
The authors argue that courts should routinely allow attorneys to bring retained experts along to help depose the opponent and his or her experts.

The Case for Allowing Expert Assistance at Depositions

By Leon I. Finkel and Lena Goretsky Winters

While no Illinois rule specifically allows experts to be present at depositions in Illinois, no rule or case law expressly disallows it.

Conducting a deposition is challenging, especially when the deponent has more knowledge and skill in a given field than the deposing attorney. While attorneys can educate themselves in an expert's field, there is no substitute for having another expert at the deposition to provide instant input.

For example, in divorce cases involving a complex appraisal of a business owned by the husband, the deposition might be the wife's attorney's only opportunity to question the husband or key personnel of his business before trial. Not having access to the wife's business appraiser to assist in the deposition could place the wife's attorney at a serious disadvantage because the husband's attorneys and experts have unfettered access to the same information. Yet even though no rule or caselaw explicity disallows experts' presence at depositions, Illinois judges sometimes prohibit their attendance.

Illinois Supreme Court Rule 201

In fact, allowing experts to be present at depositions is consistent with the rules and objectives of the discovery process as delineated by case law in Illinois. No rule or case law expressly disallows an expert's presence at depositions. Further, the only way to limit discovery in Illinois is to obtain a protective order pursuant to Illinois Supreme Court Rule 201(c)(1). Rule 201(c)(1) only allows protective orders in a limited set of circumstances as discussed below. Thus, absent a request by the opponent resulting in a protective order, there is arguably no basis to preclude an expert from being present at a deposition.

Illinois discovery rules are designed to (1) further the efficient and expeditious administration of justice, *Monier v Chamberlain*, 35 Ill 2d 351, 357, 221 NE2d 410, 415 (1966), (2) enhance the truth-seeking process by enabling attorneys to better prepare and evaluate their cases, (3) eliminate surprises, and (4) ensure that judgments rest upon the merits of the case, *Mistler v Mancini*, 111 Ill App 3d 228, 231-232, 443 NE2d 1125, 1128 (2d D 1982).

The presence of an expert at a deposition may enable attorneys to better prepare for trial and to properly follow up with additional questions. An attorney not assisted by an expert may be significantly disadvantaged by a lack of access to essential information concerning complex matters or requiring specialized skills and knowledge ascertainable only at a deposition. Therefore, allowing attorney access to experts during depositions furthers the goals of Illinois discovery rules.

Liberal discovery rights were originally developed "in response to prevailing dissatisfaction with procedural doctrines which had exalted the role of a trial as a battle of wits and subordinated its function as a means of ascertaining the truth." *Krupp v Chicago Transit Authority*, 8 Ill 2d 37, 41, 132 NE2d 532, 535 (1956).

The current provisions reflect our state's continued adherence to the same policy of broad discovery. Illinois Supreme Court Rule 201(b)(1) states that, "Except as provided in these rules, a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action." Courts should only deny discovery where there is insufficient evidence that the requested discovery is relevant, or when justice requires limiting, conditioning, or regulating discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression. Ill S Ct Rule 201(c)(1).

Other Illinois rules

In addition, no court rule or case law in Illinois specifically disallows an expert to be present at a deposition. Illinois law does set specific limits on (1) the purposes for which depositions may be taken, defined in Supreme Court Rule 202, (2) the locations where depositions may be taken, specified in Rule 203, and (3) the methods of compelling appearance of deponents, described in Rule 204. However, the Illinois Code of Civil Procedure and Illinois Supreme Court Rules do not contain any provision limiting the presence of certain persons at depositions.

Accordingly, in Illinois, the only correct remedy for an improper discovery procedure is a protective order. *Harris v Harris*, 196 Ill App 3d 815, 555 NE2d 10 (1st D 1990). Under Supreme Court Rule 201(c)(1), a "court may at any time on its own initiative, or on motion of any party or witness, make a protective order as justice requires, denying, limiting, conditioning, or regulating discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression." Illinois courts have only granted motions for protective orders when a party has abused the discovery process.

For instance, a protective order was granted when a party was preserving information for an ancillary federal proceeding, not for the case in which the deposition was taken. *Avery v Sabbia*, 301 Ill App 3d 839, 704 NE2d 750 (1st D 1998). Similarly, relying upon the testimony of a plaintiff that certain financial data was confidential, and that disclosure of such data would seriously injure the plaintiff's business, a court issued a protective order under Rule 201(c)(1) requiring that the tenant and tenant's counsel treat the information about the terms as confidential and not communicate the terms to any person not a party to the lawsuit. *May Centers, Inc. v S.G. Adams Printing & Stationery Co.*, 153 Ill App 3d 1018, 506 NE2d 691 (5th D 1987.

It follows, then, that experts should not be prevented from assisting attorneys at depositions, absent a showing of (1) unreasonable annoyance, expense, embarrassment, disadvantage, or oppression of the party being deposed, or (2) the confidential nature of the information disclosed.

The federal rules

The Federal Rules of Civil Procedure and case law interpreting them often serve as persuasive authority for Illinois courts in interpreting Illinois Supreme Court Rules. See, e.g., *Petruchius v Don Roth Restaurants, Inc.*, 79 Ill App 3d 1071, 398 NE2d 1228 (1st D 1979). Thus, the FRCP history of addressing protective orders sheds light on Illinois Supreme Court Rules and supports the argument that experts should not be prevented from assisting during depositions.

Specifically, FRCP 26(c), which is similar to Illinois Supreme Court Rule 201(c)(1), states that "[u]pon motion by a

party…for good cause shown, the court…may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense…." This provision was based on FRCP 30(b), formerly Rule 26, which was amended in 1970. See Advisory Committee Notes, FRCP 26.

Prior to that amendment, Rule 30(b) specified "that the examination shall be held with no one present except the parties to the action and their officers or counsel." The language of Rule 26(c) has been changed from specifically limiting who could be present at depositions to a general standard to determine the propriety of issuing a protective order that would exclude the attendance of individuals which would cause "annoyance, embarrassment, oppression, or undue burden or expense."

The fact that the federal rules were modified to explicitly eliminate the provision preventing anyone but the parties and the attorneys from attending depositions indicates intent to allow the presence of individuals who would assist in the truth-seeking process of discovery.

Similarly in spirit to the Illinois cases, federal cases grant protective orders only to avoid embarrassment or ridicule to a party (see, e.g., *Galella v Onassis*, 487 F2d 986 (2d Cir 1973)), and to control disclosure of confidential information and trade secrets (see, e.g., *United States v Osidach*, 513 F Supp 51 (ED Pa 1981)).

Discouraging mumbo-jumbo

American Bar Association Course Study Materials state that you must have your own expert present during the deposition of your adversaries. When pressed about complex subject matters, the deponents may tend to seek refuge in technical "mumbo-jumbo." The presence of an expert, according to the ABA Course Study Materials, will discourage this practice and assist an attorney in conducting the deposition.

Bringing your retained expert to a deposition is not always the best approach, of course – for example, the deposition might be taking place out of state, in which case the cost of bringing a retained expert might outweigh the benefit. But that should be for you and your client to decide. Allowing experts to assist attorneys is consistent with the spirit of both Illinois and federal discovery rules and case law and should be allowed absent a showing that a protective order is warranted.

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