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SUPREME COURT RULES COMMITTEE
PUBLIC HEARING

Michael A. Bilandic Building
160 North LaSalle Street
Room C-500
Chicago, Illinois 60601

July 21, 2021
10:30 a.m.

1 COMMITTEE PANEL:

2 Mr. James A. Hansen, Chair
Mr. Michael J. Rothstein, Vice Chair
3 Justice Rita B. Garman
Honorable Cynthia Y. Cobbs
4 Mr. Martin Dolan
Mr. Jeffrey Green
5 Mr. Richard Harden
Mr. Steve H. Kim
6 Ms. Summer Lyzynczyk
Mr. Larry R. Rogers, Jr.
7 Mr. John Spesia
Mr. Jonathan M. Thomas
8 Professor Keith H. Beyler
Ms. Amy Bowne, Committee Secretary

9

10 SPEAKERS:

11 Mr. David Sosin, Illinois State Bar Association
12 Ms. Samira Nazem, Chicago Bar Foundation, CBA/CBF
Task Force

13

Mr. Seth Horvath, Appellate Lawyers Association

14

Ms. Patricia Joyce, State of Appellate Defenders
Office

15

16 Mr. Douglas Hoff, State of Appellate Defenders Office

17

Ms. Jennifer Nijman, Access to Justice Commission,
Remote Access Committee

18

Mr. Matt Dudley, Illinois Trial Lawyers Association

19

Ms. Laura Beasley,

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1 CHAIRMAN HANSEN: Good morning. We'll go ahead
2 and get started. I would like to welcome everybody.
3 This is the first time many of us have met here in
4 person, certainly for this Committee it's been well
5 over a year.

6 We would like to welcome you to the public
7 hearing today for the Illinois Supreme Court Rules
8 Committee. This is the group, my name is Jim Hansen,
9 I'm the Chair. Today we have about eight or nine of
10 you that are listed to be speakers. You each will
11 get 10 minutes. We will have some questions, it will
12 be open to the panel to question you after you get
13 done talking about your proposal.

14 A couple of ground rules, if you don't mind.
15 We would like you to introduce your name so our court
16 reporter can take that down. And even though she has
17 a list of the speakers, that will help as well as the
18 fact this is live streaming for the public. So that
19 being said, I will not cut you off if you're in the
20 middle of a question and answer period with one of
21 the panel members, we will give you the deference of
22 finishing that.

23 Out first up we have Proposal 20-01. David
24 Sosin, you are up first, and please go ahead.

1 MR. SOSIN: Thank you, Mr. Chairman and members
2 of the Supreme Court Rules Committee. It's a
3 privilege to be here on behalf of our 30,000 members.
4 I was the president of the Illinois State Bar two
5 years ago, 2019 and 2020. We are of course the
6 largest bar association in Illinois, we have 30,000
7 members. And I think what's significant in our
8 proposal is the fact that we have access to lawyers
9 from Cairo to Waukegan to the Quad Cities, and we
10 hear from them all the time.

11 We as presidents or perspective presidents,
12 we run for office. What that means is getting out on
13 the road. When I ran I said it's like running for
14 Governor except they don't give you a plane, no bus,
15 no assistance, you don't even get a driver. My wife
16 was the driver. But we do hear from lawyers.

17 And the other aspect of leadership in the
18 Bar is that once a year we get together with the
19 leaders from all of the Great River States, and
20 that's from Colorado to Ohio, so along the midwest.
21 And it's kind of a little bit of a two day think
22 tank, and we hear from them.

23 And the issue that created this role in the
24 beginning is not one of helping necessarily the

1 lawyers, but helping the public. The idea of limited
2 scope is an idea that came to us from the lawyers in
3 Iowa who have been doing this fairly successfully for
4 some time. And we have been less successful in doing
5 it over the past three years, and we believe one
6 reason for that is the reluctance of our lawyers to
7 engage in limited scope work, especially in the area
8 of litigation, primarily family law and landlord
9 tenant law, and the areas where limited scope kind of
10 works well, and small business litigation.

11 And the concern of our lawyers is that once
12 they get engaged, they have difficulty getting
13 unengaged. We understand that judges like lawyers to
14 be in cases and make life easier for the judiciary.
15 But our lawyers have told us that they're really
16 concerned because many of them have gotten into cases
17 and have trouble then once they finish their limited
18 scope, getting out of the case.

19 For that reason we propose the rule, after
20 forming committee, hearing from our lawyers, and
21 trying to come up with a proposal. I am aware that
22 the next speaker will be from the Chicago Bar. They
23 certainly have a very similar perspective than we do,
24 but there are some differences.

1 The rule, our rule says that a notice of
2 withdrawal is filed with the court and pretty much
3 ends. Certainly anybody, especially a litigant can
4 come to court and complain about their lawyer. We're
5 concerned about the CBA aspect which has kind of a
6 formalized process for a person hiring somebody at a
7 limited scope, and then not being happy with them
8 leaving.

9 In our opinion limited scope is something that
10 can work, and we're going to have to work at it to
11 make it work. But unlike some of the other
12 proposals, especially out west, non-lawyer ownership
13 of law firms, e-sharing, those proposals really have
14 not worked where they exist, which is in England,
15 New Zealand, Australia, it just hasn't worked. It's
16 worked well for investors who have put large money
17 into law firms, which worked well for insurance
18 companies.

19 We think that a much better approach is to
20 try and educate and get our lawyers enthused about
21 expanding their practice. We have learned over the
22 years that many of the public that choose not to hire
23 lawyers, choose not to hire them because they're
24 concerned about getting into a quagmire where the

1 bills keep coming and the general representation
2 turns out to be onerous to them, and it doesn't
3 accomplish what they want.

4 We think that a very good reason to approach
5 limited scope allows people on a cafeteria style to
6 pick where they need help in their divorce, where
7 they need help in appearing on their landlord tenant
8 issues, where small business needs help and cannot
9 afford a medium or a large sized law firm. In the
10 ISBA, a medium sized law firm is five lawyers. We
11 have a lot of one, two and three lawyer law firms,
12 all of whom the members belong to the ISBA.

13 In order to accomplish this, once there is a
14 change in the rule, and we can tell our lawyers that
15 you have a vehicle to limit your involvement through
16 a contract with the client, and then a notice of
17 withdrawal, we still need to educate our lawyers and
18 publicize the rule and have education and teach them
19 how to do that. We actually had one where we had
20 some lawyers from Iowa come to Illinois and explain
21 how they in their experience, how it can work.

22 We believe that if we can change this rule,
23 that we need to keep it simple. That there would be
24 no difference in a rule that has some sort of an

1 objection from a client, because just same thing as a
2 judge trying to keep a lawyer in a case, because it
3 does help the litigation. The point is that the
4 choice of keeping in the case is one of the client so
5 that they know what they're paying and what they can
6 afford, and the difference is not necessarily that
7 the client would not be happy, the idea is that the
8 client gets what they paid for, which is the portion
9 of their matter that they need help with and still
10 not get into an endless series of bills that they
11 neither can't afford or don't want to pay for.

12 So once we have limited scope with that
13 setting, we think it also makes it more attractive to
14 the public. So thank you, and I'm happy to answer
15 any questions you may have. Thank you.

16 CHAIRMAN HANSEN: I'll start, because I have a
17 question. Obviously your proposal to Rule 13 is
18 quite different than the one we're going to hear from
19 coming up next. Your proposal seems to delete and
20 take out quite a bit, including the formalized
21 approach for an objection.

22 So if the goal is to, I don't want to say
23 transparent, but have a formalized process, if you
24 will, what is wrong with leaving the formalized

1 process for the objection and leave that part of the
2 rule in?

3 MR. SOSIN: We're concerned that just as the
4 current status of the withdrawal process with the
5 court proceeding allowing that withdrawal would be --
6 is objectionable to our lawyers who would not take
7 limited scope engagements because of that the
8 withdrawal process being formalized would also have a
9 chilling effect. And we have heard that from lawyers
10 that they have that choice, whether to do limited
11 scope or not do it.

12 And if we're going to make this work and
13 make it useful to the public, we have to have lawyers
14 that are willing to do limited scope, that is our
15 concern. If it wasn't that, we wouldn't have an
16 objection to it.

17 CHAIRMAN HANSEN: But shouldn't the client have a
18 right to come in and lodge an objection?

19 MR. SOSIN: We still -- they still have that
20 right in practicality. Formalizing that process, you
21 know, we think going into that kind of detail is when
22 a lawyer reads that they're saying, well, I'm really
23 not doing a withdrawal, because now I still have to
24 go through the gauntlet, just from a different

1 source.

2 CHAIRMAN HANSEN: Thank you. Other questions?
3 Okay. Thank you very much.

4 MR. SOSIN: Thank you.

5 CHAIRMAN HANSEN: Okay. Our next speaker, and
6 let me just first state, anyone on the list here if I
7 mispronounce your name, I apologize in advance. The
8 next speaker is Samira Nazem.

9 MS. NAZEM: You got it right.

10 CHAIRMAN HANSEN: Great. For the CBF proposal
11 20-03, the same Rule 13. Go ahead.

12 MS. NAZEM: Good morning. Thank you to the Chair
13 and to members of the Supreme Court Rules Committee.

14 My name is Samira Nazem, I am here today on
15 behalf of the Chicago Bar Foundation and the CBA/CBF
16 Task Force on the Sustainable Practice of Law &
17 Innovation. And I would like to thank everyone again
18 for the opportunity to speak in support of our
19 proposal, which seeks to amend Supreme Court Rule 13,
20 793 and 794.

21 As you just heard from Mr. Sosin, limited
22 scope representation is a really critical tool for
23 improving the practice of law and allowing
24 practitioners to serve more people more ethically.

1 And moreover, we agree wholeheartedly with Mr. Sosin
2 that it's dramatically underused across our state,
3 and we need to find new ways to expand and fuse an
4 adoption.

5 It's our belief that we can address these
6 challenges by streamlining the limited scope
7 appearance rules to provide more clarity and
8 certainty around when an appearance terminates, and
9 by improving our efforts to educate the legal
10 community about limited scope representation,
11 beginning with new lawyers.

12 The recommendations in our proposal are the
13 result of the work, a joint CBA/CBF Task Force which
14 was drafted and reviewed by Committee members, and it
15 includes judges and representatives from both the
16 ISBA and CBA, as well as legal aid attorneys and
17 private practitioners. And I would also like to
18 acknowledge that our goals are very much in line with
19 those that you just heard about with respect to
20 proposal 20-01, that all states could make
21 improvements to the limited scope process, one that
22 will lead to its widespread use and adoption, and I
23 agree with much of what Mr. Sosin just said a few
24 moments ago.

