ILLINOIS
Association of
DEFENSE TRIAL
COUNSEL

PO Box 588
Rochester, IL 62563
800-232-0169, 217-498-2649
F: 866-230-4415
idc@iadtc.org, www.iadtc.org

The Illinois Association of Defense Trial Counsel (IDC), an organization whose members are committed to protecting and improving civil justice in Illinois, opposes Proposal 17-12, which would amend Supreme Court Rule 202-212.

This proposal would eliminate the distinction between discovery and evidence depositions. The reasons offered for this proposal – to promote efficiency and to conform our rules with the Federal Rules – fails to account for the unintended consequences of the proposal and would upset the delicate balance that has been struck in Illinois based upon the constellation of rules and applicable doctrines that govern practice in this State. In short, the current Illinois rules governing disclosure and depositions work well and serve the ends of justice in the search for truth and prevention of surprise. Contrary to the assumptions underlying the proposal, the distinction between discovery and evidence depositions makes discovery and trials in Illinois more expeditious, not less. The proposed change would take Illinois back to the period of at least Rule 220, if not before, which proved unworkable insofar as the disclosure of opinions was concerned and force the practitioners to endure the convulsions of the rapid changes that followed with Rule 213(g) and the creation and amendment to Rule 213(f).

A. The Proposal is Inconsistent with the Operation of the Illinois Rules as a Whole

Taking one aspect of the Federal Rules, the use of depositions at trial, without the rest of those Rules, fails to acknowledge that the Illinois Rules operate as a whole. Conforming Illinois practice with that of other jurisdictions piecemeal is of no obvious advantage and plays on the logical fallacy of *argumentum ad populum*. Changing one part of the Illinois Rules to mirror one part of the Federal Rules does not move towards efficiency or greater effectiveness.

B. Discovery Depositions Are Fundamental to Illinois Civil Practice

Illinois discovery practice is generally built on the basic and well-established principle that it is a "cooperative undertaking … for the purpose of ascertaining the merits of the case and thus promoting either fair settlement or a fair trial." *Williams v. A.E. Staley Mfg. Co.*, 83 Ill.2d 559, 566 (1981). The purpose of discovery is thus the search for the truth that meets the ends of justice. To that end, the deposition procedure in Illinois has developed four cornerstones of practice that serve competing interests and generally tend toward those goals: the three-hour rule in Rule 206(d), the *Petrillo* doctrine, the disclosure requirements of Rule 213(f), and the distinction between discovery and evidence depositions. As a corollary to those principles, Rule 218(c), requires discovery to be completed 60 days before trial; the 60 days between the close of discovery and the time of trial is when evidence depositions are most often taken, causing little or no delay between discovery and the beginning of trial.

While differently-situated parties may think certain changes could work to their benefit, these principles work together as a coherent whole and represent a system that is intended to provide the best chance at a level playing field for all parties. Taking one principle or aspect away, as proposed here by the elimination of the discovery deposition, will undo the system that has developed as a whole, particularly with respect to treating physicians' depositions and especially in medical malpractice cases. The Proposal, if adopted, would simply move the unfairness of undisclosed opinions from the time of trial to the time of deposition (which in effect will be the time of trial) for treating physicians where defense counsel is not permitted to speak

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with these witnesses. Treating physicians often have a pecuniary interest in the outcome of the case and plaintiffs are not required to make detailed disclosure of their opinions. It is common for evidence depositions to be used to obtain the testimony of treating physicians for trial. Eliminating the distinction between discovery and evidence depositions and requiring treating physicians to appear at trial will make trial scheduling very difficult and defeat one of the very purposes of this proposal.

The reason for these proposed changes is even less apparent given the proliferation of videoconferencing and Skype technology, which provides an easy and cost-effective method to permit the judge or jury to observe the manner of testifying. It is no great burden to require a witness to submit to an evidence deposition in lieu of appearing at trial. In fact, it is almost always more convenient for a witness to appear for a scheduled deposition than to testify during trial. There is no compelling reason to excuse certain witnesses, particularly those residing more than 100 miles away from a courthouse, from having to appear while local witnesses have to appear at trial. The current Illinois rules strike an appropriate balance to allow the use of an evidence deposition – or even a discovery deposition – as trial testimony when justice requires.

C. The Proposal Will Not Save Time or Resources

This proposed change would also not tend to reduce the time or effort in litigation. It is a frequent occurrence that upon appearing for a deposition an independent witness has not produced all documents requested by subpoena. Under the current rules regime, the noticing party will typically proceed with the deposition knowing that the party taking the deposition will get an evidence deposition of the witness after the party has had the opportunity to fully review the documents and depose the remaining witnesses in the case. Eliminating this rule will lead litigants, who otherwise would take the deposition under reservation, to continue the deposition and file a motion, thereby taking up valuable time and judicial resources that could be better used on other matters.

