ILLINOIS
Association of
DEFENSE TRIAL
COUNSEL

December 13, 2018

Judge Diane J. Larsen
Chancery Division
Circuit Court of Cook County
Richard J. Daley Center, Suite 2405
50 W. Washington Street
Chicago, IL 60602

Dear Judge Larsen,

We write to you with respect to the proposed revisions to Illinois Supreme Court Rules 201 through 218. We appreciate the opportunity you have given us to be a part of this process and look forward to continuing to work with you on this matter.

With respect to the proposal to eliminate evidence depositions, we maintain our opposition to that proposal and urge that it be rejected. Having a distinction between depositions that are taken for the purpose of discovering what the witness has to say and those that are taken to preserve a witness's testimony for trial has served the bar of this state well for several decades. As practitioners from both sides of the litigation will attest, the distinction between discovery and evidence depositions is vital to protecting the scope of discovery. The range of questioning in a discovery deposition is broader—and the scope of examination is more liberal—since the purpose of a discovery deposition is mainly investigatory and the deponent may be questioned regarding anything related to the merits of the case without regard to whether it will be admissible at trial. The advantages of the current rules and the history of those rules are set forth in our submissions from the spring. I have included another copy of those submissions with this letter for your convenience.

Whenever the issue of eliminating the distinction between discovery and evidence depositions is brought up, those that seem to be pushing for a single deposition system always state, in one form or another, that Illinois is the only state in the country that has a dual deposition system. Those claims are simply not true. At least 17 states (including some of our neighbors) and the District of Columbia have some type of dual-deposition procedure in place. I have attached for your review a summary of those states which recognize the importance of allowing for depositions to discover what a witness has to say on the one hand and depositions to preserve that witness's testimony on the other. Illinois, like these other states and the District of Columbia, should continue to recognize the importance of allowing litigants to use the more informal procedures of a discovery deposition to develop their claims and defenses while allowing them the opportunity to preserve trial testimony in the event that an important witness will be unavailable for trial.

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In our experience, evidence depositions, noticed for the purpose of presenting testimony at trial, particularly of treating physicians, are time and cost efficient for all involved. The parties work out the vast majority of objections and only a limited number of objections are then presented to the court for ruling. If the deposition is videotaped, then the video can be easily edited and presented to the jury at times when live trial witnesses are not available.

While we continue to oppose the elimination of the distinction between discovery and evidence depositions, we do wholly support the proposed amendment to Illinois Supreme Court Rule 201(d), which would require the parties to prepare and serve on all other parties a set of initial disclosures concerning witnesses, documents and damages. As we discussed when we first met in the fall, we continue to have concerns about a requirement that the parties meet, prepare and submit discovery plans in state court similar to those required in federal court. While the preparation and submission of discovery plans may be achievable in smaller counties in the state, imposing such a requirement on litigants in Cook County, and requiring judges in this venue to read, implement and keep track of discovery plans on dockets consisting of hundreds or even thousands of cases, seems to be impractical and a likely waste of time and effort.

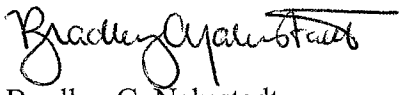
As outlined above, we urge that the current structure of depositions in Illinois civil cases be maintained. If, however, your committee insists that changes to the deposition structure are to be made, we respectfully submit the enclosed proposal to make these proposed changes less onerous on all involved. Where necessary, we have included comments that seek to explain the basis for our proposed changes to the proposal.

The thrust of the changes to the proposal we have drafted is to carve out all treating physicians and Rule 213(f)(2) witnesses from the elimination of the discovery depositions. This is in line with the disclosure requirements contained in the 2010 amendments to the Federal Rules and would deal with the vast majority of the problems created by the elimination of discovery/evidence depositions. We have also proposed to modify the three hour rule.

We have also included two fallback positions. The first, which begins on page 24, eliminates the inclusion of all Rule 213(f)(2) witnesses from the elimination of discovery depositions, but keeps the discovery depositions of all treating physicians. The second, which begins on page 48, eliminates the distinction between Rule 213(f)(2) and (f)(3) witnesses and would require that any witness who is going to offer opinions be subject to disclosure in the form currently required under Rule 213(f)(3) prior to the taking of their deposition.

We thank you again for the opportunity to be part of this process. We emphasize again that our preference is for no change to the current rules related to depositions and our proposed changes are only in the event that such a change would be imposed. Please let me know if you have any questions or would like to discuss this matter further.

