

# WITNESS PROTECTIONS IN ILLINOIS CIVIL ACTIONS

Jeffrey A. Parness\*

## I. INTRODUCTION

This article examines the laws guiding witnesses at depositions, hearings, and trials in civil actions in Illinois circuit courts. Such laws encompass norms for judicial limits ahead of any scheduled depositions or testimonies; for the taking of depositions and the presenting of testimonies once scheduled; and, for judicial sanctions arising from witness abuse during depositions, hearings, or trials. The study includes a general review of other American trial court guidelines, especially comparing Illinois circuit court and federal district court practices.

The article concludes Illinois lawmakers, in both the Supreme Court and in the General Assembly, have insufficiently protected civil case witnesses before, during, and after witness interrogations. This lack of protection is especially evident upon viewing of the greater protections afforded by other American jurisdictions.

Amendments to American civil practice guidelines, especially on formal discovery, are common. New discovery laws should be considered in Illinois in order to protect witnesses better.<sup>1</sup> The general federal civil procedure rule on discovery has been amended eight times since 1980.<sup>2</sup> The comparable Illinois rule has been revised five times since 1981.<sup>3</sup> Yet

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\* Professor Emeritus, Northern Illinois University College of Law. Thanks to Russ Kazda for his research assistance and to the U.S. Chamber of Commerce for supporting some of the research leading to the article. All analyses, errors, and omissions are mine alone.

1. Witness protections arise both from limits on those seeking discovery and from judicial controls over discovery initiatives. The evolution of modern discovery methods and their controls is well-explained in Paul M. Connolly, Edith A. Holleman and Michael J. Kuhlman, *Judicial Controls and the Civil Litigation Process: Discovery* (District Court Study Series, Federal Judicial Center, June, 1978) at 5-17.
2. Amendments to Federal Civil Procedure Rule (FRCP) 26 took effect in 1980, 1983, 1987, 1993, 2000, 2006, 2007 and 2010 (though the 2007 amendments only restyled, and thus (allegedly) did not significantly alter practices). Congress as well as the federal judicial rulemakers continue to discuss possible civil discovery reforms. *See, e.g.*, House Panel Looks at Discovery Costs, Urged to Defer to Judicial Rulemaking, 80 U.S.L.W. 827 (12-20-11) (most think federal judicial rulemaking rather than preemptive Congressional action is best, and many believe evidence preservation and sanctions for evidence spoliation require the attention of judicial rulemakers).
3. Amendments to Illinois Supreme Court Rule (ILLR) 201 took effect in 1981, 1982, 1989, 1995 and 2002. The significant changes that occurred in 1995 are described in Stephen F. Pflaum and Faustin A. Pipal, Jr., *Successful Practice Under the New Illinois Civil Discovery Rules*, 9 CBA Record 20 (Oct. 1995).

the major federal changes involving compelled disclosures, meet and confer demands, certification standards, more limited relevancy, and discovery plans have not been added in Illinois, leaving greater opportunities in Illinois for witness abuse. These changes were designed to insure that discovery is appropriately sequenced and not unduly burdensome.

In reviewing witness protections, the article must necessarily confront a few foundational questions, including whether all witnesses should be similarly treated and, if not, which witnesses require special protections. For example, in some jurisdictions courts will consider, under the Apex Doctrine, the potential burden of a deposition relative to its likely benefits. Differentiated guidelines for entity leaders (and perhaps others) are often deemed necessary, in part, because: (A) entity leaders usually know much less about the relevant facts than do others; (B) entity leaders with some knowledge are abused more frequently than others; and, (C) the economic costs to certain entity parties whose agents respond are far greater than the costs for witnesses generally. The Apex Doctrine often supplements, and reinforces, written civil procedure laws promoting cost effective, convenient and nonduplicative information gathering.

The article first explores appropriate guidelines for limiting future witness questioning at depositions, trials or hearings. This exploration considers the possible adoption in Illinois of the federal meet and confer mandate, or perhaps a more explicit and demanding case management conference rule devoted to discovery scheduling.

Next, current Illinois guidelines on the taking of depositions and on the giving of testimonies in trials and hearings are examined. The article explores possible new norms, including a good cause requirement for scheduling certain witnesses; a requirement that alternative routes of information or evidence procurement first be explored for certain witnesses; and, new time, place and manner restrictions that help mitigate the costs of scheduled depositions and testimonies.

Finally, the article explores possible judicial actions following witness abuses during depositions and testimonies, including sanctions on parties, their lawyers and their law firms. Sanctions can involve public or private interests, thus encompassing both disciplinary referrals and costshifting.

In assessing possible reforms, the article will also consider whether actions by the Illinois General Assembly or the Illinois Supreme Court are most appropriate. While there is much shared civil procedure lawmaking authority, resulting in both significant Civil Procedure Code and Supreme Court Rule provisions on testimonial and nontestimonial witness presentations, certain initiatives may need to be primarily, or exclusively, legislative or judicial in nature. Today, General Assembly authority over

so-called statutory causes of action seems preeminent, while Supreme Court authority over certain civil jury trial procedures appears dominant.<sup>4</sup> In assessing possible reforms, the article will not consider other discovery methods, like interrogatories (though clearly at least certain of the suggested reforms would prevent discovery abuses outside of depositions).

## II. PREEMPTING WITNESS ABUSE

Might certain witnesses be afforded opportunities to prevent altogether, or to limit, formal questioning of themselves even before they are summoned for questioning? If so, which witnesses and what preemptive mechanisms are most appropriate?

### A. Federal Meet and Confer Practices

In the federal district courts there are no explicit rules or statutes generally permitting party or nonparty witnesses to head off altogether, or to limit, unscheduled depositions. Under Federal Rule of Civil Procedure (FRCP) 26(c), only a party or any person “from whom discovery is sought” may move for a protective order.<sup>5</sup> By contrast, under the general Illinois discovery rule,<sup>6</sup> in civil actions any party or witness may seek “a protective order as justice requires, denying, limiting, conditioning or regulating discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression.” The general discovery rule in Illinois further recognizes that circuit courts “may supervise all or any part of any discovery procedure,” seemingly permitting sua sponte case-by-case judicial oversight ahead of discovery initiatives.<sup>7</sup> The Illinois rule thus technically permits movants to seek witness protection orders in advance of any deposition notices.<sup>8</sup>

Notwithstanding the more limiting language of FRCP 26(c), in the federal district courts many future abusive discovery initiatives are prevented via the so-called “meet and confer” provisions. Under the

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4. See, e.g., Jeffrey A. Parness, *Judicial Versus Legislative Authority After Lebron*, 98 Ill. B.J. 324 (2010).
  5. In at least one case, a court heard from a party seeking a protective order, under FRCP 26(c), that would foreclose a deposition of a certain witness, where no official deposition notice was mentioned. *Johnson v. Jung*, 242 F.R.D. 481 (N.D. Ill. 2007) (pro se plaintiff, in earlier discussions and later emails, proposed to depose the entity defendant’s “general secretary and CEO”) [hereinafter *Johnson*].
  6. ILLR 201(c)(1).
  7. ILLR 201(c)(2).
  8. No such cases under the rule could be found, however. See also California Code of Civil Procedure 2025.420(a) (deponent may be protected by court order “before, during, or after a deposition).

Federal Rules, generally “a party may not seek discovery from any source before the parties have conferred.”<sup>9</sup> A Rule 26(f) meet and confer typically results in a report<sup>10</sup> which must contain “the parties’ views and proposals” on what “limitations should be imposed” regarding discovery.<sup>11</sup> The report can lead directly to a scheduling order.<sup>12</sup> The report can also lead to a scheduling conference,<sup>13</sup> or a judicial consultation “by telephone, mail or other means,”<sup>14</sup> that yields a scheduling order. All scheduling orders “must limit” the time to complete discovery.<sup>15</sup> Such a scheduling order can also “modify the extent of discovery”<sup>16</sup> and can include “other appropriate matters” regarding any future discovery.<sup>17</sup> A scheduling order following a meet and confer must be issued “as soon as practicable” but no later than 120 days after “any defendant has been served,” or no later than 90 days “after any defendant has appeared.”<sup>18</sup> Where discovery meetings and any conferencing or consultations yield no agreements or orders limiting witness initiatives, a protective order request seeking to forestall witness abuse can still follow a deposition notice, or a hearing or trial testimony notice.<sup>19</sup>

#### B. Other State Meet and Confer Practices

American state high court rules also often contain similar mandatory “meet and confer” provisions. Thus, in Colorado there is no general opportunity for discovery, with exceptions comparable to those in the federal district courts,<sup>20</sup> until there is submitted a proposed Case Management Conference Order.<sup>21</sup> In Alaska, for many civil cases,<sup>22</sup> except for interrogatories there is no “discovery from any source” before

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9. FRCP 26(d)(1) (conferral requirements appear in FRCP 26(f)). There are some exceptions under FRCP 26(a)(1)(B) per FRCP 26(d)(1). Exceptions may also be authorized by another federal rule, stipulation or court order. FRCP 26(d)(1).
  10. FRCP 26(f)(2) (“written report” to the court 14 days after the conference that outlines “proposed discovery plan”).
  11. FRCP 26(f)(3)(E).
  12. FRCP 16(b)(1)(A).
  13. FRCP 16(b)(1)(B).
  14. FRCP 16(b)(1)(B).
  15. FRCP 16(b)(3)(A).
  16. FRCP 16(b)(3)(B)(ii).
  17. FRCP 16(b)(3)(B)(vi).
  18. FRCP 16(b)(2).
  19. *See, e.g.*, FRCP 26(c) (protection from discovery request) and FRCP 45(c)(3) (protection from hearing or trial subpoena to testify).
  20. Colorado Rule of Civil Procedure (ColRCP) 26(d) (exceptions include court order and party agreement exemptions via CRCP).
  21. ColRCP 26(d). The proposed order is guided by CRCP 16.
  22. Alaska Rule of Civil Procedure (AkRCP) 16(d)(1) (cases where there are required disclosures per AkRCP 26(a)).

the parties have met, conferred and developed “a proposed discovery plan,”<sup>23</sup> which must indicate the parties’ views and proposals concerning “limitations” on formal discovery.<sup>24</sup> By contrast, in Utah, for many civil cases<sup>25</sup> there is “no discovery from any source” before the parties have met and conferred,<sup>26</sup> including no interrogatories. In Utah the goal is for the parties to “develop a stipulated discovery plan,” which “shall include” what “limitations on discovery” should be imposed and “whether discovery should be conducted in phases.”<sup>27</sup>

### C. Federal and Other State Discovery Planning Practices

Future abusive discovery initiatives can also be prevented where there are no mandated private party conferrals before discovery begins, but where such conferrals are strongly encouraged. Such conferrals often occur while formal discovery is stayed. Encouragement of voluntary conferrals was found within Federal Rule of Civil Procedure 26(f) between 1980 and 1993.<sup>28</sup> That rule contemplated discovery conferences could be sought (though not “routinely”) by “counsel who has attempted without success to effect with opposing counsel a reasonable program or plan for discovery.”<sup>29</sup> The federal rulemakers determined “abuse can best be prevented by intervention by the court as soon as abuse is threatened.”<sup>30</sup>

A variation of this former federal rule lives today in a variety of general state court discovery rules. For example, in a civil action in North Dakota a trial judge may schedule “a discovery conference” at “any time,”<sup>31</sup> which must be followed by a court order “tentatively” identifying discovery issues; establishing a discovery plan; and, setting out discovery limits.<sup>32</sup>

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23. AkRCP 26(d)(1) (conferral guidelines found in AkRCP 26(f)).

