UIC Law Review

Volume 10 | Issue 2 Article 1

Winter 1977

Re-Discovering Discovery: A Fresh Look at the Old Hound, 10 J. Marshall J. of Prac. & Proc. 197 (1977)

Terrence F. Kiely

RE-DISCOVERING DISCOVERY: A FRESH LOOK AT THE OLD HOUND

by TERRENCE F. KIELY*

> It's all very well for you to laugh Mr. Sherlock Holmes. You may be very smart and clever, but the old hound is the best, when all is said and done.†

Inspector Lestrade's retort to the world's most famous detective is a truism among members of the practicing bar. The slow, steady gathering and analysis of information has always had more to do with the successful practice of law than Holmesian deduction or the sudden flashes of insight so often portrayed in fictionalized accounts of the lawyer's role. The rules of discovery are the primary mechanisms used in the process of shaping a client's often rambling and incomplete tale into a concrete factual universe upon which professional skills can be applied.

As essential as discovery practice is in the lawyer's work-a-day world, it has, due to the press of other matters, received insufficient attention in law school civil procedure and trial advocacy courses, continuing legal education programs and academic journals.[1] Coverage in bar journals and other practice oriented publications has been more extensive,[2] but is too often ignored as source material in currently used classroom texts.

It will be the purpose of this article to sketch the statutory perimeters of the major civil[3] discovery devices, in the context of analyzing recent Illinois decisions addressing various aspects of discovery. It is hoped that this basically informational format will be of benefit to the neophyte—whether a newly admitted practitioner or one whose area of specialization seldom requires use of the full panoply of discovery tools.

This article will be divided into six sections. The first will address the primary issue of scope of discovery, regardless of the

---

* B.S., Loyola University; J.D., DePaul University; LL.M., New York University. Mr. Kiely is a Professor of Law at DePaul University.

† A. C. DOYLE, A STUDY IN SCARLET 32 (Ballantine ed. 1975).

1. *See, e.g.*, Comment, *Attorney-Client Privilege*, 46 CHI.-KENT L. REV. 54 (1969); Comment, *Equity's Bill of Discovery: A Unique Application in the Field of Products Liability*, 49 CHI.-KENT L. REV. 124 (1972).

2. *See, e.g.*, Katz & Gore, *Discovery and the Special Appearance*, 62 ILL. B.J. 12 (1973); Bua, *Motion Practice in Circuit Court of Cook County; a cursory outline*, 54 CHI. B. REC. 231 (1973); Sprager, *Depositions and Discovery, How to Win a Child Custody Action*, 60 ILL. B. J. 122 (1971).

3. Supreme Court Rules 411-15 provide for limited discovery in criminal cases. ILL. REV. STAT. ch. 110A, §§ 411-15 (1975).

particular form by which it is initiated. This discussion will be followed in turn by analyses of the four major discovery components: (1) written interrogatories; (2) requests for the admission of facts or the genuineness of documents; (3) accompanying requests for the production of documents, objects and tangible things; and (4) depositions, both discovery and evidentiary in nature. The concluding section will scrutinize statutory measures and recent decisions regarding the sanctions available to the trial court in the event of non-compliance with requests for discovery or ancillary court orders.

THE SCOPE OF DISCOVERY

Supreme Court Rule 201 sets forth the general principles which control the utilization of the information gathering devices considered to be appropriate discovery methods.[4] Both time[5] and sequence[6] of discovery are provided for as is authorization for the court to supervise[7] the discovery process and issue protective orders limiting, conditioning or restricting it in appropriate circumstances.[8] Although not stated in Rule 201, discovery may be initiated by service of notice, without the necessity of a preliminary court order.[9] Discovery is specifically prohibited in suits for the violation of a municipal ordinance involving a fine[10] or in small claims matters governed by Rule 287,[11] without prior leave of court. Subsection 201(k), a new provision[12] relating to motions seeking the imposition of sanctions for non-compliance, will be discussed in the last section of this article.

Rule 201 also allows for the physical locale and manner of discovery to be fixed by stipulation of counsel.[13] This seldom litigated but often exercised perogative of the attorney who effects priority notice was successfully challenged in the recent

---

4. ILL. REV. STAT. ch. 110A, § 201 (1975).
(a) Discovery Methods. Information is obtainable as provided in these rules through any of the following discovery methods: depositions upon oral or written questions, written interrogatories to parties, discovery or inspection of documents or property, and physical and mental examination of persons. Duplication of discovery methods to obtain the same information should be avoided.
Id. § 201(a).
5. *Id.* § 201(d).
6. *Id.* § 201(e).
7. *Id.* § 201(c)(2).
8. *Id.* § 201(c)(1).
9. Under Supreme Court Rule 215, providing for the physical and mental examinations of parties, a court order is necessary. ILL. REV. STAT. ch. 110A, § 215(a) (1975).
10. *Id.* § 210(h).
11. *Id.* § 201(g). *See also id.* § 287. A small claim is a civil action based on tort or contract for money not in excess of $1,000, exclusive of interest and costs.
12. *Id.* § 201(k).
13. *Id.* § 201(i).

case of *Bicek v. Quitter*.[14] In an action for personal injuries brought by a minor against two defendants, counsel for one defendant served a notice of deposition to the plaintiff, requiring his presence in counsel's Park Ridge office. Plaintiff's attorney moved that the plaintiff only be required to attend one deposition involving all parties and the co-defendant moved to quash the notice maintaining that greater convenience to all concerned required that the deposition be taken in downtown Chicago. The trial judge entered an order that the plaintiff's deposition be held in his chambers due to counsels' inability to reach agreement on a mutually agreeable location. When the Park Ridge counsel refused to appear, he was held in contempt of court and fined fifty dollars.

The First Appellate District Court initially noted the absence of evidence to sustain appellant's claim that it was standard practice for trial courts to order that depositions be taken in downtown Chicago whenever a dispute over location arose between Chicago and suburban lawyers. It then clearly reaffirmed the broad supervisory powers of the trial court with regard to the discovery process:

> We see no abuse of discretion on the face of the order and, in fact, appellant does not claim an abuse of discretion here, but rather that . . . the trial court cannot interfere with the location of the deposition stated in the notice as long as it is within the county [where the deponent resides]. To sustain this argument would deprive a trial court of the discretionary power to change the location vested in it by the language of Rule 203: 'or in any other place designated by an order of the court.' The argument advanced also ignores the power given to the trial court by Rule 201 to 'supervise all or any part of any discovery procedure.'[15]

What Is "Relevant"?

The two most important provisions of Rule 201, subsections (b)(1) and (b)(2), set out the two poles of discovery practice—what is discoverable and what is not. An understanding of the guidelines set out by each section is necessary to a working knowledge of discovery provisions.

Rule 201(b)(1)[16] sets the tone for the implementing sections to follow by providing for full disclosure by both sides of all matters "relevant" to the subject matter of the suit. This requirement of relevancy does not mean that the desired data must qualify as *evidence* in the trial of the case. This important dis-

14. 38 Ill. App. 3d 1027, 350 N.E.2d 125 (1976).
15. *Id.* at 1030, 350 N.E.2d at 127.
16. ILL. REV. STAT. ch. 110A, § 201(b)(1) (1975).

tinction was established a decade ago by the Illinois Supreme Court in the case of *Monier v. Chamberlain*,[17] the ground-breaking decision which firmly established the principle of full disclosure in Illinois.

This same position was recently reaffirmed by the Second Appellate District in *Polowick v. Meredith Construction Co.*[18] In *Polowick*, the plaintiff, prior to an oral deposition of a party defendant, had requested the production[19] of a number of the defendant company's financial records. After the ledger books had been marked as exhibits by the court reporter, defense counsel removed several pages. The trial court, based on a lack of relevancy, refused to order their production.

On appeal, the court stated, "the Illinois Supreme Court has indicated that a liberal position is to be taken on discovery of relevant and material evidentiary matter . . . and this includes not only what would be admissible at the trial, but also that which might *lead to* what would be admissible at trial."[20] Accordingly, the denial of discovery of the disputed pages was deemed error.

