CHAPTER 804

CIVIL PROCEDURE — DEPOSITIONS AND DISCOVERY

NOTE: This chapter was created by Sup. Ct. Order, 67 Wis. 2d 585 (1975), which contains explanatory notes. Statutes prior to the 1983-84 edition also contain these notes.

804.01 General provisions governing discovery.

(1) DISCOVERY METHODS. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under sub. (3), and except as provided in ss. 804.015, 804.045, 804.08 (1) (am), and 804.09, the frequency of use of these methods is not limited.

(2) SCOPE OF DISCOVERY. Unless otherwise limited by order of the court in accordance with the provisions of this chapter, the scope of discovery is as follows:

(a) *In general.* Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(am) *Limitations.* Upon the motion of any party, the court shall limit the frequency or extent of discovery if it determines that one of the following applies:

1. The discovery sought is cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.

2. The burden or expense of the proposed discovery outweighs its likely benefit or is not proportional to the claims and defenses at issue considering the needs of the case, the amount in controversy, the parties' resources, the complexity and importance of the issues at stake in the action, and the importance of discovery in resolving the issues.

(b) *Insurance agreements.* A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial.

(bg) *Third party agreements.* Except as otherwise stipulated or ordered by the court, a party shall, without awaiting a discovery request, provide to the other parties any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise.

(c) *Trial preparation: materials.* 1. Subject to par. (d) a party may obtain discovery of documents and tangible things otherwise discoverable under par. (a) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party seeking discovery is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. This protection is forfeited as to any material disclosed inadvertently in circumstances in which, if the material were a lawyer-client communication, the disclosure would constitute a forfeiture under s. 905.03 (5). This protection is waived as to any material disclosed by the party or the party's representative if the disclosure is not inadvertent.

2. A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. Section 804.12 (1) (c) applies to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is a written statement signed or otherwise adopted or approved by the person making it, or a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(d) *Trial preparation: experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under par. (a) and acquired or developed in anticipation of litigation or for trial, may be obtained as follows:

1. A party may through written interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subd. 3. concerning fees and expenses as the court considers appropriate.

2. A party may, through written interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only upon motion showing that exceptional circumstances exist under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

3. Unless manifest injustice would result, the court shall re-

quire that the party seeking discovery pay the expert a reasonable fee for the time spent in responding to discovery under the last sentence of subds. 1. and 2.; and with respect to discovery obtained under the last sentence of subd. 1., the court may require, and with respect to discovery obtained under subd. 2., the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(e) *Specific limitations on discovery of electronically stored information.* 1g. A party is not required to provide discovery of any of the following categories of electronically stored information absent a showing by the moving party of substantial need and good cause, subject to a proportionality assessment under par. (am) 2.:

a. Data that cannot be retrieved without substantial additional programming or without transforming it into another form before search and retrieval can be achieved.

b. Backup data that are substantially duplicative of data that are more accessible elsewhere.

c. Legacy data remaining from obsolete systems that are unintelligible on successor systems.

d. Any other data that are not available to the producing party in the ordinary course of business and that the party identifies as not reasonably accessible because of undue burden or cost. In response to a motion to compel discovery or for a protective order, the party from whom discovery is sought is required to show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may order discovery from such sources only if the requesting party shows good cause, considering the limitations of par. (am). The court may specify conditions for the discovery.

1r. No party may serve a request to produce or inspect under s. 804.09 seeking the discovery of electronically stored information, or respond to an interrogatory under s. 804.08 (3) by producing electronically stored information, until after the parties confer regarding all of the following, unless excused by the court:

a. The subjects on which discovery of electronically stored information may be needed, when such discovery should be completed, and whether discovery of electronically stored information shall be conducted in phases or be limited to particular issues.

b. Preservation of electronically stored information pending discovery.

c. The form or forms in which electronically stored information shall be produced.

d. The method for asserting or preserving claims of privilege or of protection of trial-preparation materials, and to what extent, if any, the claims may be asserted after production of electronically stored information.

e. The cost of proposed discovery of electronically stored information and the extent to which such discovery shall be limited, if at all, under sub. (3) (a).

f. In cases involving protracted actions, complex issues, or multiple parties, the utility of the appointment by the court of a referee under s. 805.06 or an expert witness under s. 907.06 to supervise or inform the court on any aspect of the discovery of electronically stored information.

2. If a party fails or refuses to confer as required by subd. 1r., any party may move the court for relief under s. 804.12 (1).

3. If after conferring as required by subd. 1r., any party objects to any proposed request for discovery of electronically stored information or objects to any response under s. 804.08 (3) proposing the production of electronically stored information, the objecting party may move the court for an appropriate order under sub. (3).

(3) PROTECTIVE ORDERS. (a) Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including but not limited to one or more of the following:

1. That the discovery not be had;

2. That the discovery may be had only by specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

3. That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

4. That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

5. That discovery be conducted with no one present except persons designated by the court;

6. That a deposition after being sealed be opened only by order of the court;

7. That a trade secret, as defined in s. 134.90 (1) (c), or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

8. That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

(b) If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. Section 804.12 (1) (c) applies to the award of expenses incurred in relation to the motion.

(c) Motions under this subsection may be heard as prescribed in s. 807.13.

(4) SEQUENCE AND TIMING OF DISCOVERY. Unless the parties stipulate or the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(5) SUPPLEMENTATION OF RESPONSES. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(a) A party is under a duty seasonably to supplement the party's response with respect to any question directly addressed to all of the following:

1. The identity and location of persons having knowledge of discoverable matters.

2. The identity of each person expected to be called as an expert witness at trial.

(b) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which 1. the party knows that the response was incorrect when made, or 2. the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

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

(6) CUSTODY OF DISCOVERY DOCUMENTS. (a) Unless the court in any action orders otherwise, the original copies of all depositions, interrogatories, requests for admission and responses thereto, and other discovery documentation shall be retained by the party who initiated the discovery or that party's attorney.

(b) The original copy of a deposition shall be retained by the attorney sealed as received from the person recording the testimony until the appeal period has expired, or until made a part of the record.

(7) RECOVERING INFORMATION INADVERTENTLY DISCLOSED. If information inadvertently produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

History: Sup. Ct. Order, 67 Wis. 2d 585, 654 (1975); 1975 c. 218; 1985 a. 236; Sup. Ct. Order, 130 Wis. 2d xix (1986); Sup. Ct. Order, 141 Wis. 2d xiii (1987); 1993 a. 486; Sup. Ct. Order No. 95-03, 191 Wis. 2d xix (1995); 1997 a. 35, 133; 2007 a. 20; Sup. Ct. Order No. 09-01, 2010 WI 67, filed 7-6-10, eff. 1-1-11; Sup. Ct. Order No. 09-01A, 2010 WI 129, 329 Wis. 2d xix; Sup. Ct. Order No. 12-03, 2012 WI 114, 344 Wis. 2d xxi; 2015 a. 55; 2017 a. 235.

Judicial Council Note, 1986: Sub. (6) requires that the originals of discovery documents be retained by the party who initiated the discovery, or his or her attorney, unless the court otherwise directs, until the time for appeal has expired. [Re Order eff. 7-1-86.]

Judicial Council Note, 1988: Sub. (3) (c) [created] allows motions for protective orders to be heard by telephone conference. [Re Order effective Jan. 1, 1988]

Judicial Council Note, 1995: The revision to sub. (2) (d) 1. makes it unnecessary to obtain a court order to take an expert's deposition. By mutual agreement, practitioners commonly agree to take experts' depositions without troubling the court for an order. The court's power to control the discovery process is sufficient to prevent abuses. The revision is based on Rule 26 (b) (4) (A), F.R.C.P. Subsection (2) (d) 2. is amended to specify that discovery of non-testifying experts may be made by interrogatories or depositions. The revision is based on Rule 26 (b) (4) (B), F.R.C.P.

