

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 7

DANE COUNTY

STATE OF WISCONSIN,)	
)	
Plaintiff,)	
)	
v.)	Case No. 04-CV-1709
)	Unclassified – Civil:30703
AMGEN INC., et al.,)	
)	
Defendants.)	

AFFIDAVIT OF ELIZABETH J. EBERLE

State of Wisconsin)
) ss.
County of Dane)

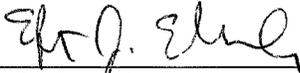
I, Elizabeth J. Eberle, hereby declare and affirm that:

1. I am an associate with Miner, Barnhill & Galland and represent the Plaintiff in this action.
2. Attached as Exhibit A is a true and correct copy of Judge Eich’s April 27, 2006, Decision & Report of Discovery Master, regarding Defendant Merck’s Motion for a Protective Order.
3. Attached as Exhibit B is a true and correct copy of Wisconsin Statute § 804.05 (1975-76 version), as reprinted in Patricia Grazcyk, *The New Wisconsin Rules of Civil Procedure: Chapter 804*, 59 Marq. L. Rev. 463 (1976).
4. Attached as Exhibit C is a true and correct copy of the Judicial Council Committee’s Note, Judicial Counsel Collection, Rules of Civil Procedure Committee, Wisconsin

State Law Library, Folder 7 of 7, Document 15.

I certify under penalty of perjury that the foregoing is true and correct.

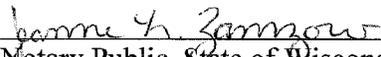
Dated this 17th day of May, 2006.



Elizabeth J. Eberle

Miner, Barnhill & Galland, P.C.
44 East Mifflin Street, Suite 803
Madison WI 53703
(608) 255-5200

Subscribed and sworn to before me
this 17th day of May, 2006.



Notary Public, State of Wisconsin
My commission expires 06/14/09.

EBERLE AFFIDAVIT

EXHIBIT A

<p>STATE OF WISCONSIN, PLAINTIFF VS. AMGEN, INC., <i>ET AL</i>, DEFENDANTS</p>	<p><u>DECISION & REPORT OF DISCOVERY MASTER:</u> <u>DEFENDANT MERCK'S MOTION FOR A PROTECTIVE ORDER</u> <u>APRIL 27, 2006</u> ### CASE No. 04 CV 1709 UNCLASSIFIED-CIVIL: 3003</p>
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Attys. Jeffrey Archibald, William P. Dixon and Elizabeth J. Eberle for the Plaintiff State of Wisconsin. Oral argument by Mr. Archibald.

Attys. Robert B. Funkhauser and Michael Crooks for Defendant Merck & Co. Oral argument by Mr. Funkhauser.

INTRODUCTION & SUMMARY OF DECISION

The State of Wisconsin has sued more than thirty-five pharmaceutical manufacturers, claiming, in essence, that they have violated various state laws governing fraudulent pricing and similar activities by selling their products to wholesalers at prices less than those listed in industry price compendia, with the result that the State, whose Medicaid payments to health care providers are based on the listed prices, has suffered significant economic loss.

By order of the court dated June 23, 2005, I was appointed Special Master with authority, *inter alia*, to “decide discovery disputes ... within the scope of Wis. Stat. §§ 804.01(3) and (4), and §§ 804.12(1), (2)(b), and (4).” The case is in the pretrial discovery

stage and Defendant Merck seeks a protective order quashing a notice setting a deposition in Madison, Wisconsin, for a Merck corporate designee, who works and resides at Merck's headquarters in Pennsylvania.

Letter briefs and other submissions have been provided by counsel, and oral argument was held *via* telephone on April 25, 2004. In general terms, the issue is whether applicable Wisconsin statutes permit the State to compel the presence of Merck's nonresident corporate designee in Wisconsin for purposes of a deposition. As explained further below, I conclude that, because Merck maintains an active sales staff in Wisconsin, it is "transacting business in person" in the state—including the City of Madison—within the meaning of §804.05(3)(b)1, *Stats.* As a result, the deposition was properly noticed in Madison.¹ I therefore deny Merck's motion for a protective order.

DISCUSSION

The following statutes set forth the underlying authority for depositions and deposition subpoenas.

804.05 Depositions upon oral examination ...

(2) Notice of examination...

(a) A party desiring to take the deposition of any person ... shall give reasonable notice in writing [stating] the time and place for taking the deposition and the name and address of each person to be examined....

(e) A party may in the notice name as the deponent a public or private corporation The organization ... so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf,...

