

Chicago Daily Law Bulletin®

Serving the profession since 1854

May 20, 2020

Supreme Court remote deposition rule should not be misinterpreted

By Donald P. Eckler and Daniel B. Mills

Donald “Pat” Eckler is a partner at Pretzel & Stouffer focusing on professional liability defense, insurance coverage litigation, and general tort defense. He is the legislative chair of the Illinois Association of Defense Trial Counsel. Daniel B. Mills is an equity partner at Cunningham, Meyer & Vedrine focusing on litigating health care issues, including the defense of hospitals, large independent practices, individual physicians, nurses and long-term care facilities. Their views are their own and not those of their firms or their clients.

Amid the flurry of orders and directives from federal, state and local governments and from courts in the wake of the coronavirus pandemic the most salient for civil practitioners will likely be the temporary amendment to Supreme Court Rule 206(h) related to remote depositions.

On April 29, the court issued an order and shortly thereafter issued a corrected order. The court made several sensible changes to address the current circumstances.

First, the amended rule removed the requirement of Rule 206(h)(1) that the deponent be in the presence of the court reporter.

Second, the corrected order added the following to Rule 206(h)(2) which required exhibits to be provided within a reasonable time prior to the deposition “unless the deposition participants are able to view the exhibits in real time during the deposition.” This accounts for the ability to share screens using most remote video technology.

Third, the court added section (h)(5) which removes from the time to be counted for the “Three-Hour Rule” any time spent resolving technological issues.

Fourth, to address another feature of the technology, the court added section (h)(6) which precludes any recording of the deposition except by the means disclosed in the notice.

The court also made two changes that could be problematic and are likely to be ripe for abuse if misinterpreted.

First, the court reserved section (h)(3), which had required that written disclosure of the intention of a party to attend a deposition be given in a reasonable time before the deposition. This change, which may be designed to allow the deponent to forbid others to be physically present with them during the deposition, could result in the opposite. The purpose of the unamended rule was to allow a party to determine if they wanted to physically appear at the deposition if others were

going to do so. By removing this requirement, a party could appear without notice at a deposition noticed to be remote and thereby deprive the opposing party of the opportunity to have done the same.

Second, the court added a comment which reference Rules 3.3, 3.4, and 8.4(d) of the Rules of Professional Conduct and provided: "Where a deponent testifies from a remote location and no neutral representative or representative of an adverse party is present in the room with the testifying deponent, care must be taken to ensure the integrity of the examination. The testifying deponent may be examined regarding the identity of all persons in the room during the testimony. Where possible, all persons in the room during the testimony should separately participate in the videoconference."

Within hours of the court's order, some attorneys were insisting that these amendments mean that a party is not entitled to have counsel physically present with them at the deposition and by this amendment the court was mandating that depositions are to proceed remotely without delay. This is an unreasonable interpretation of the amendment and reads into it an intent that is not in the text.

Contrary to the assertion of some counsel, the amendment to Rule 206(h) provides no indication that the court is requiring depositions to proceed in any set time frame or that all witnesses, particularly defendant medical professionals and experts, are to proceed remotely. Whether such depositions proceed at all during the most serious medical crisis of our lifetime is questionable and should be the province of motion and trial judges based upon what justice requires in each particular case.

Another point we must all consider is that to effectively represent some deponents, particularly in the representation of professionals, the physical presence of counsel at the deposition and in preparation for the deposition is often necessary. The right of a civil defendant to have counsel and the ability of that counsel to provide competent representation, as required under Rule 1.1 of the Rules of Professional Conduct, may require, in a given case, the physical presence of counsel at the deposition. Defendants whose professional conduct is being questioned are often highly emotional about the accusation and the presence of their counsel can provide comfort and assist them in testifying. This is no different than a deponent who is a plaintiff or a witness whose loved one was injured or is deceased and who, may understandably, want their lawyer to be with them during the deposition. In emotionally charged litigation, as well as in exceedingly complex and document intensive matters, being physically present at deposition matters.

It should be obvious to all that no one is served by the delay caused by coronavirus. Defense counsel are typically paid by the hour, and depositions and trials make up a significant part of their workload. Deposition continuances by defense counsel, especially of health care providers, is not being done out of self-interest, but rather out of necessity during this crisis. Health care providers must be allowed a singular focus, to work to save lives, and should not be required to try to find time to adequately prepare and present for depositions.

In addition, to suggest a delay in discovery of a few months during a pandemic is prejudicial to any party is largely untrue. This is especially so in medical malpractice cases, which can take half a decade or more from filing to trial. There are other, more obvious causes of delays, like voluntary dismissal and re-filing a year later, that should be under scrutiny and are ripe for reform if expediting the time to trial is the true goal.

In conclusion, no lawyer should use the current circumstances to gain a tactical advantage over their opponent by insisting that depositions proceed without counsel physically present, nor should counsel use that claim frivolously to delay depositions. The court's temporary amendment to Rule

206(h), is merely an attempt to adjust the rules to the current circumstance, which could not have been anticipated and should not be used as a sword to disadvantage opposing parties.

©2020 by Law Bulletin Media. Content on this site is protected by the copyright laws of the United States. The copyright laws prohibit any copying, redistributing, or retransmitting of any copyright-protected material. The content is NOT WARRANTED as to quality, accuracy or completeness, but is believed to be accurate at the time of compilation. Websites for other organizations are referenced at this site; however, the Law Bulletin Media does not endorse or imply endorsement as to the content of these websites. By using this site you agree to the [Terms, Conditions and Disclaimer](#). Law Bulletin Media values its customers and has a [Privacy Policy](#) for users of this website.