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Proposal to amend Supreme Court Rule 212 needs revision

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The COVID-19 pandemic has seen action from all branches and level of government, but for the Illinois legal community the professional impact will likely most directly be felt by actions from the Illinois Supreme Court.

The court took action under its supervisory authority to, among other things, give direction and impose limitation on the circuit courts in the face of the pandemic, then it temporarily amended Rule 206(h), and, to prepare for remote proceedings, it recently has since repealed Rule 185, adopted Rule 45, and amended Rules 46 and 241.

Despite the appropriate attention these extraordinary changes to the rules has garnered, the ordinary process of rules changes continues. One of the changes that has been proposed would modify Rule 212(d) and would add a Section (e) to the rule. While encompassing some sensible changes, the new rule, if adopted without changes, could create unnecessary litigation and would likely not improve the civil justice system.

As rules proposals are not made in a vacuum and the whole purpose of the rules to provide for the just, fair and expeditious resolution of disputes, in evaluating any rule proposal it is appropriate to consider several questions. What is the goal of the proposal? What problem is the proposal attempting to address? Does the plain language of the rule address that problem? Is there actually a problem that needs addressing? If so, will the proposed language reduce or increase litigation?

Testimony on Proposal 19-03 will be heard at a public hearing of the Illinois Supreme Court Rules Committee on June 24 in Chicago. The proposal concerns the use of depositions taken in prior proceedings, whether those prior proceedings were in any state or federal court, and it has several features. First, in a needed change, but for which the language should be modified, the proposal would clarify use of depositions in newly filed actions under 735 ILCS 5/13-217 that were previously voluntarily dismissed pursuant to 735 ILCS 5/2-1009. The proposal uses the term "refiling" to refer to the use of depositions in such situations, but the plain language of the statute concerns the "commence[ment] of a new action," not a refiling. *Eighner v. Tiernan*, 2020 IL App (1st) 191369, Para. 12-13. The rule should more carefully clarify the situation being addressed.

More important, and in reflection of the addition of Section (e), the proposal would remove remanded cases from Rule 212(d) because it would allow use of a deposition taken in a prior case involving the same subject matter and between the same parties or their representatives. The spirit and some of the language of proposed Section (e) is taken from Federal Rule of Civil Procedure 32(a)(8) and use of depositions in federal court relies on Federal Rule of Evidence 804. Though Illinois has an analog to Rule 804, it is not exactly the same text and, as written, the current proposal could create numerous issues.

What constitutes "the same subject matter?" This language has led to a split in federal courts in its meaning. See *Hub v. Sun Valley Co.*, 682 F.2d 776, 778 (9th Cir. 1982), *Alamo v. Pueblo Int'l Inc.*, 58 F.R.D. 193 (D. P.R. 1972), and *Wolf v. United Airlines, Inc.*, 12 F.R.D. 1 (M.D. Penn. 1951). A rule that leads to a split in authority in the court from whence it came is not desirable and more precise language such as "the same cause(s) of action that arises from the same nucleus of operative facts" might be preferable. This would also track the circumstances that the proposal has in mind: remanded cases and cases which were commenced following voluntary dismissal. This language would also ensure that the opposing party had the appropriate incentive and opportunity to appear and cross examine the witness at the prior deposition.

In combination with Illinois Rule of Evidence 804, the proposal could allow a deposition taken in a prior case to be admissible as substantive evidence, but because admissibility is often only determined moments before the use would be allowed, this fails to give adequate notice of the proponents intent to the opposing party. Therefore it raises questions about the notice provision of the proposal. The proposal does not require notice to opposing counsel of the intent to use the prior deposition and gives the court discretion to decide whether to require such disclosure and only then upon "reasonable notice."

If this rule is adopted, the rule should require notice a sufficient time before the close of oral fact discovery, at least 60 days, to allow a party to determine if a deposition of the witness should be taken in the currently pending case and to otherwise prepare for the use of the deposition at trial which may include disclosing and/or deposing other witnesses, disclosing or obtaining documents from third-parties, and the like. Absent such notice a party will not be able to prepare properly for trial and the amended rule would countenance trial by ambush.

The Supreme Court rules are the parameters under which litigation is conducted in Illinois. As seen by their recent modifications, the rules are essential to a well-functioning justice system. Proposal 19-03 has a laudable purpose as it seeks to address an actual problem that arises in a small number of cases and the language is suited to the purpose, but there is language in the proposal that requires correction before it can be adopted.

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