Supreme Court Note, 2010: Sub. (2) (e) was created as a measure to manage the costs of the discovery of electronically stored information. If the parties confer before embarking on such discovery, they may reduce the ultimate cost.

The rule does not require parties to confer before commencing discovery under s. 804.05 (Depositions upon oral examination), s. 804.06 (Depositions upon written questions), s. 804.08 (Interrogatories to parties); or s. 804.11 (Requests for admission). These discovery devices, if employed before serving a request for production or inspection of electronically stored information, may lead to more informed conferences about the potential scope of such discovery.

Parties may not be able to reach consensus on how discovery of electronically stored information is to be managed. Accordingly, subs. (e) 2. and (e) 3. confer authority on the court to intervene as appropriate. In determining whether to issue an order relating to discovery of electronically stored information, the circuit court may compare the costs and potential benefits of discovery. *See Vincent & Vincent, Inc. v. Spacek,* 102 Wis. 2d 266, 306 N.W.2d 85 (Ct. App. 1981). It is also appropriate to consider the factors specified in the Advisory Committee notes to Fed. R. Civ. P. 26(b)(2)(B): (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

Judicial Council Note, 2012: Sup. Ct. Order No. 12-03 states that "the Judicial Council Notes to Wis. Stat. § 804.01 (2) (c), 804.01 (7), 805.07 (2) (d), and 905.03 (5) are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule."

Sub. (2) (c) is amended to make explicit the effect of different kinds of disclosures of trial preparation materials. An inadvertent disclosure of trial preparation materials is akin to an inadvertent disclosure of a communication protected by the lawyer-client privilege. Whether such a disclosure results in a forfeiture of the protection is determined by the same standards set forth in Wis. Stat. s. 905.03(5). A disclosure that is other than inadvertent is treated as a waiver. The distinction between "waiver" and "forfeiture" is discussed in cases such as State v. Ndina, 2009 WI 21, ¶¶28-31, 315 Wis. 2d 653.

Sub. (7) is modeled on Fed. R. Civ. P. 26(b)(5)(B), the so-called "clawback" provision of the federal rules. The following Committee Note of the federal Advisory Committee on Civil Rules regarding the 2006 Amendments to the Federal Rules of Civil Procedure (regarding discovery of electronically stored information) is instructive in understanding the scope and purpose of Wisconsin's version:

> The Committee has repeatedly been advised that the risk of privilege waiver, and the work necessary to avoid it, add to the costs and delay of discovery. When the review is of electronically stored information, the risk of waiver, and the time and effort required to avoid it, can increase substantially because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed. Rule 26(b)(5)(A) provides a procedure for a party that has withheld information on the basis of privilege or protection as trial-preparation material to make the claim so that the requesting party can decide whether to contest the claim and the court can resolve the dispute. Rule 26(b)(5)(B) is added to provide a procedure for a party to assert a claim of privilege or trial-preparation material protection after information is produced in discovery in the action and, if the claim is contested, permit any party that received the information to present the matter to the court for resolution.
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> Rule 26(b)(5)(B) does not address whether the privilege or protection that is asserted after production was waived by the production. The courts have developed principles to determine whether, and under what circumstances, waiver results from inadvertent production of privileged or protected information. Rule 26(b)(5)(B) provides a procedure for presenting and addressing these issues. Rule 26(b)(5)(B) works in tandem with Rule 26(f), which is amended to direct the parties to discuss privilege issues in preparing their discovery plan, and which, with amended Rule 16(b), allows the parties to ask the court to include in an order any agreements the parties reach regarding issues of privilege or trial-preparation material protection. Agreements reached under Rule 26(f)(4) and orders including such agreements entered under Rule 16(b)(6) may be considered when a court determines whether a waiver has occurred. Such agreements and orders ordinarily control if they adopt procedures different from those in Rule 26(b)(5)(B).
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> A party asserting a claim of privilege or protection after production must give notice to the receiving party. That notice should be in writing unless the circumstances preclude it. Such circumstances could include the assertion of the claim during a deposition. The notice should be as specific as possible in identifying the information and stating the basis for the claim. Because the receiving party must decide whether to challenge the claim and may sequester the information and submit it to the court for a ruling on whether the claimed privilege or protection applies and whether it has been waived, the notice should be sufficiently detailed so as to enable the receiving party and the court to understand the basis for the claim and to determine whether waiver has occurred. Courts will continue to examine whether a claim of privilege or protection was made at a reasonable time when delay is part of the waiver determination under the governing law.
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> After receiving notice, each party that received the information must promptly return, sequester, or destroy the information and any copies it has. The option of sequestering or destroying the information is included in part because the receiving party may have incorporated the information in protected trial-preparation materials. No receiving party may use or disclose the information pending resolution of the privilege claim. The receiving party may present to the court the questions whether the information is privileged or protected as trial-preparation material, and whether the privilege or protection has been waived. If it does so, it must provide the court with the grounds for the privilege or protection specified in the producing party's notice, and serve all parties. In presenting the question, the party may use the content of the information only to the extent permitted by the applicable law of privilege, protection for trial-preparation material, and professional responsibility.
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> If a party disclosed the information to nonparties before receiving notice of a claim of privilege or protection as trial-preparation material, it must take reasonable steps to retrieve the information and to return it, sequester it until the claim is resolved, or destroy it.
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> Whether the information is returned or not, the producing party must preserve the information pending the court's ruling on whether the claim of privilege or of protection is properly asserted and whether it was waived. As with claims made under Rule 26(b)(5)(A), there may be no ruling if the other parties do not contest the claim.

The trial court has no authority to order the production of documents relevant to a claim upon which it could grant no relief. State ex rel. Rilla v. Circuit Court, 76 Wis. 2d 429, 251 N.W.2d 476 (1977).

Discovery, although it has a purpose of finding admissible evidence, does not imply that what is discovered will be admissible. Shibilski v. St. Joseph's Hospital of Marshfield, Inc., 83 Wis. 2d 459, 266 N.W.2d 264 (1978).

When the cost of discovery was several times greater than the claim for damages, a protective order against discovery was appropriate. Vincent & Vincent, Inc. v. Spacek, 102 Wis. 2d 266, 306 N.W.2d 85 (Ct. App. 1981).

A highly placed state official who seeks a protective order should not be compelled to testify on deposition unless a clear showing is made that the deposition is necessary to prevent prejudice or injustice. State v. Beloit Concrete Stone Co., 103 Wis. 2d 506, 309 N.W.2d 28 (Ct. App. 1981).

Public records germane to pending litigation were available under s. 19.35 even though the discovery cutoff deadline had passed. State ex rel. Lank v. Rzentkowski, 141 Wis. 2d 846, 416 N.W.2d 635 (Ct. App. 1987).

A lawyer's decision to spend a client's resources on photographic or video surveillance is protected work product. Disclosure of the fact of the surveillance and description of the materials obtained would impinge on the core of the work-product doctrine. Ranft v. Lyons, 163 Wis. 2d 282, 471 N.W.2d 254 (Ct. App. 1991).

