

**Discovery Disputes in Divorce Proceedings:
Motions to Compel, Motions for Sanctions
and Motions to Quash**

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Introduction:

Discovery disputes remain a common problem in family law matters, particularly those involving complex financial estates. Most of these disputes, quite frankly, are the result of one of two “bottlenecks” – either the client is slow in compiling and organizing the required materials or the client’s attorney is tardy in processing the provided materials and forwarding them on to opposing counsel. In a relatively small percentage of cases, parties who are seeking to hide assets or income will actively attempt to thwart the discovery process by providing incomplete, false or misleading information. The Illinois Supreme Court Rules, together with the Illinois Code of Civil Procedure and our Nineteenth Judicial Circuit Local Rules, provide a variety of techniques to coerce parties into discovery compliance. The most common of these are the Motion to Compel and the Motion for Sanctions.

While obtaining reasonable and necessary discovery compliance is an unfortunately frequent problem, the flipside of this issue is dealing with discovery requests, often made by way of subpoenas, that are overbroad, irrelevant or simply harassing in nature. In those instances, the Illinois Code of Civil Procedure and our local rules provide a remedy in the form of a Motion to Quash. However, judges should keep in mind that the standard for “relevance” in discovery is very different from the standard of relevance applied to evidence presented at trial.

I. Motions to Compel

If a party fails to comply with requests for production, a notice for deposition or fails to answer interrogatories, a motion seeking an order compelling the party to comply

with discovery can be filed.¹ However, Supreme Court Rule 201(k) states that the parties must “make reasonable attempts to resolve differences over discovery” and requires any motion to compel to include a statement that:

counsel responsible for trial of the case after personal consultation and reasonable attempts to resolve differences have been unable to reach an accord or that opposing counsel made himself or herself unavailable for personal consultation or was unreasonable in attempts to resolve differences.

The Committee Comments to Rule 201(k) emphasize the point that it must be the attorneys who are “responsible for trying the case” and not “junior attorneys” who participate in the efforts to resolve these discovery disputes. This phrase was added due to their perception that there was a problem with junior attorneys “not ultimately responsible for cases, perpetuating discovery disputes.” Therefore, in the context of a divorce case involving larger law firms, a Motion to Compel would likely be premature if it were preceded only by a standard 201(k) letter from an associate attorney, rather than personal consultation with the partner primarily responsible for the file.

Under Supreme Court Rule 219(a), if the court finds that the failure to comply with discovery was without substantial justification, the court “shall” order the offending party to pay the “reasonable expenses incurred” by the aggrieved party. However, the reverse is also true- if the motion to compel is denied and found to have been brought without substantial justification, the court “shall” order the *moving party* to pay reasonable expenses, including attorney’s fees.

The overall intent of Rule 201(k) is to force attorneys to work out discovery disputes on their own, rather than seeking court intervention every time there is a bump in the road. There is little Illinois case law pertaining to motions to compel because the

¹ Illinois Supreme Court Rule 219(a).

orders entered in relation to such motions generally are not final and appealable. However, the perils inherent in skipping past a motion to compel and filing immediately for sanctions can be seen in the First District appellate court case *In re the Marriage of Lai*, 625 N.E.2d 330 (1st Dist. 1993), which focuses not only on whether the parties have technically complied with Supreme Court Rule 201(k), but also whether the parties have acted within the spirit of the rule.

In *Lai*, the husband went to Italy during the divorce proceedings, purportedly to take care of an ill family member. The husband's attorney was served with interrogatories and a notice of deposition; however, the husband failed to answer the interrogatories or appear for the deposition since he was still in Italy. Two months later, the wife filed a motion for sanctions against the husband. As the trial was just a few days away, the wife's motion requested that the court set an immediate date for the husband's deposition, and that, if he failed to appear, he be held in default. The motion asserted that a Supreme Court Rule 201(k) letter had been sent to the husband's attorney and that it had become apparent that the husband would not comply. The court scheduled the deposition two days after the hearing and stated that if the husband failed to appear, the court would strike his pleadings and hold him in default. After the husband failed to attend the court-ordered deposition, the court struck the husband's pleadings and entered a default judgment for dissolution of marriage. The court also sentenced the husband to 119 days in jail for his failure to pay court-ordered child support, awarded the wife sole custody of the parties' child (with no visitation for the husband) and awarded the wife the marital residence.