Just *who* is responsible for disclosure of information is a related discovery question. The Illinois Supreme Court, in the 1971 case of *Drehle v. Fleming*[21] addressed the concept of full discovery with regard to the common practice among insurance defense attorneys[22] of completing requests for discovery themselves with little or no client participation:

> Discovery is not limited to matters within the knowledge of the attorney who represents a litigant. A request for discovery is addressed to the litigant. The attorney becomes involved because he is the agent of the litigant. Neither a litigant nor the insurer of a litigant can frustrate discovery procedures by fragmenting its knowledge among different agents or attorneys.[23]

Specifically designated as concomitants of full disclosure are the availability of complete information as to the existence and location of knowledgeable individuals, as well as the description, nature, condition and location of all relevant documents and tangible items. To avoid any debate over the extent of the term "document," it is stated to include, but not be limited to: papers; photographs; films; recordings; books of account and other mem-

---

17. 35 Ill. 2d 351, 221 N.E.2d 410 (1966).
18. 29 Ill. App. 3d 1092, 332 N.E.2d 17 (1975).
19. The request was made pursuant to ILL. REV. STAT. ch. 110A, § 204 (a) (3) (1975).
20. Polowick v. Meredith Constr. Co., 29 Ill. App. 3d 1092, 1097, 332 N.E.2d 17, 20 (1975) (emphasis added).
21. 49 Ill. 2d 293, 274 N.E.2d 53 (1971).
22. *See* text accompanying note 29 *infra*.
23. Drehle v. Fleming, 49 Ill. 2d 293, 297, 274 N.E.2d 53, 55 (1971).

orandums. The catchall term "communications" rounds out the list by providing for the discovery of relevant information potentially not covered by the preceding descriptions.[24]

What Is "Privileged"?

The opposite pole of the discovery continuum, that of privilege, is governed by Rule 201(b)(2), which states in pertinent part:

> All matters that are privileged against disclosure on the trial, including privileged communications between a party or his agent and the attorney for the party, are privileged against disclosure through any discovery procedure. Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney.[25]

The scope of this exception to the principle of full disclosure has been interpreted in a series of decisions, the most important of which concentrate on one of the two key factors present in most disputes over its range: representation by insurance counsel and problems raised by the personnel structures of corporate defendants.[26]

The Illinois Supreme Court, in *People v. Ryan*,[27] extended the full protection of the privilege to communications between an insured, insurance claims representatives and counsel retained by the liability insurance carrier. Apart from the collateral source rule, which prohibits the factor of insurance from being raised at trial,[28] the court held that as a matter of pre-trial discovery:

> The insured is ordinarily not represented by counsel of his own choosing either at the time of making the communication or during the course of litigation. Under such circumstances we believe that the insured may properly assume that the communication is made to the insurer as an agent for the dominant purpose of transmitting it to an attorney for the protection of the interests of the insured.[29]

---

24. ILL. REV. STAT. ch. 110A, § 201(b)(1) (1975).

25. *Id.* § 201(b)(2). *See also* Monier v. Chamberlain, 35 Ill. 2d 351, 221 N.E.2d 410 (1966); American Ins. Co. v. Formeller, 123 Ill. App. 2d 244, 263 N.E.2d 262 (1970); City of Chicago for Use of Schools v. Albert J. Schorsch Realty Co., 95 Ill. App. 2d 264, 238 N.E.2d 426 (1968); Hawkins v. Potter, 44 Ill. App. 2d 314, 194 N.E.2d 672 (1963).

Most recently, the second appellate district reaffirmed the position that in condemnation actions, the reports of appraisers are not considered the work product of attorneys and hence there is no error in requiring their production. Department of Bus. & Econ. Developers v. Pioneer T. & S. Bank, 15 Ill. App. 3d 269, 349 N.E.2d 467 (1976).

26. Hawkins v. Potter, 44 Ill. App. 2d 314, 194 N.E.2d 672 (1963); Stimpept v. Abdour, 30 Ill. 2d 456, 194 N.E.2d 817 (1961).

27. 30 Ill. 2d 456, 197 N.E.2d 15 (1964).

28. *See, e.g.*, Cargnino v. Smith, 17 Ill. App. 3d 31, 308 N.E.2d 853 (1974); Bireline v. Esperchild, 15 Ill. App. 3d 368, 304 N.E.2d 508 (1973).

29. People v. Ryan, 30 Ill. 2d 456, 460-61, 197 N.E.2d 15, 17 (1964).

Conversely, the existence and amount of defendant's liability policy is discoverable. This information is considered "relevant" to the subject matter of the suit in that it gives counsel a more realistic appraisal of the case and provides a basis for possible settlement.[30]

As regards the discoverability of communications made in the context of a corporate defendant's decision-making hierarchy, Illinois courts have long adopted what is referred to as the "control group" principle as the determinative factor on the question of privilege. In *Day v. Illinois Power Co.*,[31] after adopting the rule first formulated by the Federal District Court for the Eastern District of Pennsylvania in *Philadelphia v. Westinghouse Electric Corp.*,[32] the court clarified the scope of the doctrine:

> If an employee or investigator making reports to an attorney for the corporation is in a position to control or take part in a decision about any action the corporation might take upon the advice of its attorney, he personifies the corporation and when he makes reports or gives information to the attorney, the attorney-client privilege applies. Such employee must have actual authority, not apparent authority to participate in a contemplated decision.[33]

Subsequent decisions, such as *Golmina v. Fred Teitelbaum Construction Co.*,[34] and *Cox v. Yellow Cab Co.*,[35] while accepting the control group concept as a functional method for setting a limit on privilege in corporate settings, have held that such exclusionary guidelines are *not* meant to apply absolutely to statements made by anyone outside of the control group. As stated by the court in *Golmina*, there are two important instances where the non-member is entitled to assert the privilege:

> [T]he principle underlying the attorney-client privilege would demand that an employee's communication should be privileged when the employee of the defendant corporation is also a defendant or is a person who may be charged with liability and makes statements regarding facts with which he or his employer may be charged, which statements are given or delivered to the attorney who represents either or both of them.[36]

In *Schere v. Marshall Field & Co.*,[37] recently decided by the

---

30. Washburn v. Terminal R.R. Ass'n, 114 Ill. App. 2d 95, 252 N.E.2d 389 (1969).
31. 50 Ill. App. 2d 52, 199 N.E.2d 802 (1964).
32. 210 F. Supp. 483 (E.D. Pa. 1962).
33. Day v. Illinois Power Co., 50 Ill. App. 2d 52, 58, 199 N.E.2d 802, 806 (1964).
34. 112 Ill. App. 2d 445, 251 N.E.2d 314 (1969).
35. 16 Ill. App. 3d 665, 306 N.E.2d 738 (1973).
36. Golmina v. Fred Teitlebaum Constr. Co., 112 Ill. App. 2d 445, 449-50, 251 N.E.2d 314, 318 (1969).
37. 26 Ill. App. 3d 728, 327 N.E.2d 92 (1975).

first appellate district, both aspects of the privilege/work product issue were discussed. The disputed item was an accident report prepared by defendant's safety director. The report was written on a pre-printed form supplied to defendant by, and subsequently submitted to, Safety and Claims Service, an independent adjusting service retained by defendant and defendant's excess liability carrier. Over defendant's objection on the basis of privilege, the trial court ordered the report's production. Upon refusal, defendant's counsel was held in contempt.

In rejecting defendant's assertion of the attorney client privilege under Rule 201(b)(2),[38] the court of appeals noted the absence of the underlying relationship of insurer and insured, the existence of which provided the basis for the application of privilege to the insured's communication in *People v. Ryan*.[39]

> Safety and Claims Service is an independent contractor retained by both the defendant and by defendant's excess public liability insurer to investigate and adjust claims. However, it is not an insurer. The attorney-client privilege has never been extended to cover communications to such third parties. . . . We therefore find no reason to extend the privilege to the instant independent investigating and adjusting service.[40]

The same result was necessitated under the "control group" concept, upon examination of the decision-making status of defendant's safety director.[41] The net result in the particular case was not unduly traumatic since defendant had offered to produce the greater portion of the statement. The decision will have substantial future impact however in litigation involving self-insurers who retain independent adjusting firms. While the bulk of reports prepared by such firms contain hearsay and most of the data found therein is subject to indirect discovery by way of deposition, a core of valuable, confidential material may in fact remain and be subjected to discovery and possible damaging use at trial.

---

38. ILL. REV. STAT. ch. 110A, § 201(b)(2) (1975).

39. 30 Ill. 2d 456, 197 N.E.2d 15 (1964).

40. Shere v. Marshall Field & Co., 26 Ill. App. 3d 728, 731, 327 N.E.2d 92, 94 (1975).

41. In the instant case, defendant admits that the author of the instant report was not within the corporation's control group and the record contains nothing to indicate otherwise. We must therefore conclude that Paul Lamb had no actual authority to participate in a decision regarding what action the corporation might take upon the advice of its attorney. In these circumstances the instant statement was not privileged and was not discoverable.