Very truly yours,



Bradley C. Nahrstadt
President, IDC

Enclosures

Illinois is not the only state that uses a dual-deposition system. While not every jurisdiction uses both types of depositions in the same manner as Illinois (for example, Michigan allows a discovery deposition to be taken of a lay witness with leave of court and a discovery deposition of an expert witness to be taken without leave of court), the list below highlights the number of states where the dual-deposition procedure exists in practice.

States with some type of Dual-Deposition Procedure

1. California
2. Colorado
3. D.C.
4. Florida
5. Georgia
6. Kentucky
7. Maryland
8. Michigan
9. Minnesota
10. Missouri
11. New Jersey
12. Oklahoma
13. Pennsylvania
14. South Carolina
15. Vermont
16. Virginia
17. Washington
18. Wyoming

- Colorado
  - "(5) Depositions for Obtaining Documents and for Trial. In addition to depositions allowed under subsection (k)(4)(A) of this Rule: *** (B) A party who intends to offer the testimony of an expert or other witness may, pursuant to C.R.C.P. 30(b)(1)-(4) and (7), take the deposition of that witness for the purpose of preserving the witness' testimony for use at trial without being subject to the six-hour limit on depositions in subsection (k)(4)(A) of this Rule. Unless authorized by the court or stipulated to by the parties, such a deposition shall be taken at least 21 days before trial. In that event, any party may offer admissible portions of the witness' deposition, including any cross-examination during the deposition, without a showing of the witness' unavailability. Any witness who has been so deposed may not be offered as a witness to present live testimony at trial by the party taking the preservation deposition." C.R.C.P. Rule 16.1(k)(5)(B).
- D.C.
  - "Dr. Bechamp gave two depositions in connection with this case. The first was a discovery deposition taken approximately one year before trial. The second

was a *de bene esse* deposition taken during the trial, when pressing medical commitments prevented him from returning to testify for a second day after he had testified before the jury about his expert qualifications and briefly about substantive issues. The parties continued his testimony that evening at the *de bene esse* deposition." *Townsend v. Donaldson*, 933 A.2d 282, FN 11 (D.C. 2007).

- Florida
  - "The testimony of an expert or skilled witness may be taken at any time before the trial in accordance with the rules for taking depositions and may be used at trial, regardless of the place of residence of the witness or whether the witness is within the distance prescribed by rule 1.330(a)(3). No special form of notice need be given that the deposition will be used for trial." FRCP 1.390(b).
  - *Cook v. Lichtblau*, 176 So. 2d 523 (Fla. 2d Dist. 1965) (where plaintiff failed to comply with the special procedure for introducing the testimony of an expert by deposition, plaintiff was not permitted to use the expert's testimony by deposition).

- Georgia
  - "(5)a. All discovery has been completed, unless otherwise noted, and the court will not consider any further motions to compel discovery except for good cause shown. The parties, however, shall be permitted to take depositions of any person(s) for the preservation of evidence for use at trial." USCR 7.2 (5a).
  - "At the beginning of the deposition, it is referred to as a deposition "de bene esse," and counsel asks: 'Can you describe for our jury the nature of your practice.' Four times more in the deposition the jury is referred to, three of those by defendant-appellee's counsel. This deposition followed an initial telephone deposition a week earlier." *Dugger v. Danello*, 175 Ga. App. 618, 619, FN1 (Ga. App. 1985).

- Kentucky
  - "The strategy and goals of a discovery deposition are different than a deposition taken to preserve testimony for or taken for use at trial." *Goodpaster v. Ridgeway Nursing and Rehabilitation Facility, LLC*, (Ky.) (unreported decision) (2009 WL 3786483).

- Maryland
  - *Wantz v. Azfal*, 197 Md. App. 675, 691, 695 (Md. App. 2011)
    - "Unlike Dr. Manders's *de bene esse* deposition, Dr. Gaber had not yet offered trial testimony ***."
    - "As stated above, Dr. Gaber's and Dr. Zoarski's depositions were discovery depositions. We cannot be certain at this point in time whether Dr. Gaber would be able to further develop this opinion at trial."

- Michigan
  - "(ii) A party may take the deposition of a person whom the other party expects to call as an expert witness at trial. The party taking the deposition may notice that the deposition is to be taken for the purpose of discovery only and that it shall not be admissible at trial except for the purpose of impeachment, without the necessity of obtaining a protective order as set forth in MCR 2.302(C)(7)." MCR 2.302(B)(4)(a)(ii).
  - MCR 2.302(C) provides that a party may file a motion to conduct the deposition of a witness for discovery only. Pursuant to MCR 2.302(C)(7), such a deposition may be taken "only for the purpose of discovery and shall not be admissible in evidence For the purpose of impeachment".
  - "(C) After the time for completion of discovery, a deposition of a witness taken solely for the purpose of preservation of testimony may be taken at any time before commencement of trial without leave of court." MCR 2.301(C).
  - "A *de bene esse* deposition, as distinguished from a discovery deposition, is generally taken to preserve testimony." *Surgical Institute of Michigan, L.L.C. v. State Farm Mut. Auto. Ins. Co.*, 2015 WL 6439004 (unreported decision).