¹ Because I reach that conclusion, it becomes unnecessary to consider Merck's arguments relating to the subsequent service of a subpoena for the deposition.

(3) Depositions: Place of examination.....

(b)1. Any party may be compelled by notice under sub. (2) to give a deposition at any place within 100 miles from the place where that party resides, is employed or transacts business in person, or at such other convenient place as is fixed by an order of the court...

3. A defendant who is not a resident of this state may be compelled by subpoena served within this state to give a deposition at any place within 100 miles from the place where that defendant is served....

5. In this subsection, the terms "defendant" and "plaintiff" include officers, directors and managing agents of corporate defendants ... or other persons designated under sub. (2)(c) as appropriate

6. If a deponent is an officer, director or managing agent of a corporate party, or other person designated under sub. (2)(e), the place of examination shall be determined as if the deponent's place of residence, employment or transacting business in person were that of the party.

In its March 23, 2006, Notice of Deposition, the State demanded that Merck produce a corporate witnesses to testify, in Madison, on several topics relating to communications between Merck and two publishers of pharmaceutical pricing compendia, and on Merck's knowledge of the prices charged by wholesalers for several pharmaceuticals produced by Merck. The deposition was scheduled for May 1, 2006. Merck, whose business is headquartered in Pennsylvania, objected to the location of the deposition, and when it appeared that no compromise in that regard could be reached, Merck moved for a protective order. Opposing the motion, the State argued that the deposition could properly be noticed for Madison because Merck, by maintaining a sales staff in Wisconsin, was "transacting business in person" in the state within the meaning of §804.05(3), *Stats.* It also argued that, in any event, all it need do would be to serve a subpoena on Merck's registered agent (located in Madison) and, under relevant service-of-process statutes, there would be no question as to the propriety of locating the deposition in Madison. And, when Merck pointed out in its brief that no such subpoena

had been served, the State promptly issued and served a deposition subpoena on the registered agent.

The parties agree that there are no Wisconsin cases interpreting the deposition-location provisions of §804.05(3), *Stats.* Merck says, however, that because Wisconsin's civil procedure code is patterned after the Federal Rules of Civil Procedure, federal cases construing the rules are relevant here, citing the long-established rule that, where a Wisconsin civil procedure rule is based on a federal rule, "decisions of the federal courts, to the extent they show a pattern of construction, are considered persuasive authority." *See, Neylan v. Vorwald*, 124 Wis.2d 85, 99, 368 N.W.2d 648 (1985). And it says that those cases indicate that the corporation's home-office location is the only proper *locus* of corporate-designee depositions. The State disagrees, stating that—as Merck itself concedes—there is no specific federal rule governing the location of depositions.

Merck, however, points to the Wisconsin Judicial Council Note to § 804.05(3)(b), *Stats.*, which states that subsection (3) had been "amended to conform to the territorial scope of deposition notices and subpoenas to the 100-mile provision of Rule 45(d), F.R.C.P., as amended in 1985." *See*, Judicial Council Note to § 804.05, *Wis. Stats.* (1994). The Federal rule, which has since been renumbered Rule 45 (c)(3)(a), deals with protection of persons subject to subpoenas, and directs courts to quash subpoenas which, among other things, "require[] a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person..."

The statutes are, however, significantly different and, more importantly, the Judicial Council note suggests by its very language that the legislature was not adopting the federal rule in its entirety—or even substantially—but rather was importing the quoted excerpt only to describe "the territorial scope of deposition notices" in terms of the 100-mile limitation set forth in the rule.² It thus seems to me that the connection

² In this regard, the State points out that the 1985 amendment to §804.05(3), *Stats.*, simply changed the territorial scope of the rule from 30 to 100 miles. *See*, §804.03(2)(b)1 & 6 (1983-84).

between §805.05(3) and F.R.C.P. 45 is so tenuous that it would be inappropriate to consider the cited cases as persuasive precedent.³

There is no question that Merck maintains sales representatives in Wisconsin—including Madison. And §804.05(3)(b)1, *Stats.*, plainly allows a noticed deposition to be held within 100 miles from the place where the party “transacts business in person.” And subsection 6, which deals with depositions of corporate designees, is to the same effect: it states that the location will be determined as if the designee’s “place of residence, employment or transacting business in person” was the same as the corporation’s; in other words the designee’s deposition is properly located wherever the corporation transacts such business. And, as I have indicated, that location, in both instances, is Madison.

