

**REPORT  
OF THE  
ILLINOIS JUDICIAL  
CONFERENCE  
2008**



## 2008 REPORT

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**ROSTER OF JUDICIAL CONFERENCE OF ILLINOIS**

The following are members of the Judicial Conference of Illinois during the 2008 Conference year.

SUPREME COURT

Hon. Robert R. Thomas  
Chief Justice  
Second Judicial District

Hon. Charles E. Freeman  
Supreme Court Justice  
First Judicial District

Hon. Thomas R. Fitzgerald  
Supreme Court Justice  
First Judicial District

Hon. Thomas L. Kilbride  
Supreme Court Justice  
Third Judicial District

Hon. Rita B. Garman  
Supreme Court Justice  
Fourth Judicial District

Hon. Lloyd A. Karmeier  
Supreme Court Justice  
Fifth Judicial District

Hon. Anne M. Burke  
Supreme Court Justice  
First Judicial District

Appellate Court

Hon. Alan J. Greiman  
Chairman, Executive Committee  
First District Appellate Court

Hon. Thomas R. Appleton  
Presiding Judge  
Fourth District Appellate Court

Hon. Robert E. Byrne  
Presiding Judge  
Second District Appellate Court

Hon. Bruce D. Stewart  
Presiding Judge  
Fifth District Appellate Court

Hon. Mary W. McDade  
Presiding Judge  
Third District Appellate Court

APPOINTEES

Hon. Kenneth A. Abraham  
Associate Judge  
Eighteenth Judicial Circuit

Hon. Adrienne W. Albrecht  
Circuit Judge  
Twenty-First Judicial Circuit

Hon. Kathleen M. Alling  
Associate Judge  
Second Judicial Circuit

Hon. Robert J. Anderson  
Circuit Judge  
Eighteenth Judicial Circuit

Hon. Thomas R. Appleton  
Appellate Court Judge  
Fourth Appellate Court District

Hon. C. Stanley Austin  
Associate Judge  
Eighteenth Judicial Circuit

Hon. Patricia Banks  
Circuit Judge  
Circuit Court of Cook County

Hon. Kathy Bradshaw Elliott  
Chief Judge  
Twenty-First Judicial Circuit

Hon. Elizabeth M. Budzinski  
Associate Judge  
Circuit Court of Cook County

Hon. Robert E. Byrne  
Appellate Court Judge  
Second Appellate Court District

Hon. Ann Callis  
Chief Judge  
Third Judicial Circuit

Hon. Robert L. Carter  
Appellate Court Judge  
Third Appellate Court District

Hon. Mark H. Clarke  
Chief Judge  
First Judicial Circuit

Hon. John P. Coady  
Circuit Judge  
Fourth Judicial Circuit

Hon. Mary Ellen Coghlan  
Circuit Judge  
Circuit Court of Cook County

Hon. Claudia Conlon  
Circuit Judge  
Circuit Court of Cook County

Hon. Joy V. Cunningham  
Appellate Court Judge  
First Appellate Court District

Hon. Eugene P. Daugherity  
Circuit Judge  
Thirteenth Judicial Circuit

Hon. Deborah M. Dooling  
Circuit Judge  
Circuit Court of Cook County

Hon. Timothy C. Evans  
Chief Judge  
Circuit Court of Cook County

Hon. Michael J. Gallagher  
Appellate Court Judge  
First Appellate Court District

Hon. Vincent M. Gaughan  
Circuit Judge  
Circuit Court of Cook County

Hon. Susan Fox Gillis  
Associate Judge  
Circuit Court of Cook County

Hon. James R. Glenn  
Circuit Judge  
Fifth Judicial Circuit

Hon. Robert E. Gordon  
Appellate Judge  
First Appellate Court District

Hon. John K. Greanias  
Circuit Judge  
Sixth Judicial Circuit

Hon. Alan J. Greiman  
Appellate Court Judge  
First Appellate Court District

Hon. John B. Grogan  
Associate Judge  
Circuit Court of Cook County

Hon. Daniel P. Guerin  
Associate Judge  
Eighteenth Judicial Circuit

Hon. Shelvin Louis Marie Hall  
Appellate Court Judge  
First Appellate Court District

Hon. David E. Haracz  
Associate Judge  
Circuit Court of Cook County

Hon. Janet R. Holmgren  
Chief Judge  
Seventeenth Judicial Circuit

Hon. Robert K. Kilander  
Circuit Judge  
Eighteenth Judicial Circuit

Hon. Dorothy Kirie Kinnaird  
Circuit Judge  
Circuit Court of Cook County

Hon. John C. Knight  
Circuit Judge  
Third Judicial Circuit

Hon. Michael D. Kramer  
Associate Judge  
Twenty-First Judicial Circuit

Hon. Diane M. Lagoski  
Circuit Judge  
Eighth Judicial Circuit

Hon. Paul G. Lawrence  
Associate Judge  
Eleventh Judicial Circuit

Hon. Vincent J. Lopinot  
Associate Judge  
Twentieth Judicial Circuit

Hon. Jerelyn D. Maher  
Associate Judge  
Tenth Judicial Circuit

Hon. Mary Anne Mason  
Circuit Judge  
Circuit Court of Cook County

Hon. John R. McClean, Jr.  
Circuit Judge  
Fourteenth Judicial Circuit

Hon. Mary W. McDade  
Appellate Court Judge  
Third Appellate Court District

Hon. Ralph J. Mendelsohn  
Associate Judge  
Third Judicial Circuit

Hon. James J. Mesich  
Associate Judge  
Fourteenth Judicial Circuit

Hon. Michael J. Murphy  
Appellate Court Judge  
First Appellate Court District

Hon. Leonard Murray  
Associate Judge  
Circuit Court of Cook County

Hon. Steven H. Nardulli  
Associate Judge  
Seventh Judicial Circuit

Hon. Lewis Nixon  
Circuit Judge  
Circuit Court of Cook County

Hon. Rita M. Novak  
Associate Judge  
Circuit Court of Cook County

Hon. Jeffrey W. O'Connor  
Chief Judge  
Fourteenth Judicial Circuit

Hon. Stephen R. Pacey  
Circuit Judge  
Eleventh Judicial Circuit

Hon. Stuart E. Palmer  
Circuit Judge  
Circuit Court of Cook County

Hon. Stephen H. Peters  
Circuit Judge  
Sixth Judicial Circuit

Hon. Lance R. Peterson  
Associate Judge  
Thirteenth Judicial Circuit

Hon. M. Carol Pope  
Appellate Court Judge  
Fourth Appellate Court District

Hon. Kenneth L. Popejoy  
Circuit Judge  
Eighteenth Judicial Circuit

Hon. Dennis J. Porter  
Associate Judge  
Circuit Court of Cook County

Hon. James L. Rhodes  
Circuit Judge  
Circuit Court of Cook County

Hon. Elizabeth A. Robb  
Chief Judge  
Eleventh Judicial Circuit

Hon. Mary S. Schostok  
Appellate Court Judge  
Second Appellate Court District

Hon. William G. Schwartz  
Circuit Judge  
First Judicial Circuit

Hon. Mitchell K. Shick  
Circuit Judge  
Fifth Judicial Circuit

Hon. Karen G. Shields  
Associate Judge  
Circuit Court of Cook County

Hon. Robert B. Spence  
Circuit Judge  
Sixteenth Judicial Circuit

Hon. Daniel J. Stack  
Circuit Judge  
Third Judicial Circuit

Hon. John O. Steele  
Appellate Court Judge  
First Appellate Court District

Hon. Bruce D. Stewart  
Appellate Court Judge  
Fifth Appellate Court District

Hon. Jane Louise Stuart  
Circuit Judge  
Circuit Court of Cook County

Hon. Michael P. Toomin  
Appellate Court Judge  
First Appellate Court District

**2008 REPORT**

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Hon. Joseph J. Urso  
Circuit Judge  
Circuit Court of Cook County

Hon. Walter Williams  
Circuit Judge  
Circuit Court of Cook County

Hon. Hollis L. Webster  
Circuit Judge  
Eighteenth Judicial Circuit

Hon. Lori M. Wolfson  
Associate Judge  
Circuit Court of Cook County

MEMBERS OF EXECUTIVE COMMITTEE

Hon. Robert R. Thomas, Chairman  
Chief Justice  
Second Judicial District

Hon. Adrienne W. Albrecht  
Circuit Judge  
Twenty-First Judicial Circuit

Hon. John Knight  
Circuit Judge  
Third Judicial Circuit

Hon. Robert L. Carter  
Appellate Court Judge  
Third Appellate Court District

Hon. Rita M. Novak  
Associate Judge  
Circuit Court of Cook County

Hon. Timothy C. Evans  
Chief Judge  
Circuit Court of Cook County

Hon. Stephen H. Peters  
Circuit Judge  
Sixth Judicial Circuit

Hon. Susan Fox Gillis  
Associate Judge  
Circuit Court of Cook County

Hon. M. Carol Pope  
Appellate Court Judge  
Fourth Appellate Court District

Hon. Shelvin Louise Marie Hall  
Appellate Court Judge  
First Appellate Court District

Hon. Robert B. Spence  
Circuit Judge  
Sixteenth Judicial Circuit

Hon. Robert K. Kilander  
Circuit Judge  
Eighteenth Judicial Circuit

Hon. John O. Steele  
Appellate Court Judge  
First Appellate Court District

Hon. Joseph J. Urso  
Circuit Judge  
Circuit Court of Cook County

**OVERVIEW OF THE ILLINOIS JUDICIAL CONFERENCE**

The Supreme Court of Illinois created the Illinois Judicial Conference in 1953 in the interest of maintaining a well-informed judiciary, active in improving the administration of justice. The Conference has met annually since 1954 and has the primary responsibility for the creation and supervision of the continuing judicial education efforts in Illinois.

The Judicial Conference was incorporated into the 1964 Supreme Court Judicial Article and is now provided for in Article VI, Section 17, of the 1970 Constitution. Supreme Court Rule 41 implements section 17 by establishing membership in the Conference, creating an Executive Committee to assist the Supreme Court in conducting the Conference, and appointing the Administrative Office as secretary of the Conference.

In 1993, the Supreme Court continued to build upon past improvements in the administration of justice in this state. The Judicial Conference of Illinois was restructured to more fully meet the constitutional mandate that “the Supreme Court shall provide by rule for an annual Judicial Conference to consider the work of the courts and to suggest improvements in the administration of justice and shall report thereon annually in writing to the General Assembly.” The restructuring of the Conference was the culmination of more than two years of study and work. In order to make the Conference more responsive to the mounting needs of the judiciary and the administration of justice (1) the membership of the entire Judicial Conference was totally restructured to better address business of the judiciary; (2) the committee structure of the Judicial Conference was reorganized to expedite and improve the communication of recommendations to the Court; and (3) the staffing functions were overhauled and strengthened to assist in the considerable research work of committees and to improve communications among the Conference committees, the courts, the judges and other components of the judiciary.

The Judicial Conference, which formerly included all judges in the State of Illinois, with the exception of associate judges (approximately 500 judges), was downsized to a total Conference membership of 82. The membership of the reconstituted Conference includes:

Supreme Court Justices	7
Presiding judges of downstate appellate districts and chair of First District Executive Committee	5
Judges appointed from Cook County (including the chief judge and 10 associate judges)	30
Ten judges appointed from each downstate district (including one chief judge and 3 associate judges from each district)	<u>40</u>
Total Conference Membership	82

The first meeting of the reconstituted Conference convened December 2, 1993, in Rosemont, Illinois.

A noteworthy change in the Conference is that it now includes associate judges who comprise more than a quarter of the Conference membership. In addition to having all classifications of judges represented, the new structure continues to provide for diverse geographical representation.