This problem is particularly common with treating physicians. As medical records are held electronically, providers often produce only those electronic records in response to a subpoena. At the deposition the doctor often appears with handwritten records that were not previously produced. Given that Illinois law bars defense counsel from speaking to a treating physician outside of deposition and that the Rules do not require exact, specific disclosure of a treating physicians' opinions though they may offer causation opinions or even opinions on the standard of care in medical malpractice cases, review of all records by defendants' retained expert is essential prior to the deposition. In these circumstances, significant delay will be worked where there will be no later evidence deposition to challenge these opinions.

It is further important to recognize the impact this proposed rule change would have upon delaying the discovery process and, potentially precluding settlements. It is common in personal injury cases for the discovery deposition of the treating physician to be taken prior to a plaintiff completing medical treatment and, often years in advance of trial. Illinois case law requires a recent exam in order to admit a treating physician's opinion regarding permanency or the plaintiff's current condition. *Soto v. Gaytan*, 313 Ill. App. 3d 137, 141 (2nd 2000) (citing *Knight v. Lord,* 271 Ill. App. 3d 581, 587 (4th Dist. 1995); *Henricks v. Nyberg, Inc.,* 41 Ill. App. 3d 25,

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28 (1st Dist. 1976). As a result, permanency opinions at discovery depositions taken early in the case would be less reliable or barred from evidence.

In current practice, a discovery deposition is taken, but the plaintiff may continue to seek treatment without a negative impact to the litigation position (assuming the treatment is timely disclosed). In most cases, the post-discovery deposition treatment records are disclosed, and in most cases, the parties take the evidence deposition of the provider in anticipation of trial thereby affording the opportunity to explore the treatment offered following the discovery deposition and obtain testimony regarding any opinions related to permanency. Under this system, parties are not prejudiced by taking the deposition of a treating provider prior to the completion of treatment because an evidence deposition can be taken at a time sufficiently close to the trial date to afford the opportunity for a defendant to learn whether the provider will offer valid opinions regarding permanency.

The elimination of discovery depositions would necessarily delay the discovery process because depositions of treating physicians would not be taken until a time sufficiently close to trial to ensure that treatment of the plaintiff was complete and testimony regarding permanency could be offered for the benefit of plaintiff and cross examined for the benefit of defendant. This would erect a barrier to settlement and delay in the litigation as the parties would be forced to rely solely upon medical records and anticipated medical opinion testimony when attempting to negotiate a settlement prior to trial and prepare the matter for trial. Accordingly, this proposal would force delay in case resolution and defeat the very purpose of the proposed rule change.

The elimination of discovery depositions and the requirement that most witnesses appear at trial because they do not fit into the definition of unavailability, will also delay some trials and make trial more difficult to schedule. This is particularly so in multi-party cases in counties where the motion judge is not the trial judge, especially Cook County. In such instances, a trial judge may not be available on the first day of trial. And even when a trial starts as planned, the day or time that a witness will actually testify is often uncertain. The use of evidence depositions speeds trial along by allowing testimony to be taken during such delays, and does not hinder the timely completion of trial.

D. The Proposal Fails to Recognize the Changes to Federal Rules on Disclosure

It is also important to note that the 2010 amendments to the Federal Rules require that if a treating physician is to testify on opinions not reached during their treatment of the plaintiff, in particular on issues of causation and standard of care, those opinions must be disclosed. As one court recently described,

> To summarize, before the 2010 amendments to Rule 26(a)(2), the majority of courts held that treating physicians providing opinions on causation, diagnosis, prognosis, and the extent of disability were not required to provide Rule 26(a)(2)(B) reports if their opinions were formed during the course of treating their patients. However, if a treating physician's opinions were based on information provided by an attorney or others that were not reviewed during the course of treatment, a Rule 26(a)(2)(B) report was required "insofar as their

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additional opinions are concerned." [*Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817, 826 (9th Cir. 2011)].

The 2010 amendments to Rule 26(a)(2) now mandate that non-retained experts, like treating medical providers, who offer opinions based on their "knowledge, skill, experience, training or education" under Federal Evidence Rules 702, 703, or 705, make the disclosures required by Rule 26(a)(2)(C). Rule 26(a)(2)(C) requires disclosure of "(i) the subject matter on which the written witness is expected to present evidence under Federal Evidence Rule 702, 703 or 705; and (ii) a summary of facts and opinions to which the witness is expected to testify." FED. R. CIV. P. 26(a)(2)(C)(i), (ii).