The circuit court denied the husband's petition for rehearing, finding that the default sanction was properly given and noting that a 201(k) letter had been sent to the

husband's attorney and that because the husband "occasioned his own absence" he should not "be excused from the consequences of it."² The trial court also concluded that the distribution of the marital estate was not inequitable although the default hearing may have "disadvantaged him with regard to showing his own position with regard to distribution..."³

The husband argued on appeal that his deposition should have been rescheduled for a reasonable date and held at a different location or by telephone. The appellate court stated that:

The purpose behind Rule 201(k) is to urge counsel to adopt a spirit of cooperation with regard to discovery.... Where a party immediately moves for sanctions, the requirements of Rule 201(k) are not met as it demonstrates that party's failure to make a reasonable attempt to resolve the discovery problem before seeking judicial intervention.⁴

The court further noted that although the husband did exhibit willful disregard for other court orders not related to discovery, it is nevertheless inappropriate to order sanctions for discovery violations based on a party's willful disregard of court orders *unrelated* to discovery.⁵ Thus, the appellate court reversed the trial court's default judgment against the husband and remanded for a new hearing on the distribution of marital assets. It should be noted that the trial court's enthusiasm for imposing sanctions against Mr. Lai may well have been related to the fact that he "kidnapped his daughter in direct violation of the July travel agreement, and he continually failed to pay court-ordered child support."⁶

² 625 N.E. 2d at 333.

³ Id.

⁴ Id. at 334.

⁵ Id. at 335.

⁶ Id.

The trial court has wide discretion to control discovery, and may, pursuant to Supreme Court Rule 213(b), deny a motion to compel answers to interrogatories if the interrogatories are found to be unduly burdensome. Such was the case in *In re Marriage of Zummo*, 521 N.E.2d 621 (4th Dist. 1988), where, on appeal, the husband argued that the trial court erred in denying his motion to compel discovery.

During the divorce proceedings in *Zummo*, the husband frequently changed counsel and when his fourth attorney became involved in the case, he submitted a series of interrogatories to the wife. The appellate court noted that the trial in *Zummo* occurred on four days spread out over the course of more than six months and that the interrogatories were submitted to the wife on February 5, 1987, between the second and third days of trial. The court stated that:

The interrogatories submitted were those that would normally be submitted early in the proceeding. In this case, petitioner had already testified twice concerning the matters contained in the interrogatories before they were submitted to her. To require her to answer them would result in the imposition of an unnecessary burden and expense to her in violation of Supreme Court Rule 213(b).⁷

Therefore, the appellate court concluded that the trial court had properly denied the husband's motion to compel answers to interrogatories.

II. Motion for Sanctions

Under Supreme Court Rule 219, sanctions can be imposed on a party that fails to comply with discovery. Rule 219(c) provides for a variety of potential sanctions that the court may impose, including:

- Staying the proceedings until there is compliance; or
- Debarring the offending party from: filing pleadings or maintaining any particular claim or defense, or
- barring a witness's testimony; or

⁷ 521 N.E. 2d at 628.

- entering a judgment by default or
- dismissing an action; or
- striking pleadings.

However, sanctions are only to be imposed when noncompliance is unreasonable, thus the noncompliant party's conduct must show a "deliberate, contumacious, or unwarranted disregard of the court's authority."⁸ Furthermore, the court is limited to imposing "necessary sanctions to accomplish discovery, it may not impose sanctions that are intended primarily as punishment."⁹ Therefore, discovery compliance sanctions, like civil contempt purges, should be coercive, rather than punitive, in nature.

In *In re Marriage of Booher*, 728 N.E.2d 1230 (4th Dist. 2000), the Fourth District Appellate Court stated this principle as follows:

Supreme Court Rule 219(c) authorizes a trial court to impose a sanction on a party who unreasonably fails to comply with the court's discovery rules or orders.... The purpose of the sanction is to coerce compliance with discovery orders, not to punish the remiss party.¹⁰

In *Booher*, the trial court barred the *pro se* husband from presenting any evidence, including evidence regarding custody and visitation, because he failed to file a pretrial financial affidavit during the dissolution proceedings. The appellate court in *Booher* listed the factors used to determine whether a trial court has abused its discretion in enacting sanctions, which include,

(1) the surprise to the adverse party, (2) the prejudicial effect of the proffered evidence or testimony, (3) the nature of the evidence or testimony, (4) the diligence of the adverse party in seeking discovery, (5) the timeliness of the adverse party's objection to the evidence or testimony, and (6) the good faith of the party offering the evidence or testimony. No single factor is determinative.¹¹

⁸ *Blott v. Hanson*, 670 N.E.2d 345 at 349 (2nd Dist. 1996).