Another important aspect of the newly restructured Conference is that the Chief Justice of the Illinois Supreme Court presides over both the Judicial Conference and the Executive Committee of the Conference, thus providing a strong link between the Judicial Conference and the Supreme Court.

The natural corollary of downsizing the Conference, and refocusing the energies and resources of the Conference on the management aspect of the judiciary, is that judicial education will now take place in a different and more suitable environment, rather than at the annual meeting of the Conference. A comprehensive judicial education plan was instituted in conjunction with the restructuring of the Judicial

Conference. The reconstituted judicial education committee was charged with completing work on the comprehensive education plan, and with presenting the plan for consideration at the first annual meeting of the reconstituted Judicial Conference. By separating the important functions of judicial education from those of the Judicial Conference, more focus has been placed upon the important work of providing the best and most expanded educational opportunities for Illinois judges. These changes have improved immensely the quality of continuing education for Illinois judges.

# ANNUAL MEETING OF THE ILLINOIS JUDICIAL CONFERENCE

Hilton Suites Chicago Magnificent Mile Hotel  
Chicago, Illinois

## AGENDA

Thursday, October 23, 2008

- 7:30 - 9:00 a.m.**                    **Buffet Breakfast & Registration**
- 9:00 - 10:30 a.m.**                **Committee Meetings**
- *Alternative Dispute Resolution Coordinating Committee*
  - *Automation and Technology Committee*
  - *Committee on Criminal Law and Probation Administration*
  - *Committee on Discovery Procedures*
  - *Committee on Education*
  - *Study Committee on Complex Litigation*
  - *Study Committee on Juvenile Justice*
- 10:45 - 11:30 a.m.**                **Judicial Conference Address**  
*Honorable Thomas R. Fitzgerald, Chief Justice, Supreme Court of Illinois*
- 11:30 a.m. - 12:45 p.m.**        **Luncheon**
- 1:00 - 4:30 p.m.**                **Plenary Session**
- *Call to Order by Honorable Thomas R. Fitzgerald, Chief Justice*
  - *Presentation of Consent Calendar*
  - *Presentation of Committee Reports & Discussion*  
*Committee on Criminal Law and Probation Administration*  
*Committee on Discovery Procedures*  
*Automation and Technology Committee*  
*Alternative Dispute Resolution Coordinating Committee*
  - *Break; Committee Reports & Discussion Resume*  
*Study Committee on Complex Litigation*  
*Study Committee on Juvenile Justice*  
*Committee on Education*
- (Moderators: Hon. Robert L. Carter, Hon. Timothy C. Evans, Hon. M. Carol Pope)*
- 4:30 p.m.**                            **Adjourn**

## 2008 REPORT

**2008 Annual Illinois Judicial Conference**  
**Thursday, October 23, 2008**  
**9:00 a.m.**  
**Hilton Suites Chicago Magnificent Mile Hotel**  
**Chicago, Illinois**  
**Honorable Thomas R. Fitzgerald, Chief Justice**

Good morning, and welcome to the 55th Annual Meeting of the Illinois Judicial Conference. On behalf of my colleagues on the Illinois Supreme Court, I would like to thank you all for attending, and for your tireless work this past year. I understand how busy a judge's schedule can be, and, on behalf of my colleagues, I am grateful for your efforts.

Let me introduce my colleagues. First, I would like to recognize two retired justices and dear friends, John Stamos and Ben Miller.

And the current members of the Court. From the First District: our senior member Justice Charles Freeman, and Justice Anne Burke. From the Second District: Justice Bob Thomas. From the Third District: Justice Tom Kilbride. From the Fourth District: Justice Rita Garman. And from the Fifth District: Justice Lloyd Karmeier.

It has been a pleasure serving with each of you, and it is my honor to speak here today for you as the 120th Chief Justice of the Illinois Supreme Court.

I would also like to introduce Cynthia Cobbs, Director of the Administrative Office of the Illinois Courts. Cynthia and her staff have again done a remarkable job in coordinating the work of the committees and preparing for the Conference.

Article 6, section 17 of our State Constitution instructs that the Supreme Court shall provide for an annual Judicial Conference to consider the work of the courts and to suggest improvements in the administration of justice, and it is pursuant to that directive that we meet here today: to discuss our court system and address ways in which we may make it better for our fellow citizens. I have attended many of these Conferences, but I feel both privileged and humbled to open this one with some remarks on the state of the state judiciary.

The state of our courts is very strong. And I hope that it continues to improve during my term as Chief Justice. The unifying theme of every Judicial Conference, naturally, is the creation of a strong judiciary. In Federalist 78, Alexander Hamilton describes the judiciary as the weakest of the three branches of government - having neither the force nor the will to impose its judgments. But Hamilton also noted that the complete independence of the courts is [particularly] essential because such independence may be a safeguard against the effects of occasional ill humors in society.

Hamilton said maybe, but I suggest that independent judges **are** the safeguard of our liberties. President Woodrow Wilson, a century ago, said that government keeps its promises in its courts. The struggle for constitutional government is a struggle for good laws, but also for **intelligent, independent, and impartial** courts, and making intelligent, independent, and impartial courts is precisely the point of the Judicial Conference. Let us examine each of these three qualities.

**Intelligent** courts **require** intelligent judges.

Later today, we will hear a report from the Education Committee detailing its work last year on the inaugural expanded 30-hour curriculum at the Biennial Education Conference. This year's Conference consisted of 56 sessions attended by nearly 900 judges, with more than 70 other judges serving as instructors and mentors. It is truly heartening to see this combination of the experience and wisdom from more tenured members of the bench and the commitment of newer members to take advantage of it. This coming together, this synergy, makes us all better judges.

The Education Committee also prepared and produced judicial benchbooks in five of the six core curriculum areas: evidence, family law, domestic violence, traffic law, and civil procedure, and it plans to complete the remaining benchbook for criminal law and procedure later this year. The Juvenile Justice Committee was busy, too. It will soon complete its update of the Juvenile Justice Benchbook regarding abuse, neglect, and dependency cases. The Complex Litigation Committee decided to redraft the Civil Complex Litigation Manual and began its review of the Criminal Complex Litigation Manual in order to avoid unnecessary overlap with the Criminal Law and Procedure Benchbook.

**Independent** courts also **require** independent judges.

Last year in his address here, then Chief Justice Thomas mentioned that the judiciary is a bureaucracy, and the purpose of that bureaucracy is to ensure that the court system operates fairly - and independently. It falls to us to make sure that the wheels of justice turn, and turn efficiently, both in courtrooms and in less traditional fora.

In that regard, the Criminal Law and Probation Administration Committee continued its study of alternative dispute resolution in criminal courts. The Juvenile Justice Committee examined the efficacy of so-called problem-solving courts. The Alternative Dispute Resolution Coordinating Committee drafted a uniform manual concerning the fundamental practices of mandatory arbitration. That committee also submitted proposed rule changes to allow arbitrators to waive their compensation in exchange for *pro bono* legal service credit.

The Complex Litigation Committee researched the possibility of an electronic judicial forum, so judges can communicate with colleagues - seek, as well as give advice - on various issues common to complex cases. The Discovery Procedures Committee investigated e-discovery, while the Automation and Technology Committee explored the benefits and detriments of using video court conference systems. Speaking of technology and video, I must mention the Illinois Courts website - our state of the art home on the world wide web. Now any interested party can stream video of oral arguments before the Supreme Court the day after they occur. The Courts website also allows access to Supreme and Appellate Court opinions, and offers educational programs for both adults and children. And it is available to schools across the state.

And finally, **impartial** courts **require** impartial judges.

It is easy to talk about the value of judicial independence. It is easy to find eloquent quotes on that subject from founding fathers like Hamilton, or statesmen like Wilson, or other commentators, including Justice Sandra Day O'Connor. In her retirement from the United States Supreme Court, Justice O'Connor has become a leading voice for an independent judiciary. She has expressed concern with efforts in other states, and in Congress, to police the judiciary. To place it under the watchful eye of the legislature, and ensure that so-called activist judges pass no

judgment on legislation that **may have** serious constitutional flaws. I applaud Justice O'Connor for her efforts and wish her continued success in them.

My former colleague Justice Philip Rarick, in *Jorgensen v. Blagojevich*, recognized the inevitability of occasional conflicts between the judiciary and the political branches. He wrote:

As arbiters of the law and guardians of individual liberties, members of the judiciary often find themselves at odds with other branches of government. Such challenges are unavoidable. They are an inherent part of the adjudicatory process. That their constitutional duty requires this of judges does not mean that their decisions will be well received by the other branches of government. Retribution against the courts for unpopular decisions is an ongoing threat.

Justice Rarick's point was that principled disagreements between coordinate branches of government are part of our democratic system, but we must be watchful, such disagreements cannot be allowed to devolve into bully tactics in the name of political expediency. Fortunately, we have not had this problem in Illinois. Perhaps that is because the Illinois courts have taken their independence so seriously for so long. Perhaps it is because our co-equal branches of government, unlike their counterparts elsewhere, have taken our independence seriously, as well.

Four years ago, my friend and former colleague Mary Ann McMorrow addressed us here as Chief Justice. In the course of a speech that presented an elucidating history of the Judicial Conference, she quoted another former member of this Court, Justice Floyd Thompson. After his retirement from the bench, Justice Thompson spoke to the 1958 Judicial Conference about a proposal to amend the judicial article of our State Constitution. Justice Thompson called our nation's establishment of an independent judicial branch by written constitution our greatest single contribution to the science of government. Thompson continued that, without an independent judiciary, there can be no freedom, and with it there can be no dictatorship. We must guard against any invasion of this fundamental principle of government in the laudable effort to improve the administration of justice.

Being watchful, being on our guard means that we must not treat judicial independence as only a matter for textbooks or treatises. It is, as Justice O'Connor has advised, not an end in itself, but a means to an end. It is the kernel of the rule of law, giving the citizenry confidence that the laws will be fairly and equally applied.

Judicial independence, and the impartiality from which it stems, is a living, breathing concept - living and breathing in each of you. Alexander Hamilton's rival Thomas Jefferson said, and I paraphrase, judges should always be men [and women] of learning and experience in the laws, of exemplary morals, great patience, calmness and attention; their minds should not be distracted with jarring interests; they should not be dependent upon any individual or group.

My friends, at the end of the day, when verdicts are rendered, and orders signed, it is you who ensure judicial independence, and so the rule of law, by putting aside outside influences, and making certain that your decisions involve nothing more than applying the law to the facts to reach the correct result.

Each time a judge makes a decision following this familiar formula, the judiciary is made stronger. We depend upon the approval of our fellow citizens for our strength. When the people of the State of Illinois believe that their courts strive for justice, and strive to improve the efficiency

of dispensing that justice, they are free with their support. And we are stronger than Hamilton could have ever imagined.

Again, thank you all.

## **CONSENT CALENDAR**

*The Consent Calendar includes memorials for deceased judges, biographies for retired judges and a listing of new judges for the period from August 1, 2007 through July 31, 2008.*

**2008 REPORT  
RESOLUTION  
IN MEMORY OF  
THE HONORABLE JOSEPH J. BARR**

The Honorable Joseph J. Barr, former circuit judge for the Third Judicial Circuit, passed away November 10, 2007.

Judge Barr was born October 31, 1919, in Alton, Illinois. He received his law degree from the University of Notre Dame Law School, and was admitted to the Illinois bar in 1946. From 1949 - 1953, Judge Barr served as attorney for the cities of Roxana and Wood River, Illinois. From 1950 - 1957, he was with the probate court for Madison County. He became a judge for the Third Judicial Circuit in 1957.

The Illinois Judicial Conference extends to the family of Judge Barr its sincere expression of sympathy.

**RESOLUTION**

**IN MEMORY OF**

**THE HONORABLE ANTHONY J. BOSCO**

The Honorable Anthony J. Bosco, former circuit judge for the Circuit Court of Cook County, passed away July 25, 2008.