The disclosure obligation stated in 26(a)(2)(C) "does not apply to facts unrelated to the expert opinions the witness will present." FED. R. CIV. P. 26 Advisory Comm. Notes (2010). A treating physician is still a percipient witness of the treatment rendered and may testify as a fact witness and also provide expert testimony under Federal Evidence Rules 702, 703, and 705. However, with respect to expert opinions offered, a Rule 26(a)(2)(C) disclosure is now required. *Alfaro v. D. Las Vegas, Inc.*, No. 215CV02190MMDPAL, 2016 WL 4473421, at *11 (D. Nev. Aug. 24, 2016)(paragraph breaks added).

The comments to the 2010 amendments to Rule 26 make explicit that the goal of the amendments was to address experts not required to provide reports.

In the absence of significant amendment to the disclosure rules under Rule 213(f) to match something similar to what is required under the Federal Rules, the manifest unfairness of allowing treating physicians to testify at a deposition to causation and standard of care without disclosure prior to their deposition is clear. The better alternative, which would not upset the long-standing and well-settled disclosure requirements in Rule 213(f), is to leave untouched the current rules regarding the distinction between discovery and evidence deposition.

E. The Proposal Will Hamper the Search for Truth

The Illinois Supreme Court has "long recognized that the principal safeguard against errant [] testimony is the opportunity of opposing counsel to cross-examine ***. [Citations]." *Trower v. Jones*, 121 Ill. 2d 211, 217 (1988). But the use of a discovery deposition at trial and elimination of an evidence deposition would substantially hamper the ability of litigants to conduct effective witness cross-examinations and impede a fact-finder's ability to search for the truth.

First, allowing a discovery deposition to stand as trial testimony would eradicate the use of a deposition to impeach the credibility of the witness. An inconsistent statement in the discovery deposition is frequently used at trial as a vital tool of cross-examination. Next, a litigant would be precluded from taking the discovery deposition of an adverse physician or expert, thereafter consulting with the litigant's own expert to evaluate the deposition testimony, and subsequently cross-examining the adverse physician or expert based upon the expertise of the litigant's own expert. Consulting a party's own expert and investigating the bases of an

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expert's opinions often provides the basis for a meaningful cross-examination, and litigants should not be deprived of that right. In addition, in many instances, the full discovery process will reveal previously unknown facts that can either provide new support for a known claim/defense or give rise to a new claim/defense. So it is unfair to require litigants to take witness trial testimony at the beginning of the discovery process simply because a witness happens to reside in Indiana or Wisconsin or is otherwise considered unavailable under the broad federal court definition.

Moreover, the proposed changes would unnecessarily impair cross-examination at trial because litigants would not be able to prepare effective cross-examinations in the same manner as currently permitted by the Illinois Supreme Court Rules. The questioning during a discovery deposition is suited to the purpose of discovering the testimony of a witness. Conversely, the questioning during an evidence deposition, particularly on cross examination, involves narrowly tailored, leading questions to serve an evidentiary purpose. These two types of questioning cannot be reconciled in a single deposition. And a litigant should not be required to prepare for a trial cross-examination without even knowing the details of the testimony offered by that witness, particularly so when that witness is a party. The use of a discovery deposition at trial is nothing like the use of an evidence deposition under Illinois Supreme Court Rule 212, as a litigant can appropriately prepare for an evidence deposition under the current rules.

Further, the elimination of discovery depositions may, in certain circumstances, chill the questions that are asked of all witnesses, but particularly treating physicians and thus hinder the search for the truth. Illinois has balanced the expansive search for the truth at depositions by imposing a three-hour rule. This proposal keeps the three-hour rule, and adopts wholesale, other aspects of the federal rules without proposing to adopt the seven-hour rule that is applicable in federal courts. The three-hour rule has served Illinois well, but only in the context of the unlimited timeframe of an evidence deposition. Upsetting the balance struck that has served Illinois well is unwise and will not achieve the goals of the proposal. Rather, the possibility that deposition testimony will be transformed into trial testimony would significantly lengthen the average time of a deposition and increase the costs of litigation.