Merck also puts forth a lengthy argument that the State’s subsequent service of a deposition subpoena on the corporation’s registered agent in Madison does not invoke §804.05(3)(b)3 (which states that a non-resident party’s deposition can be compelled at a location within 100 miles of the place where the subpoena is served) because it does not comply with various statutes dealing with personal and substituted service of subpoenas and other legal process. It is an argument that need not be considered, however, in light of my conclusion that, because Merck “transacts business in person” in Madison, §804.05(3)(b)1, *Stats.*, authorizes the deposition to be noticed there.⁴

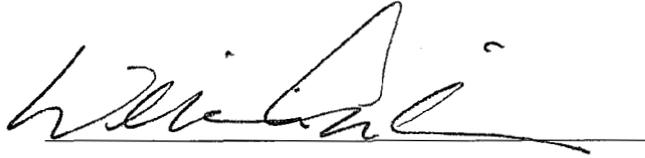
³ I note also that, while Merck cites three district court cases (and one court of appeals case) for the proposition that, under Rule 45, corporate-designee depositions are to be held at or near the corporation’s home offices, it does not indicate whether there was any claim—or any ruling—in any of those cases with respect to the “regularly transacts business” language, which is at the heart of the instant dispute.

⁴ Merck also argued that the language in §805.04(3)(b)1, *Stats.*—“or at such other convenient place as is fixed by an order of the court”—should result in my granting its motion for a protective order. As the State points out, however, no evidence was presented on that point, and very little argument was directed that way. It may be assumed, I am sure, that travel from Pennsylvania to Madison—which undoubtedly would involve an overnight stay—will carry some inconvenience to the designee (as would locating the deposition in Pennsylvania inconvenience the State, at least to some degree—recognizing, of course, that the choice of the forum, and the election to join more than 35 defendants in a single action, was the State’s). On this record, however, I am not persuaded that the inconvenience is so great as to warrant exercising my discretion to re-locate the deposition.

CONCLUSION

I conclude, therefore, that, under applicable Wisconsin statutes, the State's Notice of Deposition properly located the deposition in Madison. It follows that Merck's Motion for a Protective Order should be, and hereby is, denied.

Dated at Madison, Wisconsin, this 27th day of April 2006

A handwritten signature in black ink, appearing to read 'William Eich', written over a horizontal line.

William Eich
Special Master

EBERLE AFFIDAVIT

EXHIBIT B

stipulation (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 this chapter for other methods of discovery.

Section 804.04 is substantially identical to Federal Rule 29. It recognizes by statute what has been the general practice under the former code of civil procedure and is consistent with the philosophy of the new rules that the parties should conduct discovery with minimal supervision by the court.

Under subsection (1) of section 804.04, it is proper to stipulate in writing or upon the reporter's record that a deposition may be taken in the examining attorney's office before the attorney's stenographer who will report the testimony, even though the stenographer is not a notary public⁶⁰ and is disqualified according to section 804.03(4).

Subsection (2) permits the parties to stipulate to the modification of discovery procedures. However, the introductory words of section 804.04 permit the court by order to supersede stipulations under this rule. Federal Rule 29 provides that stipulations related to the extension of time for responses to certain forms of discovery can be made only with the approval of the court. This exception was eliminated in the state version of the rule.

It must also be noted that section 804.04 relates only to the use of stipulations affecting discovery procedures. Parties may not stipulate to enlarge the scope of discovery provided for under Chapter 804 or the subsequent use of discovery materials at trial.

804.05 Depositions upon oral examination. (1) **WHEN DEPOSITIONS MAY BE TAKEN.** After commencement of the action, any party may take the testimony of any person including a party by deposition upon oral examination. The attendance of witnesses may be compelled by subpoena as provided in s. 805.07. The attendance of a party deponent or of an officer, director or managing agent of a party may be compelled by notice to him or his attorney meeting the requirements of sub. (2) (a). Such notice shall have the force of a subpoena addressed to the deponent. The deposition of a person confined in prison may be taken only by leave of

60. 4A J. MOORE, *supra* note 3, ¶ 29.02.

court on such terms as the court prescribes, except when the party seeking to take the deposition is the state agency or officer to whose custody the prisoner has been committed.

(2) NOTICE OF EXAMINATION; GENERAL REQUIREMENTS; SPECIAL NOTICE; NONSTENOGRAPHIC RECORDING; PRODUCTION OF DOCUMENTS AND THINGS; DEPOSITION OF ORGANIZATION. (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. The notice shall state the time and place for 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 him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(b) The court may for cause shown enlarge or shorten the time for taking the deposition.