Judge Bosco was born February 24, 1928, in Chicago, Illinois. He received his law degree from DePaul University College of Law, and was admitted to the bar in 1956. Judge Bosco became an associate judge for the Circuit Court of Cook County in 1972, and a circuit judge in 1978. He retired from the bench in 1995.

The Illinois Judicial Conference extends to the family of Judge Bosco its sincere expression of sympathy.

**2008 REPORT  
RESOLUTION  
IN MEMORY OF  
THE HONORABLE CLARENCE BRYANT**

The Honorable Clarence Bryant, former circuit judge for the Circuit Court of Cook County, passed away May 27, 2008.

Judge Bryant was born June 13, 1928, in Lewisville, Arkansas. He received his law degree from IIT Chicago-Kent College of Law in 1956, and was admitted to the bar that same year. Judge Bryant worked in the private sector, until becoming an associate judge for the Circuit Court of Cook County in 1976. He became a circuit judge in 1982.

The Illinois Judicial Conference extends to the family of Judge Bryant its sincere expression of sympathy.

**RESOLUTION**

**IN MEMORY OF**

**THE HONORABLE RICHARD J. CADAGIN**

The Honorable Richard J. Cadagin, former circuit judge for the Seventh Judicial Circuit, passed away April 5, 2008.

Judge Cadagin was born June 23, 1935, in Springfield, Illinois. He received his law degree from St. Louis University School of Law in 1965, and was admitted to the bar that same year. Judge Cadagin was appointed a Magistrate for the Seventh Judicial Circuit in 1970. He remained in that position until being elected a circuit judge in 1978. Judge Cadagin retired July 7, 1995.

The Illinois Judicial Conference extends to the family of Judge Cadagin its sincere expression of sympathy.

**2008 REPORT  
RESOLUTION  
IN MEMORY OF  
THE HONORABLE EUGENE C. CAMPION**

The Honorable Eugene C. Campion, former associate judge for the Circuit Court of Cook County, passed away August 11, 2007.

Judge Campion was born September 27, 1929, in Chicago, Illinois. He received his law degree from DePaul University College of Law in 1973, and was admitted to the bar that same year. Judge Campion served in both the public and private sectors, until being appointed an associate judge for the Circuit Court of Cook County in 1980.

The Illinois Judicial Conference extends to the family of Judge Campion its sincere expression of sympathy.

**RESOLUTION**

**IN MEMORY OF**

**THE HONORABLE THOMAS F. CARMODY, JR.**

The Honorable Thomas F. Carmody, Jr., former circuit judge for the Circuit Court of Cook County, passed away April 20, 2008.

Judge Carmody was born October 29, 1951, in Evergreen Park, Illinois. He received his law degree from The John Marshall Law School in 1976, and was admitted to the bar that same year. Judge Carmody served as an assistant Public Defender for Cook County from 1977 - 1992. He became a circuit judge in 1992.

The Illinois Judicial Conference extends to the family of Judge Carmody its sincere expression of sympathy.

**2008 REPORT  
RESOLUTION  
IN MEMORY OF  
THE HONORABLE ARTHUR J. CIESLIK**

The Honorable Arthur J. Cieslik, former circuit judge for the Circuit Court of Cook County, passed away December 7, 2007.

Judge Cieslik was born July 5, 1924, in Chicago, Illinois. He received his law degree from The John Marshall Law School in 1958, and was admitted to the bar that same year. Judge Cieslik was an assistant Corporation Counsel for the City of Chicago from 1960 - 1972. In 1976, he was elected a circuit judge for the Circuit Court of Cook County, and remained in that position until 1988.

The Illinois Judicial Conference extends to the family of Judge Cieslik its sincere expression of sympathy.

**RESOLUTION**

**IN MEMORY OF**

**THE HONORABLE HARRY G. COMERFORD**

The Honorable Harry G. Comerford, former circuit judge for the Circuit Court of Cook County, passed away January 29, 2008.

Judge Comerford was born March 19, 1921, in Chicago, Illinois. He received his law degree from DePaul University College of Law in 1947, and was admitted to the bar that same year. Judge Comerford was an assistant to the Attorney General, assistant attorney for the Chicago Park District, and in the Municipal Court from 1960 - 1963. In 1964, he was appointed an associate judge for the Circuit Court of Cook County. Judge Comerford served as the Chief Judge for the Circuit Court of Cook County from 1978, until his retirement December 4, 1994.

The Illinois Judicial Conference extends to the family of Judge Comerford its sincere expression of sympathy.

**2008 REPORT  
RESOLUTION  
IN MEMORY OF  
THE HONORABLE KENNETH CORTESI**

The Honorable Kenneth Cortesi, former circuit judge for the Circuit Court of Cook County, passed away February 11, 2008.

Judge Cortesi was born January 17, 1942, in Chicago, Illinois. He received his law degree from DePaul University School of Law, and was admitted to the bar in 1972. Judge Cortesi worked in the Attorney General's office from 1985 - 1995. He was appointed a circuit judge for the Circuit Court of Cook County in 2001.

The Illinois Judicial Conference extends to the family of Judge Cortesi its sincere expression of sympathy.

**RESOLUTION**

**IN MEMORY OF**

**THE HONORABLE DAVID W. COSTELLO**

The Honorable David W. Costello, former associate judge for the Twentieth Judicial Circuit, passed away May 1, 2008.

Judge Costello was born May 16, 1923, in E. St. Louis, Illinois. He received his law degree from St. Louis University School of Law in 1956, and was admitted to the bar that same year. Judge Costello was an assistant State's Attorney for St. Clair County from 1956 - 1960. He became a magistrate in 1968, and retired as an associate judge June 30, 1983.

The Illinois Judicial Conference extends to the family of Judge Costello its sincere expression of sympathy.

**2008 REPORT  
RESOLUTION  
IN MEMORY OF  
THE HONORABLE JOSEPH F. CUNNINGHAM**

The Honorable Joseph F. Cunningham, former Illinois Supreme Court Justice, passed away July 13, 2008.

Justice Cunningham was born February 25, 1924, in East St. Louis, Illinois. He received his law degree from Washington University School of Law in 1952, and was admitted to the bar that same year. Justice Cunningham served as Corporation Counsel for the cities of New Baden and Trenton, Illinois, from 1960 - 1965. He was appointed Magistrate for the Twentieth Judicial Circuit in 1965. Justice Cunningham was appointed a circuit judge in 1972, and elected to that position in 1974. He served as Chief Judge for the Twentieth Judicial Circuit from 1975 - 1984. He was appointed to the Supreme Court in 1987, and served as Director of the Administrative Office of the Illinois Courts from, July 16, 1990 - June 17, 1991. He was once again appointed to the Supreme Court in 1991, retiring from the bench December 6, 1992.

The Illinois Judicial Conference extends to the family of Justice Cunningham its sincere expression of sympathy.

**RESOLUTION**

**IN MEMORY OF**

**THE HONORABLE WALTER P. DAHL**

The Honorable Walter P. Dahl, former circuit judge for the Circuit Court of Cook County, passed away March 24, 2008.

Judge Dahl was born September 13, 1922, in Chicago, Illinois. He received his law degree from Northwestern University School of Law in 1948, and was admitted to the bar that same year. Judge Dahl served as an assistant Attorney General from 1950 - 1952, administrative assistant for the Director of Labor from 1952 - 1953, and as "J.P." for Wheeling Township from 1956 - 1962. He served as a circuit judge for the Circuit Court of Cook County, retiring from the bench July 31, 1983.

The Illinois Judicial Conference extends to the family of Judge Dahl its sincere expression of sympathy.

**2008 REPORT  
RESOLUTION  
IN MEMORY OF  
THE HONORABLE MELVIN E. DUNN**

The Honorable Melvin E. Dunn, former associate judge for the Sixteenth Judicial Circuit, passed away January 7, 2008.

Judge Dunn was born October 31, 1933, in Chicago, Illinois. He received his law degree from IIT Chicago-Kent College of Law. Judge Dunn served in the private sector and as chief investigator for the Illinois Attorney General's office. He became an associate judge for the Sixteenth Judicial Circuit in 1982, and became a circuit judge in 1986.

The Illinois Judicial Conference extends to the family of Judge Dunn its sincere expression of sympathy.

**RESOLUTION**

**IN MEMORY OF**

**THE HONORABLE EDWARD J. EGAN**

The Honorable Edward J. Egan, former appellate court judge for the First District, passed away March 26, 2008.

Judge Egan was born May 10, 1923, in Chicago, Illinois. He received his law degree from DePaul University College of Law in 1950, and was admitted to the bar that same year. Judge Egan served mainly in the public sector until being elected a circuit judge in 1964, for the Circuit Court of Cook County. He served in the appellate court from 1973 - 1975. He was re-appointed to the appellate court in 1988, and subsequently elected in 1990. He retired from the bench in 1996.

The Illinois Judicial Conference extends to the family of Judge Egan its sincere expression of sympathy.

**2008 REPORT  
RESOLUTION  
IN MEMORY OF  
THE HONORABLE PHILIP J. R. EQUI**

The Honorable Philip J. R. Equi, former associate judge for the Eighteenth Judicial Circuit, passed away September 28, 2007.

Judge Equi was born September 12, 1922, in Maywood, Illinois. He received his law degree from DePaul University College of Law, and was admitted to the bar in 1949. Judge Equi served in both the public and private sectors prior to being appointed an associate judge for the Eighteenth Judicial Circuit in 1977.

The Illinois Judicial Conference extends to the family of Judge Equi its sincere expression of sympathy.

**RESOLUTION**

**IN MEMORY OF**

**THE HONORABLE ALLEN A. FREEMAN**

The Honorable Allen A. Freeman, former circuit judge for the Circuit Court of Cook County, passed away June 19, 2008.

Judge Freeman was born October 19, 1915, in Chicago, Illinois. He received his law degree from the University of Illinois College of Law in 1938, and was admitted to the bar that same year. Judge Freeman served in both the public and private sectors before being elected a circuit judge for the Circuit Court of Cook County in 1976.

The Illinois Judicial Conference extends to the family of Judge Freeman its sincere expression of sympathy.

**2008 REPORT  
RESOLUTION  
IN MEMORY OF  
THE HONORABLE SIMON L. FRIEDMAN**

The Honorable Simon L. Friedman, former circuit judge for the Seventh Judicial Circuit, passed away March 13, 2008.

Judge Friedman was born November 18, 1921. He received his law degree from the University of Illinois School of Law in 1944, and was admitted to the bar that same year. In 1972, Judge Friedman was appointed a circuit judge for the Seventh Judicial Circuit. He was subsequently elected in 1974. Judge Friedman retired December 3, 1990.

The Illinois Judicial Conference extends to the family of Judge Friedman its sincere expression of sympathy.

**RESOLUTION**

**IN MEMORY OF**

**THE HONORABLE JEROME GAROON**

The Honorable Jerome Garoon, former associate judge for the Circuit Court of Cook County, passed away September 28, 2007.

Judge Garoon was born April 11, 1920, in Chicago, Illinois. He received his law degree from The John Marshall Law School in 1947, and was admitted to the bar that same year. Judge Garoon was elected an associate judge for the Circuit Court of Cook County in 1982. He retired in 1995.

The Illinois Judicial Conference extends to the family of Judge Garoon its sincere expression of sympathy.

**2008 REPORT  
RESOLUTION  
IN MEMORY OF  
THE HONORABLE PAUL F. GERRITY**

The Honorable Paul F. Gerrity, former circuit judge for the Circuit Court of Cook County, passed away August 12, 2007.