⁹ *Id.*

¹⁰ 728 N.E.2d 1230 at 1232.

¹¹ *Id.* at 1233.

The appellate court found that the *pro se* party had made a good-faith effort to comply with discovery and had in fact responded to all other discovery requests. Moreover, the appellate court concluded that the sanction imposed upon the petitioner was “unwarranted and unreasonable.”¹²

The appellate court noted that an appropriate sanction depends on the *nature* of the discovery violation, stating that:

A reasonable sanction for failure to comply with an order for discovery providing information on income, expenses, and property, when much of the information was already disclosed in previous discovery, would be one barring [petitioner] from contradicting or going beyond the discovery materials provided on those matters; it would not bar any testimony regarding the marriage and, more important, the best interests of the children.¹³

The appellate court concluded that a greater degree of prejudice and wrongdoing would be needed to warrant such a severe sanction and therefore overruled the trial court and remanded the cause for further hearing.

Relying in part on their earlier decision in *Booher*, the Fourth District appellate court in *In re Marriage of Barnett*, 802 N.E.2d 279 (4th Dist. 2003), found that the trial court did not err in barring the husband from presenting additional financial evidence after he repeatedly missed discovery deadlines and provided vague, incomplete and evasive responses regarding his medical practice.

In *Barnett*, the wife filed a request to produce and matrimonial interrogatories in April of 2000. On June 27, 2000 the trial court entered an agreed order requiring the husband to furnish discovery within 60 days. The husband failed to comply with that deadline and on January 25, 2001, the court ordered him to comply with discovery within 10 days. The husband’s response, tendered on February 5, 2001, was also incomplete

¹² Id. at 1234.

¹³ Id.

and evasive, stating, for example, “records for 2000 and 2001 are to be provided” and “details are unavailable to respondent at this writing.”¹⁴

On October 2, 2001, the court made its final ruling on discovery, stating in part, “I believe ‘details are unavailable at this time’ is in fact an improper answer. It’s a euphemism for saying I am not going to get around to answering your question yet.”¹⁵ The court sanctioned the husband, barring him from presenting any further evidence on financial matters and also imposed an award of attorney’s fees against him.

On appeal, the husband argued that the trial court erred in sanctioning him because by October 2nd he was in compliance with the wife’s discovery requests. The appellate court rejected this argument, stating:

An enormous potential for prejudice lies if financial information is missing due to [husband’s] failure to comply with discovery. The court here was forced to make a number of rulings without sufficient financial information. For example, although the court awarded the value of respondent’s medical practice to him, the court was unaware of the value of that asset... it is clear [husband] was a wealthy man with various assets and money placed in numerous accounts. The trial court considered the potential for prejudice to [husband] and found the potential prejudice to [wife] due to [husband’s] concealment of information more compelling.¹⁶

The appellate court concluded that the trial court imposed a sanction proportionate to the gravity of the husband’s discovery violations and affirmed the trial court’s decision.¹⁷

It should also be noted that Supreme Court Rule 219(c) allows the court to impose sanctions not only on the offending party but also on his or her attorney. This occurred in

¹⁴ Id. at 280.

¹⁵ Id.

¹⁶ Id. at 281.

¹⁷ The *Barnett* opinion presents a healthy warning to parties who choose to play games with discovery. In *Barnett*, the trial court, based upon what could safely be described as ambiguous evidence, concluded that a \$1,500,000+ investment account transferred from joint title to the wife’s name during the marriage was a gift to her from the husband. In other words, despite apparently managing to never fully comply with discovery, Mr. Barnett himself may have discovered that “there is more than one way to skin a cat.”