A litigant's request to see the litigant's file that is in the possession of current or former counsel does not waive the attorney-client and work-product privileges and does not allow other parties to the litigation discovery of those files. Borgwardt v. Redlin, 196 Wis. 2d 342, 538 N.W.2d 581 (Ct. App. 1995), 94-2701.

Discussing discoverability of lawyer work product. State v. Hydrite Chemical Co., 220 Wis. 2d 51, 582 N.W.2d 411 (Ct. App. 1998), 96-1780.

A substantiated assertion of privilege is substantial justification for failing to comply with an order to provide or permit discovery. Burnett v. Alt, 224 Wis. 2d 72, 589 N.W.2d 21 (1999), 96-3356.

Unfiled pretrial materials in a civil action between private parties are not public records, and neither the public nor the press has either a common law or constitutional right of access to those materials. State ex rel. Mitsubishi Heavy Industries America, Inc. v. Circuit Court, 2000 WI 16, 233 Wis. 2d 1, 605 N.W.2d 868, 99-2810.

The test of whether the work-product doctrine under sub. (2) (c) applies is whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. Once a matter is classified as work product, the party moving for discovery must make an adequate showing that the information sought is unavailable from other sources and that a denial of discovery would prejudice the movant's preparation for trial. Lane v. Sharp Packaging Systems, Inc., 2002 WI 28, 251 Wis. 2d 68, 640 N.W.2d 788, 00-1797.

The New Wisconsin Rules of Civil Procedure: Chapter 804. Graczyk. 59 MLR 463 (1976).

Witness Statements: Current state of discovery in Wisconsin. Van Domelen & Benson. WBB May 1988.

Discoverability of Work-Product Materials Reviewed by Testifying Experts. Matthews. Wis. Law. June 2002.

What You Need to Know: New Electronic Discovery Rules. Sankovitz, Grenig, & Gleisner. Wis. Law. July 2010.

E-Discovery: Who Pays? Edwards. Wis. Law. Oct. 2012.

Sweeping Changes to Rules of Civil Procedure. Billings, Gegios, & Bialzik. Wis. Law. June 2018.

Electronically Stored Information: Balancing Proportionality & Preservation. Edwards. Wis. Law. Oct. 2020.

804.015 Limits on discovery by prisoners. (1) In this section, "prisoner" has the meaning given s. 801.02 (7) (a) 2.

(2) Unless ordered by the court, a prisoner in an action or special proceeding may not obtain discovery before the court receives a copy of the answer or other responsive pleading in the action commenced by the prisoner. If a defendant submits a motion to dismiss or a motion for summary judgment, no discovery may be obtained until the court decides that the prisoner has a reasonable opportunity to prevail on the merits, or until the court decides the merits of the motion, unless the court orders a party to submit to discovery.

(3) If a court allows a prisoner to obtain discovery under sub. (2) before the court decides that the prisoner has a reasonable opportunity to prevail on the merits, receives a copy of the answer or other responsive pleading in the action, or decides the merits of a motion to dismiss or a motion for summary judgment, the court order shall be narrowly tailored to limit the discovery to allow only discovery that is essential to enable the prisoner to obtain the evidence necessary to his or her case. The court shall limit the discovery so as to provide a minimal intrusion in the activities of any person subject to discovery under this subsection.

(4) If a prisoner commences an action or special proceeding, the court shall limit the number of requests for interrogatories, production of documents or admissions to 15, unless good cause is shown for any additional requests. This number may not be expanded by the use of subparts to the interrogatories.

(5) This section does not apply when the prisoner appears by an attorney who is licensed to practice law in this state.

History: 1997 a. 133.

804.02 Perpetuation of testimony by deposition. (1) BEFORE ACTION. (a) *Petition.* A person who desires to perpetuate personal testimony or that of another person regarding any matter that may be cognizable in any court of this state may file a verified petition in any such court in this state. The petition shall be entitled in the name of the petitioner and shall show that the petitioner expects to be a party to an action; the subject matter of the expected action and the petitioner's interest therein; the facts which the petitioner desires to establish by the proposed testimony and the petitioner's reasons for desiring to perpetuate it; the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known; and the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(b) *Notice and service.* The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will move the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served either within or without the state in the manner provided in s. 801.11 for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in s. 801.11, an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or is an individual adjudicated or alleged to be incompetent, s. 803.01 (3) applies.

(c) *Order and examination.* If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with this chapter; and the court may make orders of the character provided for by ss. 804.09 and 804.10. For the purpose of applying this chapter to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(d) *Use of deposition.* If a deposition to perpetuate testimony is taken under this section, or if, although not so taken, it would be otherwise admissible in the courts of this state, it may be used in any action involving the same subject matter subsequently brought in this state in accordance with s. 804.07.

(2) PENDING APPEAL. (a) If an appeal has been taken from a judgment of a court of this state or before the taking of an appeal if the time therefor has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the court.

(b) In such case, the party who desires to perpetuate the testimony may make a motion in the court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the court. The motion shall show all of the following:

1. The names and addresses of persons to be examined and the substance of the testimony which the moving party expects to elicit from each of those persons.

2. The reasons for perpetuating the testimony of the persons under subd. 1.

(c) If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by ss. 804.09 and 804.10 and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in this chapter for depositions taken in actions pending in the court.

History: Sup. Ct. Order, 67 Wis. 2d 585, 660 (1975); 1975 c. 218; 1993 a. 486; 2005 a. 387; 2021 a. 238 s. 45.

804.03 Persons before whom depositions may be taken. (1) WITHIN THE UNITED STATES. Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of this state or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony.

(2) IN FOREIGN COUNTRIES. In a foreign country, depositions may be taken on notice before a person authorized to administer

oaths in the place in which the examination is held, either by the law thereof or by the law of the United States; before a person commissioned by the court, and a person so commissioned shall have the power by virtue of the commission to administer any necessary oath and take testimony; or pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on motion and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in (here name the country)". Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under this chapter.

(3) DISQUALIFICATION FOR INTEREST. No deposition may be taken before a person who is a party to the action or a relative or employee or attorney, or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action. No deposition may be taken before a person who has entered into a contract for court reporting services unless the contract is limited to a particular action or incident. This subsection does not apply to a person who records or transcribes depositions for a public agency, as defined in s. 66.0825 (3) (h).

(4) REMOTELY LOCATED INDIVIDUALS. (a) For the purposes of this section, an oath may be administered to a remotely located individual using audio-visual equipment. An officer administering an oath shall be in simultaneous communication with all parties to the deposition, whether or not in the physical presence of any of them. Remote administration of an oath at a deposition via audio-visual communications technology shall constitute the administration of an oath before a court reporter.

(b) Court reporters qualified to administer an oath in this state may administer an oath to a witness at a deposition remotely via audio-visual communications technology from a location within this state provided the person administering the oath can see and hear the witness and can identify the witness.

(c) If a witness is not located within this state, the witness may consent to being placed under oath remotely via audio-visual communication technology by a court reporter qualified to administer an oath in this state.

History: Sup. Ct. Order, 67 Wis. 2d 585, 663 (1975); 1975 c. 218; 2003 a. 227; Sup. Ct. Order No. 21-05, 2022 WI 24, 401 Wis. 2d xix; 2021 a. 238 s. 45; s. 35.17 correction in (4) (b), (c).

804.04 Stipulations regarding discovery procedure. Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by this chapter for other methods of discovery.

History: Sup. Ct. Order, 67 Wis. 2d 585, 664 (1975).

804.045 Limits on quantity of depositions. A party shall be limited, unless otherwise stipulated or ordered by the court in a manner consistent with s. 804.01 (2), to a reasonable number of depositions, not to exceed 10 depositions, none of which may exceed 7 hours in duration.