1 As you mentioned, there are similarities in
2 our proposal, although since we both identified
3 similar barriers, we do have a few spaces where our
4 proposal deviates, and I'll do my best to draw
5 attention to those and explain why we have crafted
6 our proposal the way that we have.

7 So in our proposal we would like to make
8 three changes to Supreme Court Rule 13. First we
9 would like to streamline the process that governs the
10 termination of a limited scope appearance, once the
11 limited scope service has been completed by the
12 attorney. The current rules create a lot of
13 ambiguity, and we have also heard from practitioners
14 that the ambiguity is a real barrier to them wanting
15 to use limited scope appearances.

16 Attorneys can be left in a limbo period for
17 21 days after they file their notice to withdraw,
18 waiting for an objection that may never come from a
19 client. We've also heard from practitioners who have
20 concerns about the current rule and the process for
21 withdrawing through an oral motion. And we have
22 heard that there are inconsistent record keeping
23 practices in different courthouses and differences in
24 how judges handle those oral motions that make them

1 reluctant to follow that part of the rule either.

2 So to that end we have proposed some
3 modifications to the Rule 13 that would streamline
4 both past the ending of limited scope appearance by
5 using one common standardized form that could be
6 presented in court or filed electronically outside of
7 the court.

8 Under our rule proposal a lawyer would have
9 two pathways available to them. In court an attorney
10 could present a notice of completion of limited scope
11 representation at a hearing where the litigation is
12 present without prior written notice and without
13 electronic filing of that notice. Upon presentment
14 of the notice of completion, the appearance would
15 terminate automatically without requiring leave of
16 court. Outside of court an attorney could
17 electronically file the same notice of completion,
18 and upon filing that notice the appearance would
19 terminate, again without requiring leave of court,
20 and the attorney in that situation would be required
21 to serve the notice on the litigant, the judge, and
22 the opposing party.

23 In either of these pathways the termination
24 would be documented in this form notice of completion

1 of limited scope representation, and both pathways
2 would provide a designed moment in time where the
3 limited scope appearance ends, which is what the
4 current rule is lacking. We believe it's important
5 to leave in place these two options, an in-court
6 process and an out-of-court process, and to allow the
7 lawyer to choose which pathway to take once they have
8 completed their limited scope service.

9 The purpose behind this rule is to create
10 greater flexibility for practitioners, and the rule
11 can be used in different ways. Limited scope
12 appearances may be for longer durations of time or
13 for one day only, and we need a rule that's similarly
14 flexible in allowing multiple ways to complete and
15 provide notice of completion of that limited scope
16 service.

17 Many of the practitioners, as Mr. Sosin
18 mentioned, the smaller practices may find that it's
19 beneficial to file that notice in writing and of
20 course they would have that option under our rule
21 proposal. And however, we have also heard from legal
22 aid practitioners who run high volume clinics in the
23 courthouse where they provide day of attorneys for
24 short periods of time, usually just one morning. And

1 we hear from them that they may represent dozens of
2 clients in a single day, and the burden of having to
3 electronically file a notice for each individual case
4 would be really challenging for them
5 administratively. They prefer to retain that option
6 to do a quick in-court process once their limited
7 scope appearance is completed.

8 We think our rule balances on the different
9 needs of practitioners who have different size
10 offices and use limited scope in different ways by
11 giving them the choice to terminate their limited
12 scope appearance either in writing outside of court
13 or in court by presenting the notice to the judge.

14 The second proposed change that we make or
15 we seek to make to Rule 13 covers the objection
16 process. We agree wholeheartedly with some of the
17 concerns that you just heard about from Mr. Sosin
18 about the current process. It leaves a lot of
19 ambiguity, it's very cumbersome, and we too would
20 like to simplify that process because we believe it
21 is a barrier to practitioners using limited scope
22 appearances.

23 However, instead of removing that language
24 completely and not outlining any kind of process for

1 a client who seeks to object to the termination of a
2 limited scope appearance, we recommend that the court
3 simply remove the 21-day waiting period language, and
4 instead clarify to the litigant to simply file a
5 motion to challenge a termination of limited scope
6 appearance, and the court shall then conduct a
7 hearing on that motion once it's filed. We believe
8 it's important to still have that language to protect
9 consumers in this situation, and we believe our
10 proposal balances the consumer protection needs with
11 the needs for attorneys to have greater transparency
12 and administrative ease when practicing under a
13 limited scope appearance.

14 Our last proposed change to Rule 13 is a
15 relatively modest one, but we believe it will also
16 create great efficiencies in the use of limited
17 scope. We recommend that the rule be amended to
18 mandate the use of limited scope appearance forms to
19 be created by the Access to Justice Division of the
20 AOIC.

21 When these rules were first drafted back in
22 2013, the Access to Justice Commission forms efforts
23 had not yet widely launched. Now however the Access
24 to Justice forms are widely known throughout the

1 state and are widely lauded for their ease of use and
2 their high quality. The Access to Justice Commission
3 also takes responsibility for keeping their forms
4 updated when rules and statutes require such a change.
5 For greater consistency throughout the state and also
6 to help raise awareness of limited scope among the
7 public, clerks and court staff, we seek to similarly
8 use the Access of Justice Commission process for all
9 limited scope appearance forms required under Rule
10 13, and to make those standardized forms mandatory
11 throughout the state. The consistent use of those
12 forms can also aid in data collection, which will
13 allow all of our Bar associations and for the public
14 at large to have a better sense of how and where
15 limited scope appearances are being used throughout
16 the state.

17 Lastly, we have proposed two small
18 amendments to Rule 793 and 794 which govern the
19 continuing legal education requirements for lawyers.
20 Mr. Sosin spoke very well about the importance of
21 education and encouraging practitioners to use more
22 limited scope appearances. We also believe that
23 education is a key part of this. We believe ongoing
24 public education is a crucial part of expanding the

1 use and awareness of limited scope representation and
2 normalizing it as a routine practice tool. So we
3 seek to add limited scope representation and Access
4 to Justice more broadly, a category that may be
5 covered by the professional responsibility
6 requirements, and the basic skill support for new
7 attorneys and in the ongoing CLE requirements for
8 admitted attorneys.

9 This rule change would not mandate any
10 additional requirements for lawyers. It would signal
11 additional support for Access to Justice and to
12 limited scope representation, and it would better
13 integrate those concepts into the existing
14 educational requirements for lawyers. It is our hope
15 that that will lead more lawyers, both new lawyers
16 and experienced lawyers to gain the information about
17 limited scope representation and have access to more
18 educational programs about it.

19 So with that I will pause to see if there
20 are any questions from the Rules Committee. And I
21 just want to thank you one more time for the
22 opportunity to speak today on behalf of the CBF, and
23 on behalf of the CBA/CBF Task Force on the
24 Sustainable Practice of Law. Thank you.

1 VICE CHAIRMAN ROTHSTEIN: If you have a question,
2 you can go first, you're the chair.

3 CHAIRMAN HANSEN: I have one question. So the
4 ISBA'S proposal completely eliminates the objection.
5 Okay. I understand it's your proposal we have two
6 mechanisms for an attorney in a limited scope
7 practice to get out. You file it right in court, if
8 the litigant is there, they're obviously getting
9 notice of that because they're present. And if they
10 want to object, they have to do it right there.

11 The second means is by written notice and
12 sending it to the client. And you say that part of
13 the reason why the 21-day notification period has
14 been eliminated in a proposal is because lawyers were
15 waiting in limbo, and the 21 days was too long. How
16 does that reconcile then with Subset 3 under your
17 proposal which doesn't have any time limit?

18 So I'm not following that. If I'm a limited
19 scope attorney and I mail notice to my client,
20 there's no guidance to them whatsoever on any
21 timeline. So what if they wait 24 days, 26 days?
22 We're outside now the 21-day problem area, but
23 there's no guidance in the proposal as to any time
24 frame.

1 MS. NAZEM: Thank you for the question, and it's
2 a great one. The current 21-day waiting period is
3 something that every attorney who files a notice is
4 subject to. So they file their notice seeking to end
5 the appearance, and then they have the 21-day limbo
6 period where they really don't know if they're
7 representing the client or not. And that's what we
8 want to avoid.

9 Once the appearance is terminated under our
10 rule proposal the attorney will know that at that
11 time. Yes, a litigant can always file something
12 trying to bring the attorney back into court and
13 raising some issue with the representation. But the
14 attorney at least has certainty that they are no
15 longer in an attorney-client relationship with that
16 individual. And so it's possible it could happen
17 after 24 days or 30 days or 120 days, but the
18 attorney at least during that interim period has
19 certainty that this is no longer their client and
20 they have no obligation to treat this individual such
21 as their client.

22 Any time an attorney represents a client,
23 there's always some risk that down the road that
24 client will be unhappy about something. It's one of

1 the unfortunate realities of being in a client
2 service industry. And we can't do anything to
3 alleviate that, but what we want to avoid is the
4 awkward in between period where the attorney simply
5 does not know if they are that client's attorney or
6 not.

7 CHAIRMAN HANSEN: So just following up on that
8 then. Your proposal is once I sent the notice, I'm
9 out?

10 MS. NAZEM: Yes. Once the notice is filed. And
11 that I believe mirrors the previous proposal as well,
12 both of them terminate at the moment of filing.

13 CHAIRMAN HANSEN: And if an objection is filed
14 and a judge makes a determination later that they're
15 not out, well, that's fine, I'll be brought back in,
16 but at least at that period time that passed, I
17 didn't have an attorney client relationship?

18 MS. NAZEM: Yes. Correct.

19 VICE CHAIRMAN ROTHSTEIN: That was my question.

20 CHAIRMAN HANSEN: Sorry. Okay. Any other
21 questions from the Committee? Okay. Thank you very
22 much. Appreciate it.

23 Our next speaker is Seth Horvath from the
24 Appellate Lawyers Association as to proposal 20-09,

1 amending Rules 315, 321 and 341 and creating new
2 Rules 322 and 455. Go ahead.

3 MR. HORVATH: Good morning to the Members of the
4 Committee. Seth Horvath on behalf of the Appellate
5 Lawyers' Association.

6 As always, the ALA really appreciates the
7 opportunity to present its rules proposal to the
8 Committee. It's an especially delightful morning to
9 be here in person today as compared to last year's
10 meeting. But there's several proposals that we want
11 to cover, so I'll get right to it.

12 We're here to cover proposal 20-09 this
13 morning, and there's three parts to it. There's a
14 part on PLA deadlines, there's a part on the filing
15 of supplemental authorities, and there is a part on
16 exhibits. I will try to kick through each piece and
17 leave some time at the end for questions by the
18 members of the Committee.