Id. at 732, 327 N.E.2d at 95. In Nowakowski v. Hoppe Tire Co., 38 Ill. App. 3d 155, 349 N.E.2d 578 (1976), it was held that facts originally obtained via a statement of an officer of defendant corporation, and thus properly suppressed due to the control group/work product privilege, could be the subject of a subsequent request for the admission of facts.

WRITTEN INTERROGATORIES

Supreme Court Rule 213[42] provides for the serving of written questions regarding matter relevant to the subject matter of the suit, which must be answered or objected to by the recipient within 28 days of service. While the rules themselves do not specifically mandate any particular discovery sequence,[43] the written interrogatory is normally the first discovery tool utilized by counsel in the information gathering process.[44]

The answers to interrogatories serve several important purposes at the inception of a civil case. They provide counsel with a preliminary information base with which to: ascertain the *factual* perimeters of the dispute; determine the basis for the subsequent gathering of relevant data; and provide a structure for the later oral depositions of parties, important witnesses or other knowledgeable individuals. Pursuant to the principle of full disclosure noted above, counsel may ask a wide-ranging series of *factual* questions covering any aspect of the case deemed relevant.

Since a court order is not necessary to initiate discovery, and court supervision is rare, counsel are urged to use discretion in the utilization of the various discovery techniques. Rule 213(b)[45] delineates the duty of counsel in regard to the serving of interrogatories.[46] This section complements Rule 201(a),[47] which provides that duplication of discovery methods to obtain the same information is to be avoided.

The major limitations on the nature of the questions propounded under Rule 213, in addition to the aforementioned relevancy base, are that the recipient need not reply to inquiries that are not answerable through his or her personal knowledge,[48] that call for a legal conclusion[49] or that require the *recipient* to estimate the relevancy of facts.[50] Accordingly, such questions may

---

42. ILL. REV. STAT. ch. 110A, § 213 (1975).
43. People *ex rel.* General Motors Corp. v. Bua, 37 Ill. 2d 180, 226 N.E.2d 6 (1967).
44. In products liability cases this may be required as a first step by the trial court. *See* note 85 and accompanying text *infra.*
45. ILL. REV. STAT. ch. 110A, § 213(b) (1975).
46. It is the duty of an attorney directing interrogatories to restrict them to the subject matter of the particular case, to avoid undue delay, and to avoid the imposition of any unnecessary burden or expense on the answering party.
Id.
47. ILL. REV. STAT. ch. 110A, § 201(a) (1975).
48. Smith v. Realcoa Constr. Co., 13 Ill. App. 3d 254, 300 N.E.2d 855 (1973).
49. Rosales v. Marquez, 55 Ill. App. 2d 203, 204 N.E.2d 829 (1965); Reske v. Klein, 33 Ill. App. 2d 302, 179 N.E.2d 415 (1961).
50. Grant v. Paluch, 61 Ill. App. 2d 247, 210 N.E.2d 35 (1965); Nelson v. Pals, 51 Ill. App. 2d 269, 201 N.E.2d 187 (1964).

be objected to. In instances where the answer to a question may only be provided by the scrutiny of numerous documents, the recipient has the option of specifying these and making them available for inspection and copying.[51]

Rule 213(e)[52] provides that once the recipient has fully answered the interrogatories he has no duty to disclose further data, relevant to the questions asked, that subsequently comes to his attention unless specifically requested to do so by receipt of supplemental interrogatories at a later date. To avoid surprising counsel with a witness obtained just prior to trial, where counsel has not issued supplemental interrogatories as a means of learning the witness' identity for deposition purposes, the section provides that upon request a party must furnish, *at any time* before trial, a list of knowledgeable individuals not indicated in previously answered interrogatories.[53]

In addition to their primary function in providing counsel with a preliminary information base for the subsequent structuring of the case, answers to interrogatories may be used to impeach a witnesses' testimony[54] or serve as admissions in the same manner as any other admission.[55] Rule 213(f), in regard to impeachment, states that the answers "may be used in evidence to the same extent as a discovery deposition."[56] Rule 213(f)[57] specifies that interrogatories may be put to the same uses as depositions pursuant to Rule 212. Sections (a) and (b) of Rule 212[58] differentiate between discovery and evidentiary depositions. A discovery deposition may be used for: (1) impeachment purposes; (2) admission purposes; (3) providing any exception to the hearsay rule and (4) any other purpose for which an affidavit may be used.[59] All or any part of an evidentiary deposition (interrogatory) may be used for any purpose for which a discovery deposition (interrogatory) may be used and for any purpose whatever as long as the deponent is unable to be produced in the courtroom.[60] The evidentiary-use-of-a-discovery-deposition provision of Rule 213 was recently given a unique application by the Illinois Supreme Court in the case of *Sierens v. Clausen*.[61]

51. ILL. REV. STAT. ch. 110A, § 213(d) (1975).
52. *Id.* § 213(e).
53. *Id.*
54. Tolman v. Wieboldt Stores, Inc., 38 Ill. 2d 519, 233 N.E.2d 33 (1967).
55. *Id. See also* Flewellen v. Atkins, 99 Ill. App. 2d 409, 241 N.E.2d 667 (1968).
56. ILL. REV. STAT. ch. 110A, § 213(f) (1975).
57. *Id.*
58. *Id.* § 212(a) (discovery depositions); § 212(b) (evidentiary depositions) (1975).
59. *Id.* § 212(a) (1975).
60. *Id.* § 212(b) (1975).
61. 60 Ill. 2d 585, 328 N.E.2d 559 (1975).

In *Sierens*, the plaintiffs, grain elevator operators, sued defendant-farmer for the alleged breach of two oral contracts for the sale of soybeans. Defendant moved to dismiss the complaint due to the absence of any allegation of a writing signed by him as required by section 2-201(1) of the Uniform Commercial Code[62] for a sale of goods over five-hundred dollars. He also urged that the more liberal "confirmation" section of section 2-201(2),[63] applicable to merchants, had no bearing because he was a farmer. The circuit court granted the defendant's motion and the appellate court affirmed.[64]

Defendant's answers to plaintiffs' interrogatories indicated that he had been a farmer for 34 years and that over the five preceding years he had sold sizeable crops to grain elevators. The Supreme Court held that the answers provided a sufficient factual basis for finding the defendant to be a "merchant" and thereby governed by the confirmation rule of section 2-201(2).[65] *Sierens* illustrates that certain facts may be found by treating defendants' answers to discovery interrogatories as an affidavit.

The court noted that while actual affidavits were not filed, Supreme Court Rules 213(f)[66] and 212(a)(4)[67] allowed treating the answers to interrogatories as such:

> Our rules provide that 'answers to interrogatories may be used in evidence to the same extent as a discovery deposition' (Rule 213(f), . . . and that discovery depositions may be used for 'any purpose for which an affidavit may be used' (Rule 212(a)(4)). The facts stated in defendant's answers to the interrogatories were therefore before the circuit court for its consideration when it ruled on defendant's motion.[68]

Thus, while answers to discovery interrogatories do not have sufficient evidentiary value to allow counsel to avoid the necessity of proof at trial of the facts contained therein, the *Sierens* decision now specifically allows for their use as a factual basis in pre-trial motions.

Admission of Facts or the Genuineness of Documents

Supreme Court Rule 216,[69] providing for requests for the admission of facts or the genuineness of documents, is an important but seldom used discovery device. Whether this is due to an attorney's tactical decision to establish key facts during the ac-

---

62. Ill. Rev. Stat. ch. 26, § 2-201(1) (1975).
63. *Id.* § 2-201(2).
64. 21 Ill. App. 3d 540, 315 N.E.2d 897 (1974).
65. Ill. Rev. Stat. ch. 26, § 2-201(2) (1975).
66. Ill. Rev. Stat. ch. 110A, § 213(f) (1975).
67. *Id.* § 212(a)(4).
68. Sierens v. Clausen, 60 Ill. 2d 585, 588, 328 N.E.2d 559, 561 (1975).
69. Ill. Rev. Stat. ch. 110A, § 216 (1975).

tual trial for maximum impact, wariness due to uncertainty over the provision's appropriate uses, or general unfamiliarity with the rule itself, it has received limited attention in reported decisions which reflects its minimal use by counsel in daily practice.[70]

As with answers to interrogatories, requests pursuant to Rule 216 must be grounded on the factual aspects of the case. While the admission or failure to object to a Rule 216 request establishes the fact, as answers to interrogatories generally do not, the nature of the request has the same limitations as to relevancy, personal knowledge or legal conclusions.[71]

Due to the evidentiary weight given to responses elicited under Rule 216, the nature of proper objections to submitted requests is much more formalized than that required for interrogatories. Rule 216(c) states proper objection procedure.[72]

While the benefits provided counsel from the more extensive use of this device in terms of saved trial expense are potentially great, its major use to date appears to be that of establishing prior to trial the market value of services rendered or property losses.[73] One of the few recent decisions discussing Rule 216, *Crest v. State Farm Mutual Automobile Insurance Co.*,[74] does so in the property loss context.