(c) The court may upon motion order that the testimony at a deposition be recorded by other than stenographic means or videotape means as provided in ss. 885.40 to 885.47, in which event the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at his own expense.

(d) The notice to a party deponent may be accompanied by a request made in compliance with s. 804.09 for the production of documents and tangible things at the taking of the deposition. The procedure of s. 804.09 shall apply to the request.

(e) A party may in his notice name as the deponent a public or private corporation or a partnership or an association or a governmental agency or a state officer in an action arising out of the officer's performance of his employment and designate with reasonable particularity the matters on which examination is requested. The organization or state officer so named shall designate 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 he will testify. The persons so designated shall testify as to matters known or reasonably available to the organization. This paragraph does not pre-

clude taking a deposition by any other procedure authorized by statute or rule.

(3) DEPOSITIONS; PLACE OF EXAMINATION. (a) A subpoena issued for the taking of a deposition may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by s. 804.01(2), but in that event the subpoena will be subject to sub. (2) and s. 804.01 (3).

(b) 1. Any party who is a resident of this state may be compelled by notice as provided in sub. (2) to give his deposition at any place within the county of his residence, or within 30 miles of his residence, or at such other place as is fixed by order of the court. A plaintiff who is a resident of this state may also be compelled by like notice to give his deposition at any place within the county where the action is commenced or is pending.

2. A plaintiff who is not a resident of this state may be compelled by notice under sub. (2) to attend at his own expense an examination in the county of this state where the action is commenced or is pending or at any place within 30 miles of his residence or within the county of his residence or in such other place as is fixed by order of the court.

3. A defendant who is not a resident of this state may be compelled:

a. By subpoena to give his deposition in any county in this state in which he is personally served, or

b. By notice under sub. (2) to give his deposition at any place within 30 miles of his residence or within the county of his residence or at such other place as is fixed by order of the court.

4. A nonparty deponent may be compelled by subpoena served within this state to give his deposition at a place within the county of his residence or within 30 miles of his residence or at such other place as is fixed by order of the court.

5. In this subsection, the terms "plaintiff" and "defendant" include officers, directors and managing agents of corporate plaintiffs and corporate defendants, or other persons designated under sub. (2)(e), as appropriate. A defendant who asserts a counterclaim or a cross claim shall not be considered a plaintiff within the meaning of this subsection, but a third-party plaintiff under s. 803.05 (1) shall be so considered with respect to the third-party defendant.

6. If a deponent is an officer, director or managing agent of a corporate party, or other person designated under sub. (2) (e), the place of examination shall be determined as if the residence of the deponent were the residence of the party.

(4) EXAMINATION AND CROSS-EXAMINATION; RECORD OF EXAMINATION; OATH; OBJECTIONS. (a) Examination and cross-examination of deponents may proceed as permitted at the trial. The officer before whom the deposition is to be taken shall put the deponent on oath and shall personally, or by someone acting under his direction, record the testimony of the deponent. The testimony shall be taken stenographically or by videotape as provided by ss. 885.40 to 885.47 or recorded by any other means ordered in accordance with sub. (2)(c). If the testimony is taken stenographically, it shall be transcribed at the request of one of the parties.

(b) All objections made at time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and he shall transmit the questions to the officer, who shall propound them to the witness and record the answers verbatim.

(5) MOTION TO TERMINATE OR LIMIT EXAMINATION. At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending 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 s. 804.01 (3). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Section 804.12(1)(c) applies to the award of expenses incurred in relation to the motion.

(6) SUBMISSION TO DEPONENT; CHANGES; SIGNING. If requested by the deponent or any party, when the testimony is fully transcribed the deposition shall be submitted to the deponent for examination and shall be read to or by him. Any changes in form or substance which the deponent desires to make shall be entered upon the deposition by the officer with

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EXHIBIT C

804.05

ANALYSIS

§4.30 Purpose and Availability of the Device

§4.31 Notice of Taking Deposition

§4.32 Notice of Examination

→ §4.33 Place of Examination

§4.34 Record of Examination and Objections

§4.35 Protection During Examination

§4.36 Submission to Witness

§4.37 Certificate and Filing: Copies

804.05

TEXT OF RULE

Judicial Council Committee's Note

Library References

Cross References

§4.30 Purpose and Availability of the Device

This Rule governs depositions taken on oral examination, whereas ~~Rule~~ Rule 804.06 applies to depositions taken on written questions, and written interrogatories are provided for under Rule 804.08. The latter rule is addressed only to parties in the action, and Rule 804.06 applies to all persons. Like the pretrial conference authorized by Trial Rule 802.10 (2), depositions under this rule may be used to narrow the issues by revealing and thereby eliminating matters which are not actually disputed, and are therefore an important adjunct to a system of simplified pleading. Pretrial depositions also are designed to obtain evidence to be used at the trial, and to learn of the existence and availability of facts which may lead to evidence which may be used on trial.