19 The PLA deadline proposal pertains to Rule
20 315, it's a technical proposal, but one that the
21 members of our Association believe is necessary to
22 address a certain lack of clarity in the current
23 version of the rule. Rule 315 currently does not
24 contain any language explaining the deadline for a

1 petition for leave to appeal in the event that an
2 Appellate Court decision is modified on denial of a
3 hearing. So the proposal would state that a PLA is
4 due 35 days from the entry of a modified decision,
5 it's a fairly straightforward and simple change to
6 the language of the rule, but it would lend some
7 clarity to it and give practitioners who handle
8 appeals, and for that matter those who don't, some
9 much needed clarity in knowing that when that
10 modifying decision is handed down, they still have 35
11 days to file the petition for leave to appeal, should
12 they choose to do so. So the ALA would ask for the
13 adoption of that amendment to Rule 315.

14 The next piece of the ALA's proposal of
15 20-09 involves Rule 341. That's a rule that all
16 appellate practitioners are widely familiar with,
17 it's the rule that governs briefs. It's a
18 multi-part rule, and the specific issue that the
19 ALA's membership has discern with respect to this
20 rule is that there's no provision in the rule for
21 submitting supplemental authority to a reviewing
22 court.

23 Typically the practice varies from one
24 appellate district to another. Typically it's done

1 by motion. And filing a motion could be cumbersome,
2 so the current version of the rule is simply silent
3 on how supplemental authority ought to be addressed
4 to the review of court. The proposal would create a
5 separate section of the rule that allows the
6 submission of supplemental authority by letter, and
7 brevity is key here, the proposal focuses on a 350
8 word or less letter that would be submitted as of
9 right to the reviewing court if new authority arises.
10 It's germane to an issue that's been briefed or an
11 issue that arose at oral argument, and opposing
12 counsel would have an opportunity after the
13 submission of the brief 350 word letter articulating
14 the supplemental authority to respond.

15 The ALA's membership, I believe that that
16 type of change to the rule would lend some efficiency
17 to the submission of supplemental authorities, and it
18 would also still leave open the possibility for
19 filing the motion in instances where more than 350
20 words is necessary to get the point across about a
21 potentially significant decision that could have some
22 bearing on the outcome of an appeal. So that's the
23 aspect of the proposal with respect to Rule 351, the
24 briefing rule on supplement authority.

1 That takes me to the most complex part of
2 the ALA's proposal. This part of the proposal deals
3 with the submission into the appellate record of
4 exhibits that are used at trial. And there are two
5 pieces of this part of the proposal, there's the
6 civil part and a criminal part, and they more or less
7 mirror one another. I will try to walk the Committee
8 through some of the differences in the remaining time
9 that I have here.

10 But the basic through line that runs through
11 the civil and the criminal parts of this proposal is
12 that the exhibits are just the connective tissue of
13 an appeal, they really help the appellate lawyer
14 understand what is being addressed through the trial
15 testimony when those cold transcripts are being read
16 and reviewed, the exhibits just help put everything
17 in context.

18 But right now we don't have a uniform
19 mechanism for submitting exhibits to make them part
20 of the record, and there's been fairly widespread
21 recognition among the ALA's membership that there are
22 often problems locating exhibits once time passes
23 that should have been included in the record and
24 weren't included. The Committee is going to hear

1 presentations from other speakers this morning from
2 the Office of the State Appellate Defender, and they
3 will speak to this issue in some detail.

4 But I wanted to highlight one of the
5 statistics that the Appellate Defenders Office
6 pointed out in its July 6th written submission to the
7 Committee. The Appellate Defender has indicated that
8 as of this writing over 30 cases assigned to OSAD's
9 First District in 2018, 2019 and 2020 are missing
10 states exhibits that should have been impounded.
11 Over two-thirds of the incomplete records in the
12 First District's office are missing exhibits that
13 were never impounded, that is with respect to
14 criminal appeals, but the issue falls on both sides.
15 There's issues on the civil side and on the criminal
16 side, and the ALA's proposal is designed to address
17 both sides, civil and criminal.

18 I mentioned that there were some slight
19 differences between the two. I will try to walk
20 through those right now. The civil proposal and the
21 criminal proposal both involve a scenario where seven
22 days after either the filing of the notice of appeal
23 on the civil side or the sentencing hearing on the
24 criminal side, an index or inventory of exhibits, as

1 well as the exhibits utilized at trial are filed and
2 put into the court record. And this is definitely a
3 different practice than is currently used by
4 practitioners and by courts. It's a mandatory filing
5 of the exhibits that's being proposed here, where
6 there is no rule that currently requires within a
7 certain time frame the submission of the exhibits for
8 inclusion in the record. But again, the purpose for
9 making it mandatory is to address the lack of
10 uniformity on one hand, and the issues that have
11 arisen with exhibits absent from the record on the
12 other.

13 So that's the gist of the proposal, there's
14 a seven-day period within which to make the
15 submission. There is certification requirements,
16 there is an opportunity for the party on the other
17 side, the appellee, to object to the submission of
18 the exhibits, and then there are some further
19 differences in the criminal rule, but I'll highlight.
20 There is a proposal within the criminal rule where if
21 co-defendants are both tried at the same time and the
22 same exhibits are used for each co-defendant, the
23 original version of an exhibit has to be submitted as
24 to one co-defendant, and a copy of the exhibit or an

1 indication that a physical exhibit was used that is
2 an image or a photograph has to be submitted for the
3 other co-defendant. The other wrinkle in the
4 criminal part or criminal proposal is there's a
5 provision that specifically governs petitions to
6 withdraw exhibits from the record on appeal on the
7 criminal side. Both proposals are really designed to
8 create some much needed uniformity in the submission
9 of exhibits and to help avoid situations where an
10 appeal proceeds and exhibits are absent from the
11 record.

12 I'm getting close to my 10 minutes, but I
13 wanted to make one more point about the criminal
14 proposal. The criminal proposal has been the subject
15 of some spirited discussion by commentators who have
16 submitted written submissions to the Committee, and I
17 think it's important to note that even though the
18 criminal proposal makes mandatory the submission of
19 exhibits and the submission of inventory within seven
20 days of sentencing, that's viewed by the ALA as an
21 essential change to rules, because there are two
22 situations where that change becomes particularly
23 important. One is in instances where a post-
24 conviction petition is filed. In those instances a

1 petitioner has three years to file a post-conviction
2 petition. If the exhibits aren't submitted in a
3 timely fashion at the conclusion of the trial, it's
4 often times the case that three years may pass or
5 somewhere thereabouts without the submission of
6 exhibits, and time is the enemy here, the more time
7 that passes, the more difficult it becomes to compile
8 an accurate set of exhibits that were used at trial.

9 The other specific situation on the criminal
10 side is germane, and I wanted to point out to the
11 Committee. It's the situation where a pro se
12 criminal defendant files a notice of appeal, often
13 times without the knowledge of trial counsel and
14 often times without the knowledge of any appellate
15 counsel at the outset, and there could be a delay in
16 the time period between the filing of the pro se
17 notice of appeal and the time in which appellate
18 counsel is appointed. And again, time being the
19 enemy during those intervening months or years, there
20 can be issues with locating exhibits.

21 So those are my remarks, and I'll leave it
22 to the Committee for any questions. Thank you so
23 very much for giving the ALA an opportunity to
24 present its proposals this morning. Much

1 appreciated. Thank you very much.

2 CHAIRMAN HANSEN: Okay. Committee members,
3 questions?

4 PROFESSOR BEYLER: I do. I assume you may have
5 seen the letter from Donald Ramsell. He sort of
6 seems to be saying there's, you know, more than one
7 world out there. On the criminal side there's the
8 serious ones that the State Appellate Defender
9 handles, and then there are mine where there almost
10 never is an appeal and you're requiring me within
11 seven days of sentencing to do this work over and
12 over again for absolutely no purpose because there's
13 never going to be an appeal.

14 Is there any way to deal with his problem
15 and preserve the rest of your closing?

16 MR. HORVATH: I believe one potential way of
17 targeting Mr. Ramsell's issue would be to specify a
18 subset of criminal cases that are subject to this
19 rule. And that's not the proposal the ALA made, but
20 it is one way of potentially addressing it, perhaps
21 carving out misdemeanors versus felonies.

22 But I will say it seems to be the case that
23 in smaller scale criminal matters there may simply
24 not be many exhibits, the burden of submitting

1 exhibits may be minimal, and on the other side of
2 that equation for more complex criminal matters with
3 multiple exhibits there's clearly a need to have some
4 mechanism in place where these exhibits are getting
5 submitted in a timely fashion and included in the
6 record.

7 HONORABLE JUDGE COBBS: And so is there any
8 consideration given to the source of these exhibits?
9 Does it take into consideration what's going on or
10 the clerk's offices ability to produce these
11 exhibits? If you want them or not, you get a motion
12 that you have requested the exhibits, but you enter
13 an order that would require the production of the
14 exhibits instanter, and the clerk's office simply
15 can't or won't respond or produce timely? Any
16 consideration given to that?

17 MR. HORVATH: I think that's a very apt
18 observation. There often times are issues with the
19 clerk's office. I will say based on observations
20 that members of the ALA made in deliberating over
21 this proposal, it seems like some of the issues that
22 used to arise at the clerk's office are perhaps
23 becoming less frequent as exhibits shift over to
24 electronic exhibits.

1 It's become the case over the last several
2 years, I hesitate to call it standard operating
3 procedure, but I feel it's moving in that direction,
4 that exhibits are being disseminated electronically
5 to the trial court judges who are utilizing them, and
6 to the clerk's office. And so some of the issues
7 that used to exist with respect to checking out
8 physical hard copy exhibits and managing the large
9 bales of paper that were submitted to the clerk's
10 offices are being minimized as time passes and
11 technology is used to streamline the process of
12 submitting and handling exhibits.

13 MR. SPESIA: I have a question about your
14 proposal on Rule 341. You mentioned before that the
15 citation of supplemental authorities would be
16 relative to new authorities. But I'm wondering the
17 way that the rule, the proposed rule is written if
18 this is really going to become a rule that is an
19 automatic rebuttal to oral argument, for example.
20 And I'm wondering if you think that the way this rule
21 is written, where it states pertinent and significant
22 authorities, that what you're creating here could be
23 used by practitioners as an automatic rebuttal filing
24 to oral argument?

1 MR. HORVATH: I think that's a fair concern, as I
2 review the language in the rule. And the intention
3 of the rule is certainly to accommodate new
4 authorities and newly announced decisions.