In *Crest*, the insured brought a contract action against his liability and automobile collision carrier due to its refusal to pay his automobile damage claim. The carrier appealed a judgment in the plaintiff's favor, in part based on the absence of any evidence as to the fair market value of the alleged loss. The court,

---

70. *See, e.g.*, Breault v. Feigenholtz, 54 Ill. 2d 173, 296 N.E.2d 3 (1973); Crum v. Gulf Oil Corp., 12 Ill. App. 3d 988, 299 N.E.2d 820 (1973); Deaton v. Loyds Jewelry Co., 7 Ill. App. 3d 926, 289 N.E.2d 123 (1972).

71. Breault v. Feigenholtz, 54 Ill. 2d 173, 296 N.E.2d 3 (1973). *See* text accompanying notes 48-50 *supra*.

72. (c) Admission in the Absence of Denial.
Each of the matters of fact and the genuineness of each document of which admission is requested is admitted unless, within 28 days after service thereof, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part. If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission. If good faith requires that a party deny only part, or requires qualification, of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder.
ILL. REV. STAT. ch. 110A, § 216(c) (1975).

73. *See, e.g.*, Association of Franciscan Sisters of Sacred Heart v. Homola, 131 Ill. App. 2d 904, 269 N.E.2d 532 (1971).

74. 20 Ill. App. 3d 382, 313 N.E.2d 679 (1974).

while recognizing that no evidence in that regard had been presented at trial, noted that the defendant had failed to answer a request under Rule 216 to admit "the actual cash value of the collision was and is $2,224.04." Citing Rule 216, the court found the defendant's *failure* to answer the request established the fact and hence had evidentiary value at trial.[75]

Discovery of Documents, Objects and Tangible Things

Third on the list of major discovery tools is the request for documents, objects and tangible things, governed by Supreme Court Rule 214.[76] The rule provides for an opportunity to photocopy or to receive copies of all relevant documentary materials which are specified with sufficient particularity in the request. It also provides for the inspection and photographing of tangible objects. Since September 1, 1974, this process can be initiated by service of notice of such requests, thus eliminating the necessity for a preliminary "Monier" order[77] and bringing it in line with the other discovery devices. Rule 214 states in relevant part:

> Any party may by written request direct any other party to produce for inspection, copying, reproduction and photographing, specified documents, objects or tangible things . . . or to disclose information calculated to lead to the discovery or whereabouts of any of these items, whenever the nature, contents or condition of such . . . is relevant to the subject matter of the action.[78]

Rule 214 requires that compliance with requests be made within 28 days, unless such time is extended by agreement of counsel or a subsequent court order.[79] While considerable flexibility in this regard is normally afforded by counsel, it is important to note that an extension request under the 1974 amendment is to be accorded the same dignity as was the "Monier" order under the prior rule.[80] In accordance with the foregoing, the rule is that requesting counsel need not take any preliminary court action as a prerequisite to making a motion for the imposition of sanctions due to lack of compliance.[81]

Specificity of Request

The Illinois Supreme Court has made it clear that the specificity requirement is to be taken very seriously by requesting

---

75. *Id.* at 387, 313 N.E.2d at 683.
76. Ill. Rev. Stat. ch. 110A, § 214 (1975).
77. *See* text accompanying notes 82-83 *infra*.
78. Ill. Rev. Stat. ch. 110A, § 214 (1975).
79. *Id.*
80. *Id.*
81. *See* Trippel v. Lott, 19 Ill. App. 3d 936, 312 N.E.2d 369 (1974) and text accompanying note 138 *infra*.

counsel so as to avoid the potential harassment of an adversary in the course of obtaining data deemed relevant. This important aspect of Rule 214 was addressed in terms of its predecessor section in the major discovery decision of *Monier v. Chamberlain*:[82]

> Basically, the question is whether each document or individual items must be particularly described and identified by the moving party, or whether it is sufficient to request production of such material by groups or categories of similar items. . . . What will suffice as a reasonable description may well vary from case depending on the circumstances of each, but we believe that designation by category ordinarily is sufficient for these purposes. . . . Requiring minute particularization of each document sought might well unduly lengthen the discovery process by enabling the parties to engage in dilatory practices.[83]

In *People ex rel. General Motors v. Bua*,[84] a products liability case, the supreme court returned to the specificity issue paying greater attention to the practicabilities involved in the appropriate use of the category concept. While neither altering its earlier position on full disclosure nor *requiring* any particular discovery sequence, the court urged counsel to utilize written interrogatories under Rule 213 as a precursor to their request for documents.[85]

Tangible Objects

While the majority of the cases dealing with the scope of discovery under Rule 214 or its predecessor have approached the issue in the context of disputes over documents,[86] an important Illinois Supreme Court decision has approached the topic as it relates to tangible objects. This aspect of Rule 214, of vital concern in the ever-expanding products liability field, has received relatively little attention to date.[87]

In *Sarver v. Barrett Ace Hardware, Inc.*,[88] a products liability

---

82. 35 Ill. 2d 351, 221 N.E.2d 410 (1966).
83. *Id.* at 356, 221 N.E.2d at 415.
84. 37 Ill. 2d 180, 226 N.E.2d 6 (1967).
85. If such materiality or relevancy does exist we would think that this could be determined by a judicious use of interrogatories. While we indicated in *Monier* that the use of interrogatories was not a *necessary* condition precedent to discovery, it is clear that their prior use may be required by the trial judge, in the exercise of his discretion where, as here, such prior use will substantially expedite identification of relevant material.

Id. at 194, 226 N.E.2d at 14 (emphasis supplied).

86. For a complete analysis of this aspect of Rule 214, see the lengthy opinion of the Illinois Supreme Court in People *ex rel.* General Motors Corp. v. Bua, 37 Ill. 2d 180, 226 N.E.2d 6 (1967).
87. *See, e.g.*, Levin v. Cleveland Welding Co., 118 Ohio App. 389, 187 N.E.2d 187 (1963); Petruk v. South Ferry Realty Co., 157 N.Y.S.2d 249 (App. Div. 2d 1956); Salzo v. Vi She Bottling Corp., 37 Misc. 2d 357, 235 N.Y.S.2d 585 (1962); Nasoff v. Hills Supermarket, Inc., 40 Misc. 2d 417, 243 N.Y.S.2d 64 (1963).
88. 63 Ill. 2d 454, 349 N.E.2d 28 (1976).

suit was brought against a hammer manufacturer and a retailer for injuries sustained by the plaintiff when a piece of the hammer chipped, striking plaintiff in the eye. Defendant, under the predecessor Rule 214, obtained an order providing that the hammer be made available for inspection *and* testing. Despite repeated challenges to its propriety, an order providing for "destructive testing"[89] was eventually entered with what the court deemed to be appropriate safeguards.[90] Upon refusal of plaintiff's counsel to produce the hammer for testing, an order of contempt was entered and an appeal taken.

Plaintiff maintained that "destructive testing" was not a permissible mode of discovery under Supreme Court Rules 201 and 214, since the provisions for "inspection" contained therein do not specifically sanction *every* type of testing. It was the defendant's position that in light of the realities of products liability litigation, destructive testing was well within the spirit of full disclosure inherent in all of the discovery rules.