History: 2017 a. 235.

804.05 Depositions upon oral examination. (1) WHEN DEPOSITIONS MAY BE TAKEN. After commencement of the action, except as provided in s. 804.015, any party may take the testimony of any person including a party by deposition upon oral examination. The attendance of witnesses may be compelled by subpoena as provided in s. 805.07. The attendance of a party deponent or of an officer, director or managing agent of a party may be compelled by notice to the named person or attorney meeting the requirements of sub. (2) (a). Such notice shall have the force of a subpoena addressed to the deponent. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes, except when the party seeking to take the deposition is the state agency or officer to whose custody the prisoner has been committed.

(2) NOTICE OF EXAMINATION: GENERAL REQUIREMENTS; SPECIAL NOTICE; NON-STENOGRAPHIC RECORDING; PRODUCTION OF DOCUMENTS AND THINGS; DEPOSITION OF ORGANIZATION. (a) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena requiring the production of materials is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

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

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

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

(e) A party may in the notice name as the deponent a public or private corporation or a limited liability company or a partnership or an association or a governmental agency or a state officer in an action arising out of the officer's performance of employment and designate with reasonable particularity the matters on which examination is requested. The organization or state officer so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. The persons so designated shall testify as to matters known or reasonably available to the organization. This paragraph does not preclude taking a deposition by any other procedure authorized by statute or rule.

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

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

deposition at any place within the county where the action is commenced or is pending.

2. A plaintiff who is not a resident of this state may be compelled by notice under sub. (2) to attend a deposition at the plaintiff's expense at any place within the county where the action is commenced or is pending, or at any place within 100 miles from the place where that plaintiff resides, is employed or transacts business in person, or at such other convenient place as is fixed by an order of court.

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

4. A nonparty deponent may be compelled by subpoena served within this state to give a deposition at any place within 100 miles from the place where the nonparty deponent resides, is employed, transacts business in person or is served, or at such other convenient place as is fixed by an order of court.

5. In this subsection, the terms "defendant" and "plaintiff" include officers, directors, and managing agents of corporate defendants and corporate plaintiffs, or other persons designated under sub. (2) (e), as appropriate. A defendant who asserts a counterclaim or a cross claim shall not be considered a plaintiff within the meaning of this subsection, but a 3rd-party plaintiff under s. 803.05 (1) shall be so considered with respect to the 3rd-party defendant.

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

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

(b) All objections made at time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Upon request of any party, where the witness has refused to answer, and with the consent of the court, the court may rule by telephone on any objection. The court's ruling shall be recorded in the same manner as the testimony of the deponent. In the absence of a ruling by the court, the evidence objected to shall be taken subject to the objections.

(c) In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party shall transmit the questions to the officer, who shall propound them to the witness and record the answers verbatim.

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

(6) SUBMISSION TO DEPONENT; CHANGES; SIGNING. If requested by the deponent or any party, when the testimony is fully transcribed the deposition shall be submitted to the deponent for examination and shall be read to or by the deponent. Any changes in form or substance which the deponent desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the deponent for making them. The deposition shall then be signed by the deponent, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the deponent within 30 days after its submission to the deponent, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the deponent or the fact of the refusal or failure to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under s. 804.07 (3) (d) the court holds that the reasons given for the refusal or failure to sign require rejection of the deposition in whole or in part.

(7) CERTIFICATION AND SERVICE BY OFFICER; EXHIBITS; COPIES; NOTICE OF SERVICE. (a) The person recording the testimony shall certify on the deposition that the witness was duly sworn by the person and that the deposition is a true record of the testimony given by the deponent. The person shall then securely seal the deposition in an envelope endorsed with the title of the action and marked "Deposition of (here insert the name of the deponent)" and shall promptly serve it upon the attorney requesting the deposition or send it by registered or certified mail to the attorney requesting the deposition and give notice of the service to all parties and the court.

(b) 1. Documents and things produced for inspection during the examination of the deponent shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that:

a. The person producing the materials may substitute copies to be marked for identification, if the person affords to all parties fair opportunity to verify the copies by comparison with the originals; and

b. If the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them.

2. The original materials copied or returned under subd. 1. may be used in the same manner as if annexed to and returned with the deposition to the court, pending final disposition of the case.

(c) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(8) PARTICIPATION BY TELEPHONE. Upon notice by any party unless the court otherwise orders for good cause shown, the deponent, the reporter, or any other person participating in a deposition under this section may do so by telephone. Any participant other than the reporter electing to be present with any other participant shall give reasonable notice thereof to the other participants.

History: Sup. Ct. Order, 67 Wis. 2d 585, 665 (1975); Sup. Ct. Order, 67 Wis. 2d vii (1975); 1975 c. 218; 1979 c. 110; 1983 a. 189; Sup. Ct. Order, 130 Wis. 2d xi, xix (1986); Sup. Ct. Order, 141 Wis. 2d xiii (1987); Sup. Ct. Order, 158 Wis. 2d xvii (1990); 1991 a. 189; 1993 a. 112; 1997 a. 35, 133, 254; 2005 a. 253; 2007 a. 97; 2009 a. 180.

Judicial Council Committee's Note, 1975: Subs. (2) (c) and (4) (a) are amended to recognize the Wisconsin Rules of Videotape Procedure and to make cer-

tain that a motion to the court is not required prior to taking a videotape deposition. [Re Order eff. Jan. 1, 1976]

Judicial Council Notes, 1986: Sub. (3) (b) is amended to conform the territorial scope of deposition notices and subpoenas to the 100-mile provision of Rule 45 (d), F.R.C.P. as amended in 1985. [Re Order eff. 7-1-86]

Sub. (7) (a) is amended to require that the deposition be served upon the attorney rather than filed in court. See s. 804.01 (6). [Re Order eff. 7-1-86]

Judicial Council Note, 1988: Sub. (4) (b) is amended to allow contact with the court by telephone to obtain its ruling on any objection, on request of any party and with the consent of the court.

Sub. (8) [created] allows any person to participate in a deposition by telephone upon notice by any party unless good cause to the contrary is shown. [Re Order eff. Jan. 1, 1988]

Judicial Council Note, 1990: Sub. (8) is amended to clarify that reasonable advance notice to all participants is required if any participant to a deposition to be taken by telephone elects to be present with any other participant. The requirement is aimed primarily at the situation in which one party is in the physical presence of the deponent, while others are not, by allowing others to be present if they choose. [Re Order, eff. 1-1-91]

A highly placed state official who seeks a protective order should not be compelled to testify on deposition unless a clear showing is made that the deposition is necessary to prevent prejudice or injustice. State v. Beloit Concrete Stone Co., 103 Wis. 2d 506, 309 N.W.2d 28 (Ct. App. 1981).

While not subject to the rules of civil procedure, the Department of Revenue's subpoena authority does not permit it to take possession of subpoenaed records for more than one business day. The department may however repeatedly subpoena records until its investigation is completed. State v. Kielisch, 123 Wis. 2d 125, 365 N.W.2d 904 (Ct. App. 1985).

804.06 Depositions upon written questions. (1) SERVING QUESTIONS; NOTICE. (a) After commencement of the action, except as provided in s. 804.015, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by subpoena as provided in s. 805.07. The attendance of a party deponent or of an officer, director, or managing agent of a party may be compelled by notice to the person to be deposed or his or her attorney meeting the requirements of s. 804.05 (2) (a). The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes, except when the person seeking to take the deposition is the state agency or officer to whose custody the prisoner has been committed.

