CHAPTER 804

CIVIL PROCEDURE — DEPOSITIONS AND DISCOVERY

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), 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 matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(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.

(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.

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 only 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. 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 may deem appropriate.

2. A party may 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 a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

3. Unless manifest injustice would result, the court shall require 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.

(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 on specified terms and conditions, including a designation of the time or place;

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 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.

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

(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 his response with respect to any question directly addressed to 1. the identity and location of persons having knowledge of discoverable matters, and 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.

History: Sup. Ct. Order, 67 W (2d) 654; 1975 c. 218.

Judicial Council Committee's Note, 1974: Sub. (1) enumerates the discovery methods which are described more fully in ss. 804.05, 804.06, 804.08, 804.09, 804.10 and 804.11. Omitted from the list is the bill of particulars (s. 263.32) whose function has been assumed by written interrogatories.

Sub. (2) (a) provides a uniform, broad rule of relevancy with respect to information sought by discovery methods authorized in sub. (1). It is incorporated by reference into other discovery statutes, e.g., ss. 804.08 (2), 804.09 (1) and 804.11 (1). It replaces the more restrictive relevancy rules found in s. 269.57 (1) [authorized inspection of property or documents "containing evidence relating to the action"], s. 889.22 [where the demand to admit or deny is confined to "facts material in the action"]. The liberal scope of discovery rule is necessary in light of the limited function of the pleadings under ch. 802.

Sub. (2) (b) is desirable because of the availability of direct action against insurers in Wisconsin.

Subs. (2) (c) and (2) (d) will not change the state practice under State ex rel Dudek v. Circuit Court, 34 Wis. 2d 559, 150 N.W. 2d 387 (1966) and State ex rel Reynolds v. Circuit Court, 15 Wis. 2d 311, 112 N.W. 2d 686, 113 N.W. 2d 537 (1961). Sub. (2) (d) 2 preserves the protection afforded plaintiffs' non-witness medical consultants in Halldin v. Peterson, 39 Wis. 2d 668, 159 N.W. 2d 738 (1968).

Sub. (2) (d) 3 requires the party seeking discovery of an expert to pay the expert "a reasonable fee". It liberalizes the rule in State ex rel Reynolds v. Circuit Court, supra, that sets a maximum limit on expert witness fees during discovery at the amount recoverable as costs under s. 271.04 (2).

Sub. (3) is substantially the same as s. 887.12 (3).

Sub. (4) recognizes that there is no need to establish rules of priority for discovery in most cases. If such rules are necessary in a particular case, an appropriate protective order under sub. (3) may be sought.

Sub. (5) works a change in the present practice. Now, there is no duty to supplement responses obtained by deposition, by demand to admit, by bill of particulars or otherwise, and a rather restrictive duty to supplement responses in written interrogatories under s. 887.30 (6). This subsection imposes a limited but uniform duty to supplement responses in appropriate cases regardless of the discovery method used in eliciting the responses originally. [Re Order effective Jan. 1, 1976]

Footnote cites (2) (c) 1 and (d) 2. State ex rel. Shelby Mut. Ins. Co. v. Circuit Court, 67 W (2d) 469, 227 NW (2d) 161.

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. Dodge County Cir. Ct. 76 W (2d) 429, 251 NW (2d) 476.

Hospital fire drill rules and committee report on fire in plaintiff's decedent's hospital room held discoverable. Shibilski v. St. Joseph's Hospital, 83 W (2d) 459, 266 NW (2d) 264 (1978).

Where cost of discovery was several times greater than claim for damages, trial court abused discretion in denying defendant's motion for protective order. Vincent & Vincent, Inc. v. Spacek, 102 W (2d) 266, 306 NW (2d) 85 (Ct. App. 1981).

See note to 804.05, citing State v. Beloit Concrete Stone Co. 103 W (2d) 506, 309 NW (2d) 28 (Ct. App. 1981).

The new Wisconsin rules of civil procedure: Chapter 804. Graczyk, 59 MLR 463.

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: 1. that the petitioner expects to be a party to an action; 2. the subject matter of the expected action and the petitioner's interest therein; 3. the facts which the petitioner desires to establish by the proposed testimony and the petitioner's reasons for desiring to perpetuate it; 4. the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known; and 5. 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 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. 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. 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 (a) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each; and (b) the reasons for perpetuating their testimony. 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 W (2d) 660; 1975 c. 218.

Judicial Council Committee's Note, 1974: Sub. (1) provides a modernized simplified version of the bill in equity to perpetuate testimony and replaces ss. 887.27-.29. The present statutes do not permit depositions upon oral questions and s.