5 I think if you read it as stated, you could
6 read it more broadly to encompass situations where a
7 point is raised in oral argument and someone utilizes
8 the rule to simply submit authority that may be in
9 existence already. So perhaps there's some need for
10 clarification there with respect to the type of
11 authority that would qualify for the rule, but the
12 intention behind it is certainly to trigger
13 situations where there's a newly announced decision
14 that's germane to the appeal, and that decision is
15 raised by counsel through a letter rather than a
16 motion.

17 MR. SPESIA: Okay. That's all I have.

18 VICE CHAIRMAN ROTHSTEIN: With respect to
19 proposed Rule 322, in terms of inventory of exhibits,
20 how important is it that it be a brief period as
21 seven days? I appreciate the benefit the longer it
22 goes, exhibits get lost or misplaced, let's say paper
23 and it's not electronic. On the other hand, I have
24 been in more than a few case where it's a complex

1 case, a party is still deciding whether it wants to
2 pursue an appeal, but the 30 days comes and the
3 notice has to be filed to preserve the right, but
4 then there's a period of time where there's other
5 ministerial matters that have to be completed before
6 real work on a brief has to start. And a big case
7 with lots and lots of exhibits, you know, it is some
8 degree of work a relatively short period after the
9 filing of the notice. So if that period were
10 expanded somewhat, would that be a big concern?

11 MR. HORVATH: I don't believe it would. I think
12 there's some room for expansion on that aspect of the
13 proposal. The way that we attempted to address it is
14 that there's a provision that allows a motion to be
15 filed to request additional time. But if there is
16 additional time built in on the front end, I don't
17 see that as problematic, so long as it's not so much
18 time that exhibits start to disappear into people's
19 filing cabinets and storage areas and whatnot.

20 VICE CHAIRMAN ROTHSTEIN: So to put you on the
21 spot, what do you think a reasonable outer limit
22 would be if seven is too short, what would be an
23 appropriate period that is not too long?

24 MR. HORVATH: It seems to me that one could sync

1 if with the time for filing a notice of appeal and
2 put it right about 30 days. And then from that point
3 forward if an extension is necessary, an extension
4 can be requested under the proposal.

5 So I think the seven day deadline addresses
6 an important concern of having this all happen in a
7 very timely fashion. I can see that it could be
8 backed out a bit more. I would suggest the backout
9 date to be about 30, and then leave a stop gap
10 provision in the rule for requesting an extension of
11 time for additional time.

12 CHAIRMAN HANSEN: I have to piggyback on that.
13 You answered one of my questions on the seven days.
14 But, you know, the proposal in Rule 322 has the word
15 and, and what I'm wondering is not only the 30 day,
16 let's say that's the day, but it's one thing to
17 prepare an index, okay, most attorneys at a civil
18 trial will have an index of that, we know what was
19 submitted, you know, something was offered and it was
20 rejected or not, which would be a lot easier than the
21 word and to also submit then every documentary piece
22 of evidence that was submitted that may be sitting in
23 the circuit clerk's office, you know, in a room, and
24 good luck trying to get them to get that to you in

1 seven days.

2 So my question was, does it also help if you
3 take the word and out and submit it as an or?

4 MR. HORVATH: Well, I think that the reason it's
5 structured as an and, the reason it's there is once
6 the time passes and the actual exhibits haven't been
7 tendered, the concern that they may disappear from
8 anyone's possession becomes greater and greater.

9 So the reason the rule is set up to require
10 both the inventory and the exhibits is that sometimes
11 busy practitioners having schedules like they are,
12 exhibits just tend to go missing or be more difficult
13 to compile. So the logic behind it was that it would
14 actually be easier to do some additional work on the
15 front end when everything is at the fingertips of
16 trial counsel and get it compiled and get it
17 submitted than to wait and try to do it on the back
18 end after memories have faded and things have gone to
19 the four winds.

20 So I think that having the simultaneous
21 submission of the inventory and the exhibits is
22 important. I am encouraged in speaking with ALA
23 members about this, I'm encouraged by the narratives
24 that express that more exhibits are being compiled

1 electronically, as a referenced earlier. I think
2 that does help the compilation process. It doesn't
3 negate all the work associated with it, but it helps
4 it and it makes it a bit easier than it was I would
5 say five years ago when things were hard copy driven.

6 CHAIRMAN HANSEN: Thank you. Any further
7 questions?

8 HONORABLE JUDGE COBBS: Can I just back again to
9 341? The question asked earlier. You said, I
10 thought you said that the letter writing requirement
11 would be less cumbersome than the filing of a motion.
12 In my limited experience in seeing motions to file
13 supplemental authority, they have been fairly brief,
14 they have not been long at all, it simply is a motion
15 to strike to the judicial authority and the reason
16 why.

17 This letter requirement seems to require
18 notice to the other party, the opportunity for the
19 other party to respond. Why is it less cumbersome or
20 how is it less cumbersome?

21 MR. HORVATH: A point well taken. I think that
22 the aspect of the proposal that we believe is less
23 cumbersome is putting that hard and fast word limit
24 on the proposal. The proposal is really targeted to

1 situations where a new case can be summarized in such
2 a fashion that it requires very few words to explain
3 to the court what the case is about, rather than a
4 situation where there may be a need for more extended
5 discussion that a new precedent has an effect on a
6 pending case. So our belief is that having that 350
7 word limit will on average simplify the nature of the
8 submissions that are made to the courts, and simplify
9 it from a practitioner's standpoint insofar as not
10 having to prepare some of the additional documents
11 associated with filing a formal motion.

12 VICE CHAIRMAN ROTHSTEIN: One more follow up on
13 that. Any consideration on that matter that such a
14 letter is submitted to the Appellate Court, a ruling
15 on appeal comes down and the Supreme Court decides to
16 take the case. Where is that letter? How would that
17 letter -- would the letter be known to the Supreme
18 Court that they would know that the Appellate Court
19 had an opportunity to consider these authorities?

20 MR. HORVATH: I think that the right way to
21 address that predicament is to clarify that the
22 letter itself still ought to be filed and made part
23 of the court record in some fashion. It wouldn't
24 require the formality of filing a motion, but the

1 letter with the 350 words and the brief explanation
2 could still be e-filed and made part of the existing
3 public electronic access of the record.

4 And my understanding is that -- I'm hopeful
5 that the next upcoming months we're going to have
6 more docket access and things like that and you'll be
7 able to check and see what was filed on appellate
8 dockets statewide.

9 CHAIRMAN HANSEN: Thank you.

10 MR. GREEN: One more follow up. If the rule is
11 going to be re-proposed or amended to indicate that
12 new authorities, is there also going to be a
13 clarification as to that new authorities that are
14 decided after briefing has been completed, is that
15 kind of what you're thinking?

16 MR. HORVATH: I think that that's a necessary
17 clarification that we can work on at the Committee's
18 request or mechanically, whatever makes the most
19 sense. But, yes, I think that would be a good
20 clarifying point with the court's rule.

21 CHAIRMAN HANSEN: Larry, go ahead.

22 MR. ROGERS: If I'm understanding you clearly, by
23 permitting filing of a letter, you're basically
24 removing the court's ability to deny a motion to

1 provide supplemental authority, correct?

2 MR. HORVATH: Rather than requesting permission,
3 it would be an as of right submission, and so the
4 court would not be denying or granting. But again,
5 the hope is that the brevity of the letter really
6 negates any need for the court to even weigh in on
7 whether it's something that should be allowed or
8 denied. It's going to be so short and
9 straightforward that it will be of use to the court
10 because of its brevity alone.

11 MR. ROGERS: It seems that the limited stuff is a
12 bit to some abuse by way of citation or something
13 that may not be new authority, but then it's filed
14 and now needs to be responded to without the court
15 having the opportunity to rule. Do you have any
16 comment on that?

17 MR. HORVATH: I think that any time a rule is
18 modified, there's some potential for abuse, and I
19 think at some point the good faith of practitioners
20 has to be taken into consideration. But to the
21 extent this amendment were abused in the eyes of a
22 practitioner's opposing counsel, there is a provision
23 to object to the manner of which the supplemental
24 authority is cited. And so I would hope that it

1 could be addressed and checked, if you will, by
2 having that procedure in place.

3 MR. ROGERS: Thank you.

4 CHAIRMAN HANSEN: Okay. Thank you. Appreciate
5 your time. Next up on the same proposal from the
6 Office of the State Defender, Patricia Joyce. Maybe
7 you lucked out and he got all the questions.

8 MS. JOYCE: Pardon me?

9 CHAIRMAN HANSEN: I said maybe you lucked out and
10 he got all the questions. Go ahead.

11 MS. JOYCE: Good morning, I'm Patricia Joyce, I'm
12 a paralegal with the State Appellate Defender's
13 Office. Let me go back, I'm the director of the
14 paralegal department. And I am also here in support
15 of Proposal 20-09, the proposed Rule 455.

16 The proposed rule is needed to fix the
17 broken process of making exhibits part of the record
18 on appeal. Right now the process causes lengthy
19 delays and much unnecessary work on getting a
20 complete record on appeal. Paralegals at the State
21 Appellate Defenders office have the responsibility of
22 completing the records in our cases, which includes
23 getting the exhibits that were admitted to the
24 Circuit Court. If we do not receive an impound order

1 from the Circuit Court clerk, as it often happens, we
2 will not even know that there were exhibits that
3 should have been impounded until after we have
4 reviewed the court proceedings.

5 THE COURT REPORTER: Excuse me. I'm having a
6 little trouble hearing her.

7 CHAIRMAN HANSEN: Yeah, you need to speak up, and
8 speak slowly. You're doing fine.

9 MS. JOYCE: I apologize. This is my first time
10 speaking.

11 CHAIRMAN HANSEN: Sure. You're doing fine.

12 MS. JOYCE: Once we discover that there were
13 exhibits that need to be part of the record, we
14 contact a circuit clerk to see if there was an
15 impound order that was not sent to us as part of the
16 common law record. If there is no impound order,
17 depending on the type of appeal, we will have the
18 court file checked for documents. And if there were
19 no other exhibits -- and if there were other
20 exhibits, we have to start contacting the attorneys
21 for trial.

22 We spend much of our time calling and
23 e-mailing State's Attorneys and defense counsel
24 requesting that they have trial exhibits impounded.

1 Very often we receive no response at all or are put
2 off. When we have a very large backlog of state
3 exhibits that need impounding, we send reports
4 listing every case of missing exhibits and the names
5 of the trial State's Attorneys to persuade the states
6 impound the exhibits. Some of them were impounded,
7 but a large majority remain open.

