ILLINOIS DEFENSE COUNSEL

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Sent Via Email: abowne@illinoiscourts.gov

Amy Bowne
Committee Secretary
Supreme Court Rules Committee
222 N. LaSalle Street, 13th Floor
Chicago, IL 60601

Re: Draft Response to Proposal 19-03

Dear Ms. Bowne:

The Illinois Association of Defense Trial Counsel, an organization whose members are committed to protecting and improving civil justice in Illinois, has reservations about Proposal 19-03. If the Committee agrees with the spirit of the proposal, IDC believes it needs substantial modification prior to adoption.

Proposal 19-03 aims to clarify how depositions taken in previously-filed actions may be used in a subsequent action filed in Illinois state court. Currently, these depositions may be used as if taken in the subsequent Illinois action. Ill. S. Ct. R. 212(d). But the rule does not address whether depositions may be used as discovery depositions or evidence depositions in the subsequent action. In Illinois cases that are voluntarily dismissed pursuant to 735 ILCS 5/13-217, the distinction should be clear because Illinois Supreme Court Rule 206(a) requires parties to identify whether a deposition is "for discovery purposes or for use in evidence." Ill. S. Ct. R. 206(a).

But in federal cases and out-of-state cases that are dismissed or remanded and then commenced in Illinois, the distinction is less clear. Other jurisdictions use various terms to describe what Illinois calls evidence depositions (e.g. trial depositions, preservation depositions, de bene esse depositions). And the rules regarding when depositions of unavailable witnesses may be used as evidence are subject to varying interpretations.

Most practitioners would agree that depositions taken for the purpose of evidence in the previously-filed action should be available as evidence depositions in the subsequent action. This would prevent parties from wasting time and money to retake an evidence deposition simply to obtain the same testimony. But this likely represents a sliver of depositions, as most cases do not proceed to evidence depositions in another jurisdiction before the actions is dismissed or remanded and then commenced again in Illinois.

Similarly, depositions taken for the purpose of discovery in the previously-filed action should not be converted to trial testimony in the subsequent action. The Committee Comments to Illinois Supreme Court Rule 212(d) state that because "in most cases counsel will have the opportunity to preserve a party's testimony via an evidence deposition, it is expected that the circumstances that would justify use of a discovery deposition would be extremely limited." Ill. S. Ct. R. 212(d), Committee Comments.

Moreover, a deposition taken in another jurisdiction, even one taken for the purpose of evidence, may present issues due to differences in the discovery and evidentiary rules, which can vary greatly from jurisdiction to jurisdiction. Notably, with respect to experts, Illinois is a Frye state where as the federal courts and numerous states adhere to Daubert. And the foundation for evidence may be sufficed in another jurisdiction but not in Illinois.

If Proposal 19-03 is adopted, then a deposition taken in accordance with the rules of discovery and evidence in another jurisdiction could be deemed an evidence deposition in Illinois even where foundational requirements for important evidence are not met. Proposal 19-03 would leave ambiguity as to whether trial courts should allow a second evidence deposition in those circumstances, which could result in key evidence or experts being barred based upon the application of the Illinois rules of discovery and evidence.

The spirit and some of the language of proposed Section (e) is taken from Federal Rule of Civil Procedure 32(a)(8) and the 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.

Because admissibility is often only determined moments before the use would be allowed, the notice provision of Proposal 19-03 fails to give adequate notice of the proponent's intent to the opposing party. In cases where no pretrial order is entered, 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 deposition 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.

Proposal 19-03 may have a laudable purpose as it seeks to address an actual problem that arises in a small number of cases and it does have certain language that is generally suited to the purpose. However, there is language in the proposal that requires modification before it is considered for potential adoption. The present rule leaves many of the potential issues to the discretion of the trial court or agreement of the parties, which may be advisable. If any change is made, the IDC suggests that the current Illinois Supreme Court Rule 212(d) be amended to add language (1) providing that depositions taken for discovery purposes in the previously-filed action may be used as discovery depositions are used in Illinois; (2) providing that depositions taken for the purpose of evidence in the previously-filed action may be used as evidence depositions are used in Illinois; and (3) providing Committee Comments to clarify that nothing in the rule prohibits the court from permitting parties from taking an additional evidence deposition, particularly if it is requested to address differences in the rules of discovery and evidence between two jurisdictions.

Please contact me at wmcvisk@tresslerllp.com or 312-627-4045 with any questions.

Sincerely,

William K. McVisk

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