(b) A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs, and the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a limited liability company or a partnership or association or governmental agency in accordance with s. 804.05 (2) (e).

(c) Within 30 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(2) OFFICER TO TAKE RESPONSES AND PREPARE RECORD. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by s. 804.05, either personally or by someone acting under the officer's direction, to take the testimony of the witness in response to the questions and to prepare, certify, and serve the deposition upon, or mail it by registered or certified mail to, the party who requested it, attaching thereto the copy of the notice and the questions received by the officer.

(3) NOTICE OF SERVICE. When the deposition is served upon or mailed to the requesting party, the person who has recorded the testimony shall promptly give notice thereof to all parties and the court.

History: Sup. Ct. Order, 67 Wis. 2d 585, 671 (1975); 1975 c. 218; Sup. Ct. Order, 158 Wis. 2d xxv (1990); 1993 a. 112, 486; 1997 a. 133.

Judicial Council Note, 1990: [Re amendment of (2)] Discovery depositions are no longer required to be filed in court, unless the court so orders. See Supreme Court Order of May 1, 1986.

Revised sub. (3) conforms practice under this section to s. 804.05 (7). [Re Order eff. 1-1-91]

804.07 Use of depositions in court proceedings. (1) USE OF DEPOSITIONS. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(a) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(b) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent or employee or a person designated under s. 804.05 (2) (e) or 804.06 (1) to testify on behalf of a public or private corporation, limited liability company, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(c) 1. The deposition of a witness other than a medical expert, whether or not a party, may be used by any party for any purpose if the court finds any of the following:

a. That the witness is dead.

b. That the witness is at a greater distance than 30 miles from the place of trial or hearing, or is out of the state, and will not return before the termination of the trial or hearing, unless it appears that the absence of the witness was procured by the party offering the deposition.

c. That the witness is unable to attend or testify because of age, illness, infirmity or imprisonment.

d. That the party offering the deposition has been unable to procure the attendance of the witness by subpoena.

e. Upon application and notice, that exceptional circumstances exist that make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

2. The deposition of a medical expert may be used by any party for any purpose, without regard to the limitations otherwise imposed by this paragraph.

(d) If only part of a deposition is offered in evidence by a party, an adverse party may require the party to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

(e) Substitution of parties pursuant to s. 803.10 does not affect the right to use depositions previously taken; and when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken in the former action may be used in the latter as if originally taken therefor.

(2) OBJECTIONS TO ADMISSIBILITY. Subject to sub. (3) (c) and to s. 804.03 (2), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(3) EFFECT OF ERRORS AND IRREGULARITIES IN DEPOSITIONS. (a) *As to notice.* All errors and irregularities in the notice for tak-

ing a deposition are waived unless written objection is promptly served upon the party giving the notice.

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

(c) *As to taking of deposition.* 1. Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

2. Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured 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 submitted under s. 804.06 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(d) *As to completion and return of deposition.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under ss. 804.05 and 804.06 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

History: Sup. Ct. Order, 67 Wis. 2d 585, 673 (1975); 1975 c. 218; Sup. Ct. Order, 73 Wis. 2d xxxi (1976); 1983 a. 192; Sup. Ct. Order, 130 Wis. 2d xix (1986); 1993 a. 112; 1995 a. 225.

Judicial Council Committee's Note, 1976: Section 804.07 (2) is taken from F.R.C.P. 32 (b). The reference in sub. (2) to "sub. (3) (d)" is changed to read "sub. (3) (c)" to correspond with subdivision (d) (3) in F.R.C.P. 32 (b). [Re Order effective Jan. 1, 1977]

Judicial Council Note, 1986: Sub. (1) (e) is amended to reflect the fact that depositions need not be filed except upon order of the court. See s. 804.05 (7) (a). [Re Order eff. 7-1-86]

Under subs. (2) and (3) (c) 1., a hearsay objection was not waived by the failure to object at deposition. Strelecki v. Firemans Insurance Co. of Newark, 88 Wis. 2d 464, 276 N.W.2d 794 (1979).

The defendant's evidentiary deposition of its doctor expert taken subsequent to the plaintiff's discovery deposition of the doctor did not prevent the plaintiff's use of the discovery deposition at trial. Martin v. Richards, 176 Wis. 2d 339, 500 N.W.2d 691 (Ct. App. 1993).

804.08 Interrogatories to parties. (1) AVAILABILITY; PROCEDURES FOR USE. (a) Except as provided in s. 804.015, any party may serve upon any other party written interrogatories to be answered by the party served, or, if the party served is a public or private corporation or a limited liability company or a partnership or an association or a governmental agency or a state officer in an action arising out of the officer's performance of employment, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

(am) A party shall be limited, unless otherwise stipulated or ordered by the court in a manner consistent with s. 804.01 (2), to a reasonable number of requests, not to exceed 25 interrogatories, including all subparts.

(b) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under s. 804.12 (1) with respect to any objection to or other failure to answer an interrogatory.

(2) SCOPE: USE AT TRIAL. (a) Interrogatories may relate to any matters which can be inquired into under s. 804.01 (2), and the answers may be used to the extent permitted by chs. 901 to 911.

(b) An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

(3) OPTION TO PRODUCE BUSINESS RECORDS. If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records, including electronically stored information, and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

(a) Specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and

(b) Giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

History: Sup. Ct. Order, 67 Wis. 2d 585, 676 (1975); 1975 c. 218; 1993 a. 112; 1997 a. 133; Sup. Ct. Order No. 09-01, 2010 WI 67, filed 7-6-10, eff. 1-1-11; 2017 a. 235; 2021 a. 238 s. 45.

Judicial Council Note, 2010: The meaning of the term "electronically stored information" is described in the Judicial Council Note following Wis. Stat. s. 804.09.

Section 804.08 (3) is taken from F.R.C.P. 33(d). Portions of the Committee Note of the federal Advisory Committee on Civil Rules are pertinent to the scope and purpose of s. 804.08 (3): Special difficulties may arise in using electronically stored information, either due to its form or because it is dependent on a particular computer system. Rule 33(d) allows a responding party to substitute access to documents or electronically stored information for an answer only if the burden of deriving the answer will be substantially the same for either party. Rule 33(d) states that a party electing to respond to an interrogatory by providing electronically stored information must ensure that the interrogating party can locate and identify it "as readily as can the party served," and that the responding party must give the interrogating party a "reasonable opportunity to examine, audit, or inspect" the information. Depending on the circumstances, satisfying these provisions with regard to electronically stored information may require the responding party to provide some combination of technical support, information on application software, or other assistance. The key question is whether such support enables the interrogating party to derive or ascertain the answer from the electronically stored information as readily as the responding party. A party that wishes to invoke Rule 33(d) by specifying electronically stored information may be required to provide direct access to its electronic information system, but only if that is necessary to afford the requesting party an adequate opportunity to derive or ascertain the answer to the interrogatory. In that situation, the responding party's need to protect sensitive interests of confidentiality or privacy may mean that it must derive or ascertain and provide the answer itself rather than invoke Rule 33(d). [Re Order effective Jan. 1, 2011]

When the cost of discovery was several times greater than the claim for damages, a protective order against discovery was appropriate. Vincent & Vincent, Inc. v. Spacek, 102 Wis. 2d 266, 306 N.W.2d 85 (Ct. App. 1981).

The Effective Use of Written Interrogatories. Schoone & Miner. 60 MLR 29 (1976).

What You Need to Know: New Electronic Discovery Rules. Sankovitz, Grenig, & Gleisner. Wis. Law. July 2010.