8 Right now we have cases where we have been
9 requesting the state impound exhibits since October
10 of 2019 without success. I have a couple of
11 examples. October 15, 2019 we discovered that
12 exhibits were admitted into evidence during trial.
13 No impound order was in the common law record or the
14 court file. The assigned paralegal e-mailed the
15 State's Attorney office asking they impound the
16 exhibits. That was October 15, 2019. The same
17 paralegal e-mailed the State's Attorney October 25th,
18 November 5th, November 12th and on November 15th.
19 And then on November 16th the State's Attorney
20 e-mailed her back, she said, quote, I have ordered
21 the file from our file room and will get the
22 impounded exhibits as soon as possible. That was on
23 November 16th, 2019, and we just received the
24 exhibits July 8th of 2021. That's how long it takes

1 to get these exhibits impounded when the State's
2 Attorney office does not impound them immediately
3 after the trial.

4 They take them back to their office and the
5 State's Attorney leaves the office, goes to a
6 different location, the exhibits get lost, they get
7 put some place, and it's up to us to keep after the
8 State's Attorneys office or PD's office or a private
9 attorney to impound these exhibits. It's not fair to
10 the defendant, it's not fair to the State Appellate
11 Defender's office that we have to do this. We do
12 this day in and day out. This has been an ongoing
13 problem since I started there in 2003, and I have
14 been there almost 18 years and it is still a major
15 problem. It's too big of a problem.

16 I have another case, November 12th, 2020, we
17 e-mailed the State's Attorney. She replies, I don't
18 recall this case. It appears this was a bench trial
19 in June of 2018 and he wasn't sentenced until
20 September of 2019. Have you checked the clerks
21 office for the impound order? That's the first step
22 we do. I am currently working remotely, I therefore
23 don't have access to my impound orders, but I am
24 certain it was impounded. If not by me, as I have

1 moved on to a different assignment, by the time he
2 came back off of the warrant, by one of my partners.
3 And we received the exhibits -- actually, we have not
4 received the exhibits. That was November 12th, 2020,
5 and the exhibits have been impounded May of 2021, and
6 they are at the clerk's office, and we filed a motion
7 to the Appellate Court for them, for the clerk's
8 office to release them to the Appellate Court for us
9 to receive them.

10 And this is ongoing. This is nothing new to
11 the State Appellate Defender's office. Within a year
12 of being employed at the State Appellate Defender's
13 office, I discovered that this was one of the biggest
14 problems that we have in getting a complete record.
15 So in a perfect world, these exhibits should be
16 impounded when the judge signs an impound order.

17 CHAIRMAN HANSEN: Okay. Any questions for
18 Miss Joyce? Okay. Thank you, very much.

19 MR. ROGERS: You did a great job.

20 VICE CHAIRMAN ROTHSTEIN: I second that. You
21 very much communicated the concerns of your office
22 and why the proposed rule addition would be important
23 to your office.

24 MS. JOYCE: It's very much needed.

1 CHAIRMAN HANSEN: I have a question that has
2 nothing to do with the rule. Isn't there some
3 mechanism though for you to get the State's Attorneys
4 involved or somebody at -- I mean, the head State's
5 Attorney, the head person?

6 MS. JOYCE: We have been in contact with a few of
7 them over the course of, you know, several years
8 and --

9 CHAIRMAN HANSEN: Still nothing?

10 MS. JOYCE: The first few times of being in
11 contact with them they seem very enthused about
12 helping us, and then they put it off on somebody else
13 in the office. And then that person says, yeah, I'm
14 going to do this, and then we'll get four impound
15 orders out of maybe 30 that we requested.

16 And then I don't want to put words in their
17 mouth, but it just seems like that that was good
18 enough. Well, we did four or five of them, you know,
19 that should be enough. That's how I feel. And it's
20 just too long of a process and it's very, very, very
21 aggravating for me and my department. And the
22 defendants get on us all the time, hey, what's going
23 on, what's going on. Well, we're missing exhibits.
24 And if it's a murder case, the attorney needs to

1 review the exhibits. It's just not fair to the
2 defendants.

3 CHAIRMAN HANSEN: Thank you.

4 MS. JOYCE: And they deserve a timely deal, and
5 they're not getting it. And some of these defendants
6 have been released from prison, and now the attorney
7 now we finally get the exhibits and the attorney is
8 writing a brief, we can't contact the defendant
9 because we don't know where they're at. So it's just
10 a viscous cycle.

11 CHAIRMAN HANSEN: Thank you. You did good.
12 Thank you. Appreciate it.

13 MS. JOYCE: Thank you.

14 CHAIRMAN HANSEN: Next up, Douglas Hoff on the
15 same proposal.

16 MR. HOFF: Good morning, Mr. Chairman, Committee.
17 Thank you for the opportunity to speak before this
18 Committee on behalf of this proposal.

19 As Miss Joyce ably put it, this is a massive
20 problem in the criminal courts for our office, for
21 our clients. It is in fact the single biggest
22 problem we have in getting timely complete records.

23 THE COURT REPORTER: I'm sorry. Could you speak
24 up, please?

1 CHAIRMAN HANSEN: Yes, you need to speak louder.

2 MR. HOFF: So it is the single biggest problem we
3 have with getting a timely and state complete record
4 on appeal. It is a bigger problem than documents
5 that are missed from common law records, it is a
6 bigger problem than hearing dates missing from the
7 transcript.

8 The lack of impounded exhibits is the single
9 biggest factor in holding these cases up, being
10 briefed much less decided, and even more so than in
11 the past exhibits are vital. Increasingly our cases
12 will have video exhibits, it will be body cam, police
13 body cam footage, police dash cam footage,
14 surveillance footage from businesses, videotaped
15 statements from defendants. Appeal cases could not
16 be briefed without these exhibits, so the entire case
17 comes screeching to a halt when these exhibits are
18 missing.

19 And our paralegals go to great lengths to
20 try to get these exhibits. And as Justice Cobbs
21 noted, there's a two step here, there is the clerk's
22 office and then there is the parties themselves as
23 far as the exhibits go. The biggest problem is never
24 getting these exhibits even to the clerk's office,

1 they're not being impounded in the first place. Once
2 they're impounded, at least we have a site for them.
3 But until they're impounded, they are in the wind, we
4 don't know if the State's Attorneys still have them
5 or if they have been lost. And that does also
6 happen, actually simply getting lost.

7 But I have a case I have been working with
8 here lately where there was body cam footage and dash
9 cam footage in a case that simply disappeared after
10 trial. We're having to make do with videos that were
11 provided to the defense in discovery, although the
12 problem there is because they weren't marked as
13 exhibits, and at that point we don't know which ones
14 were actually played and which ones weren't. So, you
15 know, even our efforts to improvise are hindered in
16 this situation.

17 We have other examples of key things where,
18 you know, recordings of supposedly threatening phone
19 calls the defendant was charged with making. The
20 recordings were never impounded, and it took our
21 office nearly a year and a half after we first
22 requested them. A copy of the order of protection
23 the client was charged with violating, again, it held
24 up the brief for nearly six months. So it is a major

1 problem. It is a very pervasive problem, and a key
2 component in holding up criminal appeals and delaying
3 them from even being briefed to begin with.

4 And as Miss Joyce noted, this can be a
5 problem even in -- well, especially in lower level
6 cases where the defendant -- you know, that the clock
7 is ticking on the defendant's sentence. And we do
8 have clients who wind of serving their entire
9 sentence and being released before a case can be
10 briefed. And a huge part of that delay can be
11 definitively from not having exhibits. So we have
12 justice literally being denied because of this.

13 There was some discussion about the time
14 involved, the seven days, how critical it is the time
15 involved here. The critical moment I think is
16 sentencing, because all the parties are there, you
17 have the State's Attorney, defense counsel, the
18 judge, the clerk. They're also probably litigating a
19 post-trial motion, so odds are they will have the
20 exhibits with them, because some of them certainly
21 could be subject to the post-trial motion. And if
22 these are going to be secured, that is the moment,
23 because everyone is there, the exhibits are there,
24 and that is the time to nail them down. And so I

1 think it's critical to have this time for sentencing
2 or shortly thereafter.

3 There was some concern expressed about the
4 scope of this. Is this putting too much of a burden
5 on trial counsel? Mr. Horvath suggested if this was
6 going to be narrowed, I would say the way to narrow
7 it would be to make it parallel to the rights of
8 defendants to have appointed appellate counsel, which
9 in our case is generally speaking Class A
10 misdemeanors and all felonies. So if the rule was
11 going to be limited in the scope, you know, provide
12 or the duty to impound these exhibits, that would be
13 the way to go about it, tying it to all cases where
14 the notice of appeal has been filed.

15 Notedly, time is the enemy. The longer
16 they -- the more time that passes between sentencing
17 and these exhibits being filed, the more likely they
18 are to go missing, that has been definitely our
19 experience. It is a viscous circle. The more time
20 it takes us to find the exhibits, the more likely it
21 is that they're missing or more difficult to find or
22 that, you know, State's Attorneys have moved on, so
23 it can feed on itself.

24 The other critical issue is that there's no

1 provision -- actually, in the rule short of the
2 notification of the state that a notice of appeal has
3 been filed. So if it's tied to the notice of appeal,
4 the State's Attorney might not ever know that an
5 appeal has been filed, and the duty to impound
6 exhibits has been triggered.

7 So I think keeping it tied to sentencing is
8 critical, because I think -- I mean, we do have luck
9 getting exhibits, we do have some, and it is because
10 they were impounded right there at sentencing. I
11 think making that a uniform practice is the way to go
12 to address this issue.

13 The other part of this rule that is
14 absolutely critical which has been brought up has
15 been the issue of co-defendant cases and their
16 exhibits. The exhibits are typically filed in one
17 co-defendant case, one of the co-defendant cases, and
18 they are not impounded until all the co-defendants
19 are convicted and sentenced. So essentially the
20 slowest case sets the pace for this. The last
21 defendant to be sentenced, that's when the exhibits
22 will be impounded.

23 So we have had several clients waiting on
24 their appeals until their co-defendant is sentenced.

1 And these delays can run into years as well, because
2 if you have a co-defendant who perhaps hires new
3 counsel after the verdict to pursue ineffective
4 assistance claims against the trial counsel, that
5 litigation will hold up his sentencing, you know, for
6 who knows how long. And in the meantime all the
7 co-defendants have already been convicted or are
8 being sentenced are sitting and waiting their turn.
9 So we have Subsection D which provides for the state
10 to give copies of these exhibits to the other
11 co-defendants I think will be a huge help with
12 regards to those cases and that will eliminate the
13 delay there. And it has been brought up on a number
14 of occasions, these are digital exhibits, so getting
15 copies, there's no burden there whatsoever.

16 The other provisions in the rule that are
17 also critical, the detailed new point will help a
18 lot, because it will inform appellate counsel right
19 off the bat what the exhibits are supposed to be,
20 what is expected instead of having to wait until
21 other parts of the record show up and then check to
22 see if the exhibits were entered.