24. AkRCP 26(f)(4).

25. Utah Rule of Civil Procedure (UtRCP) 26(d) (per Rule 26(a)(2) exempted cases include contract claims where less than \$20,000 is sought).

26. UtRCP 26(d).

27. The conferral, under UtRCP 26(d), references UtRCP 26(f) which dictates what must be in the plan.

28. 1980 Amendments to the Federal Rules of Civil Procedure, 85 F.R.D. 521, 526. Three Justices dissented, finding the new discovery rules (FRCP 26, 28, 30, 32, 33, 34, and 37) fell short of the changes “needed to accomplish reforms in civil litigation that are long overdue.” *Id.* at 521 (J. Powell, joined by J. Stewart and J. Rehnquist). The shortcomings are discussed, together with more significant reforms deemed necessary, in, *e.g.*, Second Report of the Special Committee for the Study of Discovery Abuse, Section of Litigation, American Bar Association (revised draft Nov. 1980), found at 92 F.R.D. 137.

29. Advisory Committee Note to 1980 Addition of FRCP 26(f), found at Revised Preliminary Draft of Proposed Amendments to the FRCP (February 1979), 80 F.R.D. 323, 332 [hereinafter 1980 Advisory Note].

30. 1980 Advisory Note, 80 F.R.D. at 332.

31. North Dakota Rule of Civil Procedure (NDRCP) 26(f)(1).

32. NDRCP 26(f)(4).

There too, if “a party proposed making a discovery plan, each party has a duty to participate in good faith in the framing of the plan.”<sup>33</sup> Then, if one party moves to have a discovery conference scheduled, “the court must order a discovery conference as long as the motion is in proper form.”<sup>34</sup> The general discovery rules in Delaware<sup>35</sup> and Washington<sup>36</sup> are comparable.

Under the North Carolina general civil procedure rule on discovery, any party “may request a meeting on the subject of discovery,” but can do so “no earlier than 40 days after the complaint is filed.”<sup>37</sup> Such a request usually prompts a meeting of the parties, often occurring more than 3 weeks after the request.<sup>38</sup> The meeting typically results in the submission of a “discovery plan or joint report.”<sup>39</sup> If there is no plan, any party can then compel a discovery conference.<sup>40</sup> All the while discovery can proceed.<sup>41</sup>

Elsewhere, guided as in North Dakota by a general civil procedure rule on formal discovery, American state trial judges have discretion to direct the attorneys for the parties to appear before them for discovery conferences, and must convene such conferences upon a properly-supported motion by an attorney for any party.<sup>42</sup> Thus, some general discovery guidelines recognize judicial discretion to convene discovery conferences,

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33. NDRCP 26(f)(3).

34. NDRCP 26(f)(2). The court must order a discovery conference if requested by a proper motion, which must include, *inter alia*, “a proposed discovery plan and schedule,” “proposed limitations on discovery” and an assurance that parties made “a reasonable effort to reach agreement on contentious matters that are set forth).

35. Delaware Rule of Civil Procedure (DelRCP) 26(f). Comparable is Hawaii Rule of Civil Procedure (HawRCP) 26(f); Iowa Rule of Civil Procedure (IoRCP) 1.507(1); Minnesota Civil Procedure Rule (MinnRCP) 26.06; South Carolina Civil Procedure Rule (SCRCP) 26(f); and Vermont Civil Procedure Rule (VtRCP) 26(f).

36. Washington Superior Court Civil Rule (Wash SCCR) 26(f).

37. North Carolina Rule of Civil Procedure (NCRCP) 26(f)(1).

38. NCRCP 26(f)(1) (if a request is filed, “the parties shall meet”).

39. NCRCP 26(f)(2).

40. NCRCP 26(f)(4) (if “parties are unable to agree . . . they shall, upon motion of any party, appear before the court for a discovery conference”).

41. NCRCP 26(d). *See, e.g.*, *Winston-Salem Joint Venture v. City of Winston-Salem*, 65 N.C. App. 532, 310 S.E.2d 58, 60 (N.C. App. 1983) (under General Practice Rule 8, all desired discovery shall be completed within 120 days of the last required pleading; and discovery should begin “promptly . . . even before the pleadings are completed”).

42. *See, e.g.*, Montana Rule of Civil Procedure (MtRCP) 26(f); West Virginia Rule of Civil Procedure (WVaRCP) 26(f) (recognizing that such conference may be done “personally or by telephone”); Mississippi Rule of Civil Procedure (MissRCP) 26(c); and Wyoming Rule of Civil Procedure (WyRCP) 26(f). *See also* VtRCP 26(f) (court “may direct the attorneys to appear at a discovery conference; rule later says discovery conference may be combined with “a pretrial conference,” “subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference”).

but no duties regarding good faith dealings regarding discovery plans or mandated conferrals at the urging of a single party.<sup>43</sup>

Outside the general discovery rules, some American courts also encourage, if not require, discovery planning, often ahead of any formal discovery initiatives. There are frequently general civil practice rules on pretrial/scheduling/case management conferences which anticipate, *inter alia*, judicially-supervised discovery planning. In the federal district courts, as noted, there is mandated discovery planning by the parties under the general discovery rule, followed by a scheduling order.<sup>44</sup> Under the general federal pretrial conference rule, however, there will follow as well a “scheduling order” regarding discovery not only upon the mandated meet and confer on discovery,<sup>45</sup> but also upon a judicial pretrial conference on discovery.<sup>46</sup> Following a pretrial conference where there was no meet and confer, a federal district judge can “take appropriate action” to “obtain admissions and stipulations . . . to avoid unnecessary proof;”<sup>47</sup> to control and schedule discovery;<sup>48</sup> and to facilitate “just, speedy and inexpensive disposition.”<sup>49</sup>

Comparably, American state high court rules on pretrial/scheduling/case management conferencing invite, if not require, significant judicial involvement in discovery management, in some part at least, to preempt witness (and other discovery) abuse. For example, in Arizona, upon written request, the trial court “shall” schedule “a comprehensive pretrial conference” at which the court may make a discovery schedule; guide the production of electronically stored information; and set forth measures on preservation of discoverable documents.<sup>50</sup> In Alaska, a “scheduling order”<sup>51</sup> is often entered in civil cases<sup>52</sup> after a scheduling conference<sup>53</sup>

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43. Alabama Civil Procedure Rule (AlaRCP) 26(f).

44. FRCP 26(f)(1) (exemptions include cases listed in FRCP 26(a)(1)(B) [*e.g.*, administrative review, in rem forfeiture, habeas corpus, student loan collection and U.S. benefit recovery claims] or cases where “the court orders otherwise”).

45. FRCP 16(b)(1)(A).

46. Under FRCP 16(a), pretrial conferencing unrelated to mandated discovery planning via the meet and confer seemingly can be scheduled upon motion or *sua sponte*. Comparable state court rules include Kentucky Civil Procedure Rule (KyRCP) 16(1) and MinnRCP 16.

47. FRCP 16(c)(2)(C).

48. FRCP 16(c)(2)(F).

49. FRCP 16(c)(2)(P).

50. Arizona Rule of Civil Procedure (AzRCP) 16(b)(1) (except in medical malpractice cases). Comprehensive pretrial conferences on, *inter alia*, formal discovery are also usually held in medical malpractice cases. AzRCP16(c).

51. AkRCP 16(b)(1).

52. AkRCP 16(g) (“exempted” cases include, *inter alia*, paternity, custody, habeas corpus, small claims, and eminent domain cases).

53. AkRCP 16(b)(2) (conference can be judicially determined to be “unnecessary” or replaced by “a local uniform” procedure).

“within 90 days after the appearance of the defendants”;<sup>54</sup> this order typically addresses “the control and scheduling of discovery” and the facilitation of a “just, speedy and inexpensive disposition.”<sup>55</sup> In New Mexico, a scheduling order on discovery completion follows judicial consultation “with the attorneys and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means.”<sup>56</sup> In Maine, in most civil cases after the filing of an answer, the trial court “shall enter a standard scheduling order setting deadlines for a conference of counsel concerning discovery . . . the exchange of expert witness designations and reports . . . [and] the completion of discovery.”<sup>57</sup> In Alabama the court may direct the attorneys “to appear . . . for a conference on the subject of discovery.”<sup>58</sup>

#### D. Federal and Other State Relevancy Practices

Future abusive discovery can also be lessened by narrowing or excepting the relevancy requirement. In the federal district courts, “unless otherwise limited by court order,” one can seek via discovery only “nonprivileged matter that is relevant to any party’s claim or defense.”<sup>59</sup> Similar relevancy requirements are found, *inter alia*, in Mississippi, where discovery must be “relevant to the issues raised by the claims or defenses of any party,”<sup>60</sup> and in North Dakota, where discovery must be “relevant to any party’s claim or defense.”<sup>61</sup> Here, fishing expeditions are less likely than where discovery must only be generally relevant to the subject matter of the lawsuit.<sup>62</sup>

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54. AkRCP 16(b)(1).

55. AkRCP 16(c)(6) and (16).

56. New Mexico Rule of Civil Procedure for the District Courts (NMRCP) 16B(3). Comparable is WVaRCP 16(a); Arkansas Civil Procedure Rule (ArkRCP) 16; MinnRCP 16; and MtrCP 16.