- Minnesota
  - "While the Minnesota Rules of Civil Procedure do not distinguish between discovery depositions and depositions to preserve trialtestimony, the purposes of the two types of depositions are very different. On the one hand, a discovery deposition is usually taken by a party to discover the testimony that a witness may give if called to testify at trial, as well as to cross-examine the witness to test the knowledge of the witness and to obtain admissions from the witness. On the other hand, the purpose of a deposition to preserve trial testimony is not to learn what a witness knows and might testify to at trial; instead, the purpose is to preserve the testimony of the witness for use at trial. *See generally* 1A David F. Herr & Roger S. Haydock, *Minnesota Practice—Civil Rules Ann.* § 30:7 (5th ed.2010) (stating that a deposition to preserve trial testimony may be taken after the discovery deadline in a scheduling order because "the purpose of the deposition is not to discover information but to preserve the testimony of a witness who will be unavailable for trial")." *TC/American Monorail, Inc. v. Custom Conveyor Corp.*, 840 N.W.2d 414, 418-19 (Minn. 2013) (holding that deposition to preserve trial testimony of unavailable witness was not barred by discovery deadline in scheduling order).

- Missouri
  - It appears that there is no rule allowing or forbidding depositions to proceed on a discovery versus evidence basis. However, for experts, it is not uncommon to take a discovery deposition followed by a deposition in lieu of trial testimony (largely because expert reports are not required to be tendered in advance of the deposition).

- New Jersey
  - "A *de bene esse* deposition is taken for potential use at trial." *Mellwig v. Kebalo*, 624 A.2d 82, 84 (N.J. App. 1993).
  - "Once the discovery deposition, if one is desired, is conducted, plaintiffs and defendant shall agree on the time and place of and the type video equipment for videotaping the *de bene esse* deposition." *Mills v. Dortch*, 142 N.J. Super. 410 (1976).

- Pennsylvania
  - "Prior to his death, Decedent testified in a pre-trial discovery deposition and in a *de bene esse* deposition." *Quinby v. Plumsteadville Family Practice, Inc.*, 589 Pa. 183 (2006) ("A *de bene esse* deposition is taken when the witness will likely be unable to attend a scheduled court hearing. BRYAN A. GARDNER, A DICTIONARY OF MODERN LEGAL USAGE 250 (2d ed.1995).")

- South Carolina
  - "The deposition taken by defendants' attorney was not a *de bene esse* deposition to preserve testimony but purely a discovery deposition taken on the motion of defendants' attorney." *Logan v. Gatti*, 289 S.C. 546 (1986).
  - "[A]n evidence deposition, otherwise admissible, may be received in evidence at a trial or hearing. *** The notice shall specify that the purpose of the deposition is for evidence at a trial or hearing pursuant to this rule, and shall further specify the manner in which the deposition is to be taken." Rule 30(i), SCRCP.

- Vermont
  - "[T]he deposition at issue was specifically noticed and conducted as a "preservation" deposition where objections could be interposed for ruling at trial. The doctor's preserved testimony was videotaped, so that his tone and demeanor on direct and cross-examination could be observed. This was preceded by plaintiffs' initial discovery deposition when the nature and scope of Dr. Rabinowitz's opinion and the basis therefore could be known in advance of the preservation deposition. Thus, the circumstances underlying the second deposition were significantly different from the typical discovery deposition, where counsel would normally not be prepared or expected to conduct an adequate cross-examination on matters of which counsel had only first gained knowledge." *Nichols v. Brattleboro Retreat*, 185 Vt. 313, 320 (2009).

- Virginia
  - "*De bene esse* depositions are creatures of consent or court order, and they are taken because a witness, which is usually an expert witness, cannot attend the trial. There is no statute or Rule of Court specifically authorizing a *de bene esse* deposition. Since all depositions are governed by the Rules of Court, any deposition of a physician may potentially be used at trial pursuant to Rule 4:7(a)(4)(E); therefore, it is potentially a *de bene esse* deposition as that

term has evolved." *Boyer v. Dabinett*, 74 Va. Cir. 19 (2007) (unreported decision) (2007 WL 5960173).