F. The Peculiar Problem of Treating Physicians

In addition, this proposal does not modify the procedure for payment of a treating physicians' fee. The circumstance will likely arise where defense counsel inadvertently elicits opinions at a deposition from a treating physician that are harmful to the defendant and must pay for those harmful opinions that can now be used against a client. Worse still, plaintiff's counsel, who has the advantage of speaking with a treating physician prior to the deposition, may attempt to elicit undisclosed causation or standard of care opinions, with no opportunity for the defendant to adequately prepare and rebut those opinions at the deposition or at a subsequent evidence deposition, procedure right protected under the current rules. The carefully crafted disclosure rules will thereby be turned on their head and the ambush of the defense will simply occur at the deposition, instead of trial.

Under the current scheme when such situations occur, the defendant rebuts those opinions with expert opinion and then the treating physician's evidence deposition is taken before trial, after the expert has been deposed, so that both counsel for plaintiff and counsel for defendant

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can deal with these opinions before trial and there is a full development of the issue at trial. The search for the truth is satisfied and no party is disadvantaged. The bench and the bar benefit from this process that has long served this state well.

G. The Unique Problems Faced in Toxic Tort Cases

The proposed rule change to eliminate evidence depositions and adopt the single deposition concept does not take into account the mass tort litigation in Illinois such as asbestos related cases. One glaring problem is the proposed rule does not change or eliminate the limitation as contained in Supreme Court Rule 206(d) on duration of depositions of any party or witness to not exceed three hours regardless of the number of parties involved in the case. However, in an asbestos case, it is not unusual for forty, fifty or up to more than one hundred defendants to be named in one lawsuit. There could easily be between twenty and fifty defendants present at a deposition of a plaintiff or non-party co-worker who need to examine the witness to understand their individual liability potential and defenses for trial. While lengthier examinations are permitted either by agreement of all parties or by court order upon good cause shown, that does not guarantee an extension of time will be forthcoming. In a jurisdiction in central Illinois, a plaintiff attorney will not agree to discovery depositions exceeding three hours and the court has denied defense motions for extension of time, ruling that any questions a defendant has of the witness can be submitted as an interrogatory question.

That circumstance is difficult for defendants to deal with under the present Rule. However, if that deposition would be able to be used at trial affirmatively by plaintiff, defendants whose questioning was cut short or non-existent would be at an unfair disadvantage.

Further, there is nothing in the proposed rule change (or in any of the Illinois Supreme Court Rules) that states who is allowed to notice and therefore take the lead in the single deposition. A plaintiff's attorney could notice the deposition of his or her client, take the lead in the questioning thereby setting out in direct examination fashion all of the questions needed to make a *prima facie* case against all defendants and then limit the time for defendants to examine that plaintiff. Should the plaintiff be unavailable for trial, that deposition could then be used at trial for evidentiary purposes, greatly prejudicing those defendants.

Moreover, the proposed rule change likely will result in defense counsel losing the ability to conduct trial examinations, which are markedly different from discovery deposition examinations, of plaintiffs in the majority of toxic tort cases. While a significant number of asbestos related cases are filed in Illinois, most plaintiffs in those cases do not reside in Illinois. For example, in 2016, 72 percent of plaintiffs that filed asbestos lawsuits in Illinois were non-Illinois residents. In Madison County, Illinois, over 83 percent of plaintiffs that filed asbestos lawsuits in that county were non-Illinois residents. *See*, Mealy's Litigation Report: Asbestos, Vol. 32, #13, August 16, 2017Due to their ages, medical conditions, and distance from Illinois, many plaintiffs in asbestos related cases do not travel to Illinois to testify at trial. Rather, the plaintiffs typically sit for discovery and evidence depositions in their home states. Additionally, it is not uncommon for plaintiffs to pass away before trial due to age, illness, and frequent trial continuances. Therefore, under the current rules, defense counsel has the opportunity to investigate plaintiffs' allegations and

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theories of liability through discovery depositions, while subsequently conducting trial examinations of plaintiffs during the evidence depositions. If the proposed rule change is enacted, plaintiffs would sit for only one deposition, and if they are unable to appear at trial as is often the case in this litigation, defense counsel will not have had an opportunity to conduct trial examinations of those plaintiffs.

On a related note, discovery and evidence depositions serve very different functions in asbestos related litigation. Unfortunately, the proposed rule change would unfairly deprive defense counsel of the benefits unique to each type of deposition. Specifically, defense counsel typically use discovery depositions in asbestos related litigation to determine whether or not a plaintiff will offer any testimony about the client and, if so, the extent of the testimony about the client. This is because the courts typically do not require plaintiffs to disclose this level of information through allegations in the complaint or written discovery responses. Rather, plaintiffs often are allowed to disclose only generic details regarding the nature of their claims in the complaint and written discovery responses. Therefore, in asbestos related litigation, defense counsel typically conduct extensive examinations of plaintiffs during discovery depositions, as these depositions are typically defense counsel's only opportunity to explore the plaintiff's allegations in significant detail. Defense counsel does so with the understanding that the plaintiff's discovery deposition testimony is generally for investigatory purposes only and will not be admissible at trial because, as discussed, most plaintiffs in this litigation also sit for evidence depositions.