57. Maine Civil Procedure Rule (MeRCP) 16(a)(1) (exempted are proceedings under Rules 80, 80B or 80C).

58. AlaRCP 26(f).

59. FRCP 26(b)(1).

60. MissRCP 26(b)(1).

61. NDRCP 26(b)(1)(A). Similar is Oregon Rule of Civil Procedure (OrRCP) 36B(1), WyRCP 26(b)(1), and ColRCP 26(b)(1).

62. In 2000, FRCP 26 was amended to go from relevance of the subject matter to relevance to any party’s claim or defense. The purpose was to limit discovery abuse and reduce discovery costs. The Advisory Committee Note to the 2000 amendment observed that this change had been considered in 1978 but was withdrawn, and that even with other discovery amendments “concerns about costs and delay of discovery have persisted nonetheless.” The Committee Note recognized that the “dividing line” between subject matter relevance and claim or defense relevance “cannot be defined with precision.” Amendments to FRCP, FRE, FRCrP and FR BP (effective 12-1-2000), 192 F.R.D. 340, 388-390. Some question whether the goals have been or could be met. See, e.g., Thomas D. Rowe, *A Square Peg in a Round Hole? The 2000 Limitation on the Scope of Federal Civil Discovery*, 69 *Tenn. L. Rev.* 13, 14 (2001) (“I fear that the amendment may lead to



Further, future abusive discovery can further be lessened by disallowing certain discovery initiatives even when relevant, i.e., by recognizing exceptions where relevant inquiries are forbidden. Elsewhere in the United States such exceptions include cost/benefit analyses barring unworthy information gathering requests. Thus, in the federal judiciary, a court “on motion or on its own must limit the frequency or extent of discovery otherwise allowed . . . if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive . . . [or that] (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake...and the importance of the discovery in resolving the issues.”<sup>63</sup> In advance of discovery, a federal litigant must consider such a cost/benefit analysis.<sup>64</sup> Comparable cost/benefit analyses are required in several states before relevant discovery is sought.<sup>65</sup>

#### E. Illinois Prediscovery Practices

In Illinois civil actions there are no mandated prediscovery conferences.<sup>66</sup> There is, as noted, an explicit recognition in the Illinois general civil procedure rule on formal discovery that circuit judges “may supervise all or any part of any discovery procedure.”<sup>67</sup> However, there is no explicit recognition in the general discovery rule of a party’s ability to propose making a discovery plan, or of a party’s duty to act in good faith

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little positive change by way of curbing cost and excess in federal discovery, while increasing purely procedural contention over the multiple and vague terms in the revised rule”).

Subject matter, rather than claim or defense, relevance remains the standard in some states. *See, e.g.,* AlaRCP 26(b)(1); AkRCP 26(b)(1); and AzRCP 26(b)(1).

63. FRCP 26(b)(2)(C).

64. FRCP 26(g)(1)(B)(iii). In contemplating discovery, certain federal litigants must also abide by local court standards (i.e., on civility) that go beyond civil procedure and professional conducts norms. *See, e.g.,* Standards for Professional Conduct Within the Seventh Judicial Circuit (voluntary adherence sought as standards “shall not be used as a basis for litigation or for sanctions or penalties”) and U.S. District Court, District of Nebraska, Local Rule 45.1(a) (“No subpoenas for production or inspection on a nonparty without giving adverse party notice”).

65. *See infra* notes 89-100.

66. There are mandatory attempts in Illinois by parties to resolve “differences over discovery” initiatives before judicial action can be sought. ILLR 201(k). Other states also permit discovery without an earlier “meet and confer.” *See, e.g.,* AlaRCP 26(d); DelRCP 26(d); HawRCP 26(d); Indiana Civil Procedure Rule (IndRCP) 26(D); and MissRCP 26(e).

67. ILLR 201(c)(2). Many of the cases utilizing this rule involve judicial authority to review possible discovery materials in camera after objections have been raised to their compelled disclosure. *See, e.g.,* In re Estate of Bagus, 294 Ill. App. 3d 887, 229 Ill. Dec. 291, 691 N.E.2d 401, 404 (Ill. App. 2d 1998) (in camera proceeding when privilege regarding psychiatrist’s “personal notes” are sought) and Youle v. Ryan, 349 Ill. App. 3d 377, 285 Ill. Dec. 402, 811 N.E.2d 1281, 1284 (Ill. App. 4th 2004) (in camera proceeding when relevance of surgical database is questioned).

when the making of a plan is suggested, or of a court's obligation to convene a discovery scheduling conference upon a party's request.<sup>68</sup> And there is no required cost/benefit analysis before a discovery request is made.<sup>69</sup> Abusive discovery tactics can thrive in an environment without such guidelines.

Furthermore, the *sua sponte* supervision of "any discovery procedure" in Illinois in order to prevent future abusive discovery initiatives seems very limited as other rules require actual party initiatives in advance of judicial supervision and judicial orders on discovery. For example, a portion of the general discovery rule says "methods of discovery may be used in any sequence" and all parties may engage in discovery simultaneously, "unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise."<sup>70</sup> Typically, this rule provision is employed only after discovery has been sought. Also, the Illinois rule on taking depositions suggests there can be no *sua sponte* orders that limit or extend the three hour time for a discovery deposition.<sup>71</sup>

In Illinois, formal discovery can start for major civil cases<sup>72</sup> once "all defendants have appeared or are required to appear."<sup>73</sup> Thus, motions regarding limits on future depositions and other discovery can be difficult to pursue because an adverse party's intentions are more likely unknown early in litigation as there are no compelled disclosures in major Illinois civil actions.<sup>74</sup> This lack of knowledge can chill motions to limit discovery in advance of any discovery request since all motions require "reasonable inquiry" ahead of time,<sup>75</sup> which is especially hard for plaintiffs before defendants appear.

The case management conference rule in Illinois does generally require a conference at which there must be considered, *inter alia*, "limitations on discovery."<sup>76</sup> But this conference can occur more than six months "following the filing of the complaint," though it must occur

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68. ILLR 201.

69. ILLR 201.

70. ILLR 201(e). *See also* ILLR 201(f) (no delay in the trial of a case "to permit discovery unless due diligence is shown").

71. ILLR 206(d) (three hours "except by stipulation of all parties or by order upon showing that good cause warrants a lengthier examination"). In Illinois there are two types of depositions, an evidence deposition (generally for use at a hearing or trial) and a discovery deposition (generally employed to gather information, so that hearsay is of little concern). ILLR 202.

72. For civil actions involving less than \$50,000, the "limited and simplified discovery procedures" provide less opportunity for formal discovery. ILLR 222.

73. ILLR 201(d) (beforehand, there is needed "leave of court granted upon good cause").

74. But *see* ILLR 222 (compelled disclosures in many civil cases involving less than \$50,000).

75. ILLR 137.

76. ILLR 218(a)(5).

“within 35 days after the parties are at issue.”<sup>77</sup> Thus, any required discovery conferencing can occur in Illinois long after formal discovery has begun. The required initial case management conference in Illinois is expressly guided solely by the standard that the rule is to be “liberally construed to do substantial justice between and among the parties.”<sup>78</sup> The rule says nothing, for example, about cost/benefit analyses or about protecting nonparty witnesses who might be scheduled for depositions.<sup>79</sup>

Finally, civil discovery in Illinois is appropriate for “any matter relevant to the subject matter involved in the pending action,”<sup>80</sup> rather than to a “claim or defense” as, e.g., in the federal district courts. Fishing expeditions are easy in Illinois, especially as there is also no required cost/benefit analysis ahead of any discovery initiative.<sup>81</sup>

Deposition abuse in Illinois circuit courts is, however, less likely in minor civil cases, that is, where claimants seek money damages not in excess of \$50,000, exclusive of interests and costs.<sup>82</sup> Here, the “limited and simplified discovery” rule restricts any discovery depositions, absent court order, to the following: (a) parties, where an entity that is a party need only have one representative deposed; and (b) treating physicians and experts, but only if “they have been identified as witnesses who will testify at trial.”<sup>83</sup> Further, in such minor civil cases there are no evidence depositions “except pursuant to leave of court for good cause shown.”<sup>84</sup> To curtail deposition (and other discovery) abuse, the dollar amount applicable to all limited and simplified discovery cases could be raised. Yet this approach has drawbacks as compared to prediscovery meet and confer<sup>85</sup> and cost/benefit mandates.<sup>86</sup>

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77. ILLR 218(a). At issue is undefined. But *see* CoIRCP 16(b)(1)(at issue means, inter alia, all permitted pleadings have been filed or defaults or dismissals entered against all non-appearing parties).

78. ILLR 218(c).

79. ILLR 202 (via deposition “testimony of any party or person”).

80. ILLR 201(b)(1).

81. It should be noted that the “subject matter” test for discovery relevancy still operates in many other American state trial courts, though in some there is also a mandated prediscovery cost/benefit analysis, as in Michigan, under Michigan Rule of Civil Procedure (MichRCP) 2.302(B)(1) and 2.302(G)(3); Nevada, under Nevada Rule of Civil Procedure (NevRCP) 26(b)(1) and 26(g)(2); Utah, under UtRCP 26(b)(1) and 26(g); Vermont, under VtRCP 26(b)(1) and 26(g); and West Virginia, under WVArCP 26(b)(1) and 26(g).

82. In small claims cases, involving less than \$10,000, under ILLR 281 there are no depositions “except by leave of court,” ILLR 287(a).

83. ILLR 222(f)(2).

84. ILLR 222(f)(3).

85. FRCP 26(d)(1) and 26(f).

86. The baby should not be thrown out with the bathwater. Civil cases involving more money should have broader opportunities for information gathering than lower dollar cases because economic efficiencies differ, with parties initially trusted to their own calculations, assuming effective devices to curtail and sanction abuses.

## II. LIMITING AND FORECLOSING SCHEDULED DEPOSITIONS AND TRIAL AND HEARING TESTIMONIES

Once scheduled, how might witnesses limit or foreclosure deposition, trial or hearing testimonies to prevent abuse? Should witnesses be afforded explicit avenues to seek protections before arriving for the scheduled questioning?