In reversing the trial court, the appellate court[91] noted the desirability of full disclosure in that the purpose of litigation was best served when each party knows as much about the controversy as is reasonably practicable. It also emphasized the wide discretion afforded the trial court, which is the final arbiter of scope of discovery requests. In this context, however, special problems arose: if the court provided for destructive testing, adequate protective measures were mandated. Whatever the method of testing, it should be relevant to the issues, the information must not be obtainable in any other less destructive way, and it should be made certain that the alteration or destruction of the item will not impair or prevent adequate presentation of the case by the adversary.[92]

After carefully scrutinizing the language of Rules 201 and 214 and noting the absence of any specific provision for such testing, the court turned to the basic policy questions involved in the issue of destructive testing and concluded that such questions should be determined by the supreme court, particularly since the resolution could involve a possible amendment of the Supreme Court Rules, or an interpretation not theretofore approved by the supreme court.[93]

89. This is a type of testing that necessitates destruction of all or part of the allegedly defective item for purposes of chemical or structural analysis.

90. The safeguards related to notice of place and time of testing, presence of plaintiff's representative at the test and possession of samples obtained.

91. Sarver v. Barrett Ace Hardware, Inc., 29 Ill. App. 3d 195, 330 N.E.2d 269 (1976).

92. *Id.* at 197, 330 N.E.2d at 271.

93. *Id.* at 199, 330 N.E.2d at 272.

The Illinois Supreme Court,[94] after reaffirming the principle of full disclosure and acknowledging the novelty of the question, affirmed the trial court order. The supreme court also stressed the factors of necessity and protecting against any trial disadvantages to the adversary that might result due to the method or extent of the proposed tests and concluded:

> [W]e hold that 'testing' whether 'destructive' or not, authorized in the exercise of sound discretion of the trial court, falls within the purview of 'inspection' under Rule 214, and disclosure of the 'nature' and 'condition' of tangible things under Rule 201(b)(1). To hold otherwise would frustrate the objective of Rule 201 of 'full disclosure regarding any matter relevant to the subject matter involved in the pending action. . . .'
>
> Our holding necessarily vests broad discretionary powers in trial court, and 'such a breadth of power requires a careful exercise of discretion in order to balance the needs of truth and excessive burden to the litigants.' (*People ex rel. General Motors Corp. v. Bua* (1967), 37 Ill. 2d 180, 193, 226 N.E.2d 6, 14.) In dealing with requests for testing and experimentation, the trial court should avail itself of the provisions of section (c) of Rule 201 which authorize protective orders and the suprevision of discovery by the trial court.[95]

Regrettably, the absence of more particularized supreme court guidelines is unavoidable due to the wide variety of products and testing methods utilized in the products liability field. Thus, one can only hope for a flexible attitude towards the Rules by trial courts in their exercise of sound discretion. While the issue of destructive testing will arise only in manufacturing defect cases,[96] perhaps the increased judicial experience in the drafting of protective orders will result in a new Supreme Court Rule dealing directly with this most complex discovery question.

DEPOSITIONS

The oral deposition is perhaps the most potent of the several discovery devices available to counsel. Given the opportunity to question under oath the adversary or an important witness, counsel can utilize the data previously gathered, analyzed and digested, in the context of the human dynamic which is so important in the eventual outcome of the actual trial. While the an-

94. 63 Ill. 2d 454, 349 N.E.2d 28 (1976).
95. *Id.* at 460-61, 349 N.E.2d at 30.
96. In design defect cases there would be no difficulty due to the ready availability of similarly designed units manufactured by the defendant. Nor would the question arise where the warnings, instructions or packaging are at issue. *See also* Klick v. R.D. Werner Co., 38 Ill. App. 3d 575, 348 N.E.2d 314 (1976), which stressed the importance of properly drafted supervisory orders for nondestructive testing of a defective unit and also held that such tests were not considered the testing attorney's work product so as to justify a refusal to allow the presence of adversary counsel's representatives during the course of such tests.

swers to questions propounded at a discovery deposition generally are not evidence, the experience allows counsel a "dry run" in which to gauge the deponent's recollection, demeanor and veracity and to estimate the ultimate impact such witness will have on the trier of fact. Supreme Court Rules 202 through 212 govern the nature, scope and use of depositions.

Supreme Court Rule 202[97] states the general purposes for which depositions may be taken, whether discovery or evidentiary in nature.[98] The right of parties to take depositions is considered fundamental to our adversary system and may not be avoided by way of dilatory technical actions or simple noncompliance.[99] While the provision for the separate taking of discovery and evidence depositions appears cumbersome, costly and time consuming, the contrary federal practice of combining the two was believed to limit and impair the utility of each. This is due to what the drafting committee thought was the absence of suffi-

---

97. ILL. REV. STAT. ch. 110A, § 202 (1975). Supreme Court Rule 210 specifically provides for the taking of depositions by written question:

> (a) Serving Questions; Notice. A party desiring to take the deposition of any person upon written questions shall serve them upon the other parties with a notice stating the name and address of the person who is to answer them if known, or, if the name is not known a general description sufficient to identify him, and the name or descriptive title and address of the officer before whom the deposition is to be taken. Within 14 days thereafter a party so served may likewise serve cross questions. Within seven days after being served with cross questions a party may likewise serve redirect questions. Within seven days after being served with redirect questions, a party may likewise serve recross questions.
>
> (b) Officer To Take Responses and Prepare Record. The party at whose instance the deposition is taken shall transmit a copy of the notice and copies of the initial and subsequent questions served to the officer designated in the notice who shall proceed promptly, in the manner provided by rules 206(e) and 207, to take the testimony of the deponent in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him. No party, attorney, or person interested in the event of the action (unless he is the deponent) shall be present during the taking of the deposition or dictate, write, or draw up any answer to the questions.

ILL. REV. STAT. ch. 110A, § 210 (1975). Due to the cumbersome nature of this discovery device and the prohibition against the presence of counsel during the deposition, it is seldom used.

98. ILL. REV. STAT. ch. 110A, § 202 (1975):

> Any party may take the testimony of any party or person by deposition upon oral examination or written questions for the purpose of discovery or for use as evidence in the action. The notice, order or stipulation to take a deposition shall specify whether the deposition is to be a discovery deposition or an evidence deposition. In the absence of specification a deposition is a discovery deposition only. If both discovery and evidence depositions are desired of the same witness they shall be taken separately, unless the parties shall stipulate otherwise or the court orders otherwise upon notice and motion.

99. Slatter v. City of Chicago, 12 Ill. App. 3d 808, 299 N.E.2d 442 (1973).

100. ILL. ANN. STAT. ch. 110A, § 202 (Smith-Hurd 1975) (Historical and Practice Notes).

cient safeguards during the course of the unified deposition in terms of its effective later use at trial.[100]

Rule 204(a)(3) provides that a deposition of any resident party or an officer, director or employee of a party may be initiated by notice,[101] without the necessity of a subpoena. The same procedure applies to the production of any documents that the deposing party wishes brought to the deposition. The issuance of a subpoena can be required to initiate the deposition of a nonparty or physician.[102] The clerk of the court has authority under the rule to issue to nonparties subpoenas which are to be accorded the same dignity as those issued by the court itself. As regards physicians and surgeons, however, an actual court ordered subpoena is required.[103]

The location and actual arrangements for the deposition is left up to the parties who normally stipulate to mutually convenient terms.[104] Under Rule 203,[105] the court may order a nonresident to appear in this state or elsewhere for deposition purposes, whether discovery or evidence in nature. The deposition may be taken before any officer authorized to administer oaths, normally a court reporter, who, pursuant to Rule 206(e)[106] is to swear the deponent and record and certify the testimony given.[107]

As to the scope of questions propounded on oral deposition, Rule 206(c),[108] in keeping with the principle of full disclosure, states that the deponent may be examined as to any relevant matter subject to discovery under the rules. Questions whose answers would violate the attorney-client privilege or require a legal conclusion[109] are not allowed and hence may be objected to.

The form of questioning for discovery depositions is governed by Rule 206(c)(1)[110] which provides that the deponent may be questioned as if under cross-examination, within the limitations allowed in that mode of examination. In the course of an evidence deposition, the examination and cross-examination must be conducted as if the deponent were being examined at trial.[111]

---

101. *Id.* § 204(a)(3).
102. *Id.* §§ 204(a)(3), 204(a)(1).
103. *Id.*
104. ILL. REV. STAT. ch. 110A, § 201(i) (1975).
105. *Id.* § 203 (1975).
106. *Id.* § 206(e).
107. Prior to the initiation of questioning, signatures are normally waived by counsel. This saves the client the trouble of reading the transcript after it has been typed and certifying its correctness.
108. ILL. REV. STAT. ch. 110A, § 206(c) (1975).
109. Carlson v. Healy, 69 Ill. App. 2d 236, 215 N.E.2d 831 (1966).
110. ILL. REV. STAT. ch. 110A, § 206(c)(1) (1975).
111. *Id.* § 206(c)(2).

