

2.13. DEPOSITIONS IN PENDING ACTIONS. -- (A)(1) Any party may take the testimony of any person, including a party, by deposition upon oral examination for the purpose of discovery or use as evidence in the trial of the action. The deposition may be taken without leave of the court provided that notice is given to the opposing party no less than seven (7) days prior to the taking of the deposition, or if the parties agree to the taking of the deposition, upon shorter notice. The attendance of a deponent may be compelled by the use of a subpoena. The deposition of a person confined in prison may be taken only by leave of the court on such terms as the court prescribes.

(2) In the event that a party issues a notice of deposition of an expert witness and indicates in said notice that the deposition is to be taken for use at trial, the failure of a party or their attorney to appear at the deposition after proper notice shall be deemed a waiver of the right to examine or cross-examine the deponent and shall be deemed a waiver of the right to object to the admissibility of the deposition transcript at trial.

(3) Objections made during a deposition which is introduced into evidence at trial shall be deemed waived unless the objecting party requests a ruling by the trial judge on a specific objection prior to the admission of the deposition into evidence.

(B) Orders for the Protection of Parties and Deponents. -- (1) Objections to the taking of a deposition and motions for protective orders must be filed at least forty-eight (48) hours prior to the scheduled time of the deposition.

(2) After notice is served for taking a deposition by oral examination, upon motion or objection timely filed by any party or by the person to be examined, and upon notice and for good cause shown, the court may make an order that the deposition shall not be taken, or that it may be taken only at some designated time or place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that the deposition be sealed and opened only by order of the court or such other conditions as the court deems appropriate.

(3) The court may, in its discretion, upon motion after notice is given of the intention to submit medical evidence by affidavit pursuant to G.L. 1956 § 9-19-27, require the party seeking to take the deposition of the expert witness or other party to pay the costs incurred in the taking of the deposition including a reasonable expert witness fee or such other conditions as the court deems appropriate.

(4) The power of the court under this rule shall be exercised with liberality toward the accomplishment of its purpose to protect parties and witnesses.

Reporter's Notes. This rule recognizes prior practice before the court and the strong reliance of the court and the litigants on the use of the deposition to present the testimony of expert witnesses. The rule has been modified somewhat in order to standardize the

practice in those cases where a party is seeking to take the deposition of an expert witness for use as evidence. W.C.C. – R.P. 2.13(A)(2) requires the party taking the deposition to state in the notice of deposition that the testimony is being taken for use at trial. When such notice is given, the burden shifts to the adverse party to appear at the deposition and voice any objections to the admission of the deposition as evidence. In the event that a party fails to appear or fails to voice any objection, s/he shall be deemed to have waived any objection to the admission of the deposition on the grounds of hearsay.

W.C.C. - R.P. 2.13(A)(3) establishes a standardized procedure to address evidentiary objections made during the deposition of a witness. Such objections are deemed waived unless the objecting party requests a ruling from the trial judge prior to the deposition being admitted into evidence.

W.C.C. – R.P. 2.13(B)(3) addresses the ruling of the Rhode Island Supreme Court in Gerstein v. Scotti, 626 A.2d 236 (R.I. 1993), with reference to the payment of an expert witness fee. While the rule still requires the proponent of an affidavit to pay the fees charged by the expert witness for the first hour of cross-examination in most cases, it also recognizes the economic disparity which may exist between the employer and employee in workers' compensation litigation. This rule allows a party offering an affidavit to seek a protective order where the exercise of the right of cross-examination could result in the exclusion of the affidavit due to the inability of a party to pay the expert witness fee in advance. It is anticipated that in ruling on a motion for a protective order filed under this section, the court will assess and attempt to balance the interests of all parties utilizing the guidelines enunciated by the Rhode Island Supreme Court in Martinez v. Kurdziel, 612 A.2d 669 (R.I. 1992). This procedure also allows the court to shift the expenses of cross-examination in those cases where it is determined that a party's exercise of the right will prove unduly burdensome to the other party. Finally, this rule recognizes the unique situation which arises in workers' compensation cases under the provisions of G.L. 1956 § 28-35-32. This statute requires that the employer shall pay costs, counsel fees, and witness fees to an employee who is successful in prosecuting or defending a petition before the court. Since the employee may ultimately be entitled to recoup expert witness fees where a case is successfully prosecuted or defended, the shifting of these costs prior to that time where justice so requires does not seem particularly onerous.

The rule was amended by deleting reference to the costs of cross-examining an impartial medical examiner appointed by the court in order to make it consistent with the language of G.L. 1956 § 28-33-35(b) which states that the party contesting the impartial medical examiner's findings shall bear the cost of the appearance of the examiner.