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Proposed state Supreme Court rule changes miss the mark

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Two proposed changes to the Illinois Supreme Court Rules pending before the Chicago Bar Association Civil Practice Committee would substantially change practice related to expert discovery — and not for the better.

The first proposal would change Rule 203 and require a controlled expert witness to come to the county where the case is pending for their deposition at the expert's expense (which effectively would be a party expense). This would apply whether the deposition was for the purposes of discovery or evidence.

The second proposed change, this one to Rule 213, claims to bring Illinois practice in conformity with federal practice and would exempt from disclosure (a) draft expert reports (b) draft expert disclosures and (c) communications with the expert except for those related to the fee agreement, billing and payment.

Under the current version of Rule 203, except for the plaintiff, all witnesses are deposed in the county where they reside or regularly transact business. The seeming justification for the proposed rule change is that the party who proposes the expert witness should bear the cost of the witness' travel, instead of the parties who are seeking the deposition.

First, this proposed change would hamper the search for the truth because it would impose a burden on a party that they may not able to bear by forcing them to front the costs of paying for the travel and fees for an expert. This may chill their ability to hire their desired expert in the first instance. While there may be a wealth of experts in the Chicago area, that is not the circumstance in all areas of Illinois.

Second, under the current rule, parties who do not want to travel to depose an expert witness still have the option to depose the opposing party's expert by telephone or video conference to save their own costs. Under the proposed rule, the costs shift and require the expert to travel thus benefiting the deposing party. Remote depositions may not be preferable to an in-person deposition, but the cost of the in-person deposition should be borne by the party who wants the advantage of the in-person deposition.

Third, and most importantly, this rule change would essentially remove from the parties the option that currently exists to pay to have the expert travel because it is cheaper to pay to have the witness travel than the lawyers.

As to the proposed change to Rule 213, this is another attempt to make Illinois civil procedure more like that of the federal rules. This piecemeal attempt, which is akin to those periodic attempts to eliminate evidence depositions, fails to recognize that the federal rules work as a whole and are well suited to how the practice in federal courts has developed. This rule change should fail because it is far broader than the federal rule.

The current federal rule, which has been in place only since 2010, allows a party to discover an expert's compensation. The proposed rule allows the same, but the federal rules also allow for the discovery of the facts or data that the expert considered in forming the opinions, irrespective of the source, and the assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed. Federal Rule of Civil Procedure 26(b)(4)(C).

As a consequence, the federal rules only protect the thoughts and impressions of the attorney, not the facts and data relied upon by the expert. See, e.g., *In re Application of the Republic of Ecuador*, 735 F.3d 1179, 1186-87 (10th Cir. 2013).

Contrary to the characterization of the federal rules by the proposed rule, the comments to the federal rules state, "Rules 26(b)(4)(B) and (C) do not impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions."

The federal rules also provide that, even if protected under Rule 26(b)(4)(C), the communications with a disclosed expert may still be subject to production if the opposing party can show "substantial need" for such materials. See Federal Rule of Civil Procedure 26(b)(3)(A)(ii).

While some of this would be covered under Rule 213, the source of the information could be shielded from disclosure and that is a substantial difference from the federal rules that the proposal purports to track. If the federal rules are to be adopted, then Illinois should adopt the federal rules; not part of the federal rules or a poor facsimile of them.

Illinois' current practice is superior to the proposal because protecting drafts and communications with retaining counsel from disclosure would hide from the jury an appropriate basis to understand the formulation of the expert's opinion and evaluate the expert's credibility. Once an expert has been disclosed, the privilege that is enjoyed as a consultant should be properly removed. This proposal would place an obstacle to the search for the truth and harm civil justice in Illinois.

Finally, what constitutes a draft report has been the subject of litigation in federal court. *Salazar v. Ryan*, 2017 U.S. Dist LEXIS 93833, CV-96-85-TUC-FRZ (D. Ariz., June 19, 2017); *Deangelis v. Corzine*¸ 2016 U.S. Dist LEXIS 1856, 12 MD 2338 (S.D. NY, Jan. 7, 2016).

Generally, a good rule change reduces litigation, it does not increase it.

Both of these proposals are a long way from becoming the rule in Illinois (they have not even been submitted to the Supreme Court Rules Committee). But that they are being considered offers the opportunity to reflect on how the Illinois civil justice system operates with respect to one of the most important parts of that system: Experts.

No matter the case, experts are critical to how a case is investigated pre-suit, litigated during suit with regard to both fact and expert discovery, and presented to a jury at trial. Changing the rules governing experts should not be done lightly. These proposals would be a disservice to Illinois civil justice and should be rejected.