Judge Gerrity was born January 19, 1927, in Chicago, Illinois. He received his law degree from DePaul University College of Law in 1953, and was admitted to the bar that same year. Judge Gerrity was the attorney for the Cook County Public Administrator, and served as police magistrate for Calumet City from 1961 - 1964. In 1964, he became a Cook County Magistrate. In 1974, he became a circuit judge for the Circuit Court of Cook County, retiring from that position August 31, 1987.

The Illinois Judicial Conference extends to the family of Judge Gerrity its sincere expression of sympathy.

**RESOLUTION**

**IN MEMORY OF**

**THE HONORABLE CHARLES E. GLENNON**

The Honorable Charles E. Glennon, former circuit judge for the Eleventh Judicial Circuit, passed away December 31, 2007.

Judge Glennon was born April 5, 1942, in Monticello, Illinois. He received his law degree from the University of Illinois College of Law in 1966, and was admitted to the bar that same year. Judge Glennon served in both the public and private sectors prior to becoming a judge in 1976. He served as Chief Judge of the Eleventh Judicial Circuit from 1990 - 1994.

The Illinois Judicial Conference extends to the family of Judge Glennon its sincere expression of sympathy.

**2008 REPORT  
RESOLUTION  
IN MEMORY OF  
THE HONORABLE JOHN A. LEIFHEIT**

The Honorable John A. Leifheit, former circuit judge for the Sixteenth Judicial Circuit, passed away March 26, 2008.

Judge Leifheit was born September 2, 1920, in DeKalb, Illinois. He received his law degree from the University of Wisconsin Law School in 1948, and was admitted to the bar that same year. Judge Leifheit served in both the public and private sectors prior to being appointed a circuit judge for the Sixteenth Judicial Circuit in 1977. He retired January 17, 1988.

The Illinois Judicial Conference extends to the family of Judge Leifheit its sincere expression of sympathy.

**RESOLUTION**

**IN MEMORY OF**

**THE HONORABLE FRANCIS S. LORENZ**

The Honorable Francis S. Lorenz, former appellate court judge for the First District, passed away June 26, 2008.

Judge Lorenz was born September 4, 1914, in Chicago, Illinois. He received his law degree from DePaul University College of Law in 1938, and was admitted to the bar that same year. He has served as an assistant Corporation Counsel and Treasurer for Cook County, Treasurer for the State of Illinois and clerk for the Superior Court of Cook County. Judge Lorenz was appointed to the appellate court in 1970. He retired December 6, 1992.

The Illinois Judicial Conference extends to the family of Judge Lorenz its sincere expression of sympathy.

**2008 REPORT  
RESOLUTION  
IN MEMORY OF  
THE HONORABLE HAROLD L. MADSEN**

The Honorable Harold L. Madsen, former associate judge for the Eighth Judicial Circuit, passed away January 22, 2008.

Judge Madsen was born October 6, 1920, in Tremont, Illinois. He received his law degree from the University of Illinois College of Law, and was admitted to the bar in 1949. Judge Madsen served in both the public and private sectors before being appointed an associate judge for the Eighth Judicial Circuit. He retired from the bench June 30, 1983.

The Illinois Judicial Conference extends to the family of Judge Madsen its sincere expression of sympathy.

**RESOLUTION**

**IN MEMORY OF**

**THE HONORABLE GEORGE J. MORAN**

The Honorable George J. Moran, former appellate court judge for the Fifth District, passed away July 31, 2008.

Judge Moran was born March 14, 1913, in Granite City, Illinois. He received his law degree from George Washington University Law School in 1937, and was admitted to the bar that same year. Judge Moran served as an appellate court judge for the Fifth District from 1964 - 1979.

The Illinois Judicial Conference extends to the family of Judge Moran its sincere expression of sympathy.

**2008 REPORT  
RESOLUTION  
IN MEMORY OF  
THE HONORABLE FRANCIS P. MURPHY**

The Honorable Francis P. Murphy, former associate judge for the Ninth Judicial Circuit, passed away May 21, 2008.

Judge Murphy was born March 17, 1914, in Grand Rapids, Michigan. He received his law degree from DePaul University College of Law in 1949, and was admitted to the bar that same year. Judge Murphy served as an associate judge for the Ninth Judicial Circuit from 1954 - 1985.

The Illinois Judicial Conference extends to the family of Judge Murphy its sincere expression of sympathy.

**RESOLUTION**

**IN MEMORY OF**

**THE HONORABLE JACKSON P. NEWLIN**

The Honorable Jackson P. Newlin, former associate judge for the Tenth Judicial Circuit, passed away October 1, 2007.

Judge Newlin was born January 28, 1918, in Peoria, Illinois. He received his law degree from the University of Illinois College of Law in 1942, and was admitted to the bar that same year. Judge Newlin was elected an associate judge for the Tenth Judicial Circuit in 1982. He retired from the bench July 31, 1993.

The Illinois Judicial Conference extends to the family of Judge Newlin its sincere expression of sympathy.

**2008 REPORT  
RESOLUTION  
IN MEMORY OF  
THE HONORABLE JOHN W. NIELSEN**

The Honorable John W. Nielsen, former circuit judge for the Seventeenth Judicial Circuit, passed away August 8, 2007.

Judge Nielsen was born March 23, 1931, in Rockford, Illinois. He received his law degree from the University of Wisconsin Law School in 1960, and was admitted to the Illinois bar that same year. Judge Nielsen served mainly in the public sector prior to becoming an associate judge for the Seventeenth Judicial Circuit in 1972. He became a circuit judge in 1988, and remained in that position until his retirement December 5, 1995.

The Illinois Judicial Conference extends to the family of Judge Nielsen its sincere expression of sympathy.

**RESOLUTION**

**IN MEMORY OF**

**THE HONORABLE JAMES P. O'MALLEY**

The Honorable James P. O'Malley, circuit judge for the Circuit Court of Cook County, passed away April 1, 2008.

Judge O'Malley was born June 3, 1954, in Oak Park, Illinois. He received his law degree from IIT Chicago-Kent College of Law, and was admitted to the bar in 1986. Judge O'Malley served solely in the private sector prior to becoming a circuit judge for the Circuit Court of Cook County in 1995. He remained in that position until his death.

The Illinois Judicial Conference extends to the family of Judge O'Malley its sincere expression of sympathy.

**2008 REPORT  
RESOLUTION  
IN MEMORY OF  
THE HONORABLE JOHN PANEGASSER**

The Honorable John Panegasser, associate judge for the Eighteenth Judicial Circuit, passed away April 16, 2008.

Judge Panegasser was born October 18, 1945, in Chicago, Illinois. He received his law degree from IIT Chicago-Kent College of Law in 1971, and was admitted to the bar that same year. Judge Panegasser served solely in the private sector until becoming an associate judge for the Eighteenth Judicial Circuit in 2006, a position he held until his death.

The Illinois Judicial Conference extends to the family of Judge Panegasser its sincere expression of sympathy.

**RESOLUTION**

**IN MEMORY OF**

**THE HONORABLE R. EUGENE PINCHAM**

The Honorable R. Eugene Pincham, former appellate judge for the First District, passed away April 3, 2008.

Judge Pincham was born June 28, 1925, in Chicago, Illinois. He received his law degree from Northwestern University School of Law in 1951, and was admitted to the bar that same year. Judge Pincham served as a circuit judge for the Circuit Court of Cook County from 1976 - 1984. He served as an appellate court judge for the First District from 1984 - 1989.

The Illinois Judicial Conference extends to the family of Judge Pincham its sincere expression of sympathy.

**2008 REPORT  
RESOLUTION  
IN MEMORY OF  
THE HONORABLE WILLIAM J. REARDON**

The Honorable William J. Reardon, former circuit judge for the Tenth Judicial Circuit, passed away November 20, 2007.

Judge Reardon was born July 15, 1922, in Pekin, Illinois. He received his law degree from the University of Illinois College of Law in 1948, and was admitted to the bar that same year. Judge Reardon served as an associate judge for the Tenth Judicial Circuit from 1965 - 2000, and as a circuit judge from July 1, 2000 - December 3, 2000.

The Illinois Judicial Conference extends to the family of Judge Reardon its sincere expression of sympathy.

**RESOLUTION**

**IN MEMORY OF**

**THE HONORABLE ELLIS E. REID**

The Honorable Ellis E. Reid, former appellate court judge for the First District, passed away August 7, 2007.

Judge Reid was born May 19, 1934, in Chicago, Illinois. He received his law degree from the University of Chicago School of Law in 1959, and was admitted to the bar that same year. Judge Reid was in private practice and served as special State's Attorney from 1970 - 1972. He became a circuit judge for the Circuit Court of Cook County in 1985. Judge Reid was assigned to the appellate court, First District in 2000, and retired from that position July 31, 2005.

The Illinois Judicial Conference extends to the family of Judge Reid its sincere expression of sympathy.

**2008 REPORT  
RESOLUTION  
IN MEMORY OF  
THE HONORABLE JAMES J. RYAN**

The Honorable James J. Ryan, former associate judge for the Circuit Court of Cook County, passed away November 3, 2007.

Judge Ryan was born March 1, 1951, in Chicago, Illinois. He received his law degree from DePaul University College of Law, and was admitted to the bar in 1977. Judge Ryan served as senior attorney and Corporation Counsel for the City of Chicago from 1976 - 1991. He became an associate judge for the Circuit Court of Cook County in 1991, and remained in that position until his death.

The Illinois Judicial Conference extends to the family of Judge Ryan its sincere expression of sympathy.

**RESOLUTION**

**IN MEMORY OF**

**THE HONORABLE CHARLES J. SMITH**

The Honorable Charles J. Smith, former circuit judge for the Fourteenth Judicial Circuit, passed away January 27, 2008.

Judge Smith was born April 9, 1918, in Moline, Illinois. He received his law degree from the University of Illinois School of Law in 1942, and was admitted to the bar that same year. Prior to joining the bench, Judge Smith worked in both the public and private sectors. Judge Smith served as an associate judge for the Fourteenth Judicial Circuit from 1964 - 1968. He became a circuit judge in 1968.

The Illinois Judicial Conference extends to the family of Judge Smith its sincere expression of sympathy.

**2008 REPORT  
RESOLUTION  
IN MEMORY OF  
THE HONORABLE HARRY D. STROUSE, JR.**

The Honorable Harry D. Strouse, Jr., former appellate judge for the Second District, passed away March 6, 2008.

Judge Strouse was born October 21, 1923, in Rochester, New York. He received his law degree from the University of Michigan School of Law in 1950, and was admitted to the Illinois bar that same year. Judge Strouse served as an assistant State's Attorney and as an assistant U. S. Attorney from 1956 - 1963. He became an associate judge for the Nineteenth Judicial Circuit in 1963. Judge Strouse was assigned to the Second District Appellate Court from 1984 - 1986.

The Illinois Judicial Conference extends to the family of Judge Strouse its sincere expression of sympathy.

**RESOLUTION**

**IN MEMORY OF**

**THE HONORABLE WAYNE C. TOWNLEY, JR.**

The Honorable Wayne C. Townley, Jr., former circuit judge for the Eleventh Judicial Circuit, passed away August 11, 2007.

Judge Townley was born January 9, 1929, in Bloomington, Illinois. He received his law degree from the University of Illinois School of Law in 1952, and was admitted to the bar that same year. Judge Townley served mainly in the public sector prior to joining the bench. He served as an associate judge for the Eleventh Judicial Circuit from 1962 - 1970, and as a circuit judge from 1970 - 1992.

The Illinois Judicial Conference extends to the family of Judge Townley its sincere expression of sympathy.

**2008 REPORT  
RESOLUTION  
IN MEMORY OF  
THE HONORABLE LLOYD A. VAN DEUSEN**

The Honorable Lloyd A. Van Deusen, former appellate judge for the Second and Third Districts, passed away November 1, 2007.