The deposition of any person may be taken; the device is not limited to parties. *Michel v. Meier*, D.C. Pa. 1948, 8 F.R.D. 464. See former W.S.A. 887.12 (1). The party seeking discovery may examine a person even though such a person may not be able to give information which will be

admissible on trial. Rule 804.01 (2) (a). It is enough that the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Subsection (4) affords a measure of protection to the deponent in such circumstances. A party may take his own deposition. Temporary residence at a place distant from the trial for reasons of health may be grounds for permitting a party's testimony to be taken by deposition.

Van Sciver v. Rothensies, C.C.A. 3d, 1941, 122 F. 2d 697.

F.R.C.P. 30 (g) pertaining to failure to attend or to serve the subpoena has been omitted.

§4.31 Notice of Taking Deposition

Subsection (1) of this rule is taken in part from F.R.C.P. 30 (a). The second sentence of the federal rule has been omitted; it is replaced by the third sentence of this subsection. The only other difference from the federal rule is the exception added to the last sentence.

The rule provides that a deposition of any person may be taken after commencement of the action.

Witnesses may be compelled by subpoena as provided in Rule 805.07.

A party, or officer, director of managing agent of a party may be compelled by notice to him or to his attorney as provided under Subsection 2 (a) of this rule. See Text Section 4.32 below. Such notice shall have the force of a subpoena.

Leave of court must be obtained in order to take the deposition of a person in prison. This provision, however, does not apply to the state agency or officer in whose custody the prisoner has been committed.

§4.32 Notice of Examination

Subsection (2) is identical to F.R.C.P. 30 (b) except that paragraph (2) of F.R.C.P. 30 (b) has been omitted. Other modifications, minor in nature, are discussed below.

~~Under~~ Subsection (2) (a) ~~is~~ is taken verbatim from F.R.C.P. 30 (b) (1). Notice in writing must be given to every party to the action, and it must be given within a reasonable time before the taking of the deposition. The rule requires that the notice must contain the name and address of the witness.

If the person to be examined is a witness, as distinguished from a party, he can be compelled to appear only by subpoena, see Subsection (1)

person

of this Rule. It is generally said that notice alone is sufficient to compel the attendance of a party. Some states which have adopted the federal rules have made additional provisions regarding parties, which generally allow protection to the party when the notice imposes hardship or unreasonable expense upon him. See Delaware Rules of the Superior Courts, Rule 30 (h), and the New Mexico Rules of Civil Procedure, Rule 30 (b). In the federal court, a party who resides at an inconvenient distance from the place designated for the deposition proceedings may seek relief under Rule 30 (b), which grants protection to the deponents. Compare *Collins v. Wayland*, C.C.A. 9th, 1944, 139 F. 2d 677, certiorari denied, 322 U.S. 744, 64 S. Ct. 1151, 88 L. Ed. 1576, with *Montgomery v. Sheldon*, D.C. N.Y. 1954, 16 F.R.D. 34. This kind of protection is provided in Wisconsin Rule 804.01 (3) which permits the court to allow expenses, or to designate the time and place for taking the deposition.

In most instances, notice will be upon the attorney. See Subsection (1) of this Rule. The notice does not have to state the subject or subjects upon which examination will be had. *U.S. ex rel Edelstein v. Brussell Sewing Mach. Co.*, D.C. N.Y. 1943, 3 F.R.D. 87. There is no requirement in the Rule that the person before whom the deposition is to be taken be named. *Norton v. Cooper Jarrett, Inc.*, D.C. N.Y. 1940, 1 F.R.D. 92. Actual knowledge of the time and place of the proceedings is immaterial;

proper notice must still be given. *Associated Transport v. Riss & Co.*, D.C. Ohio, 1948, 8 F.R.D. 99. However, where a postponement is caused by the opposing party's motion to enlarge the time, there is no need for an additional notice. *Associated Transport v. Riss & Co.*, supra.

The provision for the subpoena duces tecum applies in the main to a witness.

If a subpoena duces tecum is to be served, a copy thereof or a designation of the materials to be produced must accompany the notice. Each party is thus able to prepare the deposition more effectively. Subpoenas shall be issued and served in accordance with Rule 805.07.

