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A temporary fix should not be a permanent change

By Donald P. Eckler
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. Eckler also is the co-host of the Podium and Panel podcast with Daniel Cotter. His views are his own and not those of his firm or its clients.

Buried in a slew of changes to the Supreme Court Rules in Proposal 21-01 that would facilitate (or indeed allow) remote proceedings, is an attempt to codify the April 29, 2020, emergency change to Supreme Court Rule 206(h)(3), which concerns the presence of counsel at depositions.

This change was discussed in this space on May 20, 2020. However, this proposed permanent change is without the comment added on June 4, 2020, to clarify that the April 29 change was not intended to preclude counsel from being present at depositions with their clients and that in the event of a dispute, the trial court had discretion to resolve it.

A brief reminder of the history may be helpful. Following the halt to proceedings on March 17, 2020, there was an attempt by some to convince Judge Timothy Evans, the chief judge of the Circuit Court of Cook County, and Judge James P. Flannery Jr., the presiding judge of the Law Division of the Circuit Court of Cook County, to prevent counsel from being physically present at depositions. When presented with this request, both Evans and Flannery invited comment from across the bar and ultimately decided on general orders that left the decision on how to handle remote depositions in particular cases to the discretion of the trial and motion judges. Unsatisfied with this result, the proponents of barring counsel from being present at depositions and forcing all depositions, even of health care providers, to proceed apace submitted the proposed change to Rule 206(h) to the Supreme Court.

Within hours of this court's order temporarily amending Rule 206(h), some attorneys filed motions insisting that the amendments meant that a party is not entitled to have its counsel physically present with them at the deposition and by this amendment the court was mandating that depositions are to proceed remotely without delay.

Subsequently, a request was made by the Illinois Defense Counsel to the Supreme Court Rules Committee to clarify the change to make clear that it was not the intention of the court to preclude counsel from being present with their client at deposition. That request yielded the following additional comment that is not included in the current proposal:

"Subparagraph (h)(3) has been deleted to avoid discovery disputes over physical presence by a party or a party's attorney at a remote deposition. Deletion of the subparagraph does not mean that personal presence by a party or a party's attorney is absolutely prohibited. During the pandemic not all depositions are required to proceed remotely, nor is a continuance automatically required if counsel cannot agree on a remote method. Absent agreement, the circumstances of a remote deposition are within the discretion of the trial court."

In the wake of the addition of that comment, depositions have largely proceeded without problem, even after the emergency change was removed.

The permanent removal of Rule 206(h)(3) is unnecessary and, in a post-pandemic world, will be counterproductive. Before the pandemic, under Rule 206(h)(3), counsel for any party had the unfettered right to be with the deponent even if the deposition was taken by remote means, subject to the party being responsible for expenses associated with the right to attend in person. The Supreme Court understandably struck that from the rule on a temporary basis given the social distancing requirements and the like that were necessary during the pandemic. The result has been that virtually every deposition that has proceeded has done so with the insistence by counsel producing the witness that the witness testify via Zoom without the examiner being present.

If this rule change is made permanent, unless there is a stipulation from everyone involved, there will never be a live in-person deposition and it is unlikely that a judge will order that a party has a right to be in person. That should not become the norm forever or the subject of a permanent rule change that eliminates a party's right to insist on being present in person for a deposition. The default rule should be in-person depositions, though remote means of taking depositions will be a far more common, and perhaps the majority, practice.

Being present with a witness, whether as the lawyer taking deposition or the lawyer representing the witness, is far different than being remote. In many situations, what is lost by not being present is not known and cannot be replaced. The original change to Rule 206(h)(3) was labeled temporary for a reason. It should not be made permanent.

Whether representing plaintiffs or defendants this is an issue of critical importance and all counsel should oppose this change. The hearing on the proposal is scheduled for July 21 in Chicago, with written comments due July 7 and requests to testify due July 14. The hearing will be streamed live on YouTube and only the committee members and those testifying will be live. That the committee and those testifying will be live should be some indication of the importance being live is and should not be lost on anyone involved.