804.09 Production of documents and things and entry upon land for inspection and other purposes. (1) SCOPE. A party may serve on any other party a request within the scope of s. 804.01 (2): a) to produce and permit the requesting party or its representative to inspect, copy, test or sample the following items in the responding party's possession, custody, or control: 1. any designated documents or electronically stored information, including writings, drawings, graphs, charts, photo-

graphs, sound recordings, images, and other data or data compilations stored in any other medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or 2. any designated tangible things; or b) to permit entry onto designated land or property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(2) PROCEDURE. (a) Except as provided in s. 804.015, the request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party, and shall meet all of the following criteria:

1. The request shall describe with reasonable particularity each item or category of items to be inspected.

2. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

3. The request shall be limited, unless otherwise stipulated or ordered by the court in a manner consistent with s. 804.01 (2), to a reasonable time period, not to exceed 5 years prior to the accrual of the cause of action. The limitation in this subdivision does not apply to requests for patient health care records, as defined in s. 146.81 (4), vocational records, educational records, or any other similar records.

4. The request may specify the form or forms in which electronically stored information is to be produced.

(b) 1. The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, or state with specificity the grounds for objecting to the request. If objection is made to part of an item or category, the part shall be specified. The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form, or if no form was specified in the request, the party shall state the form or forms it intends to use. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production shall be completed no later than the time for inspection specified in the request or another reasonable time specified in the request or another reasonable time specified in the response.

2. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

a. A party shall produce documents as they are kept in the usual course of business or shall organize and label them to correspond to the categories in the request;

b. If a request does not specify a form for producing electronically stored information, a party shall produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

c. A party need not produce the same electronically stored information in more than one form.

(c) The party submitting the request may move for an order under s. 804.12 (1) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(3) PERSONS NOT PARTIES. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

History: Sup. Ct. Order, 67 Wis. 2d 585, 678 (1975); 1975 c. 218; 1997 a. 133; Sup. Ct. Order No. 09-01, 2010 WI 67, filed 7-6-10, eff. 1-1-11; 2017 a. 235.

Judicial Council Note, 2010: Sections 804.09 (1) and (2) are modeled on F.R.C.P. 34(a) and (b). Portions of the Committee Note of the federal Advisory Committee on Civil Rules are pertinent to the scope and purpose of s. 804.09 (1) and (2): Rule 34(a) is amended to confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents. The change clarifies that Rule 34 applies to information that is fixed in a tangible form and to information that is stored in a medium from which it can be retrieved and examined. A Rule 34 request for production of "documents" should be understood to encompass, and the response should include, electronically stored information unless discovery in the action has clearly distinguished between electronically stored information and "documents."

Discoverable information often exists in both paper and electronic form, and the same or similar information might exist in both. The items listed in Rule 34(a) show different ways in which information may be recorded or stored. Images, for example, might be hard-copy documents or electronically stored information. The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of electronically stored information. Rule 34(a)(1) is expansive and includes any type of information that is stored electronically. A common example often sought in discovery is electronic communications, such as e-mail. The rule covers — either as documents or as electronically stored information — information "stored in any medium," to encompass future developments in computer technology. Rule 34(a)(1) is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.

References elsewhere in the rules to "electronically stored information" should be understood to invoke this expansive approach.

Rule 34(b) provides that a party must produce documents as they are kept in the usual course of business or must organize and label them to correspond with the categories in the discovery request. The production of electronically stored information should be subject to comparable requirements to protect against deliberate or inadvertent production in ways that raise unnecessary obstacles for the requesting party. Rule 34(b) is amended to ensure similar protection for electronically stored information.

The amendment to Rule 34(b) permits the requesting party to designate the form or forms in which it wants electronically stored information produced. The form of production is more important to the exchange of electronically stored information than of hard-copy materials, although a party might specify hard copy as the requested form. Specification of the desired form or forms may facilitate the orderly, efficient, and cost-effective discovery of electronically stored information. The rule recognizes that different forms of production may be appropriate for different types of electronically stored information. Using current technology, for example, a party might be called upon to produce word processing documents, e-mail messages, electronic spreadsheets, different image or sound files, and material from databases. Requiring that such diverse types of electronically stored information all be produced in the same form could prove impossible, and even if possible could increase the cost and burdens of producing and using the information. The rule therefore provides that the requesting party may ask for different forms of production for different types of electronically stored information.

The rule does not require that the requesting party choose a form or forms of production. The requesting party may not have a preference. In some cases, the requesting party may not know what form the producing party uses to maintain its electronically stored information.

The responding party also is involved in determining the form of production. In the written response to the production request that Rule 34 requires, the responding party must state the form it intends to use for producing electronically stored information if the requesting party does not specify a form or if the responding party objects to a form that the requesting party specifies. Stating the intended form before the production occurs may permit the parties to identify and seek to resolve disputes before the expense and work of the production occurs. A party that responds to a discovery request by simply producing electronically stored information in a form of its choice, without identifying that form in advance of the production in the response required by Rule 34(b) runs a risk that the requesting party can show that the produced form is not reasonably usable and that it is entitled to production of some or all of the information in an additional form. Additional time might be required to permit a responding party to assess the appropriate form or forms of production.

The option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation. If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature. [Re Order effective Jan. 1, 2011]

What You Need to Know: New Electronic Discovery Rules. Sankovitz, Grenig, & Gleisner. Wis. Law. July 2010.

804.10 Physical and mental examination of parties; inspection of medical documents. (1) When the mental or physical condition, including the blood group or the ability to pursue a vocation, of a party is in issue, the court in which the action is pending may order the party to submit to a physical, mental or vocational examination. The order may be made on motion for cause shown and upon notice to all parties and shall specify

the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made.

(2) In any action brought to recover damages for personal injuries, the court shall also order the claimant, upon such terms as are just, to give to the other party or any physician named in the order, within a specified time, consent and the right to inspect any X-ray photograph taken in the course of the diagnosis or treatment of the claimant. The court shall also order the claimant to give consent and the right to inspect and copy any hospital, medical or other records and reports that are within the scope of discovery under s. 804.01 (2).

(3) (a) No evidence obtained by an adverse party by a court-ordered examination under sub. (1) or inspection under sub. (2) shall be admitted upon the trial by reference or otherwise unless true copies of all reports prepared pursuant to such examination or inspection and received by such adverse party have been delivered to the other party or attorney not later than 10 days after the reports are received by the adverse party. The party claiming damages shall deliver to the adverse party, in return for copies of reports based on court-ordered examination or inspection, a true copy of all reports of each person who has examined or treated the claimant with respect to the injuries for which damages are claimed.

(b) This subsection applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subsection does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with any other statute.

(4) Upon receipt of written authorization and consent signed by a person who has been the subject of medical care or treatment, or in case of the death of such person, signed by the personal representative or by the beneficiary of an insurance policy on the person's life, the physician or other person having custody of any medical or hospital records or reports concerning such care or treatment, shall forthwith permit the person designated in such authorization to inspect and copy such records and reports. Any person having custody of such records and reports who unreasonably refuses to comply with such authorization shall be liable to the party seeking the records or reports for the reasonable and necessary costs of enforcing the party's right to discover.

History: Sup. Ct. Order, 67 Wis. 2d 585, 680 (1975); 1975 c. 218; 1993 a. 424; 1995 a. 345.