887.27 requires the court to take the deposition, rather than the petitioner. It should be noted that sub. (1) contains an exception to the normal rule of non-verification found in s. 802.05 inasmuch as it requires the petition to be verified.

Depositions taken under sub. (2) will be most useful in cases where an appeal is taken from an order dismissing a complaint for failure to state a claim upon which relief could be granted. [Re Order effective Jan. 1, 1976]

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 (a) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (b) 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 (c) 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 shall be taken before a person who is a relative or employe or attorney or counsel of any of the parties, or is a relative or employe of such attorney or counsel, or is financially interested in the action.

History: Sup. Ct. Order, 67 W (2d) 663; 1975 c. 218.

Judicial Council Committee's Note, 1974: Sub. (1) does away with the requirement that, in counties within Wisconsin having a population of 500,000 or more, oral depositions be taken before a court commissioner or judge in chambers. Sub. (1) provides an inexpensive, uniform rule for practice in all counties. It supplants its counterpart provisions in s. 887.12 (4).

Sub. (2) adds to the permissible methods of deposing witnesses in foreign countries the deposition pursuant to a letter rogatory. Otherwise, sub. (2) is substantially identical to s. 887.09 (2) (b) and simplifies s. 887.26.

Sub. (3) adds relatives of parties to the list of persons prohibited from officiating at depositions by s. 887.05 (2). [Re Order effective Jan. 1, 1976]

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 W (2d) 664.

804.05 Depositions upon oral examination. (1) WHEN DEPOSITIONS MAY BE TAKEN. After commencement of the action, any party may take the testimony of any person including a party by deposition upon oral examination. The attendance of witnesses may be compelled by subpoena as provided in s. 805.07. The attendance of a party deponent or of an officer, director or managing agent of a party may be compelled by notice to 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; NONSTENOGRAPHIC RECORDING; PRODUCTION OF DOCUMENTS AND THINGS; DEPOSITION OF ORGANIZATION. (a) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify 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 own expense.

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

(e) A party may in the notice name as the deponent a public or private corporation or a partnership or an association or a governmental agency or a state officer in an action arising out of the officer's performance of 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 who is a resident of this state may be compelled by notice as provided in sub. (2) to give a deposition at any place within the county of residence, or within 30 miles of the party's residence, or at such other place as is fixed by order of the court. A plaintiff who is a resident of this state may also be compelled by like notice to give 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 at the plaintiff's expense an examination in the county of this state where the action is commenced or is pending or at any place within 30 miles of the plaintiff's residence or within the county of residence or in such other place as is fixed by order of the court.

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

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

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

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

5. In this subsection, the terms "plaintiff" and "defendant" include officers, directors and managing agents of corporate plaintiffs and corporate defendants, or other persons designated under sub. (2) (e), as appropriate. A defendant who asserts a counterclaim or a crossclaim 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 residence of the deponent were the residence of the party.

(4) EXAMINATION AND CROSS-EXAMINATION; RECORD OF EXAMINATION; OATH; OBJECTIONS. (a) Examination and cross-examination of deponents may proceed as permitted at the trial. The officer before whom the deposition is to be taken shall put the deponent on oath and shall personally, or by someone acting under 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. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party shall transmit the questions to the officer, who shall pro-

pound 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 FILING BY OFFICER; EXHIBITS; COPIES; NOTICE OF FILING. (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 indorsed with the title of the action and marked "Deposition of (here insert the name of the deponent)" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing and give notice of its filing to all parties.

(b) 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 1) the person producing the materials may substitute copies to be marked for identification, if the person afford to all parties fair opportunity to verify the copies by comparison with the originals, and 2) 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, and the materials may then 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.

History: Sup. Ct. Order, 67 W (2d) 665; Sup. Ct. Order, 67 W (2d) viii; 1975 c. 218; 1979 c. 110.

Judicial Council Committee's Note, 1974: Sub. (2) (c) expressly recognizes the permissibility in appropriate cases of recording testimony by other than stenographic means. See State ex rel Johnson v. Circuit Court, 61 Wis. 2d 1 (1972), where the Supreme Court held it an abuse of discretion to forbid the use of videotaped testimony simply because the statutes currently in force do not provide for videotaped testimony.

Sub. (2) (e) supplements the existing practice whereby the examining party designates the corporate official to be deposed. This subsection should be advantageous to both sides of lawsuits by relieving the party seeking discovery of the onus of ascertaining the appropriate individual to depose while relieving the other party of the inconvenience of having an unnecessarily large number of its officers deposed.

Sub. (6) provides that the deposition need not be submitted to the deponent for examination and signing unless submission is requested by the deponent or any party. The examination and signing of the transcript has generally been treated as a formality which could be rather readily waived. This subsection recognizes submission as an exception rather than the rule but preserves the right to inspect to any party who desires to exercise it.

