the motion was substantially justified or that other circumstances make an award unjust. Similarly, if the second step procedure is unsuccessful and no award is made, subdivision (g)(2) authorizes the court to impose expenses including counsel fees on the moving party unless the court finds that the making of the second step motion was substantially justified or that other circumstances make an award of expenses unjust. Finally, subdivision (g)(3) permits the court to apportion expenses among the parties if the motion for sanctions is granted in part and denied in part.

An order of compliance entered in the first step of the proceedings, which is not obeyed, will ordinarily supply substantial justification for the second step procedure requesting sanctions including expenses and counsel fees. There may be exceptional circumstances where the second step will fail. For example, there may be a failure to notify the respondent and the failure to comply may have resulted from no knowledge of the order. Or, the order of compliance may have directed the respondent to do something which the Rules do not permit or which was beyond the jurisdiction of the court.

Reference is made in the commentary to Rule 4003 of a possible ambiguity in the availability of sanctions under the prior Rule for failure of a party to appear for a deposition taken on a petition, motion or rule. Any such ambiguity will be removed by the all-inclusive language of subdivision (g)(1).

The amendment authorizes the court, if it grants the motion for sanctions, to impose the payment of the expenses on the guilty party or deponent or on the attorney who advised the conduct or on both. If the motion for sanctions is refused, the court is authorized to impose the expenses on the moving party or on the attorney who advised the filing of the motion or on both.

These are powerful disciplinary tools, if the courts will use them. The placing of the burden to escape the expenses and counsel fees on the shoulders of the losing party, plus the new provision for imposing the sanction on the attorney, will hopefully assure compliance with the Discovery Rules and a minimum of sanction proceedings.

Subdivision (h) adds a new provision for expenses and counsel fees not expressly found in the Federal Rule. It provides that if the filing of a motion or application is in bad faith or for the purpose

of delay, the court may impose on the party making the motion reasonable costs, including attorney's fees, incurred by the opposing party by reason of such delay or bad faith. The party on whom such costs have been imposed may take no further steps in the action without leave of court so long as the costs remain unpaid and may not recover such cost if ultimately successful in the action. The language of this Rule has been adapted from Rule 217 governing the imposition of costs in connection with continuances.

Independent of the above provisions, Rule 4008 provides that, as to oral depositions to be taken more than 100 miles from the courthouse, expenses including counsel fees may be imposed in the discretion of the court. This is of course not a sanction provision.

Subdivision (i) adds a new provision for sanctions for failure to identify witnesses as to whom discovery has been sought. A witness whose identity has not been revealed as provided by the Rules will not be permitted to testify at trial. If the failure to disclose his identity was the result of extenuating circumstances beyond the control of the defaulting party, the court may grant a continuance or other appropriate relief.

Subdivision (j) is former subdivision (g) with only a minor stylistic change. It forbids the imposition of expenses and counsel fees on the Commonwealth.

The amendment does not compel a party who has identified a witness under Rule 4003.1 as having ''knowledge of discoverable matter'' to call the witness at the trial. Nor, except as to the disclosure under Rule 4003.5(b) of the identity of experts expected to be called at trial, is a party required to present a ''witness list'' of those he intends to call at trial. Nor can an opponent claim surprise if an identified witness is not called on the ground that this tactic deprives him of the opportunity for cross-examination. He could have taken his deposition before trial.

The Rule does not deal specifically with the difficult problem of rebuttal witnesses. A plaintiff may not identify persons who can testify to rebut a particular defense because the defendant's pleadings and discovery do not clearly identify that defense. If the defendant introduces this defense at the trial, should the court exclude the plaintiff's rebuttal witness, on the ground that he did not ''identify'' this witness? A skilled plaintiff can avoid this danger by careful discovery from the defendant, which will force a disclosure of all the defenses.

The problem, of course, can arise only if the defendant has asked the plaintiff to identify all persons ''having knowledge,'' and the plaintiff has done so.

Source

The provisions of this Rule 4019 amended November 20, 1978, effective April 16, 1979, 8 Pa.B. 3551; amended April 12, 1999, effective July 1, 1999, 29 Pa.B. 2281; amended October 24, 2003, effective 9 months after the date of the Order, 33 Pa.B. 5506. Immediately preceding text appears at serial pages (255417) to (255420) and (271799) to (271800).

Rule 4020. Use of Depositions at Trial.

(a) At the trial, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had notice thereof if required, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of a deponent as a witness, or as permitted by the Pennsylvania Rules of Evidence.

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a party or a person designated under Rule 4004(a)(2) or 4007.1(e) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party, may be used by an adverse party for any purpose.

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(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds

(a) that the witness is dead, or

(b) that the witness is at a greater distance than one hundred miles from the place of trial or is outside the Commonwealth, unless it appears that the absence of the witness was procured by the party offering the deposition, or that the witness is unable to attend or testify because of age, sickness, infirmity or imprisonment, or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena, or upon application and notice that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, any other party may require the offering party to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.

Official Note:: See the Pennsylvania Rules of Evidence for a broader statement of this rule.

(5) A deposition upon oral examination of a medical witness, other than a party, may be used at trial for any purpose whether or not the witness is available to testify.

(b) Substitution of parties does not affect the right to use depositions previously taken; and, when an action has been dismissed and another action involving the same subject is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken in the former action may be used in the latter as if originally taken therein. A deposition previously taken may also be used as permitted by the Pennsylvania Rules of Evidence.

(c) Subject to the provisions of Rule 4016(b), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(d) A party shall not be deemed to make a person his or her own witness for any purpose by taking the person's deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use of an adverse party of a deposition as described in subdivision (a)(2) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by that party or by any other party.