Although a personal injury claimant's counsel attended a stipulated independent medical examination without court order or the defendant's knowledge, the trial court did not abuse its discretion in refusing to limit cross-examination of the physician since the presence of counsel was not prejudicial and the court order could have been obtained under *Whanger*, 58 Wis. 2d 461 (1973), guidelines. Karl v. Employers Insurance of Wausau, 78 Wis. 2d 284, 254 N.W.2d 255 (1977).

The trial court may order a claimant to consent to the release and inspection of health care records and reports of treatment received prior to the claimed injury if the requester shows that the records may reasonably lead to discovery of admissible evidence and the claimant has an opportunity to assert physician-patient privilege. Ambrose v. General Casualty Co. of Wisconsin, 156 Wis. 2d 306, 456 N.W.2d 642 (Ct. App. 1990).

Medical Records Discovery in Wisconsin Personal Injury Litigation. Pokrass. 1974 WLR 524.

Avoiding E-Discovery Traps. Kehoe & Rummelhoff. Wis. Law. June 2011.

804.11 Requests for admission. (1) REQUEST FOR ADMISSION. (a) Except as provided in s. 804.015, a party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of s. 804.01 (2) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

(b) Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon the defendant. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that he or she had made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to s. 804.12 (3) deny the matter or set forth reasons why the party cannot admit or deny it.

(c) The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with this section, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. Section 804.12 (1) (c) applies to the award of expenses incurred in relation to the motion.

(2) EFFECT OF ADMISSION. Any matter admitted under this section is conclusively established unless the court on motion permits withdrawal or amendment of the admission. The court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice the party in maintaining the action or defense on the merits. Any admission made by a party under this section is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.

History: Sup. Ct. Order, 67 Wis. 2d 585, 682 (1975); 1975 c. 218; 1977 c. 447 s. 210; 1983 a. 192; Sup. Ct. Order No. 95-04, 191 Wis. 2d, xxi (1995); 1997 a. 133.

The trial court erred in ruling that requests for admissions were limited to matters not denied in the pleadings. Schmid v. Olsen, 111 Wis. 2d 228, 330 N.W.2d 547 (1983).

Summary judgment can be based upon a party's failure to respond to a request for admissions, even if an admission would be dispositive of the entire case. Bank of Two Rivers v. Zimmer, 112 Wis. 2d 624, 334 N.W.2d 230 (1983).

A negligence claim's total value was not a proper subject of a request for admission. Kettner v. Milwaukee Mutual Insurance Co., 146 Wis. 2d 636, 431 N.W.2d 737 (Ct. App. 1988).

A court may permit withdrawal of admissions if both statutory conditions under sub. (2) are met, but it is not required to do so. A court may consider a party's history of discovery abuse when deciding whether to permit withdrawal or amendment of admissions, when determining prejudice under sub. (2), and when otherwise exercising the court's authority to control the orderly and prompt processing of a case. Mucek v. Nationwide Communications, Inc., 2002 WI App 60, 252 Wis. 2d 426, 643 N.W.2d 98, 00-3039.

The prejudice contemplated by sub. (2) is not simply that a party obtaining the admissions would be worse off without the admissions. Prejudice in maintaining the action or defense on the merits relates to the difficulty a party may face in proving its case, e.g., caused by the unavailability of key witnesses, because of the sudden need to obtain evidence with respect to the questions previously answered by the admis-

sions. The fact that a trial must be adjourned, or that the time for discovery must be enlarged, does not necessarily mean that the non-moving party will suffer prejudice in maintaining the action or defense on the merits. A party will not be prejudiced in maintaining a defense on the merits if the party is placed in the same position the party would have been in had the admissions not been mistakenly made. Luckett v. Bodner, 2009 WI 68, 318 Wis. 2d 423, 769 N.W.2d 504, 07-0308.

It is the burden of the party obtaining the admissions to demonstrate that withdrawal or amendment of the admissions will prejudice that party in maintaining the party's defense on the merits. Under sub. (2), excusable neglect is not a prerequisite for withdrawal or amendment of an admission. A court must consider the effect upon the litigation and prejudice to the resisting party, rather than focusing on the moving party's excuses for an erroneous admission. Luckett v. Bodner, 2009 WI 68, 318 Wis. 2d 423, 769 N.W.2d 504, 07-0308.

Requests for Admission in Wisconsin Procedure: Civil Litigation's Double-Edged Sword. Kinsler. 78 MLR 625 (1995).

804.12 Failure to make discovery; sanctions. (1) MOTION FOR ORDER COMPELLING DISCOVERY. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(a) *Motion.* If a deponent fails to answer a question propounded or submitted under s. 804.05 or 804.06, or a corporation or other entity fails to make a designation under s. 804.05 (2) (e) or 804.06 (1), or a party fails to answer an interrogatory submitted under s. 804.08, or if a party, in response to a request for inspection submitted under s. 804.09, fails to produce documents or fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he or she applies for an order. If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to s. 804.01 (3).

(b) *Evasive or incomplete answer.* For purposes of this subsection an evasive or incomplete answer is to be treated as a failure to answer.

(c) *Award of expenses of motion.* 1. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

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

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

(2) FAILURE TO COMPLY WITH ORDER. (a) If a party or an officer, director, or managing agent of a party or a person designated under s. 804.05 (2) (e) or 804.06 (1) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under sub. (1) or s. 804.10, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

1. An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

2. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence;

3. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

4. In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical, mental or vocational examination.

(b) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising the party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(3) EXPENSES ON FAILURE TO ADMIT. If a party fails to admit the genuineness of any document or the truth of any matter as requested under s. 804.11, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the requesting party the reasonable expenses incurred in the making of that proof, including reasonable attorney fees. The court shall make the order unless it finds that (a) the request was held objectionable pursuant to sub. (1), or (b) the admission sought was of no substantial importance, or (c) the party failing to admit had reasonable ground to believe that he or she might prevail on the matter, or (d) there was other good reason for the failure to admit.

(4) FAILURE OF PARTY TO ATTEND AT OWN DEPOSITION OR SERVE ANSWERS TO INTERROGATORIES OR RESPOND TO REQUEST FOR INSPECTION OR SUPPLEMENT RESPONSES. If a party or an officer, director, or managing agent of a party or a person designated under s. 804.05 (2) (e) or 804.06 (1) to testify on behalf of a party fails (a) to appear before the officer who is to take the party's deposition, after being served with a proper notice, or (b) to serve answers or objections to interrogatories submitted under s. 804.08, after proper service of the interrogatories, or (c) to serve a written response to a request for inspection submitted under s. 804.09, after proper service of the request, or (d) seasonably to supplement or amend a response when obligated to do so under s. 804.01 (5), the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others, it may take any action authorized under sub. (2) (a) 1., 2. and 3. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising the party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by s. 804.01 (3).

(4m) FAILURE TO PROVIDE ELECTRONICALLY STORED INFORMATION. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

(5) TELEPHONE HEARINGS. Motions under this section may be heard as prescribed in s. 807.13.

History: Sup. Ct. Order, 67 Wis. 2d 585, 684 (1975); 1975 c. 94 s. 3; 1975 c. 200, 218; Sup. Ct. Order, 141 Wis. 2d xiii (1987); 1993 a. 424, 490; Sup. Ct. Order No. 09-01, 2010 WI 67, filed 7-6-10, eff. 1-1-11; 2017 a. 235.

Cross-reference: See also s. 885.11 (5) regarding failure to appear at deposition.

Judicial Council Note, 1988: Sub. (5) [created] allows discovery motions to be heard by telephone conference. [Re Order effective Jan. 1, 1988]

Judicial Council Note, 2010: Section 804.12 (4m) is taken from F.R.C.P. 37(e).

