THE ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL
IDC QUARTERLY

President's Message

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As you know, the IDC is the voice of the Illinois defense bar. There is no other organized group in the state that actively analyzes issues that can impact the practice of law from the defense perspective, or that works as hard to make sure that those who are proposing changes that will affect how defense attorneys practice law hear our concerns about the impact of their proposals. Since early fall, the IDC has been involved in preparing a response to the recently proposed changes to the Illinois Supreme Court Rules put forth by the Illinois Judicial Conference Civil Justice Committee.

The Civil Justice Committee, which is comprised of 23 circuit and appellate court judges from around the state, is charged with reviewing and making recommendations on matters that affect civil justice. The committee is specifically charged with the responsibility for studying, examining and reporting on "Supreme Court Rules as they relate to civil procedure and court processes." In late summer 2018, the chair of the Civil Justice Committee, Judge Diane J. Larsen, asked for the IDC's input on a number of proposed changes to the Illinois Supreme Court Rules. These changes, which Judge Larsen indicated are still in the exploratory stage, will have a significant impact on the practice of law in this state should they ultimately meet with Supreme Court approval.

Proposed Rule Changes

Illinois Supreme Court Rules 201, 202, 204, 206, 212, 213 and 218 are affected by these proposed changes. The proposed changes to the rules include the following:

Rule 201

Rule 201 would be revised to require the parties to provide initial disclosures to the other side without awaiting a discovery request. The information to be provided under the initial disclosures includes: the name, address and telephone number of each individual who likely has discoverable information—along with the subject(s) of such information—that the disclosing party may use to support its claims or defenses; 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; a computation of each category of damages; and, for inspection and copying, any insurance agreement under which an insurance company may be liable to satisfy all or part of any judgment. Several categories of cases would be exempt from these disclosure requirements, including actions for review on an administrative record, forfeiture actions, petitions for habeas corpus, actions to quash or enforce an administrative summons or subpoena, actions by the state or the U.S. to recover benefit payments, actions to collect on student loans, proceedings ancillary to a proceeding in another court, and actions to enforce arbitration awards.

Rule 201 would also be revised to require the parties to meet and confer and prepare a joint discovery plan for submission to the court. The meet and confer would be required to take place at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 218. The proposed discovery plan would need to address any changes to the timing, form, or requirement of the mandatory disclosures, the subjects on which discovery will be needed, when discovery should be completed, any issues about disclosure, discovery or preservation of electronically stored information, any issues about claims of privilege, what changes should be made in the limitations on discovery imposed under the rules, and any other orders that the court should issue pertaining to discovery or scheduling.

Rule 202

Rule 202 would be revised to eliminate the distinction between discovery and evidence depositions. Revised Rule 202 would read, "Any party may take the testimony of any party or person by deposition upon oral examination or written questions." All references to discovery depositions and evidence depositions are eliminated from the proposed rule.

Rule 204

Rule 204 would be amended to state that any officer or person authorized by the laws of another state, territory, or county to take any deposition in this state, with or without a commission, in any action pending in a court of that state, territory, or country shall comply with the Uniform Interstate Depositions and Discovery Act, 735 ILCS 35/1. Revised Rule 204 would also permit the court to allow parties leave to take a supplemental deposition of nonparty physicians upon a showing that additional evidence or a change in circumstances have become relevant to the issues in the case since the time that the nonparty physician was deposed.

Rule 206

Rule 206 would be amended to delete all references to discovery and evidence depositions.

Rule 212

Rule 212, which essentially described how discovery and evidence depositions could be used, has been completely re-written. Under the current proposal, Rule 212 would be amended to state that, in general, at a hearing or trial, all or part of a deposition may be used against a party, provided that the following conditions are met: (1) the party was present or represented at the taking of the deposition or had reasonable notice of it; (2) the deposition is used to the extent it would be admissible under the Illinois Rules of Evidence if the deponent were present and testifying; and (3) the use is allowed by Supreme Court Rule 212(a)(2-8).

Revised Rule 212(a)(2) would allow a deposition to be used to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Illinois Rules of Evidence. Revised Rule 212(a)(3) would

allow an adverse party to use, for any purpose, the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Supreme Court Rules 206(a)(1) and 207. Revised Rule 212(a)(4) would allow a party to use the deposition of a witness, whether or not the witness is a party, if the court finds that: the witness is dead; the witness is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition; the witness cannot attend or testify because of age, illness, infirmity, or imprisonment; the party offering the deposition could not procure the witness's attendance by subpoena; or on motion and notice, exceptional circumstances make it desirable—in the interest of justice and with due regard to the importance of live testimony in open court—to permit the deposition to be used.

Revised Rule 212(a)(5) would allow a party to use the deposition of a non-party physician at trial as the testimony of that witness without prejudice to the right of any party to subpoena or otherwise call a non-party physician for attendance at trial. Revised Rule 212(a)(6) would provide limitations on the use of a deposition. According to the revised rule, a deposition may not be used against a party who, having received less than 14 days' notice of the deposition, promptly moved for a protective order requesting that it not be taken or be taken at a different time or place—and the motion was still pending when the deposition was taken. Additionally, a deposition taken without leave of court may not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition. Revised Rule 212(a)(7) pertains to the partial use of a deposition. The revised rule states, "[i]f a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts." Revised Rule 212(a)(8) would allow a party to use a deposition taken in previous action involving the same subject matter between the same parties to the same extent as if taken in the later action.

Rule 212 would also be revised to allow an objection to be made to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying. In terms of objections, the revised rule would provide that an objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice; an objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made before the deposition begins or promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known; an objection to a deponent's competence, or to the competence, relevance, or materiality of testimony, is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time; an objection to an error or irregularity at an oral examination is waived if it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and it is not timely made during the deposition; an objection to the form of a written question is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a re-cross-examination-question, within 7 days after being served with it; an objection to how the officer transcribed the testimony, or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition, is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

Rule 213

Rule 213 would be amended to delete all references to discovery and evidence depositions.

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Rule 218

Rule 218 would be amended to require the court to hold a case management conference 120 days following the filing of the complaint. Right now, the rule requires the case management conference to be held within 35 days after the parties are at issue and in no event more than 182 days following the filing of the complaint.

Conclusion

As you can see, these changes, if approved, would have a dramatic effect on how discovery is conducted in this state. Judge Larsen has invited us to provide feedback to the Civil Justice Committee on these proposed rule changes. An *ad hoc* committee, comprised of IDC members **Bill McVisk**, **Terry Fox**, **Pat Eckler**, **Denise Baker-Seal**, **John Watson**, **Jaime Padgett** and **Steve Grossi**, have worked tirelessly to draft a response to the committee's proposal. I would like to publicly thank them for all their hard work in this regard. By the time you read this column, Judge Larsen will have received our response and further conversations will have taken place regarding the proposal. Time and space limitations preclude me from setting forth our entire response to these proposed rule changes. We have informed the committee that we do not favor an elimination of the distinction between discovery and evidence depositions and that we do not believe that the preparation of discovery plans would be an effective use of time and resources in many jurisdictions, including in Cook County and the collar counties. A copy of our response can be found on the IDC website at: http://bit.ly/IDCResponseToDepositionProposal.If you are interested in the remainder of our response—including what we would propose if the committee does decide to eliminate the distinction between discovery and evidence depositions—please reach out to me or any member of the *ad hoc* committee.

In the meantime, if you have any comments or suggestions regarding the proposed rule changes, let me know!

About the IDC

The Illinois Association Defense Trial Counsel (IDC) is the premier association of attorneys in Illinois who devote a substantial portion their practice to the representation of business, corporate, insurance, professional and other individual defendants in civil litigation. For more information on the IDC, visit us on the web at www.iadtc.org or contact us at PO Box 588, Rochester, IL 62563-0588, 217-498-2649, 800-232-0169, idc@iadtc.org.