23 And the same subsection with regard to
24 pre-trial and sentencing exhibits is also necessary,

1 because a lot of these things took place -- you know,
2 the pre-trial exhibits were discussed a long time
3 ago, they kind of get forgotten at the time of
4 sentencing. And same goes for sentencing exhibits,
5 they tend not to be impounded as well, so I think
6 making that explicit is a very good idea.

7 Also including exhibits which were offered
8 but not entered into evidence, I think this would be
9 primarily helpful in dealing with defendant exhibits
10 that were not admitted so we will have a complete
11 record on appeal of what evidence was offered but not
12 admitted, and therefore we can raise that as an
13 issue, if it is an issue.

14 And clearly labeling a description provision
15 is also very important, because again, this goes back
16 to digital exhibits. Many times we'll get a DVD or
17 thumb drive which will be full of video files or
18 audio files or image files, and having a detailed
19 description of what exhibits those actually were will
20 help us figure out, you know, which of these were
21 actually shown to the jury or played in court.

22 So overall this rule places the
23 responsibility for filing exhibits on the right
24 people. The people who introduce them into evidence,

1 and the people who have control over them. As things
2 stand now, it's on the clerks, it's on the
3 appellants, it's the people who actually don't have
4 the exhibits who are now responsible for this. So I
5 think this rule would be a very welcome and very
6 necessary addition.

7 CHAIRMAN HANSEN: Thank you. Any questions from
8 the Committee?

9 MR. GREEN: I have a question. Listening to you
10 and Miss Joyce, I suppose I should have asked
11 Mr. Horvath this question. He referred to there
12 being, you know, two tracks to this 322 issue,
13 criminal and civil.

14 We have heard almost uniquely about problems
15 in the criminal side of it. Is there a need to
16 expand or is there any way to address whether or not
17 there's a need to expand this in the civil realm
18 when, you know, listening to Miss Joyce it seems like
19 uniquely criminal related procedure problems?

20 MR. HOFF: I have to say, I haven't done much in
21 the way of civil appeals.

22 MR. GREEN: And I didn't think you'd have an
23 answer to that. I guess as I have listened, you
24 know, to the speakers, it seems like this rule change

1 is directed towards criminal appellate procedure
2 issues.

3 MR. HOFF: I mean, you know, this particular rule
4 change, there is some order to the criminal side.
5 It's definitely presented a massive problem for us
6 when their clients are sitting in prison waiting for
7 their appeals. I always -- you know, I haven't given
8 much thought to the civil side.

9 CHAIRMAN HANSEN: So not to interrupt here, but
10 the track is two different rules. I mean, there's
11 Rule 322 that's being proposed for the civil aspect,
12 and Rule 455 for the criminal aspect. And then I
13 move here, we're going to recall Mr. Horvath for a
14 question, because he can address that.

15 But my understanding for everyone agreeing,
16 it's being addressed in two separate avenues. And
17 the civil rule is different and the criminal does
18 call out for those unique aspects as we heard from
19 Miss Joyce and Mr. Hoff.

20 MR. HORVATH: To address the distinction, I think
21 it's very important to address on the civil side on
22 the utter lack of uniformity statewide with respect
23 to this practice. There's simply no rule that
24 governs how exhibits get submitted into the appellate

1 record in a civil case across the board in every
2 Circuit Court in the state.

3 So one of the reasons for the civil side
4 rule is to provide that uniformity, and to provide
5 some predictability for civil practitioners or from
6 the trial side and the appellate side who just then
7 know that's how the exhibits get into the record.

8 I think I can speak on behalf of the ALA'S
9 membership who handle civil litigation, it's often
10 times the case that civil lawyers who do trials on
11 appeal have no clue what to do with the exhibits when
12 the trial is over. Civil appellate lawyers often
13 pick up an appeal and have no exhibits and nothing to
14 work with. So it would lend into the rule themselves
15 a mechanism for instructing attorneys how to deal
16 with exhibits once the exhibits are at a point where
17 they can be included in the record. So there's a
18 need for uniformity.

19 And there is I think perhaps to a lesser
20 extent on the civil side, but still a problem with
21 missing exhibits as time passes. I think the
22 consequences of that on the criminal side as
23 articulated can be pretty devastating, they can be
24 very significant on the civil side as well, but both

1 considerations on the civil side do apply.

2 VICE CHAIRMAN ROTHSTEIN: Mr. Horvath, since
3 you're back with us again, this discussion which has
4 been very interesting prompted another question for
5 me.

6 I'm noticing that the proposed civil rule is
7 limited to documentary exhibits and the proposed
8 criminal rule is not so limited. And we heard a
9 moment ago about body cam video and other video and
10 audio. And in the civil record as well there are
11 non-documentary exhibits and videos that are played
12 and the like.

13 So I'm wondering whether or not your
14 committee or the lawyers take consideration to that,
15 whether or not limiting as to documentary exhibits
16 may be too limiting. There's no provision here for
17 anything, unless the definition of documentary
18 exhibits would include video recordings and audio
19 recordings and the like.

20 MR. HORVATH: The rule was contemplated to
21 encompass both. I think when we put the language in
22 and focused on documentary, it was with an eye toward
23 the fact that it's not as common in civil cases to
24 have the type of video graphic evidence or legal

1 evidence, but it's certainly something that happens
2 with increasing regularity, and we would want Rule
3 322 to encompass all types of evidence, whether a
4 pure hard copy document or some type of recording.
5 So the documentary exhibit reference was intended to
6 encompass both and probably should simply have said
7 exhibits for clarity.

8 CHAIRMAN HANSEN: Okay. Thank you for that
9 robust discussion. Anybody else, questions? Thank
10 you, all three of you for your time.

11 Next we'll consider proposal 21-01, and
12 Jennifer --

13 MS. NIJMAN: Nijman.

14 CHAIRMAN HANSEN: Nijman. Good thing you told
15 me, I would have said something different. From the
16 Access to Justice Commission is here to start with
17 that. Go ahead. Thank you.

18 MS. NIJMAN: Good morning. Thank you. Good
19 morning, Justice Garman, Honorable Judges, members of
20 the Committee, and Chief Hansen. Thank you for
21 allowing me to speak this morning as a proponent of
22 21-01 concerning rule amendments to facilitate remote
23 access to the court.

24 I'm here in my capacity as a commissioner of

1 the Access to Justice Commission established by the
2 Illinois Supreme Court, and as Chair of the Remote
3 Access Remote Appearance Committee of that
4 Commission.

5 As you all know, the Illinois Supreme Court
6 has already taken significant steps to promote and
7 encourage remote access to the courts. And we ask
8 that these amendments, that the remaining court rule
9 that were initially established with an assumption of
10 being in person, that they be brought up to speed and
11 to become consistent with the new actions of the
12 Illinois Supreme Court.

13 Specifically in May of 2020 the court based
14 on an initial proposal from the Commission on Access
15 to Justice, the court adopted Rule 45, which concerns
16 non-testimonial court appearances. The court amended
17 Rule 241 for civil testimony appearances, and passed
18 the Illinois Supreme Court policy on remote access,
19 remote appearances in civil proceedings.

20 Each of those changes broadened and
21 encouraged the use of remote appearances in
22 proceedings in all case types. And since that time
23 we have seen judges, court staff, litigants, pro se
24 litigants take full advantage of these court

1 appearances in different categories of cases and
2 proceedings where we never frankly thought them
3 possible before. Now that was in part due of course
4 to the pandemic we were forced into this situation,
5 but it has also identified an opportunity and
6 identified the benefits of remote appearances and
7 proceedings.

8 More recently by letter of June 14th of
9 2021, Chief Justice Burke reminded the judiciary in
10 this letter that the option to appear remotely is a
11 key component in keeping our court system open and
12 accessible, and encouraged the judges to be open to
13 those remote appearances possibilities.

14 Now, we noted as the Remote Appearance
15 Committee that remote appearances are not currently
16 reflected, as I mentioned, in many of the other
17 Supreme Court rules because of this presumption that
18 things take place in person. And this proposal now
19 suggests additional amendments, much of them just
20 wording changes as you probably noted to a series of
21 rules to bring them in line with Rule 45 and Rule
22 241.

23 The proposal takes to incorporate and
24 re-enforce the option of appearing by phone or

1 videoconference in proceedings like mandatory
2 arbitration, mediation programs established by the
3 court, mortgage foreclosure actions, all different
4 proceedings covered by specifics of the Supreme Court
5 rule.

6 Two of the rule amendments that we are
7 proposing have already been in place on a temporary
8 basis by order of court, and those two are Rule 113
9 for mortgage foreclosure cases, and that was an order
10 entered, temporary order entered April 22nd of 2021.
11 And Rule 206, the method of taking depositions on
12 oral examination by remote electronic, that was
13 entered on June 4th, 2020 by order.

14 And while our committee has not been
15 informed to specific issues with the implementation
16 of these orders, I am aware that two comments have
17 been submitted to this Rules Committee about Rule 206
18 concerning the method of taking oral depositions. So
19 I wanted to address them briefly.

20 One of the commentators expressed concern that
21 the amendment to Rule 206 permanently removes the
22 requirement that depositions be conducted in person
23 unless all parties agree. And that simply is not the
24 case. The propped amendments do not mandate remote

1 depositions, they still allow, of course they -- the
2 remainder of Rule 206, parts A through F are for
3 standard depositions, and the provisions in Section H
4 provide for remote depositions by notice.

5 So all this change is doing at this point,
6 the amendment to supplement this preexisting rule
7 that allows for remote depositions, and no doubt
8 we've all participated in a remote deposition in some
9 fashion. The right to object to a remote deposition
10 still exists in these amendments, it has not changed,
11 and if a party believes that there is some unfairness
12 in the process or in a remote deposition that
13 requires an in-person deposition, that right to
14 object is not deleted in these amendments.

15 Moreover, if counsel cannot agree on the
16 circumstances of a remote deposition, trial court of
17 course retains their discretion to establish
18 parameters of the deposition.

19 Now, both our commentators, the commentators in
20 the letters you received express concern that the
21 amendment proposes to delete one specific paragraph,
22 paragraph 206H3. That paragraph provides that
23 nothing shall prohibit any party from being with the
24 deponent during the remote depositions with

1 appropriate notice. Our amendment proposes to delete
2 that provision, as did the temporary order that the
3 Illinois Supreme Court already issued, deleted that
4 provision. The concern being raised is that by
5 deleting that provision, you are depleting a party of
6 allowing that to have their attorney present with
7 them in the room.