Portions of the Committee Note of the federal Advisory Committee on Civil Rules are pertinent to the scope and purpose of s. 804.12 (4m): The "routine operation" of computer systems includes the alteration and overwriting of information, often without the operator's specific direction or awareness, a feature with no direct counterpart in hard-copy documents. Such features are essential to the operation of electronic information systems.

The rule applies to information lost due to the routine operation of an information system only if the operation was in good faith. Good faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of the routine operation to prevent the loss of information, if that information is subject to a preservation obligation. A preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case. The good faith requirement . . . means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve. When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a "litigation hold." Among the factors that bear on a party's good faith in the routine operation of an information system are the steps the party took to comply with a court order in the case or party agreement requiring preservation of specific electronically stored information.

The protection provided by this rule applies only to sanctions "under these rules." It does not affect other sources of authority to impose sanctions or rules of professional responsibility.

This rule restricts the imposition of "sanctions." It does not prevent a court from making the kinds of adjustments frequently used in managing discovery if a party is unable to provide relevant responsive information. For example, a court could order the responding party to produce an additional witness for deposition, respond to additional interrogatories, or make similar attempts to provide substitutes or alternatives for some or all of the lost information. [Re Order effective Jan. 1, 2011]

If imposed solely for failure to obey a court order, without evidence of bad faith or no merit, sanctions imposed under sub. (2) (a) deny due process. Dubman v. North Shore Bank, 75 Wis. 2d 597, 249 N.W.2d 797 (1977).

A defendant's failure to produce subpoenaed documents did not relieve the plaintiff of the obligation to make a prima facie case. Paulsen Lumber, Inc. v. Anderson, 91 Wis. 2d 692, 283 N.W.2d 580 (1979).

Although the plaintiff failed in the duty to disclose its expert's identity, the defendant failed to show hardship that would justify excluding the expert's testimony. Jenzake v. City of Brookfield, 108 Wis. 2d 537, 322 N.W.2d 516 (Ct. App. 1982).

The court exercised proper discretion in dismissing a claim when the claimants failed to provide responsive answers to interrogatories, engaged in dilatory conduct, and there was no justification for their failure to appear and produce documents at depositions. Englewood Community Apartments Limited Partnership v. Alexander Grant & Co., 119 Wis. 2d 34, 349 N.W.2d 716 (Ct. App. 1984).

Although the trial court had no power under sub. (2) (a) 4. to compel an HIV test, it did have that power in equity. Syring v. Tucker, 174 Wis. 2d 787, 498 N.W.2d 370 (1993).

The Wisconsin Personnel Commission may not award costs and attorney's fees for discovery motions filed against the state under the Wisconsin Fair Employment Act. DOT v. Wisconsin Personnel Commission, 176 Wis. 2d 731, 500 N.W.2d 664 (1993).

Discussing the application of sub. (3). Michael A.P. v. Solsrud, 178 Wis. 2d 137, 502 N.W.2d 918 (Ct. App. 1993).

The trial court erred in not considering other less severe sanctions before dismissing an action for failure to comply with a demand for discovery when no bad faith was found. Hudson Diesel, Inc. v. Kenall, 194 Wis. 2d 531, 535 N.W.2d 65 (Ct. App. 1995).

A circuit court may impose both non-compensatory and compensatory monetary sanctions for the same conduct. Hur v. Holler, 206 Wis. 2d 335, 557 N.W.2d 429 (Ct. App. 1996), 95-2966.

A substantiated assertion of privilege is substantial justification for failing to comply with an order to provide or permit discovery. Burnett v. Alt, 224 Wis. 2d 72, 589 N.W.2d 21 (1999), 96-3356.

Counsel's egregious acts may be imputed to the client. Smith v. Golde, 224 Wis. 2d 518, 592 N.W.2d 287 (Ct. App. 1999), 97-3404.

If the constitution or statutes require proof before the circuit court can enter a particular judgment or order, the court cannot enter the judgment or order without the appropriate showing. The circuit court may determine that a party's action or inaction provides adequate cause for sanctions against that party, but that does not allow the court to dispense with any constitutional or statutory burden of proof that must be satisfied prior to entering a judgment or order. Evelyn C.R. v. Tykila S., 2001 WI 110, 246 Wis. 2d 1, 629 N.W.2d 768, 00-1739.

When a sanction causes the ultimate dismissal of an action, the sanctioned party's action must be egregious and without clear and justifiable excuse. Egregiousness is not synonymous with bad faith. A party can be guilty of egregiousness without acting in bad faith or having its counsel act in bad faith. Sentry Insurance v. Davis, 2001 WI App 203, 247 Wis. 2d 501, 634 N.W.2d 553, 00-2427.

The trial court abused its discretion by ordering the defendant in a civil suit to forego its rights to insurance coverage for punitive damages when the issue of rights to insurance coverage was not before the court. City of West Allis v. Wisconsin Electric Power Co., 2001 WI App 226, 248 Wis. 2d 10, 635 N.W.2d 873, 99-2944.

Sub. (4) did not provide authority for prohibiting the moving party, who had not failed to cooperate with discovery, from submitting an affidavit of another party to the action in favor of a motion for summary judgment when the party giving the affidavit had failed to appear for a deposition by a third party in the action. Daughtry v. MPC Systems, Inc., 2004 WI App 70, 272 Wis. 2d 260, 679 N.W.2d 808, 02-2424.

It is an erroneous exercise of discretion for a circuit court to enter a sanction of dismissal with prejudice, imputing the attorney's conduct to the client, if the client is blameless. Industrial Roofing Services, Inc. v. Marquardt, 2007 WI 19, 299 Wis. 2d 81, 726 N.W.2d 898, 05-0189.

There is no requirement that conduct must be persistent in order to be egregious. When a defendant in a medical malpractice case destroyed all of the defendant's medical records in a single act, the magnitude of the loss under the circumstances was sufficient to constitute egregious conduct. Morrison v. Rankin, 2007 WI App 186, 305 Wis. 2d 240, 738 N.W.2d 588, 06-0980.

It lies within the circuit court's discretion to determine the appropriate procedure for deciding factual issues in default judgment cases and that the defaulting party therefore has no right of trial by jury. The circuit court did not violate the defendant's right of trial by jury under article I, section 5, of the Wisconsin Constitution when it denied the defendant's motion for a jury trial on the issue of damages. The defendant waived its right of trial by jury in the manner set forth in this section and s. 806.02 by violating the circuit court's discovery order and by incurring a judgment by default. Rao v. WMA Securities, Inc., 2008 WI 73, 310 Wis. 2d 623, 752 N.W.2d 220, 06-0813.

An order refusing to allow a disobedient party to support or oppose designated claims or defenses under sub. (2) (a) 2. is a severe sanction and requires a finding of egregiousness. Zarnstorff v. Neenah Creek Custom Trucking, 2010 WI App 147, 330 Wis. 2d 174, 792 N.W.2d 594, 09-1321.

As a prerequisite to imposing default judgment under sub. (2) as a discovery sanction, a circuit court must find the sanctioned party engaged in egregious or bad faith conduct, without a clear and justifiable excuse, but need not determine the opposing party was prejudiced thereby. Mohns Inc. v. BMO Harris Bank National Ass'n, 2021 WI 8, 395 Wis. 2d 421, 954 N.W.2d 339, 18-0071.

What You Need to Know: New Electronic Discovery Rules. Sankovitz, Grenig, & Gleisner. Wis. Law. July 2010.