### A. Limiting and Foreclosing Scheduled Depositions

#### 1. *Federal Deposition Limits*

As noted, in the federal district courts, relevant discovery requests, including deposition notices, can be limited or foreclosed when alternative information sources are available or costs are too high. A discovery request also cannot be initiated in a federal civil action unless the requesting party explicitly certifies that the request is “neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.”<sup>87</sup> Further, even with such a certification, a district court may alter deposition practices or halt depositions if it determines the discovery sought, that is “otherwise allowed,” nevertheless is “unreasonably cumulative or duplicate, or can be obtained from some other source that is more convenient, less burdensome or less expensive,” or that the party seeking the discovery “had ample opportunity to obtain the information by discovery,” or that “the burden or expense” of proposed discovery “outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action and the importance of the discovery in resolving the issues.”<sup>88</sup> Finally, even assuming a proper certification and no such judicial determination, presumably a federal district court can still consider the issuance of a protective order.<sup>89</sup>

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87. FRCP 26(g)(1)(B)(iii). This rule took effect in December, 1983. Its rationale is found in the Advisory Committee Note, found in 1983 Federal Rules of Civil Procedure, 97 F.R.D. 165, 218-220 (“litigants . . . must be obliged to act responsibly and avoid abuse”) [hereinafter 1983 FRCP Amendments].

88. FRCP 26(b)(2)(C). There are special limitations when there is discovery of electronically stored information. FRCP 26(b)(2)(B). Those limits are discussed in Theodore C. Hirt, *The Quest for “Proportionality” in Electronic Discovery – Moving From Theory to Reality in Civil Litigation*, 5 *The Federal Courts Law Review* 171 (2011).

89. FRCP 26(c)(1) (protection against “annoyance, embarrassment, oppression or undue burden”). *See, e.g.*, *In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65 (2d Cir. 2003) (on insulating lawyers from depositions; not automatically immune) [hereinafter *Friedman*]; *Salter v. Upjohn Co.*, 593 F.2d 649 (5th Cir. 1979) (no deposition of corporate defendant’s president until other

## 2. *Other State Deposition Limits*

Some American state trial court practices are comparable. There are similar certification standards for discovery requests in Wyoming,<sup>90</sup> Michigan,<sup>91</sup> Vermont,<sup>92</sup> Rhode Island,<sup>93</sup> Kansas,<sup>94</sup> Montana,<sup>95</sup> West Virginia,<sup>96</sup> North Dakota,<sup>97</sup> Nevada,<sup>98</sup> Colorado<sup>99</sup> and Virginia.<sup>100</sup> And there are similar avenues to halt “otherwise allowed” discovery on grounds involving, inter alia, cost-benefit analyses in Wyoming,<sup>101</sup> Alaska,<sup>102</sup> Utah,<sup>103</sup> Alabama,<sup>104</sup> Montana,<sup>105</sup> Vermont,<sup>106</sup> Kansas,<sup>107</sup> West Virginia,<sup>108</sup> North Dakota,<sup>109</sup> Tennessee,<sup>110</sup> Minnesota,<sup>111</sup> Nevada,<sup>112</sup> Arizona,<sup>113</sup> Colorado,<sup>114</sup> Washington,<sup>115</sup> and Virginia.<sup>116</sup>

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employees with more firsthand knowledge were deposed) [hereinafter Salter]; *Graves v. Bowles*, 419 Fed. App. 640 (6th Cir. 2011) (protective order barring mayor’s deposition as mayor’s affidavits showed he lacked personal knowledge) [hereinafter Graves]; *Misc. Docket #1 v. Misc. Docket #2*, 197 F.3d 922 (7th Cir. 1999) (quashing of subpoena to former CEO due to particularly serious embarrassment) [hereinafter *Misc. Docket #1*]; *Home Savings Bank, F.S.B. v. Gillam*, 952 F.2d 1152 (9th Cir. 1991) (protective order to prevent deposition of former bank officer who had no relevant information) [hereinafter Gillam].

90. WyRCP 26(g)(2).
91. MichRCP 2.302(G)(3).
92. VtRCP 26(g).
93. Rhode Island Superior Court Civil Procedure Rule (RIRCP) 26(f).
94. Kansas Stat. 60-226(f).
95. MtRCP 26(g).
96. WVaRCP 26(g).
97. NDRCP (26(g)(1).
98. NevRCP 26(g)(2).
99. ColRCP 26(g)(2).
100. Virginia Supreme Court Rule (VaSCR) 4:1(g). The comparable Utah certification provision, in former UtRCP 26(g), was eliminated in November, 2011, but only after new compulsory disclosure standards were added, UtRCP 26(a), as well as new proportionality standards (involving, in part, cost/benefit analyses), UtRCP 26(b)(2).
101. WyRCP 26(b)(2)(c).
102. AkRCP 26(b)(2)(A).
103. UtRCP 26(b)(2)(discovering party needs both relevance and “proportionality” (defined to include benefits outweighing costs) and UtRCP 26(b)(3) (court can insure discovering party’s request meets proportionality via UtRCP 37 orders).
104. AlabRCP 26(b)(2)(A) (sua sponte orders allowed after notice).
105. MtRCP 26(b)(2)(c).
106. VtRCP 26(b)(1).
107. Kansas Stat. 60-226(b)(2)(A) (sua sponte orders allowed after notice).
108. WVaRCP 26(b)(1) (sua sponte orders allowed after notice).
109. NDRCP 26(b)(1) (sua sponte orders allowed).
110. Tennessee Rule of Civil Procedure (TnRCP) 26.02(1) (sua sponte orders allowed after notice).
111. MinnRCP 26.02(b)L(3) (sua sponte orders allowed after notice).
112. NevRCP 26(b)(1) (sua sponte orders allowed after notice).
113. AzRCP 26(b)(1)(a) (sua sponte orders allowed after notice).
114. ColRCP 26 (b)(2)(F).
115. Wash SCCR 26(g).
116. VaSCR 4:1(b)(i) (sua sponte orders allowed after notice).

### 3. *Policies Underlying Deposition Limits*

Federal and state general discovery certification obligations of counsel not only seek to deter discovery abuse, but also to limit wasteful expenditures of judicial resources used in foreclosing clearly unwarranted discovery into concededly relevant information. One federal magistrate judge aptly observed that with these obligations, counsel *also must* take into account all the circumstances, that the information sought is of sufficient potential significance to justify the burden the discovery would impose, that the discovery tool selected is the most efficacious means that might be used to acquire the desired information (taking into account cost effectiveness and the nature of the information being sought), and that the timing of the probe is sensible, i.e., that there is no other juncture in the pretrial period where there would be a clearly happier balance between the benefit derived and the burdens imposed by the particular discovery effort.<sup>117</sup>

Beyond general discovery certification requirements, applicable, e.g., to interrogatories as well as depositions, there can be special certification or other standards applicable only to certain discovery, like deposition initiatives. A subpoena for attendance at a deposition is normally issued by the trial court and is limited to certain locations, sometimes explicitly different for residents and nonresidents of the issuing state.<sup>118</sup> In some jurisdictions properly scheduled deponents then must seek court protection, as from inquiries into privileged or other protected matter [made via document inspection or copying requests] or from “undue burden or expense.”<sup>119</sup> Elsewhere, deposition initiatives require more up front, like requiring those “responsible” for the subpoena to “take reasonable steps to avoid imposing an undue burden or expense” on the deponent.<sup>120</sup> Certain depositions cannot even be scheduled without a court order.<sup>121</sup>

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117. *In re Convergent Technologies Securities Litigation*, 108 F.R.D. 328, 331 (N.D. Cal. 1985) (emphasis in original).

118. *See, e.g.*, MissRCP 45(a)(1) and (b) (different); TnRCP 45.04(1) and (2) (different); WVaRCP 45(a)(1)(A) and (c) (no difference); Massachusetts Rules of Civil Procedure (MassRCP) 45(a) and (d)(2) (different); and ColRCP 45 (d)(2) (different).

119. *See, e.g.*, MissRCP 45(d)(1)(A)(ii) and (iv). *See also* MassRCP 45(b) (subpoena involving documentary evidence may be quashed if “unreasonable and oppressive”); ColRCP 45(b) (similar to MassRCP45(b)); RIRCP 45(b) (similar to MassRCP 45(b)); and Arkansas Civil Procedure Rule (ArkRCP) 45(b)(2) (similar to MassRCP 45(b)).

120. *See, e.g.*, AlaRCP 45 (c)(1); WVaRCP 45(d)(1); NCRCP 45 (c)(1); and Nevada Rule of Civil Procedure (NevRCP) 45 (c)(1).

121. *See, e.g.*, ColRCP 30(a)(2) (leave of court needed when a proposed deposition would “result in more depositions than set forth in the Case Management Order;” involves one already deposed; or, involves one “confined in prison”); 12 Okla. Stat. 3230 A (2) (confined in prison or already deposed); RIRCP 30(a)(2) (confined in prison or already deposed); and OrRCP Rule 39B (person confined in a prison or jail).

The availability of sua sponte orders limiting discovery of “otherwise allowed” materials is also premised on both the deterrence of abuse and the saving of expense. The Note accompanying the 1984 Arizona rule changes allowing sua sponte limits on the frequency or extent of use of discovery to gain relevant information were “intended to reduce redundancy in discovery and require counsel to be sensitive to the comparative costs of different methods of securing information,” as well as to “minimize repetitiveness and to oblige lawyers to think through their discovery activities in advance” and to facilitate discovery “that is disproportionate to the individual lawsuit as measured by various factors, e.g., its nature and complexity, the importance of the issues at stake, [and] the financial position of the parties.”<sup>122</sup>

Since at least 1983, federal district judges have also been affirmatively charged with controlling discovery abuses, as earlier problems led the Advisory Committee to note regarding its proposed Rule 26 amendments:

Excessive discovery and evasion or resistance to reasonable discovery requests pose significant problems . . . the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses. All of this results in excessively costly and time-consuming activities that are disproportionate to the case, the amount involved, or the issues or values at stake.

#### 4. *Illinois Deposition Limits*

By contrast, in Illinois there are no special certification requirements for discovery requests. The Illinois rule<sup>123</sup> governs alike pleadings, motions and other papers. It contains no required cost/benefit analysis, or certification regarding duplication or alternative information sources, by one seeking discovery.

A protective order limiting a deposition subpoena in an Illinois circuit court is appropriate “as justice requires” in order “to prevent unreasonable annoyance, expense, embarrassment, disadvantage or oppression.”<sup>124</sup> The

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122. Note accompanying AzRCP 26(b)(1) (further declaring judges should “prevent use of discovery to wage a war of attrition” and prevent discovery being employed “to coerce a party, whether affluent or financially weak”).