Judge Van Deusen was born June 10, 1917, in Gary, Indiana. He received his law degree from Northwestern University School of Law in 1948, and was admitted to the bar that same year. Judge Van Deusen served as an associate judge for the Nineteenth Judicial Circuit from 1966 - 1970, and a circuit judge from 1970 - 1980. He was assigned to serve in the Third District Appellate Court from 1982 - 1983, and the Second District Appellate Court from 1983 - 1984.

The Illinois Judicial Conference extends to the family of Judge Van Deusen its sincere expression of sympathy.

**RESOLUTION**

**IN MEMORY OF**

**THE HONORABLE JAMES M. WALTON**

The Honorable James M. Walton, former circuit judge for the Circuit Court of Cook County, passed away January 15, 2008.

Judge Walton was born August 17, 1926, in Norfolk, Virginia. He received his law degree from DePaul University School of Law in 1959, and was admitted to the bar that same year. Judge Walton served as an assistant State's Attorney and assistant Public Defender for Cook County from 1961 - 1964.

The Illinois Judicial Conference extends to the family of Judge Walton its sincere expression of sympathy.

**RECOGNITION OF RETIRED JUDGES**

**BEATTY, Joseph F.** was born November 10, 1948, in Rock Island, Illinois. He received his law degree from St. Louis University School of Law, and was admitted to the Illinois bar in 1977. Judge Beatty was a law clerk for the Court of Appeals in the St. Louis District, served as a public defender for St. Louis and a prosecutor for St. Louis County. He also served as an assistant State's Attorney for Rock Island County, and was in private practice, before joining the Fourteenth Judicial Circuit Court in 1984. Judge Beatty was last retained in December of 2002. He retired December 31, 2007.

**BERLAND, Richard B.** was born July 19, 1943, in Chicago, Illinois. He received his law degree from DePaul University College of Law in 1968, and was admitted to the bar that same year. Judge Berland served solely in the private sector until being appointed to the bench in 1985. He retained his position with the Circuit Court of Cook County until his retirement July 11, 2008.

**BRONSTEIN, Philip L.** was born February 2, 1952. He received his law degree from IIT Chicago-Kent College of Law in 1976, and was admitted to the bar that same year. Judge Bronstein served mainly in the public sector until being appointed a circuit judge for the Circuit Court of Cook County in 1989. He was elected in 1990 and retained that position until his retirement January 27, 2008.

**BYRNE, Robert E.** was born July 10, 1941, in Oak Park, Illinois. He received his law degree from Loyola University Chicago School of Law, and was admitted to the bar in 1968. Judge Byrne served solely in the private sector before becoming an associate judge for the Eighteenth Judicial Circuit in 1986. He was appointed a circuit judge in 1991, and was elected in 1992. In 2001, Judge Byrne was assigned by the Illinois Supreme Court to the Second District Appellate Court. Judge Byrne retired July 6, 2008.

**CALLUM, Thomas E.** was born May 18, 1944, in Evergreen Park, Illinois. He received his law degree from IIT Chicago-Kent College of Law in 1973, and was admitted to the bar that same year. Judge Callum began his legal career as an assistant Cook County State's Attorney, and then as an assistant State's Attorney in DuPage County. In 1986, he was appointed an associate judge for the Eighteenth Judicial Circuit. He became a circuit judge in 1994, and served as chief judge for the Eighteenth Judicial Circuit from 1999 until 2001, when he was appointed to the Second District Appellate Court by the Illinois Supreme Court. He remained in that position until his retirement July 6, 2008.

**CINI, Dale A.** was born July 15, 1942, in Chicago, Illinois. He received his law degree from the University of Illinois College of Law in 1965, and was admitted to the bar that same year. Judge Cini served solely in the private sector until becoming an associate judge for the Fifth Judicial Circuit in 1993. He became a circuit judge in 1996, and retained that position until his retirement January 6, 2008.

**COCO, Gloria G.** was born May 10, 1950, in Chicago, Illinois. She received her law degree from Northern Illinois University College of Law, and was admitted to the bar in 1979. Judge Coco has served as an assistant Cook County State's Attorney, a special assistant Attorney General and an assistant Illinois Attorney General. In 1991, she became an associate judge for the Circuit Court of Cook County, a position she retained until her retirement November 30, 2007.

**DARCY, Daniel P.** was born August 3, 1947, in Chicago, Illinois. He received his law degree from Loyola University Chicago School of Law in 1982, and was admitted to the bar that same year. Before becoming an attorney, Judge Darcy was a patrol officer and homicide detective with the Chicago Police Department. From 1982 until 1996, he was an assistant Cook County State's Attorney. Judge Darcy became a circuit judge for the Circuit Court of Cook County in 1996, and retired from that position July 31, 2008.

**DiMARZIO, Philip L.** was born February 22, 1949, in DeKalb, Illinois. He received his law degree from the University of Illinois College of Law in 1973, and was admitted to the bar that same year. Judge DiMarzio was in private practice, served as an assistant Cook County State's Attorney, and as the State's Attorney for DeKalb County. In 1988, he was elected a judge for the Sixteenth Judicial Circuit, serving as chief judge from 2002 - 2004. Judge DiMarzio retired March 29, 2008.

**DUNCAN, Edward R., Jr.** was born October 23, 1945. He received his law degree from the University of Illinois College of Law in 1972, and was admitted to the bar that same year. Judge Duncan served solely in the private sector until becoming an associate judge for the Eighteenth Judicial Circuit in 1987. He became a circuit judge in 1994, and remained in that position until his retirement September 30, 2007.

**EDMONDSON, Wiley W.** was born May 20, 1948, in Chicago, Illinois. He received his law degree from The John Marshall Law School in 1975, and was admitted to the bar that same year. Judge Edmondson served mainly in the private sector, except for the year he clerked for Justice Rechenmacher of the Illinois Appellate Court from 1977 through 1978. He was appointed an associate judge for the Sixteenth Judicial Circuit in 1991. He remained in that position until his retirement July 5, 2008.

**EGGERS, Robert J.** was born November 21, 1944, in Dubuque, Iowa. He received his law degree from The John Marshall Law School in 1975, and was admitted to the bar that same year. Judge Eggers served in the private sector, and as an assistant U. S. Attorney, before becoming an associate judge for the Seventh Judicial Circuit in 1991. He became a circuit judge in 1996, and retained that position until his retirement July 29, 2008.

**FALK, Bruce** was born October 5, 1947, in Chicago, Illinois. He received his law degree from DePaul University College of Law in 1972, and was admitted to the bar that same

year. Judge Falk served as an associate judge for the Twelfth Judicial Circuit from 1981 - 1991. He retired October 4, 2007.

**FROBISH, Harold J.** was born January 22, 1943, in Pontiac, Illinois. He received his law degree from the University of Illinois College of Law in 1968, and was admitted to the bar that same year. Judge Frobish served in both the public and private sectors until 1986, when he became an associate judge for the Eleventh Judicial Circuit. He became a circuit judge in 1998, and remained in that position until his retirement July 13, 2008.

**GEIGER, Donald H.** was born October 29, 1945, in Waukegan, Illinois. He received his law degree from Northwestern University School of Law in 1971, and was admitted to the bar that same year. Judge Geiger served as an assistant Lake County Public Defender, and a city prosecutor for Waukegan. He served in the private sector immediately prior to being appointed an associate judge for the Nineteenth Judicial Circuit, in 1996. He remained in that position until his retirement December 3, 2007.

**GREANIAS, John K.** was born October 21, 1943, in Decatur, Illinois. He received his law degree from the University of Illinois College of Law in 1967, and was admitted to the bar that same year. Judge Greanias was appointed to the bench in 1987, serving as a circuit judge for the Sixth Judicial Circuit. He retained that position until his retirement July 21, 2008.

**HENRY, James F.** was born December 14, 1951, in Evergreen Park, Illinois. He received his law degree from DePaul University College of Law in 1977, and was admitted to the bar that same year. Judge Henry was an assistant Cook County State's Attorney from 1978 - 1983. From 1983 until 1988, when he was appointed to the bench, he served in the private sector. He retained his judicial position until his retirement October 31, 2007.

**KELLEY, Daniel J.** was born January 23, 1953, in Oak Park, Illinois. He received his law degree from The John Marshall Law School in 1980, and was admitted to the bar that same year. Judge Kelley was an assistant Cook County State's Attorney from 1980 until 1984, when he was elected to the bench. He retired January 28, 2008.

**KILANDER, Robert K.** was born May 27, 1943, in Minot, North Dakota. He received his law degree from DePaul University College of Law in 1970, and was admitted to the bar that same year. Judge Kilander served as an assistant DuPage County State's Attorney from 1970 - 1974. From 1974 - 1984 he was in private practice. In 1991, he was appointed a circuit judge for the Eighteenth Judicial Circuit. He served as chief judge of the Eighteenth Judicial Circuit from 2001 through 2005. Judge Kilander retired July 6, 2008.

**LEWIS, Theodis P.** was born January 12, 1948, in Little Rock, Arkansas. He received his law degree from the University of Illinois College of Law, and was admitted to the bar in

1974. Judge Lewis began his legal career as an assistant Illinois Attorney General. Immediately prior to becoming an associate judge for the Seventh Judicial Circuit in 1991, he was in private practice. Judge Lewis remained in that position until his retirement August 31, 2007.

**LOTT, Gay-Lloyd** was born March 12, 1937. He received his law degree from The John Marshall Law School, and was admitted to the bar in 1965. Judge Lott served as assistant Corporation Counsel for the City of Chicago from 1965 - 1967. From 1967 until 1995, when he was appointed to the Circuit Court of Cook County, he was in private practice. He retained his position until his retirement August 31, 2007.

**MATOUSH, Robert** was born March 29, 1953. He served as a circuit judge for the Fourth Judicial Circuit from May of 1987 through December of 1988. Judge Matoush retired March 28, 2008.

**McLAUGHLIN, Patrick** was born August 2, 1947, in Keokuk, Iowa. He received his law degree from St. Louis University School of Law in 1974, and was admitted to the bar that same year. Judge McLaughlin served as a circuit judge for the Second Judicial Circuit from 1986 - 1997. He retired August 1, 2007.

**McNULTY, JILL K.** was born June 1, 1935, in Peoria, Illinois. She received her law degree from Northwestern University School of Law in 1960, and was admitted to the bar that same year. Judge McNulty was the first female associate at Ross, McGowan, Hardies & O'Keefe, working there from 1960 - 1964. She served mainly in the public sector prior to being appointed an associate judge for the Circuit Court of Cook County in 1979. In 1982, she was elected a circuit court judge, and in 1990 she was elected to the First District Appellate Court. She retained that position until her retirement July 3, 2008.

**MORRISSEY, Dennis J.** was born April 3, 1949, in Chicago, Illinois. He received his law degree from DePaul University College of Law, and was admitted to the bar in 1987. Judge Morrissey served solely in the public sector, until being elected to the Circuit Court of Cook County in 1998. He retired September 11, 2007.

**MURRAY, Michael J.** was born September 6, 1934, in Chicago, Illinois. He received his law degree from DePaul University College of Law in 1962, and was admitted to the bar that same year. Judge Murray served in both the public and private sectors prior to being appointed an associate judge for the Circuit Court of Cook County in 1987. He remained in that position until his retirement December 31, 2007.

**NEMENOFF, Brian M.** was born December 3, 1947, in Chicago, Illinois. He received his law degree from the University of Illinois College of Law, and was admitted to the bar in 1974. Judge Nemenoff served solely in the public sector, except for the year he clerked for Illinois Appellate Court Justice Jay Alloy from 1974 - 1975. He became an associate

judge for the Tenth Judicial Circuit in 1986, and remained in that position until his retirement October 31, 2007.