- Washington
  - "The deposition of a health care professional, even though available to testify at trial, taken with the expressly stated purpose of preserving the deponent's testimony for trial, may be used if, before the taking of the deposition, there has been compliance with discovery requests made pursuant to rules 26(b)(5)(A)(i), 33, 34, and 35 (as applicable) and if the opposing party is afforded an adequate opportunity to prepare, by discovery deposition of the deponent or other means, for cross examination of the deponent." WA R SUPER CT CIV CR 32.
  - "Bearden's attorney used Murphy's discovery deposition in cross-examining Murphy during Murphy's perpetuation deposition. The parties recorded and played the perpetuation deposition at trial in lieu of Murphy's live testimony." *Bearden v. McGill*, 193 Wash. App. 235 (Wash. 2016).

- Wyoming
  - "There is not a distinction as to the admissibility at trial between a deposition taken solely for purposes of discovery and one which is taken for use at trial." *Reilly v. Reilly*, 671 P.2d 330, 333 (Wy. 1983).

Proposed Rule Changes – IDC Proposed Changes No. 1

Supreme Court Rule 201

(a) Discovery Methods. Information is obtainable as provided in these rules through any of the following discovery methods: depositions upon oral examination or written questions, written interrogatories to parties, discovery of documents, objects or tangible things, inspection of real estate, requests to admit and physical and mental examination of persons. Duplication of discovery methods to obtain the same information and discovery requests that are disproportionate in terms of burden or expense should be avoided.

(b) Scope of Discovery.

(1) 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 or of any other party, including the existence, description, nature, custody, condition, and location of any documents or tangible things, and the identity and location of persons having knowledge of relevant facts. The word "documents," as used in Part E of Article II, includes, but is not limited to, papers, photographs, films, recordings, memoranda, books, records, accounts, communications and electronically stored information as defined in Rule 201(b)(4).

(2) Privilege and Work Product. All matters that are privileged against disclosure on the trial, including privileged communications between a party or his agent and the attorney for the party, are privileged against disclosure through any discovery procedure. Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney. The court may apportion the cost involved in originally securing the discoverable material, including when appropriate a reasonable attorney's fee, in such manner as is just.

(3) Consultant. A consultant is a person who has been retained or specially employed in anticipation of litigation or preparation for trial but who is not to be called at trial. The identity, opinions, and work product of a consultant are discoverable 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 matter by other means.

(4) Electronically Stored Information. ("ESI") shall include any writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations in any medium from which electronically stored information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form.

(c) Prevention of Abuse.

(1) Protective Orders. The court may at any time on its own initiative, or on motion of any party or witness, make a protective order as justice requires, denying, limiting, conditioning, or regulating discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression.

(2) Supervision of Discovery. Upon the motion of any party or witness, on notice to all parties, or on its own initiative without notice, the court may supervise all or any part of any discovery procedure.

(3) Proportionality. When making an order under this Section, the court may determine whether the likely burden or expense of the proposed discovery, including electronically stored information, outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues.

~~(d) Time Discovery May Be Initiated. Prior to the time all defendants have appeared or are required to appear, no discovery procedure shall be noticed or otherwise initiated without leave of court granted upon good cause shown.~~

(d) Initial Disclosures

(1) Except as exempted by subsection (d)(2) of this Rule, or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(B) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(C) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 214 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Supreme Court Rule 214, the declaration page or certificate of any insurance agreement under which an insurance

Comment [EDP1]: A declaration page or certificate of insurance provides the plaintiff with what they need to identify the insurer and the extent of limits.

business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(2) Proceedings Exempt from Initial Disclosure. The following proceedings are exempt from initial disclosure:

(A) an action for review on an administrative record;

(B) a forfeiture action in rem;

(C) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(D) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(E) an action to enforce or quash an administrative summons or subpoena;

(F) an action by the State of Illinois or the United States to recover benefit payments;

(G) an action by the State of Illinois to collect on a student loan;

(H) a proceeding ancillary to a proceeding in another court; ~~and~~

(I) an action to enforce an arbitration award;

(J) any cases in which Rule 222 applies; and

(K) any action subject to mandatory arbitration under Rule 86.

Comment [EDP2]: The discovery requirements in cases governed by these rules work very well and adding additional requirements will not aid in the expeditious resolution of these matters. Rather, upsetting the current discovery and arbitration process in these cases will cause confusion of well settled law.

(3) Time for Initial Disclosures—In General. A party must make the initial disclosures at or within 14 days after the parties' conference under subsection (6) of this Rule unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(4) Time for Initial Disclosures—For Parties Served or Joined Later. A party that is first served or otherwise joined after the conference under subsection F. of this order must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(5) Basis for Initial Disclosure; Unacceptable Excuses. A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused