

**RULES OF PROCEDURE FOR THE TAKING
OF DEPOSITIONS
FOR THE PURPOSE OF DISCOVERY**

**REPORT OF THE JUDICIAL COUNCIL OF VIRGINIA
TO THE
GOVERNOR AND GENERAL ASSEMBLY**

**PURSUANT TO HOUSE JOINT RESOLUTION No. 88
(ACTS OF 1960, PAGE 1082)**



HOUSE DOCUMENT No. 12

COMMONWEALTH OF VIRGINIA
Department of Purchases and Supply
Richmond
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House Joint Resolution No. 88, Acts of 1960, page 1082, reads as follows:

“Whereas, there are possible advantages and disadvantages to expanding the rules of procedure for the taking of depositions for the purpose of discovery; and

“Whereas, many states have adopted this procedure successfully; and

“Whereas, such practice could be established for uniform application throughout this State; and

“Whereas, this procedure might better serve the ends of justice by requiring full disclosure of both the plaintiff’s and defendant’s testimony in certain circumstances; and

“Whereas, such procedure might speed the cause of justice; now, therefore, be it

“Resolved by the House of Delegates, the Senate concurring, That the Judicial Council is hereby requested to make a comprehensive study and report upon the advisability of using a discovery procedure in criminal and civil cases and, if the adoption of such procedure seems justified, the safeguards it should include so as to prevent the misuse of any such procedural method. The Judicial Council is requested to consider the practices of other states in this regard. The Council is further requested to make its report to the Governor and General Assembly not later than July one, nineteen hundred sixty-one.”

It appears from this Resolution and from correspondence with the Honorable Theodore C. Pilcher, the chief patron of the Resolution, that the Rules of the Supreme Court of Appeals relating to discovery in actions at law should be broadened in some respects and narrowed in others.

The goals set forth as desirable in the Joint Resolution are:

1. The discovery practice ought to be uniform throughout the State.
2. The procedure should require “full disclosure of both the plaintiff’s and defendant’s testimony in certain circumstances.”
3. The procedure should “speed the cause of justice.”
4. The procedure adopted should include safeguards “so as to prevent the misuse of any such procedural method.”

In order to better accomplish these goals, the Judicial Council recommended changes in paragraphs (a) and (c) of Rule 3:23 of the Supreme Court Rules.

1. The Rule as originally adopted, allowed very wide discretion to the trial judges. Some of them have exercised their discretion by allowing broad discovery and others by allowing only a little discovery. This wide discretion can be limited and greater uniformity achieved by changing "may" to "shall" in the Rule.

2. In order to require full disclosure, the names and addresses of witnesses should be expressly mentioned as information that can be had.

3. In order to speed the cause of justice it is essential that discovery be denied when to allow it would unreasonably delay the case.

4. Safeguards to prevent the misuse of the procedure would necessarily include a finding of fact that discovery is sought in good faith and that it would not impose unreasonable hardship or expense on the adverse party.

Accordingly, the Judicial Council recommended to the Court that it promulgate amendments to paragraphs (a) and (c) of Rule 3:23 so that they would read as follows:

"(a) A party may object to the taking of a deposition de bene esse by moving the court, promptly after receiving notice of the taking of the deposition, to quash the notice unless satisfied that the taking of the deposition is in good faith for the purpose of taking and introducing the testimony of a witness who may not be able to attend the trial of the case."

* * *

"(c) On motion of any party, the court, if satisfied by affidavit, testimony, inspection of the pleadings or otherwise that the moving party in good faith desires access by way of discovery to evidence, the names and addresses of witnesses, or other information subject to the control of the adverse party or of a third person, shall permit the taking of a deposition for discovery and shall enter an order requiring the adverse party or such third person to attend at a time and place and before a notary or commissioner named in the order and to make available for inspection, copying or photographing any writing, chattel or real property described in the order. The court shall deny the motion if it finds that granting the motion would unreasonably delay the case or impose unreasonable hardship or expense on the adverse party."

The Supreme Court of Appeals followed the recommendation of the Judicial Council and adopted the above amendments by order dated January 17, 1961, effective April 1, 1961.

Respectfully submitted,

John W. Eggleston, Chief Justice,
Chairman.