123. ILLR 137. Compare FRCP 11(d) (discovery papers not certified under the standards for pleadings and motions).

124. ILLR 201(c). A protective order limiting a trial testimony subpoena must be supported by “good cause shown.” 735 ILCS 5/2-1101. Once a deposition has begun, limits on its continuation can be judicially imposed upon a showing that the witness examination was “being conducted in bad

“justice” standard in Illinois has been recognized as delegating quite broad judicial discretion, leaving parties and witnesses noticed for questioning somewhat uncertain about the limits on discovery interrogations, including any restraints arising from a cost/benefit analysis.<sup>125</sup> The Illinois Supreme Court has declared the “parameters of protective orders are entrusted to the trial court’s discretion,” with no alteration on appeal unless “no reasonable person could adopt the view taken by the circuit court.”<sup>126</sup> As later read by the Appellate Court, this means a protective order stands as long as the movant seeking the protective order shows “some valid reason.”<sup>127</sup> Reversal occurs only when there has been an abuse of discretion.<sup>128</sup>

### 5. *Apex Doctrine Limits on Depositions*

To date, the Illinois state courts have not generally recognized in their decisions on protective order relief, or otherwise, how the Apex Doctrine might limit or foreclose scheduled depositions of certain officers/agents/employees of entities who are parties to civil litigation. The doctrine recognizes that differing treatments should be accorded to the depositions of higher level officials within corporate, governmental, or other entities, where the officials have no personal knowledge of entity actions prompting the civil litigation.<sup>129</sup> Many federal and other American courts have utilized

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faith” or in a manner that “unreasonably annoys, embarrasses, or oppresses the deponent or party.” ILLR 206(d).

125. In other respects protective orders in Illinois circuit courts are also subject to broad discretion. *See, e.g.*, Jo Anna Pollock, *Evaluating Protective Orders for Discovery Materials*, 99 Ill. B.J. 576, 577 (Nov. 2011) (on protective orders for trade secrets and other confidential matters, “there is a dearth of Illinois state case law” and “unlike federal law . . . no requirement for establishing good cause”).
126. *Skolnick v. Altheimer & Gray*, 191 Ill.2d 214, 246 Ill. Dec. 324, 730 N.E.2d 4, 12 (2000).
127. *Willeford v. Toys “R” Us-Delaware, Inc.*, 385 Ill. App. 3d 265, 324 Ill. Dec. 83, 895 N.E.2d 83, 93 (Ill. App. 5th 2008) [hereinafter *Willeford*]. Seemingly, protective orders can be sought both in advance of a scheduled deposition and during a deposition. Local rules can address how witness protections can be sought during depositions. *See, e.g.*, U.S. Dist. Ct., N.D. of Ind., Local Rule 37-3 (good faith attempts to resolve problems and submissions of objections by phone during a recess).
128. *Willeford*, 895 N.E.2d at 89 (de novo standard applies, however, to determine whether the trial court “applied the correct standard”). In certain types of cases, abuse of discretion may occur as a matter of law, as when the court denies discovery of materials deemed always unavailable. *See, e.g.*, *People v. Schmidt*, 56 Ill.2d 572, 575, 309 N.E.2d 557 (1974) (in misdemeanor cases, discovery by defendant includes, at least, (1) a list of witnesses; (2) any confessions by the defendant; and (3) evidence negating defendant’s guilt). *Also see* *People v. Teller*, 207 Ill. App. 3d 346, 152 Ill. Dec. 364, 565 N.E.2d 1046, 1048-9 (Ill. App. 2d 1991) (further discovery beyond *Schmidt* is within trial court’s discretion, which must protect against an “oppressive” subpoena that was nothing more than “a general fishing expedition”) [hereinafter *Teller*].
129. There are also other different treatments of nonparty persons who are or are not affiliated with a corporate party in written civil procedure laws. *See, e.g.*, FRCP 45(c)(3)(A)(ii) (a nonparty who is not a party officer may quash a subpoena to attend a deposition requiring the person to travel more than 100 miles from where that “person resides, is employed or regularly transacts business



the doctrine, or employed the factors underlying the doctrine, to restrain otherwise appropriate discovery. Even when courts decline to adopt the doctrine *per se*, they still recognize that, at times, entity officials may be subjected to only limited, if any, depositions under certain circumstances. Thus, it is fair to say that American courts outside Illinois, while having varied approaches to the doctrine, all recognize the doctrine. Effectively, the doctrine is a sequencing device, requiring particular conditions be met before certain entity officials may be deposed. It is not a bar to any deposition of an official at the apex. In Illinois, the doctrine has not yet been widely recognized as a restraint on very costly, duplicative and low value discovery.

One variation in the Apex Doctrine involves the standards on what information/evidence is required initially by one seeking to limit or foreclose a scheduled deposition. Another difference involves what role, if any, alternative sources of information play in assessing protective order requests. The variations in the Apex Doctrine are well illustrated by a review of a few leading cases.<sup>130</sup>

In Texas, the Supreme Court ruled in 1995<sup>131</sup> on limiting via a protective order the deposition of “a corporate officer at the apex of the corporate hierarchy.”<sup>132</sup> The decision noted that “as virtually every court which has addressed the subject has observed, depositions of persons in the upper level of management of corporations often involved in lawsuits present problems which should reasonably be accommodated in the discovery process.”<sup>133</sup> In the Texas case, the targeted corporate officer sought accommodations from the burdens of an oral deposition and a subpoena asking for thirty-two categories of documents.<sup>134</sup> The officer’s

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in person” while a nonparty who is a party officer may be compelled to attend a deposition as long as there is no “undue burden”).

130. On occasion, the doctrine is codified. *See, e.g.*, U.S. District Court for the E.D. of New York, Standing Orders of the Court on Effective Discovery in Civil Cases, 102 F.R.D. 339, 350 (Order III, Number 10 states “an officer, director or managing agent” or “a government official,” when served with a notice of deposition or subpoena “regarding a matter about which he or she has no knowledge,” can submit an affidavit “so stating and identifying a person . . . having knowledge;” notwithstanding such an affidavit, the noticing party can “proceed with the deposition, subject to the witness’ right to seek a protective order”).
131. A recent Texas decision on the doctrine is *In re Continental Airlines, Inc.*, 305 S.W.3d 849, 859 (Tex. App. 2010) (trial court erred in compelling deposition of airline’s CEO as plaintiffs failed to show unique awareness or that less intrusive means could not be used to access information sought). The Texas precedents are reviewed in Note, *In re Alcatel-Just Another Weapon for Discovery Reform*, 53 Baylor L. Rev. 269 (2001).
132. *Crown Central Petroleum Corporation v. Garcia*, 904 S.W.2d 125, 126 (Tex. 1995) (case involved a requested video deposition of the corporate defendant’s “chairman of the board and chief executive officer” where the plaintiffs’ claims involved their decedent’s exposure to asbestos while a corporate employee) [hereinafter *Crown Central*].
133. *Crown Central*, 904 S.W.2d at 128.
134. *Id.* at 126-127.

affidavit stated he had “no personal knowledge” of the decedent, or of the decedent’s “job duties, job performance, or any facts concerning” the decedent’s alleged injuries.<sup>135</sup> As well, the officer said he had no knowledge of similar injuries to employees within the corporation and no expertise regarding such injuries.<sup>136</sup> The Texas court ruled that with such an affidavit, plaintiffs then needed to show the official had “unique or superior personal knowledge of discoverable information,” or else “attempt to obtain the discovery through less intrusive methods.”<sup>137</sup> Later, should there be reason to believe the officer’s deposition may “lead to the discovery of admissible evidence” and should “less intrusive methods” be found “unsatisfactory, insufficient or inadequate,” the decision noted that a deposition could then be scheduled.<sup>138</sup>

A federal magistrate judge in Illinois in 2007 came to a different conclusion after employing the same analyses, but faced with very different facts. There, in a case involving race and national origin discrimination in employment as well as unlawful retaliation, a pro se plaintiff was interested in deposing the defendant Board’s “general secretary and CEO.”<sup>139</sup> The Board failed to respond in a timely manner to the pro se plaintiff’s expression of interest though it was asked to do so given the “discovery deadline.”<sup>140</sup> The later response by the Board was an email by its lawyers that they did “not believe” the targeted officer had any relevant knowledge and that the plaintiff should “explain” why she believed the officer had relevant information.<sup>141</sup> Plaintiff responded by pointing out emails from the Board’s human resources department to the officer regarding “plaintiff’s job interviews.”<sup>142</sup> At that point, the Board’s counsel moved for a protective order, arguing “no personal involvement” and that the officer was “too busy to be deposed, given her extensive travel commitments” for work.<sup>143</sup>

In denying the protective order request, the judge said “conclusory statements of hardship in the officer’s affidavit” were insufficient to show the necessary “good cause.”<sup>144</sup> The judge found the affidavit did not clearly demonstrate that no relevant information, even if inadmissible as evidence, could be obtained at a deposition. The judge noted the officer had been

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135. *Id.* at 127.

136. *Id.* at 127.

137. *Id.* at 128.

138. *Id.* at 128.

139. Johnson, 242 F.R.D. at 482.

140. *Id.* at 482.

141. *Id.* at 482.

142. *Id.* at 482.

143. *Id.* at 482.

144. *Id.* at 483 (affidavit did not say the officer had “no information” regarding plaintiff’s claims).

“kept apprised” of plaintiff’s “internal complaints”<sup>145</sup> and had received from a pensioner “a letter commending the plaintiff’s work.”<sup>146</sup> Further, the judge found the officer’s travel obligations had been dramatically overstated “in open court.”<sup>147</sup>

While denying the protective order, with raised eyebrows as to the Board’s and officer’s claims,<sup>148</sup> the judge nevertheless did recognize judicial discretion would support such an order where “all the available information” demonstrates “there is no likelihood that a witness has knowledge of relevant facts.”<sup>149</sup> An earlier Seventh Circuit decision held that a protective order on behalf of a high-ranking corporate executive who was scheduled for a deposition could also be grounded on the initiating party’s failure to utilize less expensive and more convenient methods (i.e., interrogatories) to learn whether the executive even had any relevant information.<sup>150</sup>

Other courts have recognized the policies underlying the Apex Doctrine are applicable in certain circumstances and have concluded the Doctrine does not go far enough. For example, while the Oklahoma Supreme Court refused in 2007 to follow the Texas precedent,<sup>151</sup> it did so only because the burden initially placed on the apex officer at the trial level was too weak. The Oklahoma high court ruled the officer seeking protection, not the discovering party as in Texas, must show no “unique or superior personal knowledge of discoverable information” relating to the case<sup>152</sup> and must uncover the “less intrusive methods” available to the discovering party for the information that is sought<sup>153</sup> (and perhaps show, as well, undue burden and the like on the officer seeking protection<sup>154</sup>). Had this been done, rather than providing a simple “blanket” statement declaring

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145. *Id.* at 484.