**PETERS, Stephen H.** was born August 26, 1944, in Clinton, Illinois. He received his law degree from The John Marshall Law School, and was admitted to the bar in 1975. Judge Peters was the State's Attorney for DeWitt County. In 1987, he joined the Sixth Judicial Circuit. He served as the presiding judge in DeWitt County until his retirement July 31, 2008.

**PHELAN, William M.** was born August 26, 1932, in Chicago, Illinois. He received his law degree from The John Marshall Law School, and was admitted to the bar in 1967. Judge Phelan was a field agent for the Internal Revenue Service from 1962 - 1967, and in private practice from 1975 until being elected to the Circuit Court of Cook County in 1992. He retained that position until his retirement January 18, 2008.

**RADCLIFFE, James M., III** was born September 22, 1948, in Chicago, Illinois. He received his law degree from The John Marshall Law School, and was admitted to the bar in 1977. Judge Radcliffe served in both the public and private sectors prior to joining the Twentieth Judicial Circuit as an associate judge in 1988. He remained in that position until his retirement December 31, 2007.

**RAY, George H.** was born April 30, 1945. He received his law degree from the University of Iowa College of Law, and was admitted to the Illinois bar in 1970. Judge Ray served in both the public and private sectors until joining the Seventh Judicial Circuit as an associate judge in 1987. He remained in that position until his retirement August 31, 2007.

**SHEEHAN DREW, Nancy** was born September 17, 1942, in Chicago, Illinois. She received her law degree from The John Marshall Law School in 1983, and was admitted to the bar that same year. Judge Drew Sheehan served solely in the public sector until being elected to the Circuit Court of Cook County in 1996. She retained that position until her retirement August 18, 2007.

**SLATER, David W.** was born April 10, 1951. He received his law degree from The John Marshall Law School, and was admitted to the bar in 1976. Judge Slater served mainly in the private sector until 1984 when he became an associate judge for the Fourth Judicial Circuit. He remained in that position until his retirement August 17, 2007.

**SLOCUM, David K.** was born August 6, 1941. He received his law degree from the University of Illinois College of Law in 1971, and was admitted to the bar that same year. Judge Slocum served mainly in the private sector until 1975, when he was appointed to the Eighth Judicial Circuit. He served two terms as chief judge, from 1987 - 1991. Judge Slocum remained a circuit judge until his retirement December 31, 2007.

**SPRENGELMEYER, Victor V.** was born December 25, 1942. He received his law degree from the University of Iowa College of Law, and was admitted to the Illinois bar in 1967. Judge Sprengelmeyer was in private practice before joining the bench as an associate judge for the Fifteenth Judicial Circuit in 1991. He became a circuit judge in 2007, and remained in that position until his retirement July 3, 2008.

**STACK, James F.** was born May 21, 1932, in Chicago, Illinois. He received his law degree from DePaul University College of Law, and was admitted to the bar in 1959. Judge Stack was in private practice prior to being appointed to the Circuit Court of Cook County in 1987. He retired November 30, 2007.

**SUMNER, Thomas R.** was born December 4, 1949, in Louisville, Kentucky. He received his law degree from The John Marshall Law School in 1977, and was admitted to the bar that same year. Judge Sumner served as Cook County Public Defender, and immediately prior to joining the bench in 1988, was in private practice. He retired December 24, 2007.

**WELTER, Daniel G.** was born March 11, 1949, in Evergreen Park, Illinois. He received his law degree from IIT Chicago-Kent College of Law in 1976, and was admitted to the bar that same year. Judge Welter served mainly in the public sector until being appointed an associate judge for the Circuit Court of Cook County in 1986. He remained in that position until his retirement January 29, 2008.

## NEW JUDGES

Arce, Edward A. - Circuit Judge, Circuit Court of Cook County  
Berrones, Luis A. - Associate Judge, Nineteenth Judicial Circuit  
Betar, Michael B. - Associate Judge, Nineteenth Judicial Circuit  
Braud, Rudolph, Jr. - Associate Judge, Seventh Judicial Circuit  
Busch, Kevin T. - Associate Judge, Sixteenth Judicial Circuit  
Cavaness, Charles Clayton - Associate Judge, First Judicial Circuit  
Childress, John E. - Associate Judge, Seventh Judicial Circuit  
Cowlin, James S. - Associate Judge, Twenty-Second Judicial Circuit  
Fellheimer, Mark A. - Associate Judge, Eleventh Judicial Circuit  
Fish, Daniel A. - Circuit Judge, Fifteenth Judicial Circuit  
Fuhr, Frank R. - Associate Judge, Fourteenth Judicial Circuit  
Fullerton, Paul M. - Associate Judge, Eighteenth Judicial Circuit  
Gallagher, Thomas J. - Associate Judge, Sixteenth Judicial Circuit  
Geanopoulos, Nicholas - Circuit Judge, Circuit Court of Cook County  
Gorman Hubler, Katherine - Associate Judge, Tenth Judicial Circuit  
Griffin, John C. - Circuit Judge, Circuit Court of Cook County  
Hollerich, Cornelius J. - Associate Judge, Thirteenth Judicial Circuit  
Kelley, Randall W. - Associate Judge, Twentieth Judicial Circuit  
Kleeman, Robert G. - Associate Judge, Eighteenth Judicial Circuit  
Kottaras, Demetrios G. - Circuit Judge, Circuit Court of Cook County  
Lowery, John S. - Associate Judge, Seventeenth Judicial Circuit  
McJoynt, Timothy J. - Associate Judge, Eighteenth Judicial Circuit  
Murphy, Allen F. - Circuit Judge, Circuit Court of Cook County  
Napp, Kyle - Associate Judge, Third Judicial Circuit  
Nash, Raymond A. - Associate Judge, Twelfth Judicial Circuit  
O'Connor, Mary E. - Associate Judge, Eighteenth Judicial Circuit  
O'Hara, James N. - Circuit Judge, Circuit Court of Cook County  
O'Malley, Veronica M. - Associate Judge, Nineteenth Judicial Circuit  
Paisley, Bradley T. - Associate Judge, Fourth Judicial Circuit  
Pierce, Daniel J. - Circuit Judge, Circuit Court of Cook County  
Sessoms, Furmin D. - Circuit Judge, Circuit Court of Cook County  
Shapiro, James A. - Circuit Judge, Circuit Court of Cook County  
Stock, Richard M. - Circuit Judge, Eighteenth Judicial Circuit  
Ward, Kevin J. - Associate Judge, Fifteenth Judicial Circuit  
Ward Kirby, Maureen - Circuit Judge, Circuit Court of Cook County  
Wilson, Karen M. - Associate Judge, Eighteenth Judicial Circuit  
Wilson, Thaddeus L. - Circuit Judge, Circuit Court of Cook County

**ANNUAL REPORT  
OF THE  
ALTERNATIVE DISPUTE RESOLUTION COORDINATING  
COMMITTEE  
TO THE ILLINOIS JUDICIAL CONFERENCE**

Hon. John O. Steele, Chair

Hon. Harris H. Agnew, Ret.  
Hon. Patricia Banks  
Hon. John P. Coady  
Hon. Claudia Conlon  
Hon. Robert E. Gordon  
Hon. David E. Haracz

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Hon. Ralph J. Mendelsohn  
Hon. Stephen R. Pacey  
Hon. Lance R. Peterson  
Hon. Bruce D. Stewart

Mr. Kent Lawrence, Esq.

October 2008

## I. STATEMENT OF COMMITTEE CONTINUATION

Since the 2007 Annual Meeting of the Illinois Judicial Conference, the Alternative Dispute Resolution Coordinating Committee ("Committee") has found that the climate for alternative dispute resolution ("ADR") continues to be favorable and the legal community has become increasingly receptive to ADR programs. This Conference year, the Committee undertook many activities, including the consideration of proposed amendments to Supreme Court Rules and formulating a plan to accomplish the projects and priorities set forth by the Court for Conference Year 2008.

As part of the Committee's charge, Court-annexed mandatory arbitration programs, operating in sixteen counties, continued to be monitored throughout the Conference year. Madison County, in the Third Judicial Circuit, commenced its operation of an arbitration program on July 1, 2007, and became the sixteenth county in Illinois operating such a program under the auspices of the Supreme Court.

In the area of mediation, the Committee continued to monitor the activities of the Court-sponsored major civil case mediation programs operating in ten judicial circuits. During the 2009 Conference year, it is anticipated that the Committee will continue to monitor Court-annexed mandatory arbitration programs, oversee and facilitate the improvement and expansion of major civil case mediation programs, consider proposed amendments to Supreme Court Rules for mandatory arbitration and continue to study and evaluate other alternative dispute resolution options. The Committee also will continue to work on the projects and priorities delineated by the Court and stand ready to accept new projects for Conference Year 2009.

Because the Committee continues to provide service to arbitration practitioners, make recommendations on mediation and arbitration program improvements, facilitate information to Illinois judges and lawyers, and promote the expansion of court-annexed alternative dispute resolution programs in the State of Illinois, the Committee respectfully requests that it be continued.

## II. SUMMARY OF COMMITTEE ACTIVITIES

### *Court-Annexed Mandatory Arbitration*

As part of its charge, the Committee surveys and compiles information on existing Court-supported dispute resolution programs. Court-annexed mandatory arbitration has been operating in Illinois in excess of twenty-one years. Since its inception in Winnebago County in 1987, under Judge Harris Agnew's leadership, the program has steadily and successfully grown to meet the needs of sixteen counties. Most importantly, Court-annexed mandatory arbitration has become an effective case management tool to reduce the number of cases tried and the length of time cases remain in the court system. Court-annexed mandatory arbitration has become widely accepted in the legal culture.

In January of each year, an annual report on the court-annexed mandatory arbitration program is provided to the legislature.<sup>1</sup> A complete statistical analysis for each circuit is contained in the annual report. The Committee emphasizes that it is best to evaluate the success of a program by the percentage of cases resolved before trial through the arbitration process, rather than focusing on the rejection rate of arbitration awards.

The following is a statement of Committee activities since the 2007 Annual Meeting of the Illinois Judicial Conference concerning Court-annexed mandatory arbitration.

### ***Projects and Priorities Prescribed by the Supreme Court***

The Supreme Court prescribed several projects and priorities for the Committee to consider in Conference Year 2008, as well as meet the dictates of the Committee's general charge and continue its consideration of projects delineated in Conference Year 2007. The Committee reviewed the list of projects/priorities from 2007 and 2008, and formulated a plan to address those projects. The Committee elected to create subgroups to study each of the projects. As part of the plan, each subgroup will study a specific project and make a recommendation to the Committee to consider as a whole. Below are the projects/priorities the Committee addressed in Conference Year 2008.

### ***Continued Conference Year 2007 Projects and Priorities***

#### ***Training of Arbitrators***

The Court charged the Committee with "reviewing materials to develop a training curriculum for mandatory arbitration personnel and conduct a needs analysis for training of arbitrators." The Committee gathered arbitrator reference manuals from every judicial circuit in the State of Illinois that has a mandatory arbitration program. The Committee subsequently developed a draft of a uniform manual that includes the required fundamental practices of mandatory arbitration. It is hoped that a uniform arbitrator reference manual will assist judicial circuits with mandatory arbitration in providing materials and training to address the requisite skill set needed to be an effective arbitrator in the State of Illinois. The Committee completed the manual in Conference Year 2008 and sent it to Administrative Director Cynthia Y. Cobbs for due consideration and possible presentation to the Court. A summary of the manual is attached.

---

<sup>1</sup>The AOIC's Court-Annexed Mandatory Arbitration Fiscal Year 2008 Annual Report will be available on the Supreme Court website ([www.state.il.us/court](http://www.state.il.us/court)) in January 2009.