In re Marriage of Davis, 633 N.E.2d 911 (1st Dist. 1994), in which the trial court ordered the wife's attorney to pay opposing counsel's fees as a sanction for not complying with a court order. During the divorce proceedings, the court twice issued orders requiring the wife to provide proof of insurance for the parties' automobile. On the morning of the hearing, the wife provided the necessary proof of insurance to her attorney. The attorney, believing the proof of insurance would not satisfy the husband, did not tender the insurance binder to the husband's attorney. The matter was held over from the morning to the afternoon call and, during the hearing at about 3:00 p.m., a copy of the insurance binder was finally tendered to the husband's attorney. The judge, clearly dismayed that the wife's attorney had withheld documents that might have obviated the need for a hearing, required the wife's attorney to pay \$600 in attorney's fees to opposing counsel to compensate him for four hours of his time. On appeal the wife's attorney argued that it was his client who was ordered by the court to do something, not himself, but the appellate court found this argument unpersuasive as it was the attorney "who withheld the policy from the court and opposing counsel when the case was first called in the morning... [T]he attorney, not the client, engaged in the conduct the court determined was sanctionable."¹⁸ This opinion clearly emphasizes the need for an attorney to immediately forward along discovery provided by a client when there is an order in place requiring that discovery to be tendered.¹⁹

¹⁸ 633 N.E.2d at 914.

¹⁹ Further, Illinois Supreme Court Rule 219(e) states that, "a party shall not be permitted to avoid compliance with discovery deadlines, orders or applicable rules by voluntarily dismissing a lawsuit." (See *In Re Marriage of Webb*, 777 N.E.2d 443 (2nd Dist. 2002).

III. Motions to Quash

Motions to compel and motions for sanctions are structured to “twist the arm” of the offending party in order to coerce discovery compliance. However, in those instances when a party objects to a discovery request made by subpoena, a motion to quash the subpoena is the appropriate remedy. Frequently in divorce matters, motions to quash are brought when a party seeks to subpoena the records (or take the deposition) of the other party’s family members or paramour. Such subpoenas are often issued due to concerns about dissipation of marital assets by a party’s spending money on a boyfriend or girlfriend or because of asset transfers between family members.

Illinois Code of Civil Procedure section 2-1101 states that, “For good cause shown, the court on motion may quash or modify any subpoena...” Among the most consistently quashed subpoenas under Illinois law are subpoenas to the opposing party’s therapist, counselor or other mental health provider. In Illinois, the confidentiality of physician-patient communications and the medical records relating to the patient’s treatment are protected by the Illinois Mental Health and Developmental Disabilities Confidentiality Act (“IMHDDCA”) and by physician-patient privilege. Specifically, section 10 of the IMHDDCA states that, “Except as provided herein, in any civil... proceeding... a recipient, and a therapist on behalf... of a recipient, has the privilege to refuse to disclose and to prevent the disclosure of the recipient’s record or communications” and that further, “[I]n any action brought or defended under the Illinois Marriage and Dissolution of Marriage Act... mental condition shall not be deemed to be introduced merely by making such claim and shall be deemed to be introduced only if the recipient or a witness on his behalf first testifies concerning the record or

communication.” In other words, until a party in divorce proceedings has testified about the “record or communication,” the lock-box protecting his or her mental health records is absolute.

When a party’s mental condition is “in controversy,” Supreme Court Rule 215(a) permits the court to order a mental examination of the party by a licensed mental health professional. This provides the court a mechanism to obtain a professional opinion regarding the party’s mental health without undermining the physician-patient relationship or violating the party’s right to keep his or her treatment records confidential.

The importance of strict compliance with the IMHDDCA was emphasized in the *Lombaer* case. In *In re Marriage of Lombaer*, 558 N.E.2d 388 (1st Dist., 1990), the husband sought a court order authorizing him to take the deposition of the wife’s former treating psychiatrist. The wife objected, but the trial court overruled her objection and entered an order permitting the deposition of her former treating psychiatrist to proceed. The wife filed an interlocutory appeal. The First District appellate court concluded that the trial court had failed to comply with Illinois law by authorizing the deposition. To summarize, one must carefully review the specific language of the IMHDDCA before any discovery regarding an opposing party’s mental health records can even be considered. This is particularly true because section 16 of the IMHDDCA states that, “Any person who knowingly and willfully violates any provision of this Act is guilty of a Class A misdemeanor.” In many instances, a request for a Supreme Court Rule 215 examination is the best alternative.