146. *Id.* at 485.

147. *Id.* at 486 and 486 n.3 (in open court the officer was said to travel three-fourths of the year, but in her affidavit the officer claimed to travel thirty percent of the time).

148. The judge, *e.g.*, noted their claims amounted to “the I’m too important argument” and that if the U.S. President could be deposed, so could this particular officer. *Id.* at 486.

149. *Id.* at 484 (relying, *inter alia*, on a case where the IBM board chairman “testified via affidavit that he lacked personal knowledge of any facts supporting plaintiff’s age discrimination claims”). Of course, protective orders may issue on behalf of entity leaders where an otherwise proper deposition is scheduled at a bad place. *See, e.g.*, Salter, 593 F.2d at 651 (usually deposition occurs at entity’s principal place of business).

150. *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 681-2 (7th Cir. 2002) [hereinafter *Patterson*].

151. *Crest Infiti II, LP v. Swinton*, 174 P.3d 996, 1003-4 (Okla. 2007) (after reviewing the Texas precedent, declining “to adopt a form of the apex doctrine that shifts a burden to the party seeking discovery”) [hereinafter *Crest Infiti*].

152. *Crest Infiti II*, 174 P.3d at 1004.

153. *Id.* at 1004 (noting the apex officer seeking protection from a deposition failed to identify “the more appropriate corporate official to provide the information sought by plaintiffs”).

154. *Id.* at 1004 (apex officer did not explain “undue delay, burden or expense”).

a general lack of information,<sup>155</sup> “objections” to apex officer depositions would be sustained in Oklahoma.<sup>156</sup>

The Oklahoma court followed a Missouri Supreme Court ruling<sup>157</sup> declining “to adopt an ‘apex’ rule.”<sup>158</sup> But there too apex officers could still gain protections from depositions by utilizing civil procedure rule guidelines on protective orders.<sup>159</sup> In Missouri, a “top-level employee” with “discoverable information” may obtain protection by showing “good cause,”<sup>160</sup> which can be that “other methods of discovery” have not been pursued<sup>161</sup> or that “significant burden, expense, annoyance, and oppression” will arise for the entity and its officers where the discoverer’s need for the deposition is “slight.”<sup>162</sup>

And, the Oklahoma court followed a federal appellate court<sup>163</sup> ruling that did not adopt the apex doctrine, but that also recognized that apex officers could be protected from depositions upon a proper showing.<sup>164</sup> Such a showing by the officers could involve, e.g., lack of personal knowledge; the names and availability of other entity personnel with personal knowledge; “severe hardship,” given entity duties; or, lack of any depositions of other entity officers to date.<sup>165</sup>

Finally, it should be noted that the policies underlying the Apex Doctrine have been more forcefully pursued by some courts who seemingly would characterize the Texas Supreme Court approach as requiring too much of a showing of “good cause” (and not too little, as seen, for example, by the Oklahoma high court). Thus, one federal district court observed:

A corporation, for example, cannot be examined by a director who is not shown to be more than the traditional director of an American

155. *Id.* at 1004 (agreeing with plaintiffs that apex officers seeking protections must provide “more” than “blanket” statements).

156. *Id.* at 1004 (“Our opinion does not . . . prevent petitioners [alleged apex officers] from objecting to such depositions” in the trial court where the case was sent after the opinion was rendered).

157. *Id.* at 1003, citing *State ex rel Ford Motor Co. v. Messina*, 71 S.W.3d 602 (Mo. 2002) [hereinafter *Messina*].

158. *Messina*, 71 S.W.3d at 607 (“This court declines to adopt an ‘apex’ rule.”)

159. *Id.* at 607 (citing Rules 56.01(b)(1) and 56.01(c)).

160. *Id.* at 607.

161. *Id.* at 607.

162. *Id.* at 607.

163. *Crest Infiniti II*, 174 P.3d at 1003, citing *Thomas v. International Business Machines*, 48 F.3d 478 (10th Cir. 1995) [hereinafter *Thomas*].

164. *Thomas*, 48 F.3d at 483.

165. *Id.* at 483. *See also* *Friedman*, 350 F.3d at 65 (on insulating lawyers from depositions, there is no automatic immunity); *Salter*, 593 F.2d at 649 (no deposition of corporate defendant’s president until other employees with more firsthand knowledge are deposed); *Graves*, 419 Fed. App. at 640 (protective order barring mayor’s deposition as mayor’s affidavits showed he lacked personal knowledge); *Misc. Docket #1*, 197 F.3d at 922 (subpoena to former CEO quashed due to particularly serious embarrassment); and *Gillam*, 952 F.2d at 1152 (protective order to prevent deposition of former bank officer who had no relevant information).

corporation without administrative responsibility or an active part in the actual conduct of the business on a day-to-day basis.<sup>166</sup>

Another federal district court barred, for the time, a deposition of a corporate Vice President who seemingly made a blanket denial of personal knowledge and asserted that annoyance would arise from any deposition. Later, after other corporate officer depositions, the discovering party could again seek the deposition, but only by establishing “the need for further examination” of the company by its Vice President.<sup>167</sup> Comparably, a New York state court has protected a chief executive officer from a deposition because the discovering parties “more importantly” failed to establish that the officer “actually possessed necessary and relevant information germane to their lawsuit.”<sup>168</sup>

Apex Doctrine policies often are more forcefully pursued when entity leaders are government officials. As one Florida appellate court noted:

In circumstances such as these, the agency head should not be subject to deposition, over objection, unless and until the opposing parties have exhausted other discovery and can demonstrate that the agency head is uniquely able to provide relevant information which cannot be obtained from other sources. To hold otherwise would . . . subject agency heads to being deposed in virtually every rule challenge proceeding, to the detriment of the efficient operation of the agency in particular and state government as a whole.<sup>169</sup>

Government leaders differ, e.g., because excessive depositions more easily discourage people from becoming public servants than from becoming private corporate leaders.<sup>170</sup>

Whether for government or private entity leaders, any Illinois judicial or legislative adoption of some form of the Apex Doctrine seemingly should address norms on initial burdens of proof for those seeking protections, on any exhaustion requirement regarding alternative

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166. *Armstrong Cork Co. v. Niagra Mohawk Power Corp.*, 16 F.R.D. 389, 390 (S.D.N.Y. 1954) (citing *Campbell v. General Motors Corp.*, 13 F.R.D. 331 (S.D.N.Y. 1952)).

167. *M.A. Porazzi Company v. The Mormaclark*, 16 F.R.D. 383 (S.D.N.Y. 1951).

168. *Arendt v. General Electric Company*, 704 N.Y.S. 2d 346 (Sup. Ct. App. Div. 3d 2000) (also noting that discovering parties failed to establish that “the numerous managers already deposed...lacked sufficient knowledge”).

169. *Department of Agriculture and Consumer Services v. Broward County*, 810 So.2d 1056, 1085 (Fla. App. 1st 2002).

170. *Citigroup Inc. v. Holsberg*, 915 So.2d 1265, 1270 (Fla. App. 4th 2005). *See also* *Stagman v. Ryan*, 176 F.3d 986, 994-5 (7th Cir. 1999) (no deposition of Illinois Attorney General) and *Moore’s Federal Practice* (3d) § 26.105[2][a], at 26-523 to 26-525 (initiating party often must show “some extraordinary circumstance or special need”; policy can be that a public official “has greater duties and time constraints than other witnesses”).

information sources, and on any necessary cost/benefit analysis. As well, any new Apex Doctrine should include mandatory considerations of the nature and circumstances of the relevant claims. For example, the more unique or personal the facts underlying the claim, the more likely the doctrine should be available to protect apex officials without firsthand knowledge. Personal injury claims involving alleged negligence or other conduct occurring but once seem different from personal injury claims allegedly arising from systemic problems within the entity, such as patterns of discriminatory acts by entity employees. Similarly, claims arising at locales where entity leaders do not work, and have not worked, seem different from claims arising at sites where entity readers act and have acted.<sup>171</sup>

Explicit judicial recognition of the policies underlying the Apex Doctrine, via case law, in Illinois (whether explicitly referencing the doctrine or not) would certainly fit easily into existing Illinois precedents as well as rule and statutory provisions. As one Illinois appeals court panel wisely noted:

The defendant further contends that his right to depose any opposing party is unconditionally guaranteed by Supreme Court Rule 202... We cannot agree. Supreme Court Rule 202 must be viewed with the general discovery provisions set forth in Supreme Court Rule 201 . . . The latter rule empowers the courts to deny, limit, condition and regulate discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage or oppression . . . Thus, trial courts have broad discretionary powers to insure fair and orderly trials and can restrict pretrial discovery where probative value is lacking.<sup>172</sup>

The Apex Doctrine addresses simply the sequencing of depositions of entity officials, securing fair, orderly, and cost effective civil litigation.

#### B. Limiting and Foreclosing Scheduled Trial and Hearing Testimonies

In federal civil actions, per FRCP 45 subpoenas “command” witnesses to “attend and testify” at a “specified time and place.”<sup>173</sup> Anyone responsible for such a subpoena “must take reasonable steps to avoid imposing undue burden or expense” on the “person subject to the

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171. See, e.g., Patterson, 281 F.3d at 681 (vice present more than 1,000 miles from where plaintiff was employed).