Rule 206(d) allows for the termination of the deposition when it is allegedly being conducted in bad faith or in a manner that "unreasonably annoys, embarrasses or oppresses the deponent."[112] Rule 201(c)(1), providing for the entry of protective orders, empowers the court to take appropriate steps to insure propriety when the deposition is resumed.[113]

Use of Depositions

The most important provisions relative to the effective use of depositions are set out in Rules 211 and 212,[114] governing respectively, errors, irregularities and objections and the appropriate uses for deposition testimony. Rule 212 sets limits on the use of both discovery and evidence depositions aside from their information gathering and witness assessment functions. As regards the use of discovery depositions at trial, the rule provides specific limitations.[115]

If, as is normally the case, only a portion of a discovery deposition is utilized for any of the enumerated purposes, the opposing party is entitled to read or have read any other portion which in fairness ought to be considered in connection with the part read.[116] It is also important to note that the mere taking of a deposition does not make the deponent the deposing party's witness.[117] However, the use of the deposition for any purpose other than impeachment or to establish an admission *does* make the deponent the witness of the offering party to the same extent as if such witness were testifying as an adverse witness under section 60 of the Civil Practice Act.[118]

As to evidence depositions, which are generally the exception rather than the rule in discovery practice, subsections (b)(1)-(3) of Rule 212 control their use.[119] It is important to distinguish

---

112. *Id.* § 206(d).
113. *Id.* § 206(c)(1).
114. *Id.* §§ 211-12.
115. *Id.* § 212(a):
Discovery depositions taken under the provisions of this rule may be used only:
(1) for the purpose of impeaching the testimony of the deponent as a witness in the same manner and to the same extent as any inconsistent statement made by a witness;
(2) as an admission made by a party or by an officer or agent of a party in the same manner and to the same extent as any other admission made by that person;
(3) if otherwise admissible as an exception to the hearsay rule; or
(4) for any purpose for which an affidavit may be used.
116. *Id.* § 212(c).
117. *Id.* § 212(e).
118. *Id.*
119. (b) Use of Evidence Depositions. All or any part of an evidence deposition may be used for any purpose for which a discov-

the right to *take* an evidence deposition from the right to *use* it later at trial. Under prior law,[120] the issue of the later use at trial of an evidence deposition was resolved by an examination of the circumstances existing at the time it was taken. Under present law, such use is determined under Rule 212(b)(1)-(3) by reference to the circumstances existing at the time of the trial. Due to this shift of emphasis, evidence depositions, which may or may not be *used* as evidence at trial, may be *taken* even if the deponent is in good health and residing in the jurisdiction.

In this latter regard, it is also important to note the circumstances wherein counsel for the party to be deposed may utilize the deposition as evidence under Rule 212(b)(1)-(3) in the event that initiating counsel chooses not to offer it. The fifth appellate district, in the case of *Dobkowski v. Lowe's, Inc.*,[121] recently has set guidelines to cover such a situation:

> Where a plaintiff desires to introduce into evidence an evidence deposition taken by the defendant, the proper procedure is for the plaintiff to ask the defendant in open court whether he intends to use the deposition in his case. If the defendant answers affirmatively, the plaintiff may not use the deposition in his case. If, after such an exchange, the defendant fails to introduce the evidence deposition, the plaintiff should be permitted to reopen his case for the purpose of introducing the deposition into evidence. If the defendant responds when questioned in open court that he does not intend to use the deposition, the plaintiff may introduce the deposition into evidence as part of his case.[122]

The party seeking to introduce the evidence deposition must present sufficient facts to meet one of the admissibility criterion

---

ery deposition may be used, and may be used by any party for any purpose if the court finds that at the time of the trial:

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

(2) the deponent is out of the country, unless it appears that the absence was procured by the party offering the deposition, provided, that a party who is not a resident of this state may introduce his own deposition if he is absent from the country; or

(3) the party offering the deposition has exercised reasonable diligence but has been unable to procure the attendance of the deponent by subpoena; or finds, upon notice and motion in advance of trial, that exceptional circumstances exist which make it desirable, in the interest of justice and with due regard for the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

Id. § 212(b) (1975).

Rule 217 allows depositions for the purpose of perpetuating testimony. The statutory prerequisites are quite extensive. This device allows for the deposition to be taken prior to the filing of suit and has many similarities to an evidence deposition. *See* ILL. ANN. STAT. ch. 110A, § 217 (Smith-Hurd 1975) (Historical and Practice Notes).

120. *See, e.g.*, Jacobs v. Mutual Life Ins. Co., 341 Ill. App. 293, 93 N.E.2d 516 (1950).

121. 20 Ill. App. 3d 275, 314 N.E.2d 623 (1974).

122. *Id.* at 279, 314 N.E.2d at 627.

set out in Rule 212(b)(1)-(3)[123] and the trial court should make such a finding on the record. This aspect of Rule 212 was recently discussed in the case of *Ledingham v. Blue Cross Plan for Hospital Care of Hospital Service Corp.*,[124] also decided by the fifth appellate district.

In *Ledingham*, an action was brought for breach of contract based on defendant hospitalization carrier's refusal to pay a claim. The carrier's refusal was on the basis that the subject illness was in existence within the 270 day period prior to the effective date of the policy and hence not covered by its terms. On that issue, plaintiff was allowed to introduce the evidence deposition of her doctor who at the time of trial was confined to a wheelchair. In rejecting defendant's position that the trial court's failure to make a finding that Rule 212(b)(1) or (b)(3) had been satisfied, thus making the introduction of the deposition error, the court stressed the importance of the underlying facts rather than the presence or absence of a formal determination in such cases.[125]

Supreme Court Rule 211, dealing with the effect of errors and irregularities in the deposition itself and objection to questions asked, is of prime importance relative to the later use of the deposition under the authority of Rule 212. Subsection (c), the heart of the rule, which applies to both evidence and discovery depositions, provides for specific objection procedures.[126] This provision serves as the basis for the majority of appeals involving deposition related issues. The necessity of making an

---

123. *See* note 119 and accompanying text *supra*.

124. 29 Ill. App. 3d 339, 330 N.E.2d 540 (1975).

125. [I]t seems clear in this case, the trial court erred in failing to make a finding that 'deponent is . . . unable to attend or testify because of . . . infirmity . . . .' However, it is also clear that this failure does not require a reversal . . . because the doctor, who was confined to a wheelchair, and who felt that he could not testify, would be exempt from testifying in person. The deposition was proper in this case: the trial court merely did not find, as it should have at the time of trial, that the deponent was infirm.

Id. at 353, 330 N.E.2d at 550.

126. ILL. REV. STAT. ch. 110A, § 211(c)(1)-(4) (1975):

(c) As to Competency of Deponent; Admissibility of Testimony; Questions and Answers; Misconduct; Irregularities. (1) Grounds of objection to the competency of the deponent or admissibility of testimony which might have been corrected if presented during the taking of the deposition are waived by failure to make them at that time; otherwise objections to the competency of the deponent or admissibility of testimony may be made when the testimony is offered in evidence.

(2) Objections to the form of a question or answer, errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the oath or affirmation, or in the conduct of any person, and errors and irregularities of any kind which might be corrected if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(3) Objections to the form of written questions are waived un-

initial objection to the nature, form, or factual content of a question or answer and of continuing to object if the deposition proceeds on the same inappropriate line of inquiry, was recently emphasized in the case of *Neuner v. Schilling Petroleum Co.*[127]

In *Neuner*, the plaintiff brought suit against the manufacturer and the installer of an underground gasoline pipe in a store near the plaintiff's property, for damages sustained when gasoline leaked into his basement and well. Plaintiff took the evidence deposition of an expert who, when questioned on the basis of a set of hypothetical facts, stated his opinion that the leak was caused by the overtightening of a fitting during installation of the pipeline. Defendant objected to the question based on the absence of sufficient ultimate facts in the question and supplied the same. The deponent then stated that the fitting was "apparently overtightened." Defendant again objected on the basis that the opinion was not grounded on sufficient facts. The witness again responded that overtightening "appeared" to be the cause. Thereafter, defense counsel did not object or move that such testimony be stricken, all of which the deposition transcript reflected. At trial, the evidence deposition was admitted and judgment entered in the plaintiff's favor.