Explanatory Note

Except for minor stylistic amendments this Rule remains unchanged, except for a new subdivision (a)(5) permitting the use at trial of a deposition upon oral examination of a medical witness, other than a party, whether or not the witness is available to testify.

The rising costs of obtaining the testimony at trial of medical experts and the inconvenience which may be caused to the medical witness and to his patients, have suggested relaxation of the requirement that a medical witness who is available to testify must be produced at trial. The witness may have to appear a total of three times, first, at a deposition, second, at a compulsory arbitration hearing and third, at trial in the Common Pleas Court.

Videotape Rule 4017.1(g) recognizes this hardship by permitting use at trial of the videotape deposition of a medical witness even if he is available to appear. Rule 1809(b) similarly provides that on a de novo appeal to the Common Pleas Court from a Health Care Arbitration Panel the deposition of any medical witness offered during arbitration shall be admissible whether or not the witness is available at trial on the appeal.

In fact, these two Rules go beyond the medical witness and give the same privilege to any ''other'' expert witness.

To the contrary, subdivision (a)(5) is limited to medical witnesses.

The Committee was concerned about the effect of the inclusion of ''other experts'' in this Rule which permits a deposition to be read at a trial in lieu of the appearance of a witness who is available to appear.

The videotape situation is different. Here the jury or the court will see the witness and can observe his demeanor. Although there may be a reduction in the size of the image and the reproduction may not be perfect, it is a far cry from having someone read from a stenographic transcript the words of an absent person.

The Health Care Services cases are also different. These are by definition medical malpractice cases. Here the issues are basically medical and majority of expert witnesses will be medical witnesses. Sometimes there will be issues which will need a non-medical expert witness, but these issues will necessarily be subordinate to the essential medical character of the trial. For example, an issue might be the construction and operating efficiency of a piece of hospital equipment or the purity of a drug which was administered.

It is obvious that Rule 4020 is different from Rules 4017.1 and 1809(b). This Rule covers every kind of action at law or in equity. The types of experts and the nature of their testimony will be almost unlimited. These experts will have no ''personal'' problems like the physician, whose problems have been the justification for special treatment. The ''other experts'' may talk about real estate values, actuarial formulas, exploding bottles, concrete construction, security values, fire alarm systems, defective steering assemblies, false signatures, urban planning, defective heating systems, ballistics and the endless list of topics which can be the focus of expertise in litigation.

If these manifold experts do not appear on videotape, what special reason is there for the jury never to see them, if they are available to appear at the trial?

Source

The provisions of this Rule 4020 amended November 20, 1978, effective April 16, 1979, 8 Pa.B. 3551; amended April 12, 1999, effective July 1, 1999, 29 Pa.B. 2281; amended November 28, 2000, effective January 1, 2001, 30 Pa.B. 6425. Immediately preceding text appears at serial pages (255422) to (255424).

Rule 4023. Acts of Assembly not Suspended.

The following Acts of Assembly shall not be deemed suspended or affected:

(1) Section 5325 of the Judicial Code, approved July 9, 1976, No. 142, 42 Pa.C.S. § 5325.

Official Note: This section relates to when and how a deposition may be taken outside the Commonwealth.

(2) Section 5326 of the Judicial Code, approved July 9, 1976, No. 142, 42 Pa.C.S. § 5326.

Official Note: This section relates to assistance to tribunals and litigants outside the Commonwealth with respect to depositions.

(3) Any Act of Assembly relating to shareholder actions for the inspection of corporate records or the examination of persons and production of documents and tangible things at a hearing or trial in proceedings upon insolvency, election contests, or appeals from registration commissions.

Official Note: This subdivision includes the following statutes relating to shareholder actions, Section 1508 of the Associations Code, 15 Pa.C.S. § 1508; insolvency proceedings, act of June 16, 1836, P. L. 729, § 12, 39 P. S. § 252; election contests, act of June 3, 1937, P. L. 1333, § 1765, 25 P. S. § 3465; and appeals from registration commissions, act of March 30, 1937, P. L. 115, § 43, as amended July 31, 1941, P. L. 710, § 32, 25 P. S. § 623-43 (cities of the first class); act of April 29, 1937, P. L. 487, § 42 as amended May 31, 1955, P. L. 62, § 33, 25 P. S. § 951-42 (cities of the second class, cities of the second class A, cities of the third class, boroughs, towns and townships).

Source

The provisions of this Rule 4023 amended November 20, 1978, effective April 16, 1979, 8 Pa.B. 3551; amended December 27, 1995, effective January 1, 1996, 26 Pa.B. 227. Immediately preceding text appears at serial pages (134435) and (134436).

Rule 4024. Effective Date. Pending Actions.

The amendments promulgated November 20, 1978, effective April 15, 1979, shall apply to all actions pending on April 15, 1979.

Source

The provisions of this Rule 4024 rescinded November 20, 1978, effective April 16, 1979, 8 Pa.B. 3551, readopted December 14, 1979, effective January 5, 1980, 10 Pa.B. 34, amended January 4, 1980, effective January 5, 1980, 10 Pa.B. 215. Immediately preceding text appears at serial page (40176).

Rule 4025. Abolition of Practice and Procedure under Repealed Statutes.

The practice and procedure provided in all former Acts of Assembly governing depositions and discovery, which have been repealed by the Judiciary Act Repealer Act (JARA), act of April 28, 1978, No. 53 and which are now part of the common law of the Commonwealth by virtue of Section 3(b) of JARA, are hereby abolished and shall not continue as part of the common law of the Commonwealth.

Source

The provisions of this Rule 4025 amended November 20, 1978, effective April 16, 1979, 8 Pa.B. 3551; amended December 27, 1995, effective January 1, 1996, 26 Pa.B. 227. Immediately preceding text appears at serial page (134437).

[Next page is 1-1.]