172. People v. Norris, 79 Ill. App. 3d 890, 35 Ill. Dec. 213, 398 N.E.2d 1163, 1172 (Ill. App. 1st 1979).

173. FRCP 45(a)(1)(A)(iii).

subpoena.”<sup>174</sup> Such “steps” can provide opportunities for prospective witnesses to express concerns to those responsible for any later subpoenas about potential abuse, including indications by future witnesses of the lack of any knowledge about the facts at issue.<sup>175</sup>

Should a subpoena issue, a federal case trial witness can obtain an order to quash as long as there will be “undue burden or expense.”<sup>176</sup> A trial witness can also obtain court protection if she is neither a party nor a party’s officer and she will “incur substantial expense to travel more than 100 miles to attend trial” within the state.<sup>177</sup>

In some American state courts there are subpoena norms comparable to FRCP 45.<sup>178</sup> In other states there are different guidelines. In Arkansas a subpoena shall “command each person to whom it is directed to appear and give testimony at the time and place therein specified.”<sup>179</sup> No reasonable steps to avoid undue burden are required.<sup>180</sup> Subpoenas may be quashed or modified if “unreasonable or oppressive.”<sup>181</sup>

In Illinois civil actions, the statute on subpoenas for hearing or trial testimony is not very detailed.<sup>182</sup> There is no requirement that undue burden or expense be avoided. The statute simply requires witnesses to appear when they are served with subpoenas.<sup>183</sup> Subpoenas may be quashed or modified “for good cause shown.”<sup>184</sup> The high court rule adds little. It does recognize that the appearance of “a person who at the time of trial . . . or . . . hearing is an officer, director, or employee of a party may be

174. FRCP 45(c)(1).

175. Cases on avoiding “undue burden or expense” include *Northwestern Memorial Hospital v. Ashcroft*, 362 F.3d 923 (7th Cir. 2004) (undue burden when sensitive information with limited probative value is sought).

176. FRCP 45(c)(3)(A)(iv).

177. FRCP 45(c)(3)(B)(iii). Protection can include not only quashing a subpoena, but also modifying a subpoena by specifying conditions for testimony where the witness is quite important (*i.e.*, “undue hardship” without the witness’ testimony) and where the witness “will be reasonably compensated.”

178. *See, e.g.*, NevRCP 45(a)(1)(c), (c)(1) and (c)(3)(A)(IV); NCRCP 45(a)(1)b, (c)(1), (c)(3) c and d (“unreasonable or oppressive” subpoenas may be challenged); AlaRCP 45(a), (c)(1), (c)(3)(A)(ii) and (c)(3)(B)(iii); WVaRCP 45(a)(1)(c), (d)(1), (d)(3)(A)(iv); MissRCP 45(d)(1)(A)(iii) (undue burden test, but no duty to take reasonable steps); AzRCP 45(a)(1)(c), (e)(1), (e)(2)(A)(iv), and (e)(2)(A)(v) (no 100 mile provision, but allows court limitation when “justice so requires”).

179. ArkRCP 45(a). The “testimony” may only involve the production of “tangible things” and thus command no appearance. ArkRCP 45(b).

180. ArkRCP 45(a).

181. ArkRCP 45(b)(2)(i). There are similar guidelines elsewhere. *See, e.g.*, Massachusetts Rule of Civil Procedure 45(a) and (b); ColRCP 45(a); and (b)(1); and Rhode Island District Court Civil Rule 45(a) and (b)(1).

182. 735 ILCS 5/2-1101.

183. 735 ILCS 5/2-1101.

184. 735 ILCS 5/2-1101. Deposition subpoenas may be judicially limited in order “to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression.” ILLR 201(c).

required by serving the party with a notice.”<sup>185</sup> It also recognizes that if a party or person subpoenaed “is a nonresident of the county, the court may order any terms . . . in connection with appearance . . . that are just, including payment of . . . reasonable expenses.”<sup>186</sup> Compliance failures can lead to any “appropriate” sanction permitted by the discovery rule.<sup>187</sup>

Witness protections from abuse at trial or hearing in Illinois have been recognized, e.g., where subpoenas duces tecum related to information beyond that which is always required or where discretionary factors do not favor additional information being subject to compulsory process.<sup>188</sup> Upon a witness’ demonstration of “good cause” to quash a subpoena, the issuing party must then show good cause for the subpoena to be followed.<sup>189</sup>

#### IV. SANCTIONING WITNESS ABUSE

After witness abuse, what sanctions should be available in Illinois civil actions to compensate, deter and/or punish? As the Illinois Supreme Court has said:

Our discovery procedures are meaningless unless a violation entails a penalty proportionate to the gravity of the violation. Discovery for all parties will not be effective unless trial courts do not countenance violations, and unhesitatingly impose sanctions proportionate to the circumstances.<sup>190</sup>

Comparably, violations of trial procedures, including witness subpoena guidelines, must be addressed “unhesitatingly” so that

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185. ILLR 237(b). An “officer, director, or employee” under the rule has not included, to date, “persons under a party’s control.” *White v. Garlock Sealing Technologies, LLC*, 398 Ill. App. 3d 510, 338 Ill. Dec. 193, 924 N.E.2d 53, 54 (4th Dist. 2010). When the noticed officer, director, or employee is one over whom the circuit court has no personal jurisdiction, sanctions for nonappearance only may be levied against the entity party. *Pickering v. Owens-Corning Fiberglass Corp.*, 265 Ill. App. 3d 806, 203 Ill. Dec. 1, 638 N.E.2d 11127, 1136-7 (5th Dist. 1994) [hereinafter *Pickering*]. On who is an employee and who is an independent contract, see *In re Estate of Hoogerwerf*, 2012 WL 342848, 2012 IL App (4th) \_\_\_\_.

186. ILLR 237(b).

187. ILLR 237(b).

188. *See, e.g., People v. Brummett*, 279 Ill. App. 3d 421, 216 Ill. Dec. 146, 664 N.E.2d 1074, 1078 (Ill. App. 4th 1996) (applying the limits recognized for discovery in summary driving license suspension cases, as found in *Teller*, 207 Ill. App. 3d at 349, to subpoenas for trial testimony in those cases).

189. *See, e.g., Oakview New Lenox School District No. 122 v. Ford Motor Company*, 61 Ill. App. 3d 194, 19 Ill. Dec. 43, 378 N.E.2d 544, 547-8 (3d Dist. 1978).

190. *Buehler v. Whalen*, 70 Ill.2d 51, 15 Ill. Dec. 852, 374 N.E.2d 460, 467 (1977) [hereinafter *Buehler*]. *See also Williams v. A.E. Staley Mfg. Co.*, 83 Ill.2d 559, 48 Ill. Dec. 221, 416 N.E.2d 252, 256 (1981) (quoting *Buehler*’s admonition for all who use discovery “to impede and harass”).



“controversies may be speedily and finally determined according to the substantive rights of the parties.”<sup>191</sup>

#### A. Discovery Sanctions

In considering proportionate responses to discovery witness abuse, a central question emerges: Should sanctioning for discovery abuse prioritize public interests over private interests, as is done, for example, for pleading and motion abuses in the federal district courts?<sup>192</sup> Public interest sanctions benefit society as a whole while private interest sanctions benefit individual parties, though both sanctions have certain goals in common, like general deterrence.<sup>193</sup>

In the federal district courts sanctions for discovery abuses are handled differently, and more stringently, than sanctions for pleading and motion abuses. Thus the rule on pleading and motion practice abuse allows a 21 day safe harbor period in which to avoid sanctions,<sup>194</sup> with the trial court unaware of the alleged abuse if it is “withdrawn or appropriately corrected.”<sup>195</sup> The rule on discovery abuse has no such period,<sup>196</sup> though a motion for discovery sanctions must be preceded by the discovering party’s attempt “in good faith to obtain the . . . discovery without court action.”<sup>197</sup> As well, the federal pleading and motion rule frowns on attorney fee

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191. 735 ILCS 5/1-106.

192. FRCP 11(c)(4) (only if “warranted for effective deterrence” should a trial court issue an order “directing payment to the movant” to cover fees or other litigation expenses). See also the Advisory Committee Notes to the 1993 revisions to FRCP 11 which declare that since “the purpose of Rule 11 sanctions is to deter rather than to compensate the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty.” Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 501, 587-588 (1983) [hereinafter 1993 FRCP Amendments].

193. See, e.g., *Wolgast v. Richards*, 2012 WL 137810, \_\_\_ F. Supp.3d \_\_\_ (E.D. Mich. 2012) (1993 amendment to FRCP11 moved central purpose from compensation via private interest sanction to deterrence via public interest sanction [like disciplinary referral or censure or fine]). Also see Wright, Miller, Kane and Marcus, 5A Fed. Prac. & Proc. Civ. §1331 (3d ed.) and Jeffrey A. Parness, “The New Method of Regulating Lawyers: Public and Private Interest Sanctions During Civil Litigation for Attorney Misconduct,” 47 Louisiana L. Rev. 1305 (1987).

194. FRCP 11(c)(2).

195. FRCP 11(c)(2). The history of the federal rule on sanctioning pleading and motion abuse, as well as related state law developments, is reviewed in Erin Schiller and Jeffrey A. Wertkin, *Frivolous Filings and Vexatious Litigation*, 14 Georgetown Journal of Legal Ethics 909 (2001).

196. FRCP 37(a)(3)(B). And see FRCP 11(d) (rule, including its safe harbor provision, does not apply to “disclosures and discovery requests, responses, objections, and motions”). Before 1993, under the 1983 amendments to FRCP 11, the FRCP 11 provisions applied to discovery motions but not to discovery paper certifications. Advisory Committee Notes to 1983 revision of FRCP 11.

197. FRCP 37(a)(5)(i).

recoveries.<sup>198</sup> The federal discovery rule does not.<sup>199</sup> In the federal district courts, discovery abuses are deemed more problematic, and more personal, to abused parties than are pleading and motion abuses.<sup>200</sup>

By contrast, in the Illinois circuit courts there are fewer differences in the written laws between sanctions for pleading, motion and discovery abuses.<sup>201</sup> All civil litigation papers must be certified under the same Rule 137 standards.<sup>202</sup> There is no 21 day safe harbor period for bad pleadings and motions,<sup>203</sup> as there is not for nonmeritorious discovery.<sup>204</sup> And discovery sanctions cannot be sought without a good faith attempt to resolve objections.<sup>205</sup>

Attorney fee recoveries also seem more available, at least theoretically, as sanctions for all abuses in Illinois circuit courts than in the federal district courts.<sup>206</sup> Yet, as a practical matter, to this author feeshifting occurs infrequently in Illinois, certainly far less than its occurrences in the federal district courts from 1983 to 1993 when the federal pleading and motion standards were comparable to the current Illinois rule on certifying

198. FRCP 11(c)(4) (“an order directing payment to the movant of part or all of the reasonable attorney’s fees and other expenses directly resulting” from the rule violation is only available if “warranted for effective deterrence”).

199. FRCP 37(d)(3) (sanctions for certain discovery failures “must” include “the reasonable expenses, including attorney’s fees, caused” by the failures unless the failures “were substantially justified or other circumstances make an award of expenses unjust”) and FRCP 37(a)(5) (when a motion seeking to compel discovery leads to discovery rule compliance, those whose conduct prompted the motion “must” be ordered “to pay the movant’s reasonable expenses incurred in making the motion, including attorney’s fees” unless, inter alia, the relevant conduct “was substantially justified” or “other circumstances make an award of expenses unjust”).