In rejecting the defendant's contention that his objections to the expert's testimony were sufficient for review by the trial court, the appellate court noted objecting counsel's duty to point out the defects in a hypothetical question and stressed the necessity of continued objections to avoid a waiver under Rule 211:

> Although [defense] counsel objected to the form of the hypothetical, he was allowed to alter it, and Deppe's response was the same to the hypothetical in its amended form. As to the objection concerning the evidentiary insufficiency for Deppe's opinion that the fitting was 'apparently overtightened,' this also was remedied by reaffirmance. Thus, defendant's counsel must be seen as acquiescing in the responses to the amended questions. Viewed as such, the objections were insufficient to remove [the defendant] from the effect of the above-stated rule. Accordingly, defendant Hirth's objections as to factual insufficiency of Deppe's conclusions were waived.[128]

An additional issue raised by the defendant in *Neuner* was whether the trial court's reliance on an evidence *deposition* al-

---

less served in writing upon the party propounding them within the time allowed for serving succeeding questions and, in the case of the last questions authorized, within seven days after service thereof.

(4) A motion to suppress is unnecessary to preserve an objection seasonably made. Any party may, but need not, on notice and motion obtain a ruling by the court on the objections in advance of the trial.

127. 26 Ill. App. 3d 148, 325 N.E.2d 34 (1975).

128. *Id.* at 150, 325 N.E.2d at 36.

lowed for an exception to the long followed principle that an appellate court should give deference to the trial court's ability to judge the credibility of witnesses, when the issue on appeal is the sufficiency of the evidence to sustain the verdict. The appellate court, after noting that substantial live testimony was presented at trial, held that "review of a single deposition provides an insufficient basis on which to substitute judgment where live testimony was also given."[129]

SANCTIONS FOR NONCOMPLIANCE

Due to the importance of prompt and complete compliance with requests for discovery in the process of counsel's application of professional skills, a wide variety of sanctions are available to trial courts in instances of entire or partial noncompliance. Supreme Court Rule 219[130] makes provision for appropriate sanctions at each stage of the discovery process.

Subsection (a) specifically makes costs and attorney's fees available in cases of refusal, without substantial justification, to answer interrogatories, questions propounded on oral deposition, or to fully comply with a request for production. The same sanction may be imposed against the moving party if the court determines that the motion seeking the imposition of sanctions was made without substantial justification.[131]

Rule 219(c) sets forth the major sanctions available to the trial court. They are applicable to cases of alleged noncompliance under any of the discovery devices.[132] The sanctions range

---

129. *Id.* at 151, 325 N.E.2d at 37.
130. ILL. REV. STAT. ch. 110A, § 219 (1975).
131. *Id.* § 219(a).
132. (c) Failure to Comply with Order or Rules. If a party, or any person at the instance of or in collusion with a party, unreasonably refuses to comply with any provisions of rules 201 through 218, or fails to comply with any order entered under these rules, the court, on motion, may enter, in addition to remedies elsewhere specifically provided, such orders as are just, including, among others, the following:
(i) that further proceedings be stayed until the order is complied with;
(ii) that the offending party be debarred from filing any other pleading relating to any issue to which the refusal or failure relates;
(iii) that he be debarred from maintaining any particular claim, counterclaim, third-party complaint, or defense relating to that issue;
(iv) that a witness be barred from testifying concerning that issue;
(v) that, as to claims or defenses asserted in any pleading to which that issue is material, a judgment by default be entered against the offending party or that his suit be dismissed with or without prejudice; or
(vi) that any portion of his pleadings relating to that issue be stricken and, if thereby made appropriate, judgment be entered as to that issue.
In lieu of or in addition to the foregoing, the court may order that

from a simple stay of the proceedings to a dismissal of those counts of the complaint relating to the noncompliance with judgment entered against the noncomplying party, where appropriate.

A 1974 amendment to Rule 201, the general discovery provision, specifically places on initiating counsel the burden of assessing the sufficiency of compliance by the recipient. The assessment must be realistic in light of the substantial time demands of practice. Rule 201(k), the new provision, provides:

> *Reasonable Attempt to Resolve Differences Required.* Every motion with respect to discovery shall incorporate a statement that after personal consultation and reasonable attempts to resolve differences the parties have been unable to reach an accord. The court may order that reasonable costs, including attorneys' fees, be assessed against a party or his attorney who unreasonably fails to facilitate discovery under this provision.[133]

This provision has substantially reduced the number of motions seeking the imposition of sanctions immediately after the standard statutory period of twenty-eight days for compliance has passed. In addition to diminishing this costly and time consuming aspect of discovery practice, valuable court time is saved for more important matters. Prior to the amendment many trial courts, recognizing an attorney's time constraints, felt compelled to withhold sanctions until noncompliance with one or more previous orders, mandating compliance with prior requests under the rules, was demonstrated. Hopefully Rule 210(k), applicable to all forms of discovery, will eliminate this vicious circle.

The imposition of sanctions is within the sound discretion of the trial court and is meant to serve as an impetus to achieving the goal of full disclosure, not as a punishment to the recalcitrant or dilatory party.[134] Since all discovery can be initiated by request, it is important to realize that regardless of particular court practices, no preliminary court order need be violated as a prerequisite to the imposition of sanctions under Rule 219. The

---

> the offending party or his attorney pay the reasonable expenses, including attorney's fees, incurred by any party as a result of the misconduct, and by contempt proceedings compel obedience by any party or person to any subpoena issued or order entered under said rules.

ILL. REV. STAT. ch. 110A, § 219(c) (1975).

Counsel's subjecting himself to a contempt citation is an appropriate method of challenging on appeal the entry or scope of a pre-trial discovery order. *See* Bicek v. Quitter, 38 Ill. App. 3d 1027, 350 N.E.2d 125 (1976).

133. ILL. REV. STAT. ch. 110A, § 201(k) (1975).

134. People *ex rel.* General Motors Corp. v. Bua, 37 Ill. 2d 180, 226 N.E.2d 6 (1967).

135. 25 Ill. App. 3d 864, 323 N.E.2d 435 (1975).

importance of this fact was recently emphasized in two appellate court decisions, *Savitch v. Allman*[135] and *Trippel v. Lott*.[136]

In *Savitch*, attorney's fees were assessed against the plaintiff's attorney for unreasonable refusal to answer interrogatories. After holding that a six month delay constituted an "unreasonable" refusal, the court discussed the purpose of imposing minor sanctions in such cases:

> It is obvious that to impose no sanction of any kind would create a feeling among attorneys that discovery deadlines could be lightly ignored and even willfully flaunted. The deadlines are imposed for significant reasons, particularly to keep the litigation constantly progressing toward a prompt and just termination, and to insure that evidence is made available to both sides while it still exists.[137]

In response to the appellant's placing great weight on the fact that defense counsel did not attempt to obtain a court order mandating compliance, the court stated:

> There is nothing in the rules which requires that such action be taken by the party complaining of a failure to comply with the rules of court. The rules have specific provisions for procedures for sanctions in the event of a failure to comply with provisions of the rules. It is not a prerequisite to the action to require the imposition of sanctions under Rule 219 that a preliminary court order be sought, obtained, and thereafter ignored by the offending party. . . . If a specific order was required in all cases before sanctions are imposed, a dilatory attorney could simply delay as long as he wished, with consequential inconvenience to the court and other litigants, until he is commanded by order to perform an act which is required by the rules. No such procedure is required nor would it be desirable.[138]

On similar reasoning, the court in *Trippel v. Lott*[139] upheld the trial court's suppression of a statement made by the plaintiff, due to the defendant's failure to produce it pursuant to a "Monier" order[140] for its production:

> Further, we specifically reject the defendant's suggestion that the plaintiff was under a duty to further enforce the original *Monier* order that she caused to be entered, and that her failure

---

136. 19 Ill. App. 3d 936, 312 N.E.2d 369 (1974).

137. 25 Ill. App. 3d 864, 868, 323 N.E.2d 435, 438 (1975). *See also* North Park Bus Service, Inc. v. Pastor, 39 Ill. App. 3d 406, 349 N.E.2d 664 (1976), affirming the trial court's order that counsel pay $100 for failure to produce requested documents.

138. 25 Ill. App. 3d 864, 869, 323 N.E.2d 435, 439 (1975). *But see* Acosta v. Chicago Transit Auth., 39 Ill. App. 3d 80, 349 N.E.2d 613 (1976), where the court, in affirming the decision of the trial court to allow a witness who had not been listed in answers to interrogatories to testify, stressed the absence of any action on the plaintiff's part to compel complete answers after service of the interrogatories. *See* the discussion of this case in the text accompanying notes 152-53 *infra*.