8 This deletion, however, does not again mean
9 that the personal presence of a party is precluded,
10 those circumstances can be determined on a
11 case-to-case basis. As noted in the Committee
12 comments to this deletion, and to the rule generally,
13 the amendment generally, the idea is to encourage
14 remote depositions. And it was felt that this
15 provision allowing for any party to appear with the
16 deponent did the opposite, that it basically brought
17 us back to where we are today, which is where the
18 value of a remote deposition is lost because an
19 attorney for a party is going to say, well, I'm going
20 to go be with my client, and when all the other
21 attorneys hear that, they all show up in person. So
22 now you've basically avoided the entire purpose of
23 encouraging remote depositions where appropriate.

24 In fact, in the order issued on June 4th of

1 2020, the Supreme Court added a second Committee
2 comment that specifically said that this paragraph H3
3 was deleted just to avoid -- for the purpose of
4 avoiding discovery disputes caused by the presence of
5 a party or their attorney at a deposition, especially
6 because this amendment no longer requires the court
7 stenographer or someone taking the record to be in
8 that same room. So now you have a potential remote
9 deposition with an attorney and party in a room
10 without any neutral presence. So rather to encourage
11 the remote depositions, the issue is left to the
12 discretion again of the trial judge if a party would
13 decline.

14 I will note that if it would be of
15 assistance to the Committee, we can certainly address
16 any questions you have. We would be, the Remote
17 Access Committee and the Access to Justice Commission
18 would be happy to submit additional language or
19 proposed language to clarify the comments in any way
20 you might feel appropriate.

21 As a general matter the Commission's intent
22 in this proposal of all of these rule changes is to
23 again facilitate and authorize, specifically
24 authorize the availability of remote appearances, and

1 make it clear that these are permanent options. Of
2 course the courts again always retain their ability
3 to evaluate whether any particular proceeding is
4 appropriate for a remote appearance, and the proposed
5 amendments do not eliminate that discretion. We are
6 bringing those Supreme Court rules in line with the
7 availability of the remote appearance option.

8 In closing I will say that the pandemic has
9 taught us a lot of things about the legal process and
10 how it can function, including learning how to appear
11 for and preside over remote proceedings, and the
12 legal landscape will be permanently altered, and I
13 believe for the better. While remote appearances
14 certainly made it possible to protect the public
15 health and safety during the pandemic, they have also
16 demonstrated significant benefits to the court, to
17 litigants, to pro se litigants in making court
18 appearances accessible, open and convenient.

19 With that I just appreciate again the
20 Committee's consideration of these amendments, and
21 I'm happy to answer any questions you may have.

22 CHAIRMAN HANSEN: We'll go down the line. Go
23 ahead, Mike.

24 VICE CHAIRMAN ROTHSTEIN: In looking at the

1 proposed addition to Rule 203 where depositions may
2 be taken, there was language added to clarify that
3 question with respect to remote electronic means
4 depositions, but for me it did not clarify it that
5 raised a question.

6 The language added says unless otherwise
7 agreed, remote electronic means depositions shall be
8 deemed taken at the place where the deponent is to
9 answer questions. I don't know if that means where
10 the deponent is sitting at the Holiday Inn in Nome,
11 Alaska or where the court reporter is sitting, or
12 where the attorneys are sitting. I don't know what
13 this means, so I think we need to do something with
14 it to make it more clear.

15 MS. NIJMAN: Yes, the intent is that it is the
16 location where the deponent is sitting, because the
17 court reporter could also be remote on the remote.
18 So if the court reporter is on Zoom, the
19 determination was to make where the deponent is
20 sitting, whether it's a hotel room or their house in
21 whatever state they're in is the location of the
22 deposition.

23 VICE CHAIRMAN ROTHSTEIN: So we can play around
24 with a little bit of the language, but something to

1 the sense of shall be deemed taken at the place where
2 the deponent is physically located while answering
3 questions.

4 MS. NIJMAN: Better.

5 MS. LUZYNCZYK: Good morning. Does your proposed
6 change to Rule 206-H speak to include the June 4th,
7 2020 Committee comments?

8 MS. NIJMAN: We did not include that
9 specifically, but we certainly would be open to that
10 additional comment if we agree it was a clarification
11 from the court that made a lot of sense.

12 MS. LUZYNCZYK: Okay. Thank you.

13 CHAIRMAN HANSEN: I have a question on all of
14 these changes, as I read the cumulative effect. Take
15 a subpoena situation. So I subpoena a witness that I
16 have no idea of what they look like, who they are or
17 anything, and my process server serves that witness,
18 and I don't hear boo from that witness, but I serve
19 them appropriately with a deposition notice and I
20 expect them to come to my office and be there for a
21 deposition pursuant to my notice. Does the changes
22 in the rules here and the proposals basically chill
23 that subpoena to the point where the witness can just
24 say -- call my office in the morning of the depo and

1 say, I'm going to be appear remotely? I have never
2 seen them, I don't know who they are, I mean, are
3 they allowed to do that under this?

4 Because the subpoena says here for purpose
5 of this rule attendance encompasses appearing in
6 person via attorney or remotely, including by
7 telephone or videoconference. So the witness then
8 can decide how they're going to appear in any means,
9 even though I'm the attorney that served them and
10 wanted them to come in person?

11 MS. NIJMAN: There's a couple of things going on
12 there. So I believe the intent here is, yes, to
13 allow a witness to appear remotely. Now the question
14 to me becomes how do we need to then alter the
15 subpoena form, for instance, to say either appear in
16 person or appear remotely and just make that
17 determination so that you and your subpoena can make
18 that determination.

19 But the idea though is not to force a person
20 who might need to come to you just to bring you
21 documents to actually appear at your office, but to
22 rather say, I'm going to call you and FedEx them to
23 you, which has always been the opportunity presented
24 to people. People do that as a matter of course.

1 So as I think about your question on that
2 particular issue, we may need to adjust that form.
3 But the idea is that, yes, that a person could
4 submit -- could appear before you or appear remotely.
5 And the fact that you don't know, you've never seen
6 them, well, you've never seen them in person either.
7 When they show up, do you ask for their driver's
8 license?

9 CHAIRMAN HANSEN: I have that option, yes.

10 MS. NIJMAN: You have the option. You can also
11 ask for it on the screen.

12 CHAIRMAN HANSEN: And they say I don't have it.
13 I want to clarify my question. I am talking about a
14 deposition only, not record production. I subpoena a
15 fact witness who -- you know, we want -- both sides
16 want a civil case, we want that deposition, we
17 haven't been able to get that witness to cooperate.
18 So I hire a process server, they go out and they
19 serve that witness a subpoena for a deposition
20 properly, and I expect that witness to show up in my
21 office to give a deposition in person. They have
22 their attorney on the other side comes as well.

23 My question I guess is, aren't you putting
24 the right for the decision not with the attorney who

1 served the subpoena, you're allowing the witness the
2 choice to appear remotely if they so desire, even
3 though I served them with a proper subpoena that says
4 come to my office? By having this remote option,
5 they can just choose themselves?

6 VICE CHAIRMAN ROTHSTEIN: Before you answer that,
7 can I say --

8 CHAIRMAN HANSEN: Go ahead.

9 VICE CHAIRMAN ROTHSTEIN: And I may not be
10 reading this properly, and maybe I'm reading the
11 wrong document. But Rule 203 still seems to -- I'm
12 sorry. Rule 206 still seems to give the authority to
13 the party issuing the deposition notice as to whether
14 the deposition will be in person or not.

15 MS. NIJMAN: That's correct. I was just circling
16 that very same language in 206, by stating in the
17 notice the means.

18 VICE CHAIRMAN ROTHSTEIN: Well, can you state in
19 the notice that it's going to be in person? I know
20 that right now under Covid we have a different rule,
21 but are you proposing a permanent rule that the
22 witness or one of the other attorneys gets to
23 determine whether it be will be a remote experience
24 or can the person issuing the deposition notice

1 control whether or not the witness has to be
2 physically present at his office or some location?

3 MS. NIJMAN: My understanding is the way these
4 are written now is that it's the person issuing the
5 notice still has that option. However, other parties
6 may then request that to be changed.

7 VICE CHAIRMAN ROTHSTEIN: And the judge could
8 decide that?

9 MS. NIJMAN: Correct.

10 VICE CHAIRMAN ROTHSTEIN: But the fall would be
11 the party issuing the notice --

12 MS. NIJMAN: Issuing the notice.

13 VICE CHAIRMAN ROTHSTEIN: -- Mr. Witness, third
14 party or otherwise, I want you in my office at a
15 certain date and time.

16 MS. NIJMAN: That is my understanding of how that
17 would work, yes.

18 CHAIRMAN HANSEN: Go ahead, Larry.

19 MR. ROGERS: Would it be accurate to say that
20 this more less permits the taking of depositions
21 remotely, it doesn't require it?

22 MS. NIJMAN: That is very accurate. Thank you.

23 MR. ROGERS: And it more or less precludes a
24 party from objecting because they can't be present

1 because of striking H3, precluding a party from
2 saying, well, I want to be there, therefore it cannot
3 proceed? We can be there, but that would not be a
4 basis to preclude the deposition from proceeding?

5 MS. NIJMAN: That is correct.

6 CHAIRMAN HANSEN: Further questions? Okay.
7 Thank you.

8 Next is Matt Dudley from the Trial Lawyers
9 Association. Your comments to proposal Rule 21-01.
10 Go ahead.

11 MR. DUDLEY: Good afternoon, Justice Garman,
12 members of the Committee. Thank you for allowing me
13 to speak.

14 My name is Matt Dudley, I'm the president of
15 the Illinois Trial Lawyers Association. And as an
16 association we are in support of the proposed
17 amendments to 21-01. As an association we are as the
18 committee members, we are in full support of anything
19 that allows for a safe and rapid and fair resumption
20 of the civil justice system.

21 As we have seen through the pandemic,
22 through the actions of our judiciary, and frankly
23 almost all of the practitioners that I have dealt
24 with, everyone has been acting in good faith to allow

1 the system to continue to operate. I think we all
2 recognize the importance of a vibrant and effective
3 civil justice system, that we have learned, some of
4 us more reluctant than others, to participate
5 remotely. We had concerns, we have addressed those
6 concerns with one another, with other stakeholders,
7 and I believe we have done a very effective job at
8 returning and getting closer to the light at the end
9 of the tunnel.

10 Unfortunately with the Delta variant in
11 various parts of the State, it may be that the Covid
12 rules will be extended, but certainly we need to have
13 the option to participate in remote proceedings. As
14 was just discussed previously, no one is advocating
15 an end to in-person proceedings. No one is
16 advocating an end to in-person depositions, but we
17 need to have the ability to conduct proceedings
18 remotely for a multitude of reasons. Some people may
19 have a concern, a health concern, they don't want to
20 participate in person, those concerns should be -- we
21 should listen to them.