Perhaps most commonly, motions to quash argue that a subpoena is overbroad or harassing.... A court “must not hesitate to act on motions to quash subpoenas which are oppressive, unreasonable or overbroad.” *People ex rel. Fisher et al. v. Carey*, 396 N.E.2d

17 at 22 (Illinois, 1979). This is the argument most frequently advanced when a party is attempting to obtain the records of the opposing party's paramour or relative. At times, it seems judges may feel compelled to "split the baby" by winnowing down the scope of the subpoena or deposition rider issued to the third party. However, judges should keep in mind that Supreme Court Rule 201(b) states as follows, "Full Disclosure Required. Except as provided in these rules, a party may obtain by discovery full disclosure regarding any matter *relevant* to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking disclosure..." As the 1st District Appellate Court stated in *Skonberg v. Owens-Corning Fiberglass Corp.*, "[G]reat latitude is allowed in the scope of discovery, and discovery thus includes not only what is admissible at trial, but also that which may lead to the discovery of admissible evidence." 576 N.E.2d 28 at 33 (1st Dist. 1991). Similarly, "Pretrial discovery presupposes a range of relevance and materiality much broader than that of admissibility of evidence at trial." *Maxwell v. Hobart Corporation*, 576 N.E.2d 268 at 270 (1st Dist. 1991).

Additionally, subpoenas may be quashed due to technical defects in the subpoena. One common error is for attorneys to prepare subpoenas that are hybrids between records-only subpoenas, trial subpoenas and subpoenas for deposition. This can occur when one uses pre-printed subpoenas issued at the courthouse for purposes other than that for which they are intended. Such jerry-rigging of subpoena forms is not recommended. Rather, each subpoena should be carefully tailored to suit its actual purpose. The time spent developing your own task-specific subpoenas will produce better-looking, less confusing subpoenas that, perhaps most importantly, are less likely to be quashed.

In Lake County, Local Rule 3.09 sets forth a series of specific details that must be observed when issuing records-only subpoenas. Two key components of this rule are that “No oral examination of any person served or responding to a subpoena issued pursuant to this rule is permitted” and that, “no subpoena issued under this provision may be returnable less than fourteen (14) days following its date of service.” This latter provision is designed to ensure that opposing counsel has an opportunity to review and, when appropriate, object to the subpoena before the requested documents are produced. Therefore, if an attorney issues a records-only subpoena pursuant to our local rules, he or she should ensure that the face of the subpoena does not state, “you are commanded to appear to give your deposition” or “you are commanded to appear to testify” as the pre-printed Lake County subpoenas available in the clerk’s office do. Likewise, providing shorter than the required amount of time for the entity to respond may also open oneself up to a motion to quash.²⁰

The pitfalls of technically flawed subpoenas were apparent in the case of *In re Marriage of Riemann*, 576 N.E.2d 944 (5th Dist. 1991). In that case, a bank served with a subpoena during divorce proceedings was successful in having the subpoena quashed. During the dissolution proceedings, the wife served the bank with a subpoena *duces tecum* seeking her husband’s financial records. The bank argued that the subpoenas were improper because the documents sought were not returnable to the court. The trial court agreed, quashed the subpoenas and assessed fees against the issuing party. The appellate court upheld the trial court’s decision, stating that the subpoenas “no matter how classified, were improper. They were neither returnable to court nor accompanied by a

²⁰ As a practical matter, the vast majority of Lake County police departments provide subpoenaed documents almost instantaneously, even if the subpoena clearly states that the documents are not to be provided for fourteen days from the date of service of the subpoena.

notice to take the deposition of the custodian of the records.”²¹ This case is a good example of why it is important for an attorney to ensure that his or her subpoenas are in full compliance with the relevant rules before having them issued.

Conclusion:

While some discovery disputes in family law proceedings are inevitable, serious attention to the tenets of Supreme Court Rule 201(k) can minimize the frequency of such conflicts. Likewise, attention to detail in the issuance of subpoenas and the avoidance of “shotgun” subpoena riders will help to protect your subpoenas from objections and motions to quash. Careful review of the relevant Supreme Court Rules, Code of Civil Procedure sections, local rules and related statutes, together with good client management skills, are key to ensuring that the motions for sanctions served upon you are few and far between.

²¹ 576 N.E.2d 944 at 945-6.