139. 19 Ill. App. 3d 936, 312 N.E.2d 369 (1974).

140. *See* text accompanying notes 82-83 and note 85 *supra*.

> to do so until a short time prior to trial somehow excused the defendant from producing the statement until then. . . . Were we to adopt the defendant's suggestion we would not only be responsible for further lengthening the already considerable delay in personal injury actions in this district, but we would do violence to the spirit and intent of the *Monier* decision itself . . . and the Supreme Court rules that implement that holding.[141]

It appears clear that the language of the *Trippel* decision will be applicable to requests for production under revised Rule 214 which eliminates the necessity of a preliminary court (*Monier*) order to initiate discovery.

Limitations on the Imposition of Sanctions

As noted above, while the imposition of sanctions under Rule 219 is within the discretion of the trial court, the rule itself sets limits on its use by requiring that there be a reasonable relation between the requested sanction and the nature of the noncompliance by the dilatory party. Specifically, subsections (c)(ii), (c)(iii), (c)(v) and (c)(vi) of Rule 219,[142] providing for the debarring of particular pleadings or claims, judgments by default and the striking of pleadings in whole or in part, are conditioned by the requirement that the information constituting the basis for the motion for sanctions have some relation to the particular sanction desired.

The Illinois Supreme Court in *People ex rel. General Motors v. Bua*,[143] has interpreted the predecessor rule to Rule 219 as "authorizing pleadings to be stricken only when the stricken pleadings bear some reasonable relationship to the information withheld."[144] This position was recently affirmed with regard to Rule 219 in the case of *Department of Transportation v. Zabel*,[145] decided by the third appellate district.

In *Zabel*, the trial court dismissed a petition for the condemnation of land belonging to the defendant due to the plaintiff's failure to produce, pursuant to a "Monier" order, all appraisals of the land being condemned and that remaining. In holding that the trial court committed error, the appellate court stressed both the reasonable relationship principle and the availability of other, less severe sanctions:

> Obviously a '*reasonable relationship*' should be required as a minimum when the sanction is not merely the striking of pleadings but the ourtright dismissal of the case. As clearly expressed

141. 19 Ill. App. 3d 936, 942-43, 312 N.E.2d 369, 374 (1974).
142. ILL. REV. STAT. ch. 110A, § 219(c)(i)-(vi) (1975).
143. 37 Ill. 2d 180, 226 N.E.2d 6 (1967).
144. *Id.* at 197, 226 N.E.2d at 16.
145. 29 Ill. App. 3d 407, 330 N.E.2d 878 (1975).

> in cases considering the issue of sanctions, the action of the court in imposing such sanctions should be such as to promote the goal of discovery, not to punish the offending party . . . . The dismissal of a cause with prejudice is a drastic sanction and should be employed only as a last resort, when the uncooperative party shows 'a deliberate contumacious or unwarranted disregard of the court's authority' . . . .[146]

Even though the reasonable relation rule and the view of dismissal as a last resort set some limits on the severity of sanctions, continued refusal to comply with requests for discovery have and will continue to serve as the basis for the imposition of this ultimate sanction. A recent factual precedent in this regard is provided by the case of *Bender v. Pfotenhauer*,[147] decided by the third appellate district.

In *Bender*, the plaintiff's complaint was dismissed with prejudice due to his consistent failure to attend scheduled depositions. In rejecting the appellant's argument that less restrictive sanctions were appropriate, the court stated:

> While we are reluctant to approve a dismissal of an action as a consequence of failure to comply with court orders and rules, we are reminded by defense counsel that '[u]nder our system of representative litigation the general rule is that the client is bound by the acts and omissions of his lawyer-agent in the prosecution of a remedy.[148]

Rule 219(c)(iv)[149] which provides for the barring of oral testimony or documentary evidence at trial if the data contained therein or the identity of the person to testify was the subject of a request for discovery that was not complied with, was recently considered by the first appellate district in the case of *Anderson v. City of Chicago*.[150] In *Anderson*, an action for personal injuries by a pedestrian struck by a police car, the court

---

146. *Id.* at 410, 330 N.E.2d at 880. *See also* North Michigan Ave. Bldg., Inc. v. Fact System, 25 Ill. App. 3d 529, 323 N.E.2d 493 (1975).

147. 21 Ill. App. 3d 127, 315 N.E.2d 137 (1974).

148. *Id.* at 130, 315 N.E.2d at 139 (citing Danforth v. Checker Taxi Co., 114 Ill. App. 2d 471, 253 N.E.2d 114 (1969)). The *Bender* court goes on to state:

> In the case before us, plaintiff failed to appear for a discovery deposition in May, with no reason given for such failure. It was shown that he failed to obey the court order entered on June 29, for a deposition on July 19, with no reason given for such failure. He also failed to appear for a pretrial conference on August 20 with no sound reason given. The court vacated the August 20 order of dismissal and set October 24, 1973, a time agreeable to plaintiff, as the time for the taking of the deposition. As indicated, neither plaintiff nor his counsel was present at the appointed time at 1:30 P.M. on that date.

Id. Cf. Conover v. Smith, 20 Ill. App. 3d 258, 314 N.E.2d 638 (1974) (dismissal for failure to attend pre-trial conference reversed as being too severe considering that counsel was at trial elsewhere).

149. ILL. REV. STAT. ch. 110A, § 219(c)(iv) (1975).

150. 29 Ill. App. 3d 971, 331 N.E.2d 243 (1975).

allowed a witness to testify over the defendant's objection that the interrogatories requesting the names of all prospective witnesses were never answered. Upon the plaintiff's statement that such interrogatories had never been received, the court allowed the answers to be given in open court. The court also gave the defendant an opportunity to depose the testifying witness which was done on the day before her court appearance. Judgment was entered in plaintiff's favor.

On appeal, in rejecting the defendant's contention of trial court error in allowing the testimony, the court emphasized the absence of the factors normally present in cases upholding the exclusionary sanction under the rule holding "[w]e have reviewed the cases cited by defendants and find them to be distinguishable on the facts. Suffice it to say, those decisions involve extreme cases of bad faith, surprise, inadequate opportunity to investigate, or other such factors not present here."[151]

Other important considerations were noted. The court emphasized that the case at bar was tried before the court sitting without a jury, and that there was some question as to whether plaintiff's counsel received the requested interrogatories prior to trial. It was also observed that defense counsel was offered, but declined, a continuance by the court in order to allow a sufficient opportunity to investigate the matter. In light of all these mitigating factors, the court concluded that whatever prejudice there might be, it was insufficient to warrant imposition of the exclusionary sanction.

A similar result was reached in *Acosta v. Chicago Transit Authority*,[152] decided by the first appellate district on similar facts. In upholding the trial court's allowing the testimony of a bus driver whose name had not been listed in the defendant's answers to interrogatories, the court stressed, as in *Anderson*, the necessity for a clear showing of prejudice prior to the barring of testimony as a sanction for noncompliance:

> Plaintiff in the case before us filed her interrogatories on October 26, 1973. No further production orders were requested. Not until April 30, 1974, while the trial was in progress did plaintiff ask the court for sanctions against defendant for his failure to respond to her interrogatories. Plaintiff requested that the bus driver whose name was not given in response to the two interrogatories be barred from testifying at trial. She did not ask for a continuance to depose or interview the bus driver. Furthermore, she knew the number of the bus in question and yet did not ask for the name of the bus driver. She did not pursue the answers to her interrogatories from the date of filing

151. *Id.* at 978, 331 N.E.2d at 248.
152. 39 Ill. App. 3d 80, 349 N.E.2d 613 (1976).

until the bus driver was actually called as a witness. We are of the opinion the trial court did not abuse its discretion in allowing the bus driver to testify.[153]

CONCLUSION

This sketch of Illinois discovery rules, case law and practice is obviously not meant to supplant a solid reading and study of the rules and cases themselves. Its purpose has been to acquaint or refresh the reader's recollection in regard to the broad features of this most vital aspect of legal practice. Today, litigation is increasingly complex, court calendars are often congested and trial time is frequently expensive for both the client and his counsel. Proper and judicious use of the available discovery tools will undoubtedly expedite the resolution of conflict—the ultimate goal of every legal action. The "old hound" may never be replaced, but the use of discovery provisions will prove a valuable addition to every fact finder's arsenal.

153. *Id.* at 81-82, 349 N.E.2d at 615.