200. There has been much more concern by federal rulemakers over the years with intentional discovery abuses than with intentional pleading and motion abuses. Compare, *e.g.*, the original FRCP (in 1938) on sanctioning civil litigation misconduct where, until 1983, pleading and motion abuses were sanctionable only if willful, while discovery abuses did not need to be willful to be sanctionable. Consider also the switch made in 1993 away from private sanctions for pleading and motion abuses (most notably attorney’s fee recoveries), *supra* note 193, with no such switch for discovery abuses, FRCP 37, found in 1993 FRCP Amendments.

201. Independent of any rule or statute, an Illinois circuit court has broad inherent authority to sanction, especially for deliberate and continuing disregard for judicial power. *Santiago v. E.W. Bliss Co.*, 406 Ill. App. 3d 449, 346 Ill. Dec. 717, 941 N.E.2d 275, 284 (Ill. App. 1st 2010) (power is “rarely discussed”), citing *J.S.A. v. M.H.*, 224 Ill.2d 182, 196, 309 Ill. Dec. 6, 863 N.E.2d 236 (2007) (inherent authority is a crucial method for the circuit court to “prevent undue delays in the disposition of cases caused by abuses of the litigation process”) and *Sander v. Dow Chemical Co.*, 166 Ill.2d 48, 67, 209 Ill. Dec. 623, 651 N.E.2d 1071 (1995) (inherent authority to dismiss for “deliberate and continuing disregard of court authority”).

202. ILLR 137.

203. ILLR 137.

204. ILLR 137.

205. ILLR 201(K).

206. Compare FRCP 11 (21 day safe harbor period before any sanction imposed for pleading or motion abuse, with attorney fee recoveries a disfavored sanction) to ILLR 137 (sanctions for any frivolous paper-including discovery materials—and no preference for public interest sanctions).

“every pleading, motion and other paper;” from 1983 to 1993 there was in the federal district courts a cottage industry in motions for attorney’s fee awards as sanctions for civil litigation misconduct.<sup>207</sup>

Private interest sanctions include, of course, more than feeshifting. For example, evidence-including witnesses—can be excluded from trial if improperly withheld in discovery or from other civil litigation papers. Exclusion is determined upon consideration of several factors, including the surprise to the adverse party; the prejudicial effect that results; the diligence of the adverse party; the good faith of the withholding party; and the timeliness of the objection by the adverse party.<sup>208</sup> Exclusionary sanctions, however, often do little for an abused (especially nonparty) witness, who would often benefit from cost (including fee) shifting.

As well, there is the private interest sanction of dismissal. One Illinois appeals court observed:

However, Illinois courts are becoming less tolerant of violations of discovery rules, even at the expense of a case being decided on the basis of the sanction imposed, rather than on the merits of the litigation.<sup>209</sup>

Dismissal serves the “interest in promoting the unimpeded flow of litigation.”<sup>210</sup> Yet here too, as with evidence exclusion, this sanction often does little for abused witnesses (often nonparties).

Public interest sanctions include, e.g., fines payable to the court; reprimands of attorneys; and findings of contempt. As with evidence exclusion, involuntary dismissal, and default judgment, these sanctions also do little for many abused witnesses.<sup>211</sup>

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207. Compare ILLR 137 to FRCP11 (1983-1993), found in 1983 FRCP Amendments, at 196-197, which was very critically reviewed in, e.g., Note, Plausible Pleadings: Developing Standards for Rule 11 Sanctions, 100 Harv. L. Rev. 630 (1987) and Melissa L. Nelken, Sanctions Under Amended Federal Rule 11—Some “Chilling” Problems in the Struggle Between Compensation and Punishment, 74 The Georgetown L.J. 1313 (1986). The rationales for the 1993 changes to FRCP 11 are found in the Advisory Committee Notes, 1993 Federal Rules of Civil Procedure, 146 F.R.D. 401, 583-592 (reduce the number of motions for sanctions regarding pleadings and motions, and allow only the rule “specially designed for the discovery process” to guide discovery sanctions).

208. *Ashford v. Ziemann*, 99 Ill. 2d 353, 76 Ill. Dec. 805, 459 N.E.2d 940, 947-9 (1984) (recognizing each case “presents a unique factual situation”).

209. *Atwood v. Warner Electric Brake and Clutch Co., Inc.*, 239 Ill. App. 3d 81, 90, 179 Ill. Dec. 18, 605 N.E.2d 1032 (Ill. App. 2d 1992) (citing *Harris v. Harris*, 196 Ill. App. 3d 815, 820, 144 Ill. Dec. 113, 555 N.E.2d 10 (Ill. App. 1st 1990)) [hereinafter *Atwood*].

210. *Atwood*, 239 Ill. App.3d at 90 (again citing *Harris*, 196 Ill. App. 3d at 820).

211. *See, e.g., Buehler*, 374 N.E.2d at 467-8 (recognizing that while contempt is a form of sanction available under ILLR 219(c), often it “is hardly a sanction in reality” because frequently the “worst penalty is the payment of a nominal fine” which does little to console the opposing party who confronted “fractional discovery and fractional disclosure”).

Beyond sanctions for violating certification standards applicable to discovery (and pleading and motion) papers, Illinois Supreme Court Rule 219 authorizes sanctions for discovery abuse involving refusals to answer deposition questions “without substantial justification.”<sup>212</sup> Yet such sanctions may only be pursued after private attempts have been made to resolve discovery disagreements,<sup>213</sup> sometimes described as a “meet and confer” requirement.<sup>214</sup> Other discovery abuses, including failures to comply with the deposition rules, can also prompt Rule 219 sanctions.<sup>215</sup>

#### B. Trial and Hearing Witness Sanctions

And what of the sanctions for abusive trial or hearing witness subpoenas? As noted, in the federal district courts those issuing subpoenas must “avoid imposing undue burden or expense.” Similar limits operate in some state courts outside of Illinois. In other state courts, however, a party objecting to a trial or hearing subpoena will obtain relief only upon a showing of undue burden or expense.<sup>216</sup>

In Illinois, civil trial or hearing witnesses are subpoenaed with no explicitly required avoidance of undue burden or expense, though the witnesses must be thought to have “actual knowledge” and must be tendered “payment of the fee and mileage.”<sup>217</sup> Witnesses can be asked to produce at the trial or hearing “the originals of those documents or tangible things previously produced during discovery.”<sup>218</sup> Witnesses include those persons, who at the time of trial or hearing, were designated in the notice to appear as “an officer, director or employee of a party.”<sup>219</sup> For witnesses with residencies outside the relevant county, the trial court “may order appearance” upon “terms and conditions . . . that are just, including

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212. ILLR 219(a) (mandated sanction that “aggrieved party” be paid “reasonable expenses” in obtaining compliance, including “reasonable attorney’s fees”).

213. ILLR 201(K).

214. Leonard E. Gross, *Supreme Court Rule 219: The Consequences of Refusal to Comply with Rule or Orders Relating to Discovery or Pretrial Conferences*, 24 *Loyola U. Chicago L.J.* 471, 495 (1993).

215. ILLR 219(c) (varying possible sanctions available).

216. *See, e.g.*, Texas Civil Procedure Rule 176.7 (avoid “undue burden or expense”); 12 Oklahoma Stat. 2004.1 C (“avoid imposing undue burden or expense”); MinnRCP 45.03 (“reasonable steps to avoid imposing undue burden or expense”); Kansas Stat. 60-245(c) (“avoiding undue burden or expense”); AzRCP 45(c)(5)(B)(iii) (upon objection, protective order protects nonparty and one not a party’s officer from “undue burden or expense”); NCRCP 45(c) (duty to avoid undue burden or expense on any person subject to a subpoena); and MissRCP 45(d)(1) (subpoena quashed if it “subjects a person to undue burden or expense”).

217. ILLR 237(a).

218. ILLR 237(b).

219. ILLR 237(b).

payment of . . . reasonable expenses.”<sup>220</sup> Subpoenas may be quashed via court order upon a showing by the person subpoenaed of “good cause.”<sup>221</sup> Witness failures to comply with trial appearance notices can lead to “just” sanctions under Rule 237,<sup>222</sup> with failures typically read to include “unreasonable” acts.<sup>223</sup>

## V. CONCLUSION

The Illinois Appellate court has wisely observed: “The defendant further contends that his right to depose any opposing party is unconditionally guaranteed by Supreme Court Rule 202 . . . We cannot agree . . . Rule 201 . . . empowers the courts to . . . regulate discovery . . . to insure fair and orderly trials and . . . restrict pretrial discovery where probative value is lacking.”<sup>224</sup> Unfortunately, Rule 201 and judicial precedents fail to recognize certain avenues to more just and less expensive civil case resolutions. While multiple new avenues are available, in particular in Illinois there should be new judicial rules on pre-discovery meetings and conferrals in Illinois, as well as new rules on special discovery certifications. There should also be new precedents recognizing explicitly the policies underlying the Apex Doctrine. New express recognitions of limits on depositions in rules and precedents would better insure “fair and orderly trials” that are not cost prohibitive.

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220. ILLR 237(b).

221. 735 ILCS 5/2-1101.

222. ILLR 237(b).

223. *Marchese v. Vincelette*, 261 Ill. App. 3d 520, 199 Ill. Dec. 81, 633 N.E.2d 877, 882-3 (1st Dist. 1994). See also *Pickering*, 638 N.E.2d at 1137-40 (entity failure regarding officer testimony at trial) and *Government Employees Insurance Co. v. Smith*, 355 Ill. App. 3d 915, 291 Ill. Dec. 837, 824 N.E.2d 1087 (1st Dist. 2005) (entity failure regarding employee’s testimony at arbitration hearing). Compare *A.G. Edwards, Inc. v. Secretary of State*, 331 Ill. App. 3d 1101, 265 Ill. Dec. 324, 772 N.E.2d 362 (5th Dist. 2002) (administrative subpoena duces tecum quashed for it sought salespersons’ private records during a routine audit of a securities and investment services company).

224. *People ex rel. Illinois State Dental Soc. v. Norris*, 79 Ill.App.3d 890, 35 Ill. Dec. 213, 398 N.E.2d 1163, 1172 (1st Dist. 1979).