Sub. (7) requires the person recording the testimony, rather than the officer before whom the deposition is taken, to certify that the witness was duly sworn and that the deposition is a true record of the deponent's testimony. Since s. 804.03 (1) does away with the requirement that depositions be taken before a court commissioner or judge in chambers in counties with population of 500,000 or more, under these new statutes, the officer before whom the deposition is taken and the person recording the testimony will usually be the same person, a reporter. Realistically, it is always the reporter, as reporter, rather than "the officer before whom the deposition is taken" who is best able to certify to the accuracy of the deposition. [Re Order effective Jan. 1, 1976]

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

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

804.06 Depositions upon written questions. (1) SERVING QUESTIONS; NOTICE. (a) After commencement of the action, 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 him or his 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 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 file or mail the deposition to the clerk of the court where the action is pending, attaching thereto the copy of the notice and the questions received by the officer.

(3) NOTICE OF FILING. When the deposition is filed, the person who has recorded the testimony shall promptly give notice of the filing to all parties.

History: Sup. Ct. Order, 67 W (2d) 671; 1975 c. 218.

Judicial Council Committee's Note, 1974: This section makes generally available depositions upon written questions, a discovery device that is presently available only for witnesses outside the state under s. 887.26. It simplifies the cumbersome and little used procedure under s. 887.26 for taking deposition by commission. [Re Order effective Jan. 1, 1976]

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 employe or a person designated under s. 804.05 (2) (e) or 804.06 (1) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(c) 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: 1. that the witness is dead; or 2. 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; or 3. that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or 4. that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5. upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used. 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 and duly filed in the former action may be used in the latter as if originally taken therefor.

(2) OBJECTIONS TO ADMISSIBILITY. Subject to the provisions of s. 804.03 (2) and sub. (3) (c) of this section, 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 taking 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, indorsed, 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 W (2d) 673; 1975 c. 218; Sup. Ct. Order, 73 W (2d) xxxi.

Judicial Council Committee's Note, 1974: The provisions of this section are substantially the same as their counterpart provisions in the present statutes with one exception. Sub. (1) (c), however, provides that the deposition of a medical expert may be used by any party for any purpose, without regard to the 30 mile limitation imposed with respect to other witnesses. The change should make trial scheduling easier and should reduce the cost of trials by reducing expert witness fees. [Re Order effective Jan. 1, 1976]

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]

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

804.08 Interrogatories to parties. (1) AVAILABILITY; PROCEDURES FOR USE. (a) 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 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.

(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. Where the answer to an interrogatory may be derived or ascertained from the business records

of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

History: Sup. Ct. Order, 67 W (2d) 676; 1975 c. 218.

Judicial Council Committee's Note, 1974: Subs. (1) and (2) are substantially the same as the provisions in s. 887.30 except that in sub. (1) a state officer is permitted in appropriate cases to designate another person to answer interrogatories for him.

Sub. (3) is new. It is adopted from Federal Rule 33 (c) which in turn was adopted from Calif. Code of Civ. Proc. s. 2030 (c). "This provision, without undermining the liberal scope of interrogatory discovery, places the burden of discovery upon its potential benefitee," Louisell, Modern California Discovery, 124-125 (1963). The interrogating party is protected against abusive use of this provision through the requirement that the burden of ascertaining the answer be substantially the same for both sides. Thus, a respondent may not impose on an interrogating party a mass of records as to which research is feasible only for one familiar with the records. Advisory Committee's Note to 1970 Amendments of F.R.C.P. 33. [Re Order effective Jan. 1, 1976]

See note to 804.01, citing Vincent & Vincent, Inc. v. Spacek, 102 W (2d) 266, 306 NW (2d) 85 (Ct. App. 1981).

The effective use of written interrogatories. Schoone and Miner, 60 MLR 29.

804.09 Production of documents and things and entry upon land for inspection and other purposes. (1) SCOPE. Any party may serve on any other party a request (a) to produce and permit the party making the request, or someone acting on the party's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of s. 804.01 (2) and which are in the possession, custody or control of the party upon whom the request is served; or (b) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation therein, within the scope of s. 804.01 (2).

(2) PROCEDURE. 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. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. 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, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. 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 W (2d) 678; 1975 c. 218.

Judicial Council Committee's Note, 1974: This section corresponds to s. 269.57 (1). This new section is designed to operate extrajudicially, i.e., the party seeking discovery is not required to proceed by motion and order, but rather by request to the other party. In this respect, the new statute corresponds to the actual practice in the majority of cases. Also, unlike s. 269.57 (1), this section expressly gives to parties the right to "test, or sample any tangible things" within the scope of s. 804.01 (2).