The time and place at which the deposition proceedings will be had must be stated in the notice. Under Trial Rule 804.01 (3), the court, for good cause shown, may order that a deposition be not taken. Such an order has been made where it was sought to examine plaintiffs two days before trial, no previous effort having been made to take depositions. *Crowley v. North British & Mercantile Ins. Co.*, D.C. S.C. 1947, 70 F. Supp. 547, affirmed C.C.A. 164 F. 2d 550.

Courts have, at times, changed the notice time for examination to meet the convenience of the witnesses. *Union Central Life Ins. Co. v.*

Burger, D.C. N.Y. 1939, 27 F. Supp. 556. As previously stated, the attendance of witnesses may be compelled by use of a subpoena issued pursuant to Rule 805.07.

Subsection (2) (b) is taken verbatim from F.R.C.P. 30 (b) (3) and permits the court for cause shown to enlarge or shorten the time for taking the deposition.

Subsection (2) (c) is taken verbatim from F.R.C.P. 30 (b) (4). It provides for recording of testimony other than by stenographic means and by the court upon motion by the party taking the deposition. The court may require another manner of recording, preserving and filing the deposition, and other provisions as well in order to assure that the recorded testimony is accurate and trustworthy.

Regardless of the court order, a party may at his own expense arrange for a stenographic transcription.

Subsection (2) (d) is identical to F.R.C.P. 30 (b) (5). If a party has documents or materials to be produced, then as a general rule it may be compelled through a service of a notice to produce them at the deposition. The clear intention of Subsection (2) (d) is to permit production of documents and materials only by using Rule 804.09.

Subsection (2) (e) is identical to F.R.C.P. 30 (b) (6) except to add a state officer as a deponent, ~~and to~~ exclude in the first sentence the words "and in a subpoena", and ^{exclude} the third sentence of the federal rule, "A subpoena shall advise a non-party organization of its duty to make such a deposition". Both exclusions were 1971 amendments to the federal rule.
SEE TEXT SECTION 4.1 ABOVE.

It prescribes the procedure for giving notice to corporations, partnerships, associations, governmental organizations and state officers. The party seeking the deposition designates the matter on which he requests examination, and the organization shall then name one or more of its officers, directors, or managing agents to testify on its behalf with respect to matters known or available to the organization. Other persons, duly authorized, may testify on behalf of the organization if they consent to do so.

The procedure should be viewed as an added facility for discovery, one which may be advantageous to both sides as well as an improvement in the deposition process. It will reduce the difficulties encountered in determining, prior to the taking of a deposition, whether a particular employee or agent is a "managing agent". See Note, Discovery Against Corporations Under the Federal Rules, 47 Iowa L. Rev. 1006-1016 (1962). It will curb the "bandying" by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it. Cf. Haney v. Woodward & Lothrop,

Inc., 330 F. 2d 940, 944 (4th Cir. 1964). The provision should also assist organizations which find that an unnecessarily large number of their officers and agents are being deposed by a party uncertain of who in the organization has knowledge. Some courts have held that under the existing rules a corporation should not be burdened with choosing which person is to appear for it. E.g., United States v. Gahagan Dredging Corp., 24 F.R.D. 328, 329 (S.D. N.Y. 1958). This burden is not essentially different from that of answering interrogatories under Rule 804.08 and is in any case lighter than that of an examining party ignorant of who in the corporation has knowledge.

§4.33 Place of Examination

Subsection (3) (a) of this rule is identical to the second sentence of F.R.C.P. 45 (d) (1). F.R.C.P. 45 is the corresponding federal rule to Rule 805.07.

A subpoena is necessary to compel one who is not a party to appear for the taking of his deposition. Rule 805.07 sets out the procedure for the issuance of a subpoena for this purpose.

The purpose of a subpoena duces tecum is to compel the production of books, papers, documents or tangible things in court.

Under Subsection (3) (a), the subpoena may require the production, inspection and copying of those designated things which constitute or contain evidence relating to any of the matters within the scope of examination permitted by Rule 804.01 (2), that is, any matter not privileged which is relevant in a broad sense to the subject matter involved in the pending action. Even though the evidence might not be admissible at trial, it is subject to subpoena if it is calculated to lead to the discovery of admissible evidence.

In the event the subpoena does require the production, inspection and copying of the designated items, in the language of the Rule, the subpoena is subject to the provisions of Rule 804.01 (3) and Subsection (2) of this Rule. Under Subsection (2), the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

If there is objection, the deponent may seek protection under Rule 804.01 (3) or presumably, under Rule 805.07 (3). See further discussion of these matters under Rule 805.07, Text Section 4.45, below.