**Child Custody Mediation**

The Court charged the Committee with "studying, examining and reporting on the efficacy of mediation in child custody cases in domestic relations courts as an appropriate ADR application." During Conference Year 2006, the Committee observed the Supreme Court's adoption of the Article IX Rules with respect to child custody proceedings. As part of the Article IX Rules and Supreme Court Rule 99, judicial circuits must develop a mechanism for reporting to the Supreme Court on the mediation program. During Conference Year 2007 and continuing into Conference Year 2008, the Committee dialogued with the Conference of Chief Circuit Judges regarding development of an instrument to standardize the collection of statistics for child custody and visitation mediation. The Committee also worked with the Administrative Office of the Illinois Courts and the Circuit Court of Cook County to determine what type of statistics are currently being kept and which statistics are most desirable in ascertaining the effectiveness of child custody mediation. Since collection of data on child custody mediation began on January 1, 2007, the Committee is waiting for an adequate set of statistical information before providing the Court with a report.

**Arbitrator Pro Bono Service Credit**

The Court requested that the Committee "review arbitrator services in the context of *pro bono* services, as defined by the Court." The Committee considered whether or not to make a recommendation to the Court to allow arbitrators the opportunity to waive the \$100 compensation associated with service as an arbitrator and accept *pro bono* credit in its stead. After deliberation, the Committee was in favor of the concept and recognized that Supreme Court Rules 87 and 756 would have to be amended. As proposed, the amendments would allow arbitrators to waive the set compensation rate of \$100 per arbitration hearing in exchange for *pro bono* legal service credit.

In the Committee's consideration of this matter, it was decided that Supreme Court Rule 87 (e) would have to be amended and a new subsection (f)(1)(e) would have to be created under Supreme Court Rule 756. The Committee supports this amendment as it believes that service to the legal system as an arbitrator is a community service. Further, if an arbitrator is willing to provide service *pro bono* and waive his or her fee, service as an arbitrator should be equivalent to other service to the system wherein *pro bono* credit is recognized. The Committee also realized that, for reporting purposes to the Supreme Court, a form would have to be created to prove that the attorney served as an arbitrator and opted for *pro bono* credit for the service. Pursuant to Supreme Court Rule 3, the Committee plans to present this proposal to the Supreme Court Rules Committee for consideration.

***Conference Year 2008 Projects and Priorities******Supreme Court Rule 91***

The Court requested that the Committee "reconsider proposed Supreme Court Rule 91 (Absence of a Party at Hearing)." The Committee originally made this proposal in Conference Year 2006. The original proposal would have required parties to an accident to be at the arbitration hearing in subrogation cases. It is the opinion of the Committee that the concept of good faith participation requires the major participants in cases to be present at arbitration. Their appearance and participation allows the arbitrators to properly evaluate all aspects of a dispute including witness credibility thereby insuring the integrity of the arbitration process.

In a traditional subrogation case, the plaintiff is the insurance company, not the driver of the plaintiff's car. Thus, Supreme Court Rule 237 does not apply, nor do discovery rules allow for a fair inquiry prior to the hearing. The proposed rule change to Supreme Court Rule 91 would have put the driver of the plaintiff's car or the insured into the category of a "party," making them subject to discovery and requiring their appearance at arbitration with or without a 237 notice. This rule change was intended to require of a plaintiff at arbitration, that which would be required at trial.

The Committee has begun its deliberation with respect to reconsidering and presenting this amendment to the Court for further consideration. The Committee is looking at the possibility of gathering mandatory arbitration rules from other states to ascertain whether or not this requirement exists in other jurisdictions and what impact it has on arbitration hearings.

***Jurisdictional Dollar Limits for Arbitration Programs***

As part of its projects and priorities for Conference Year 2008, the Court asked the Committee to "examine the current jurisdictional dollar limits for arbitration programs and determine if an increase is viable." The Committee has begun its initial discussions on this matter and plans to further research the impact of an increase to the arbitration jurisdictional dollar limits and its impact on the court system.

***Participant Satisfaction Survey***

The Committee was charged with "surveying program practitioners and identifying reliable measures of participant satisfaction with ADR processes." The Committee has begun preliminary discovery on this project and has begun to collect survey instruments from arbitration jurisdictions that currently conduct program participant satisfaction surveys. The Committee plans to review all survey instruments and develop a proposed instrument for statewide dissemination. Once data is returned and tabulated, the Committee will formulate a report for the Court's consideration.

*Other Initiatives*

The Supreme Court charged the Committee, generally, with "undertaking any such other projects or initiatives that are consistent with the Committee's charge." During Conference Year 2008, the Committee began consideration of other initiatives such as arbitrator chair qualifications pursuant to Supreme Court Rule 87, attorney costs as part of the arbitration award, examining additional rejection statistics and time frames, and working with the Fourteenth Judicial Circuit on a settlement data initiative.

*Mediation*

Presently, Court-approved civil mediation programs operate in the First, Eleventh, Twelfth, Fourteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twentieth Circuits and the Circuit Court of Cook County. Supreme Court Rule 99 governs the manner in which mediation programs are conducted. Actions eligible for mediation are prescribed by local circuit rule in accordance with Supreme Court Rule 99.

Court-approved mediation programs have been successful and well received, and have resulted in a quicker resolution of many cases. It is important to recognize that the benefits of major civil case mediation cannot be calculated solely by the number of cases settled. Because these cases are major civil cases by definition, early resolution of a case represents a significant savings of court time for motions and status hearings as well as trial time. Additionally, in many of these cases, resolving the complaint disposes of potential counterclaims, third-party complaints and, of course, eliminates the possibility of an appeal. Finally, Court-approved mediation programs are considered by many parties as a necessary and integral part of the court system. They are responsive to a demonstrated need to provide alternatives to trial and have been well received by the participants.

The Committee continues to observe the implementation of new programs as well as monitor existing programs. The Committee also continues to study the area of child custody mediation in accord with the Supreme Court's Article IX Rules with respect to child custody proceedings.

**III. PROPOSED COMMITTEE ACTIVITIES FOR THE NEXT CONFERENCE YEAR**

The Committee requests to continue its work toward completing the projects and priorities outlined for Conference Year 2008 as well as the projects which remained from Conference Year 2007. Those projects include consideration of arbitrator training, examining child custody mediation, reconsideration of Supreme Court Rule 91, consideration of the impact of an increase to the jurisdictional dollar limits for arbitration programs, developing a statewide arbitration program participant satisfaction survey, and other initiatives as directed by the Court.

During the 2009 Conference year, the Committee also will continue to monitor and assess Court-annexed mandatory arbitration programs, suggest broad-based policy recommendations,

explore and examine innovative dispute resolution techniques and continue studying the impact of rule amendments. In addition, the Committee will continue to study, draft and propose rule amendments in light of suggestions and information received from program participants, supervising judges and arbitration administrators. The Committee further plans to facilitate the improvement and expansion of major civil case mediation programs, along with actively studying and evaluating other alternative dispute resolution options. As a final matter, the Committee will continue to study the projects/priorities and other assignments delineated by the Court for the upcoming Conference year.

**IV. RECOMMENDATIONS**

The Committee is making no recommendations to the Conference at this time.

## 2008 REPORT

2008 REPORT

# ATTACHMENT

## **Summary and Intended Purpose of the Uniform Arbitrator Reference Manual**

This statewide, uniform manual is a compilation of rules and statutes, applicable case law, questions and answers, checklists, scenarios and explanations, all pertaining to the proper practices to be followed when a case proceeds through the mandatory arbitration system. The various sections of this uniform manual contain information relative to administrative regulations, qualifications necessary to become an arbitrator, types of cases that are eligible for mandatory arbitration, and the actual steps of an arbitration proceeding including the entry of an award at the conclusion of the hearing. Also included are sections setting out the Illinois Supreme Court Rules and Statutes applicable to these proceedings as well as examples of local rules, which will differ slightly in each circuit, and how these local rules should be applied in a manner that is consistent with the overall goal of the program. Selected case law setting out various scenarios that have occurred in arbitration proceedings, and ultimate rulings on how these scenarios should be handled based on these precedents, is covered in a comprehensive outline format. Information on compliance with Supreme Court Rules and factors to be considered in determining *good faith participation*, the key to the whole arbitration proceeding, is present throughout the uniform manual.

This uniform manual was created for the purpose of responding to a prevailing need to achieve consistency in arbitration proceedings throughout the state and uniformity among the various counties/circuits in which mandatory arbitration is successfully utilized to resolve appropriate cases in an informal, but serious, alternative process. The ultimate goal is to give arbitrators, and all of the other advocates of the mandatory arbitration system statewide, a compilation of information to ensure that they share the same understanding of the purpose of the program and implement their responsibilities and decisions in a manner consistent with achieving uniformity through ongoing developments in legislation and case law.

**ANNUAL REPORT  
OF THE  
AUTOMATION AND TECHNOLOGY COMMITTEE  
TO THE ILLINOIS JUDICIAL CONFERENCE**

Hon. Kenneth A. Abraham, Chair

Hon. Adrienne W. Albrecht  
Hon. Robert E. Byrne  
Hon. Francis J. Dolan

Hon. John K. Greanias  
Hon. William G. Schwartz  
Hon. Thomas H. Sutton

October 2008

## I. STATEMENT ON COMMITTEE CONTINUATION

The Automation and Technology Committee ("Committee") of the Illinois Judicial Conference shall provide consultation, guidance, and recommendations regarding standards, policies, and procedures relating to the use of technology and automation within the judicial branch.

The Committee's charge includes the development of general guidelines which promote the effective and efficient use of technology and automation in the trial courts, including recommendations for statewide standards, protocols, or procedures. The Committee shall analyze and develop recommendations related to rules and statutory changes that will manage the use of technology within the courts. The Committee's work also includes the review and evaluation of technology applications and their impact on the operation and workflow of the court. The Committee also will research and recommend response protocols to resolve security issues which may affect the use of technology.

The Automation and Technology Committee requests that it be continued in the 2009 Conference Year.

## II. SUMMARY OF COMMITTEE ACTIVITIES

The Committee completed the analysis and prepared an Impact Statement researching the technology and use of video court/conferencing systems. The Committee analyzed the features, technology and components of video court/conference systems and identified the benefits, detriments and potential use in the trial courts. Recommendations are included identifying amendments to Supreme Court Rules that would govern the use of video conference technology in civil and criminal proceedings.

The Committee also reviewed the Disaster Recovery Guide presented during the 2006 Conference Year. A description of the Committee's activities is summarized below.

### A. Video Arraignment/Deposition (Video Court) Project

For Conference Year 2008, the Supreme Court assigned the Automation and Technology Committee to continue its work on the analysis of video court/conference technologies, consistent with the 2007 Conference Year assignment, yielding an Impact Statement with recommendations on proposed changes to Supreme Court Rules that might govern its use in the circuit courts.

The Committee completed its analysis of video/court conference systems, including its effect on Supreme Court Rules and the impact of using such technologies in the trial courts. For the purpose of the Committee's work, video court/conference systems are defined as an interactive video conference technology that allows judicial proceedings (*i.e.*, arraignments, bond calls, first appearances, or remote testimonies) to be conducted with participants in different locations.

The use of video conference technologies appears to be an option of increasing value to

the efficient administration of justice. However, the use of video court systems should be considered against its overall effects on the operation of the larger court system and the fundamental rights of the parties to its equal access and to confront witnesses. Most recently, the improvements in technology and the clarification of means whereby technology and civil rights may coexist have led court systems to, again, review video court/conference systems and their use in the courtroom. The Committee's Impact Statement, which is attached for the Court's consideration, explores the benefits and detriments of video court/conference systems, the state of its use by courts, and the state of the law governing the use of this technology. Recommendations are made proposing changes to Supreme Court Rules relating to the use of video court/conference systems. Should the Court adopt the Committee's recommendations regarding video court/conference systems, statutory provisions may be implicated and require amendments.

Although the Impact Statement differentiates the use of video court/conferencing systems between civil and criminal hearings, general benefits and detriments of this technology include the following.