By contrast, defense counsel typically take a very narrow approach to evidence depositions, asking questions for limited purposes, such as impeachment or to support an affirmative defense, with the understanding that this testimony will most certainly be the plaintiff's trial testimony. Defense counsel is able to conduct a streamlined examination, thereby promoting efficiency, because counsel has first had the opportunity to sufficiently explore the plaintiff's allegations during the discovery deposition. Under the proposed rule change, defense counsel would no longer have the opportunity to explore the nature of the plaintiff's allegations through the discovery deposition and subsequently conduct a focused trial examination during the evidence deposition. Rather, if plaintiffs in asbestos litigation are not required to provide detailed exposure information in their complaint or written discovery responses, defense counsel will likely have little information regarding the plaintiff's theory of liability against the client at the time of the deposition, which, as discussed, will very likely end up being the plaintiff's trial testimony since plaintiffs in this litigation rarely travel to testify at trial.

The problems the proposed rule change pose to toxic tort litigation cannot be understated given the significant role this litigation plays in Illinois. Of the top ten jurisdictions in which asbestos litigation is filed, two of the counties are located in Illinois. Specifically, 28 percent of asbestos litigation in 2016 was filed in Madison County, while 3 percent of this litigation was filed in Cook County. *See*, KCIC, Asbestos Litigation: 2016 Year in Review. Similarly, St. Clair County is ranked seventh on the list of jurisdictions in which asbestos related litigation is filed where the plaintiffs allegedly suffer from lung cancer. *Id.* Thus, the potential negative consequences of the proposed rule change on toxic tort litigation will be widespread and significant.

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H. Conclusion

To change these rules to adopt a single deposition rule in Illinois requires the changing of a number of other rules to make it compatible with justice and fairness. How does this affect Rule 213 for example? The Committee states in its "Reasons for the Suggested Supreme Court Rule Changes Regarding Depositions" in the fourth paragraph: "The biggest concern that could arise with the adoption of a single deposition is that the attorneys would need to object when questions of admissibility arise." Although the need to object is certainly a concern, the biggest concern should be for the due process rights of litigants if the Proposal is adopted in its present form with no consideration for time limitations or other parameters surrounding such changes.

As a consequence of all of the above: the IDC strongly opposes this fundamental and unnecessary change to Illinois civil practice and urges that it be rejected. The Illinois Rules governing depositions have served the bench, bar, and litigants well and the Rules have acquired a degree of familiarity and certainty upon which all parties can rely. The Federal Rules of Civil Procedure are not a menu where you can take one from Column A, one from Column B, and one from Column C. They are a coherent whole; the Illinois Rules are too. Upsetting the delicate balance that has been struck will lead to more litigation and delay in addition to more uncertainty and expense for all involved; the exact opposite of the stated goal of the proposal. Truth and justice are best served by maintaining the current system that gives all involved the best opportunity to discover the truth in order to obtain a just outcome.

Appendix

In addition to our overall opposition to this proposal, if it is considered there are specific deficiencies which should be addressed.

First, there are several references to the Federal Rules. See Proposed Rule 212(a)(2) and Rule 212(d)(3)(C). These references should be eliminated altogether or replaced with the appropriate references to the Illinois Supreme Court Rules.

Second, proposed Rule 212(a)(5)(A) does not have an exception for a situation in which a party was able to participate effectively despite insufficient notice. The court should have discretion to do justice between the parties.

Third, the unavailability of a witness does not include the circumstances attendant to physicians as Rule 212(b) is proposed to be eliminated in its entirety. Obtaining the attendance of physicians at trial is expensive and time consuming for plaintiffs and defendants alike. The draft unavailability rule, proposed Rule 212(a)(4), does not account for the typical situation where the treating physician is alive, within 100 miles of the trial, not aged, ill, infirm, or imprisoned, and not unable to be subpoenaed by one or another party. It cannot be that every treating physician will be seen as an exceptional circumstance under proposed Rule 212(a)(4)(E) allowing their deposition to be used as evidence. As articulated above, allowing their deposition to be used without sufficient disclosure and cross examination would likely work manifest injustice on defendants. At the very least, evidence depositions of treating physicians should be continued to be allowed and a carve out like the current Rule 212(b) should be drafted.