22 If they're unreasonable, there is a
23 provision where a litigant can bring the issue to the
24 attention of the trial court, and the trial court in

1 their discretion can enter an order that a remote
2 proceeding for that particular instance is not
3 appropriate, and that is what I think we need. We
4 need to rely on the good faith of practitioners and
5 we need to allow a judicial override, for lack of a
6 better word, if someone is abusing the process.

7 Unfortunately, we did see that certain
8 practitioners were not agreeing to participate in
9 remote depositions, specifically when a healthcare
10 provider was involved. So there were instances where
11 a physician or a nurse because of their restrictions
12 placed on them by their employers or by themselves,
13 they were not going to be in a room with anyone other
14 than a patient or someone in their practice group or
15 their hospital system. And attorneys who were
16 representing those individuals would not agree,
17 even -- and I'm not talking about just defendants,
18 but a treating physician, other physicians, they
19 would not agree to participate remotely. And that
20 should -- in that instance there may be circumstances
21 where, you know, the court would find that their
22 objection is valid, and that the particular subject
23 matter of this deposition or a defendant in perhaps a
24 medical malpractice case, they should have -- their

1 attorney should be at their need.

2 But there are other instances where the
3 objection was simply made for the purpose of -- it
4 wasn't -- it was just a delay tactic, and that
5 shouldn't be allowed, and the court should have the
6 ability to in those instances compel a remote
7 deposition.

8 I believe we have addressed some of the
9 concerns that were raised by certain litigants,
10 certain interest holders regarding 206H3. I'm happy
11 to address any of those. My experience has been,
12 usually I am taking the deposition remotely, if there
13 is a healthcare provider, his or her attorney is
14 there via Zoom. Sometimes the court reporter is
15 present via Zoom, sometimes the court reporter is
16 present at the deponent's office or sometimes in my
17 conference room. If I am presenting a plaintiff, I
18 am nearly always present with the plaintiff and the
19 defense attorney or other counsel are present
20 remotely. And it has worked better than any of us
21 could have imagined candidly. And everybody is
22 growing in the same direction of trying to have a
23 safe and an effective and a fair system.

24 Thank you for your time. I would be happy

1 to answer any questions you may have.

2 CHAIRMAN HANSEN: Do you think this still allows
3 the safeguard, if you will, for the reverse
4 situation, which is litigants and attorneys who don't
5 want to do any in-person depositions? And I will
6 tell you personally I have had that situation where
7 plaintiff's experts have been named, multiple
8 throughout the country, and they don't want to go and
9 do anything.

10 So the reverse has happened where we have to
11 go to court and say, look, we're not asking for
12 everybody, but we want one or two for sure in person.
13 So that safeguard is still in place that that can be
14 brought to the court's attention?

15 MR. DUDLEY: We always need to have the ability
16 to bring, you know, for the outliers, right, and
17 everybody has had the horror story. Right? But for
18 the outliers you have got to have the ability to
19 bring that to the court, the court can address it,
20 and hopefully those who are, you know, abusing the
21 situation will stop.

22 CHAIRMAN HANSEN: Anything else? Matt, thank
23 you.

24 MR. DUDLEY: Thank you.

1 CHAIRMAN HANSEN: All right. Next up, Laura
2 Beasley, Illinois Defense Counsel, here on Rule
3 21-01. You're up.

4 MS. BEASLEY: Our favorite rule today.

5 CHAIRMAN HANSEN: You've been waiting a long
6 time.

7 MS. BEASLEY: Good morning, and thank you all for
8 your services and letting me speak on this issue
9 today.

10 My name is Laura Beasley, and I am the
11 president of the Illinois Defense Counsel. We're
12 made up of approximately 600 members of civil defense
13 attorneys, and we're committed to protecting and
14 improving civil justice in Illinois.

15 Our concern with these proposed rule
16 changes, specifically 206H3, and the proposal to take
17 that rule out. As in our paper and what's been
18 discussed, there is a history with this. Back in
19 April 29th, 2020, because of Covid-19 and in order to
20 move forward with cases and depositions and other
21 things, there was a rule change.

22 The rule change came about, and although I'm
23 sure it wasn't the intention of the rule change, what
24 occurred were attorneys taking advantage of them

1 taking out Subsection 3 specifically, and filing
2 motions saying you couldn't be there with your client
3 or you can't attend this deposition, or it has to be
4 remote. Taking the choice out of the counselor's
5 hand and the client's hands, which should not happen.

6 Because of this and all the backlash, there
7 was another comment added on June 4th after a hearing
8 was done, and that's where you get the comment that
9 was left out of this new rule proposal that dealt
10 specifically with this. And they clarified it by
11 stating, I have it here, Subparagraph H3 has been
12 deleted to avoid discovery disputes over physical
13 presence by a party or a party's attorney at a remote
14 deposition. Deletion of the subparagraph does not
15 mean that personal presence by a party or a party's
16 attorney is absolutely prohibited. During the
17 pandemic not all depositions are required to proceed
18 remotely, nor is it continuous automatically required
19 if counsel cannot agree on a remote method. Absent
20 agreement, the circumstances of a remote deposition
21 are within the discretion of the court.

22 And that's an important part of this.
23 Without that in there, it takes away the right of
24 counsel to decide this. We all know depositions get

1 heated, whether it's a medical malpractice case, you
2 should have the right to be there with the doctor who
3 maybe during a deposition their are allegations of
4 his actions being inappropriate or calling into
5 question what he did. Or a death case, it may be a
6 family member and it's heated, you should have the
7 right to be there.

8 There is something to being in person, if
9 that's what the client wants or the deponent wants
10 their attorney present, they should have that right.
11 As the example that Matt used, he said, well, we
12 deposed a doctor and he was in, you know, he was via
13 Zoom, his attorney was via Zoom, we are via Zoom,
14 worked fine. Then he said in my case my client was
15 in person, I was with my client, and the other party
16 is via Zoom. That's a perfect example of why it's
17 important, his client had the choice and he was able
18 to be there, that should be the deponent's choice if
19 they want their attorney there or not, it should not
20 be taken out of their hands.

21 There's also situations where it then
22 affects the counsel's ability to represent their
23 client. What if they believe that it's necessary for
24 them to be present? This basically allows them to

1 say, no, it's remote and you have to be remote. In
2 order to get anything done, you then have to go to
3 the trial court and it's in front of them, and there
4 are going to be repeated arguments.

5 The example the Committee gave of what if
6 you subpoena someone and you want it in person, well,
7 according to this proposed rule change, they can
8 object, and now you're back in court because they
9 object or someone else can object. I think it will
10 make the litigation in the courts specifically on
11 Rule 206H3 rampant, and then you're going to hear
12 about how this was discussed and decided, well, we'll
13 just let the courts decide, and it's all sorts of
14 litigation that was unneeded, when it could be fixed
15 by leaving in paragraph -- Subparagraph H3 which just
16 says give notice that if you want to be in person or
17 by adding a comment in there or adding a comment with
18 the notice that clarifies what the rule means.

19 Our proposal of just basically what is
20 already in the June 4th comments would fix the issue.
21 But there's really no reason to take out Subsection
22 H3 and still get what they're all looking for to
23 happen, which I think if we decide and our client's
24 decide that Zoom is the best, that should be our

1 decision, it shouldn't be up to this rule to take
2 away how we represent our client or how the deponent
3 wants to be represented, and you shouldn't have to
4 fight the court every time that issue comes up. And
5 that's our position. Thank you for your time.

6 CHAIRMAN HANSEN: Thank you. Any further
7 questions? Yes, Larry. Go ahead.

8 MR. ROGERS: The deletion of H3, that would
9 preclude a lawyer from attending a deposition that
10 they wish to attend, correct?

11 MS. BEASLEY: Well, according to this, if someone
12 issues a notice per remote, in order for us to go or
13 anybody to go, they would have to go ask the court
14 for permission. So again, it's kind of taking that
15 decision out of your hands.

16 So there's a motion, you're going to
17 continue that deposition because now you have to have
18 a hearing, and then the decision by the judge and
19 then reset it. And let's say now someone else
20 objects to it being in person, then you're back at
21 it. When by leaving 3 in with some kind of
22 clarification I think takes care of that.

23 And it would be wonderful if everybody just,
24 you know, in good faith tried to get along, but we

1 all know that doesn't happen either. But I think
2 with taking paragraph 3 out or without having the
3 comment which was in the prior rule from June 4th,
4 it's going to be a mess again.

5 And we can avoid that, we already saw what
6 happened after the first rule proposal, temporary
7 rule proposal on April 29th, which then was fixed.
8 So why go back to that and go through the same
9 headache again when we could use what we have learned
10 in the past to make this rule better.

11 MR. ROGERS: I don't read the amendment as one
12 that precludes a lawyer from attending if they want
13 to attend in spite of it being noticed remotely. And
14 in practice, given what Mr. Dudley said, you see that
15 occur. Some lawyers show up in person, some do
16 remote.

17 Is that what you think can occur even
18 with -- do you agree that can occur with the
19 amendment?

20 MS. BEASLEY: What I saw in my practice and what
21 happened is if someone wanted to appear in person,
22 there was an objection by the other party and there
23 were motions filed to prevent that.

24 MR. ROGERS: That's an objection. But would you

1 agree a lawyer can attend in person even though it's
2 noticed to proceed remotely?

3 MS. BEASLEY: Not if it's noticed to proceed
4 remote. According to this, that's how it proceeds,
5 but it's subject to an objection. So I would have to
6 object to go, instead of if you leave 3 in, all I
7 would have to do is give notice that I'm coming in
8 person.

9 MR. ROGERS: Thank you.

10 CHAIRMAN HANSEN: Further questions? Thank you.
11 Okay. For the Committee, the last speaker is not
12 appearing, so that will conclude the meeting. We
13 thank you for your participation, and we will recess
14 ahead to our Committee meeting.

15 (Whereupon the meeting ended at
16 12:30 p.m.)

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1 STATE OF ILLINOIS)

) ss:

2 COUNTY OF COOK)

3 JOANNE RYAN, being first duly sworn,
4 deposes and says that she is a Certified Shorthand
5 Reporter in Cook County, Illinois, and reporting
6 proceedings in the Courts in said County;

7 That she reported in shorthand and
8 thereafter transcribed the foregoing proceedings;

9 That the within and foregoing transcript
10 is true, accurate and complete and contains all the
11 evidence which was received in the proceedings had
12 upon the above-entitled cause.

13

14

15



JOANNE RYAN, C.S.R.

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