SUBSECTION (3) (b) OF THIS RULE CONTROLS

A The place of taking a deposition is ~~controlled by Subsection (3) (a)~~

~~of this rule~~, as follows:

(3)(b) 1. A resident party of this state may be compelled by notice under Subsection (2) to give his deposition:

- at any place within the county of his residence
- at any place within 30 miles of his residence
- or at such other place as fixed by court order

A plaintiff resident of this state may also be compelled by like notice at any place within the county where the action is commenced or is pending.

(3)(b) 2. A non-resident plaintiff may be compelled by notice under Subsection (2) to attend at his own expense:

- in the county of this state where the action is commenced or pending
- at any place within 30 miles of his residence
- at any place within the county of his residence
- or at such other place as fixed by court order

(5)(b) 3. A non-resident defendant may be compelled:

- by subpoena in any county in this state in which he is personally served
- by notice under Subsection (2) at any place within 30 miles of his residence, or within the county of his residence, or at such other place as fixed by court order.

(3)(b) 4. A non-party deponent may be compelled by subpoena served within this state:

- at any place within the county of his residence
- at any place within 30 miles of his residence
- or at such other place as fixed by court order

Subsection (3) (b) 5 provides that the terms "plaintiff" and "defendant" include officers, directors and managing agents of corporate plaintiffs and corporate defendants, or other persons designated under Subsection (2) (e), as appropriate. In addition, it specifies that a defendant who asserts a counterclaim or a cross-claim shall not be considered a plaintiff within the meaning of Subsection (3) and thus cannot be compelled by notice; however, a third-party plaintiff under Rule 803.05 (1) shall be considered a plaintiff under Subsection (3) with respect to the third-party defendant.

Finally, Subsection (3) (b) 6 mandates the place of examination if a deponent is an officer, director or managing agent of a corporate party, or other person designated under Subsection (2) (e). In such case, the residence of the deponent is to be considered as if it were the residence of the party.

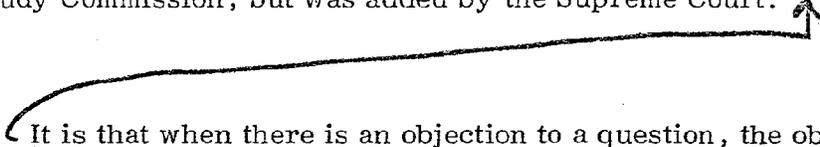
§4.34 Record of Examination and Objections

Subsection (4) is identical to F.R.C.P. 30 (c).

Testimony at deposition proceedings is taken under oath and recorded. Examination and cross-examination is permitted as at trial. Parties who do not desire to participate in the oral proceedings may serve written questions in a sealed envelope to the party taking the deposition and require him to transmit them to the officer, who shall put the question to the witness and record the answer.

Even though the testimony is not favorable, the party taking the deposition must have the testimony transcribed and filed, at the demand of the adverse party, and on payment of a reasonable charge the adverse party is entitled to a copy within a reasonable time. So held the court in *Burke v. Central-Illinois Securities Corp.*, D.C. Del. 1949, 9 F.R.D. 426; but compare Subsection (7) (a) and (b). However, where the testimony is of but limited value to the party demanding transcription, and the party taking had but limited funds, the court refused to order the party taking the deposition to have it transcribed. *Odum v. Willard Stores, Inc.*, D.C. D.C. 1941, 1 F.R.D. 680. But once filed the deposition should be available for inspection unless the court has made a protective order under Rule 804.01 (3) or perhaps Rule 804.05 (5). See and compare Rule 804.05 (7) (b).

Objections are controlled by Subsection (4) (b). An important addition is found in the Rule, which was not recommended by the Civil Code Study Commission, but was added by the Supreme Court.



It is that when there is an objection to a question, the objection and reason shall be noted, and the question shall then be answered unless the attorney instructs the deponent not to answer, or the deponent refuses to answer, in which case the proponent of the question may move for an order compelling an answer pursuant to Rule 804.12 (1).

It is believed that this provision will give greater flexibility in taking the deposition. Thus, it provides for those situations in which there is no objection to taking the answer, but there is an objection to the question, which will be preserved; and it provides for those instances in which the attorney or the deponent will not permit an answer to the question, after objection of course, and thus relief is obtained under Rule 804.12 (1). The ability to object but still permit the answer is important in that it may obviate a court order, and it will protect the witness or party against possible waiver at a subsequent time under Rule 804.07 (2) and (3) (c).

