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.

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

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

Mr. Seth Horvath, Appellate Lawyers Association

Ms. Patricia Joyce, State of Appellate Defenders Office
Mr. Douglas Hoff, State of Appellate Defenders Office
Ms. Jennifer Nijman, Access to Justice Commission, Remote Access Committee

Mr. Matt Dudley, Illinois Trial Lawyers Association

Ms. Laura Beasley,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

source.

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

MR. SOSIN: Thank you.

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

MS. NAZEM: You got it right.

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

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

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

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

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

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

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

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

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

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

reluctant to follow that part of the rule either.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. NAZEM: Yes. Correct.

VICE CHAIRMAN ROTHSTEIN: That was my question.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

appreciated. Thank you very much.

CHAIRMAN HANSEN: Okay. Committee members, questions?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

seven days.

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

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

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

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

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

CHAIRMAN HANSEN: Thank you. Any further questions?

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

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

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

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

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

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

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

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

CHAIRMAN HANSEN: Thank you.

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

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

CHAIRMAN HANSEN: Larry, go ahead.

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

provide supplemental authority, correct?

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

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

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

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

MR. ROGERS: Thank you.

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

MS. JOYCE: Pardon me?

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

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

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

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

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

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

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

CHAIRMAN HANSEN: Sure. You're doing fine.

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

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

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

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

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

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

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

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

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

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

MR. ROGERS: You did a great job.

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

MS. JOYCE: It's very much needed.

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

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

CHAIRMAN HANSEN: Still nothing?

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

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

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

CHAIRMAN HANSEN: Thank you.

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

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

MS. JOYCE: Thank you.

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

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

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

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

CHAIRMAN HANSEN: Yes, you need to speak louder.

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

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

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

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

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

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

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

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

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

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

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

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

The other critical issue is that there's no

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

is directed towards criminal appellate procedure issues.

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

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

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

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

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

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

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

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

considerations on the civil side do apply.

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

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

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

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

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

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

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

MS. NIJMAN: Nijman.

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

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

I'm here in my capacity as a commissioner of

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

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

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

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

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

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

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

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

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

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

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

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

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

So all this change is doing at this point, the amendment to supplement this preexisting rule that allows for remote depositions, and no doubt we've all participated in a remote deposition in some fashion. The right to object to a remote deposition still exists in these amendments, it has not changed, and if a party believes that there is some unfairness in the process or in a remote deposition that requires an in-person deposition, that right to object is not deleted in these amendments. Moreover, if counsel cannot agree on the circumstances of a remote deposition, trial court of course retains their discretion to establish parameters of the deposition.

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

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

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

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

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

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

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

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

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

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

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

VICE CHAIRMAN ROTHSTEIN: In looking at the

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

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

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

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

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

MS. NIJMAN: Better.

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

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

MS. LUZYNCZYK: Okay. Thank you.

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

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

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

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

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

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

CHAIRMAN HANSEN: I have that option, yes.

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

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

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

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

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

CHAIRMAN HANSEN: Go ahead.

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

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

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

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

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

VICE CHAIRMAN ROTHSTEIN: And the judge could decide that?

MS. NIJMAN: Correct.

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

MS. NIJMAN: Issuing the notice.

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

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

CHAIRMAN HANSEN: Go ahead, Larry.

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

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

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

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

MS. NIJMAN: That is correct.

CHAIRMAN HANSEN: Further questions? Okay. Thank you.

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

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

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

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

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

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

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

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

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

attorney should be at their need.

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

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

Thank you for your time. I would be happy

to answer any questions you may have.

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

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

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

CHAIRMAN HANSEN: Anything else? Matt, thank you.

MR. DUDLEY: Thank you.

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

MS. BEASLEY: Our favorite rule today.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. ROGERS: Thank you.

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

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

STATE OF ILLINOIS)
) ss:
COUNTY OF COOK)

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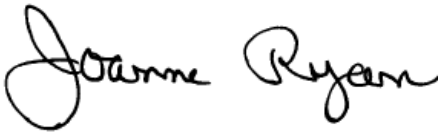

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