The scope of discovery under s. 269.57 (1) is restricted to property, books and documents "containing evidence relating to the action or special proceeding". This new section is, by explicit cross-reference, tied into the general, broad scope of discovery rule contained in s. 804.01 (2), e.g., under which discovery is not necessarily limited to matters constituting or containing "evidence". [Re Order effective Jan. 1, 1976]

804.10 Physical and mental examination of parties; inspection of medical documents. (1) When the mental or physical condition (including the blood group) of a party is in issue, the court in which the action is pending may order the party to submit to a physical or mental 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 may 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 such claimant for the injuries for which damages are claimed. The court may also order such

claimant to give consent and the right to inspect and copy any hospital, medical or other records and reports concerning the injuries claimed and the treatment thereof.

(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 W (2d) 680; 1975 c. 218.

Judicial Council Committee's Note, 1974: This section is based on Federal Rule 35 and s. 269.57 (2) through (4). Section 269.57 is by its terms restricted to physical examinations of defendants; this section permits physical or mental examination of any party. Section 269.57 permits examination only in actions for personal injuries; this section permits examination whenever mental or physical condition is actually in issue. See Schlagenhauf v. Holder, 379 U.S. 104 (1965). This statute contains no counterpart to the provision of s. 269.57 (2) (a) 1 granting to the examinee the once-exercisable right to reject an examining physician. If cause exists to object to an examiner, a protective order may be obtained under s. 804.01 (3).

Sub. (2) contains a number of changes from s. 269.57 (2). First, the papers subject to discovery are not limited to hospital records, but include "hospital, medical, and other records concerning the injuries claimed and the treatment thereof". Second, the party seeking discovery is given the right not only to inspect, but also to copy such papers. Third, the right to inspect and copy may be made subject to such terms as may be just. Fourth, a party may inspect X-rays taken in the diagnosis of the party's injuries.

Sub. (3) (a) is derived from s. 269.57 (3). It reduces from 15 days to 10 days the period after receipt of reports of court-ordered examination within which such reports must be delivered to the adverse party.

Sub. (3) (b) is substantially identical to Federal Rule 35 (b) (3).

Sub. (4) is based on s. 269.57 (4). The present provisions make the custodian of the records liable to the person examined for the cost of obtaining copies and for attorney's fees not in excess of $50. Sub. (4) on the other hand makes the custodian liable to the party seeking discovery for the reasonable and necessary costs of enforcing his right to discover. [Re Order effective Jan. 1, 1976]

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

Medical records discovery in Wisconsin personal injury litigation. 1974 WLR 524.

804.11 Requests for admission. (1) REQUEST FOR ADMISSION. (a) A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of 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 the requirements of this statute, 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 statute is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to s. 802.11 governing amendment of a pretrial order, 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 W (2d) 682; 1975 c. 218; 1977 c. 447 s. 210.

Judicial Council Committee's Note, 1974: This section corresponds to s. 889.22. It differs from the latter statute in 3 significant respects. First, it expressly provides a procedure for objection for the party served with a request to admit. Second, the request need not be limited to "fact or facts", but may seek, when appropriate, opinions of facts or of the application of law to fact. Third, this section is not limited to facts "material in the action" but rather is tied into the broad relevancy rule of s. 804.01 (2). [Re Order effective Jan. 1, 1976]

Trial court properly allowed defendant to withdraw admission and fully litigate issue of liability. Schmid v. Olsen, 107 W (2d) 289, 320 NW (2d) 18 (Ct. App. 1982).

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 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's 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's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

3. If the motion 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 or mental 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's 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's 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's 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).

History: Sup. Ct. Order, 67 W (2d) 684; 1975 c. 94 s. 3; 1975 c. 200, 218.

Judicial Council Committee's Note, 1974: Under the proposed rules, the need for effective sanctions in the discovery process is great because of the increasingly significant role discovery plays in issue formulation. The present discovery statutes do not have a single, comprehensive sanction scheme. Some discovery statutes contain individual sanction provisions, e.g., ss. 887.30 (3), 889.22 (3) and (4), and 269.57 (1) and (3). This new section provides strong sanctions against parties resisting discovery. Any party who seeks to evade or thwart full and candid discovery incurs the risk of serious consequences, which may involve imprisonment for contempt, an order that designated facts be taken as established, an order refusing the delinquent party the right to support or oppose designated claims or defenses, striking out pleadings or parts of pleadings, rendering judgment by default, dismissal of the action or of a claim therein, or assessment of expenses and attorneys fees. [Re Order effective Jan. 1, 1976]

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

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

See note to 655.17, citing Mazurek v. Miller, 100 W (2d) 426, 303 NW (2d) 122 (Ct. App. 1981).