§4.35 Protection During Examination

Subsection (5) is identical to F.R.C.P. 30 (d) except it omits (a) a phrase permitting the court in the district where the deposition is

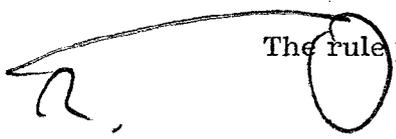
being taken to terminate or limit the proceeding, and (b) the next to last sentence in the federal rule permitting suspension of the deposition.

Rule 804.01 (3) affords protection to parties and deponents before the deposition proceedings are had; and, of course, the provision applies to all forms of discovery. Subsection (5) of this Rule gives protection during the examination, and it makes specific reference to Rule 804.01 (3).

Under it a protective order may be made by the court in which the action is pending. *Shawmut, Inc. v. American Viscose Corp.*, D.C. N.Y. 1951, 11 F.R.D. 562. The person seeking protection must show that the examination is being conducted in bad faith or in a manner as to unreasonably annoy, embarrass, or oppress the deponent. *Broadbent v. Moore-McCormack Lines*, D.C. Pa. 1946, 5 F.R.D. 220.

Once the deposition is under way, the bad faith of the examiner or the oppressive nature of the examination to the party or the deponent may become manifest. A motion then may be made to terminate or limit the deposition. One weakness of this scheme is that the judge hearing the motion will find it hard to get the feel of the case. He will not have a transcript but will have to rely upon the possibly conflicting statements of participating counsel. Another weakness is the difficulty of finding an available judge to make an on-the-spot ruling.

Repeated questioning of the deponent relative to privileged matters has been held grounds for an order under this Rule. Broadbent v. Moore-McCormack Lines, supra. That the depositions are intended for discovery in a related criminal action are also good grounds for such an order. Hiss v. Chambers, D.C. Md. 1948, 8 F.R.D. 480, and see generally, United States v. Hiss, 2d Cir. 1950, 185 F. 2d 822, certiorari denied 340 U.S. 948, 71 S. Ct. 532, 95 L. Ed. 683. And a protective order may be made at any time during the course of the examination.



The rule permits sanctions under Rule 804.12 (1) (c).

§4.36 Submission to Witness

The only difference between Subsection (b) and F.R.C.P. 30 (e), as pointed out in the Judicial Council Committee's Note, ^{is THAT} ~~the~~ the federal rule requires the deposition to be submitted to the witness. The federal requirement that the transcript of testimony be submitted to the witness for examination and signature is frequently waived. It involves the expense and nuisance of another meeting at a later date and usually serves no good purpose.

If there is no waiver, the witness is permitted to enter upon the record any changes in form or substance that he desires, along with a

statement of the reasons therefor. See Colin v. Thompson, D.C. Mo. 1954, 16 F.R.D. 194. But the original statement still appears on the record also, so that the jury may have the full picture. A substantial change at this point may in fairness necessitate reopening the deposition for further examination of the witness in the light of the change. See Turchan v. Bailey Meter Co., 21 F.R.D. 232 (D. Del. 1957).

If the witness is ill or missing or simply refuses to sign, the officer signs the deposition and records the facts. The deposition may then be used as though signed unless it is suppressed by a motion under Rule 804.07 (3). The provision of Rule 804.07 (3) with reference to waiver of irregularities should be read along with Subsection (6).

§4.37 Certificate and Filing: Copies

Subsection (7) is identical to F.R.C.P. 30 (f) except: (a) as noted in the Judicial Council Committee's Note, the "person recording the testimony" has replaced the "officer" before whom the deposition is taken in Subsection (7) (a); (b) the provision in F.R.C.P. (f) (1) for a motion and order annexing the original materials to the deposition to be returned to the court, pending final disposition of the case has been omitted; and (c) the provision for notice of filing to all parties in F.R.C.P. 30 (f) (3) has been moved to the end of Subsection (7) (a), thereby placing the burden on the person recording the testimony rather than on the party taking the deposition.

The Rule codifies in a flexible way the procedure for handling exhibits related to the deposition and at the same time assures each party that he may inspect and copy documents and things produced by a non-party witness in response to a subpoena duces tecum. As a general rule and in the absence of agreement to the contrary, exhibits produced without objection are to be annexed to and returned with the deposition, but a witness may substitute copies for purposes of marking and he may obtain return of the exhibits. The right of the parties to inspect exhibits for identification and to make copies is assured. Cf. N.Y.C.P.L.R. §3116 (c).