Benefits:

- Increased efficiency in court operations.
- Reduction in transportation costs
- Flexibility and ease of scheduling witnesses.
- Accelerated resolution of cases.

Detriments:

- Initial cost of video court/conference system is high.
- Recurring cost in operation - maintenance/support.
- Reliability or malfunctions in equipment.
- Security to prevent unauthorized access.
- Rights of parties to confront witnesses.

**B. Disaster Recovery Guide - Review**

The Committee reviewed the Disaster Recovery Guide presented to the Conference in 2006. Although no changes are recommended at this time, the Committee is requesting a 2009 Conference Year assignment to study the Disaster Recovery Guide with respect to criminal law and compliance with the time sensitive nature of criminal law during a disaster.

**III. PROPOSED COMMITTEE ACTIVITIES FOR THE NEXT CONFERENCE YEAR**

For the 2009 Conference Year, the Automation and Technology Committee proposes the following projects be assigned.

- ▶ Review of Disaster Recovery Guide with respect to criminal law and criminal law

issues. Such a study would focus on criminal law issues and the time sensitive nature of criminal proceedings during a disaster and alternatives that might avail themselves. In addition, the Committee requests to review the security-related problems to the court system during a disaster.

- ▶ Conceptual analysis identifying the uses of a secure website and how such a technology might be used in the trial courts.

The Committee is receptive to any other assignments from the Court.

#### IV. RECOMMENDATIONS

The Committee recommends that the Conference forward its Impact Statement to the Court for its consideration.

With respect to civil hearings, the Committee recommends that the Court modify Supreme Court Rules 63 and 206 to include the use of video court/conference systems to take remote testimony, similar to the language used by the federal courts.

In addition, the Committee recommends that the Court adopt a new rule which states:

“The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from different locations.”

With respect to criminal hearings, the Committee recommends Supreme Court Rules 401, 402, 411-417, and 605 be modified as proposed below.

##### Rules 401 - 402:

Supreme Court Rules 401– 402 should be revised to include a paragraph similar to the bond statute or the initial appearance statute so that it specifically “permits a person to appear by video conferencing equipment as set forth in 725 ILCS 5/106D-1” when a defendant is required to appear before it for a hearing on a plea and the defendant has waived the right to be present.

##### Rules 411 - 417:

Supreme Court Rules 411– 417 should be revised to include a paragraph similar to the bond statute or the initial appearance statute so that it specifically “permits a person to appear by video conferencing equipment as set forth in 725 ILCS 5/106D-1” when a defendant is required to appear before it for a hearing on a discovery issue.

##### Rule 605:

Supreme Court Rule 605 should be revised to include a paragraph similar to the bond statute or the initial appearance statute so that it specifically “permits a person to appear by video conferencing equipment as set forth in 725 ILCS 5/106D-1” when a defendant is required to

appear before it for a hearing on a plea and the defendant has waived the right to be present.

The Committee recommends that a local technology committee be established in any trial court planning to use video court/conferencing technologies. This group would define the need and use of a video court system and evaluate its use with regard to Illinois statutes and Supreme Court Rules and assist with the creation of any local rules.

The Committee also recommends that consideration be given to the planning, design and aesthetics of the courtroom, which are intended to provide an acceptable audio and video quality during proceedings. Reference materials, available from the Committee's Impact Statement, provide guidance in the planning and use of video court/conference systems.

The Committee recommends that any jurisdiction implementing a video court/conference system adopt local policies and procedures governing the use of such systems, including training, maintenance, upgrades to the system, and a protocol for equipment malfunctions.

## 2008 REPORT

**IMPACT**  
**STATEMENT**

## 2008 REPORT

# **VIDEO COURT/CONFERENCE IMPACT STATEMENT 2008**



ILLINOIS JUDICIAL CONFERENCE  
AUTOMATION AND TECHNOLOGY COMMITTEE  
Revision: July 17, 2008

<b>Video Court/Conference System - Impact Statement</b>
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Videoconferencing - National Center for State Courts Briefing Paper ..... C

Bridging the Distance - Implementing Videoconferencing in Wisconsin - 2005 ..... D  
The Planning & Policy Advisory Committee Videoconferencing Subcommittee  
Wisconsin Supreme Court

The Technology of Videoconferencing - National Center for State Courts CTC4 Session - 1994 ..... E

TeleJustice - Videoconferencing for the 21<sup>st</sup> Century - National Center for State Courts CTC5 Session - 1997 ..... F

Courtroom Audio, Video and Videoconferencing - National Center for State Courts CTC5 Session - 1997 ..... G

Planning Rooms for Videoconferencing ..... H  
aclearn.net website - Janet Factsheet

Videoconferencing Standards ..... I  
aclearn.net website - Janet Factsheet

Videoconferencing Safety ..... J  
aclearn.net website - Janet Factsheet

International Telecommunications Union - H.323 Definition ..... K  
Webopedia website

International Telecommunications Union - H.320 Definition ..... L  
Wikipedia website

**Note: Please advise the Administrative Office if you would like a copy of the Reference Material listed on this page.**

## Video Court/Conference System - Impact Statement

### 1. STATEMENT OF PURPOSE AND COMMITTEE'S CHARGE

#### Committee's Statement of Purpose.

The Automation and Technology Committee shall provide consultation, guidance, and recommendations regarding standards, policies and procedures relating to the use of technology and automation within the judicial branch.

#### Committee's Charge and Conference Year 2008 Projects.

The Committee shall develop general guidelines which promote the effective and efficient use of technology and automation in the trial courts including recommendations for statewide standards, protocols, or procedures. The Committee shall analyze and develop recommendations related to rules and statutory changes that will manage the use of technology within the courts. The Committee's work also includes the review and evaluation of technology applications and their impact on the operation and workflow of the court. The Committee also will research and recommend response protocols to resolve security issues which may affect the use of technology.

#### Assignments - 2008 Conference Year

Continue work on the Video Court/Conference Impact Statement consistent with the 2007 Conference Year assignment.

Undertake any such other projects or initiatives that are consistent with the Committee charge.

#### Assignments - 2007 Conference Year

##### Video Arraignment/Deposition Technologies:

The Automation and Technology Committee was assigned to analyze and evaluate the use of video arraignment and video conferencing technologies and their impact on court proceedings. This research is to yield an impact statement and, if necessary, propose rule amendments as needed to conduct court hearings from remote locations.

##### Disaster Recovery Guide:

The Committee was assigned to review the Disaster Recovery Guide for revisions.

<b>Video Court/Conference System - Impact Statement</b>
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## 2. INTRODUCTION

The Illinois Judicial Conference Automation and Technology Committee was assigned to analyze and evaluate the use of video arraignment and video conferencing technologies and their impact on court proceedings. In this Impact Statement, a ‘video court/conferencing system’ is defined as an interactive video conference technology that allows judicial proceedings to be conducted with participants in different locations, such as arraignments, bond calls, first appearances, or remote witness testimonies.

Video court/conference systems would appear to be an option of increased value to the efficient administration of justice. Through its sponsorship of the Courtroom 21 project at the College of William and Mary and the biannual Court Technology Conference, the National Center for State Courts has long promoted videoconferencing as a tool to assist trial courts.

The use of video court/conferencing systems, however, should be considered against its real and potential overall effects on the operation of the larger court system and the fundamental rights of the parties to its equal access and to confront witnesses. Courts have been reticent to adopt this technology for a number of reasons including clarity of video and audio signals as well as concerns over deprivation of the civil rights of criminal defendants. Over recent years, the advances of technology and the clarification of means whereby technology and civil rights may coexist have led many court systems to again review video court/conferencing systems and their use in the courtroom.

This Impact Statement explores the benefits and detriments of video court/conferencing systems, the state of its use by other court systems and the state of the law governing its use. Recommendations are made regarding proposed changes to Supreme Court Rules.

## Video Court/Conference System - Impact Statement

### 3. ANALYSIS OF VIDEO COURT/CONFERENCE SYSTEMS

#### 3.1 Summary of Impact Statement

This Impact Statement identifies the use and impact of video court/conference systems, while differentiating civil hearings from criminal hearings. General benefits and detriments to the use of video court conference systems would apply to the overall use of this technology in court proceedings.

Benefits to the use of a video court/conferencing system include:

- ▶ Increased efficiency in court operations.
- ▶ Reduction in transportation costs.
- ▶ Flexibility and ease in scheduling witnesses.
- ▶ Accelerated resolution of cases.

Detriments to the use of a video court/conferencing system include:

- ▶ Initial expenses to a video court/conferencing system are high.
- ▶ Recurring costs in operation - maintenance.
- ▶ Equipment reliability and malfunctions.
- ▶ Security to prevent unauthorized access.
- ▶ Rights of parties to confront witnesses.

#### Civil Hearings

Although video court/conferencing systems appear to be regularly used in criminal hearings, i.e., bond hearings, the use in civil hearings has been less frequent. A video court/conference session may occur most frequently in the civil proceedings listed below and may provide efficiencies to the court by addressing health or financial obstacles of parties, geography or travel challenges, and timing or short notice issues.

- Motion practice.
- Settlement proceedings.
- Facilitating the presence of a party at trial, such as an aged, disabled, or an out-of-state plaintiff (who was able to be present for opening or closing arguments).
- Witness testimony.
- Oral arguments in appellate court proceedings.

The Code of Civil Procedure provides for the use of video conferencing technologies, in accordance with Supreme Court Rules, as indicated in Section 2-620 (735 ILCS 5/2-620) governing motion practice and Section 2-1004 (735 ILCS 5/2-1004) governing pre-trials.

The Uniform Interstate Family Support Act (UIFSA), 750 ILCS 22/316(f), provides that a party or witness, which resides in another state, can testify or be deposed by telephone, audiovisual, or other electronic means.

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), 750 ILCS 36/111, similarly provides for the admission of testimony of witnesses by telephone, audiovisual, or other electronic means.

The Federal Rules of Civil Procedure, Rule 43(a), allow the judge discretion in accepting remote testimony.

‘The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location.’ FRCP 43(a).

Although the ability to use video taped evidence depositions in civil proceedings might replace the need and benefit of video court/conference technologies, there may be circumstances that could be satisfied using such technologies. Factors such as timeliness, security and finances may encourage the use of video conference technologies, in particular for domestic violence, child custody or child support hearings.

With respect to civil hearings, the Automation and Technology Committee recommends that the Court modify Supreme Court Rules 63 and 206 to include the use of video court/conference systems to take remote testimony.

In addition, the Automation and Technology Committee recommends that the Court adopt a new Rule which states:

“The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location.”

### Criminal Hearings

The use of video court conference systems in criminal hearings appears more frequent in general and specifically in the Illinois trial courts. The following are benefits and detriments to the use of video conference technologies in criminal proceedings.

#### Benefits in criminal hearings.

- Reduction in travel costs and time for judges, reducing cross-venue (county) hearings.
- Reduction in transportation costs for prisoners.
- Reduce the discomfort to a defendant being transported.
- Improve security to a courthouse and parties by use of video conference technologies.
- Improved efficiency in not waiting for the transfer of prisoners to the courtroom.

#### Detriments in criminal hearings.

- Initial cost and upkeep of video court/conference system.
- Inability of a defendant to privately meet with counsel.
- Depersonalizing the court proceedings.

In August 2007, the legislature amended the statute “Defendant’s Appearance by Closed Circuit Television and Video Conference” (725 ILCS 5/106D-1) to specify when video conference technologies could be used and set forth the following proceedings:

- the initial appearance before a judge on a criminal complaint, at which bail will be set;
- the waiver of a preliminary hearing;
- the arraignment on an information or indictment at which a plea of not guilty will be entered;
- the presentation of a jury waiver;
- any status hearing;
- any hearing conducted under the Sexually Violent Persons Commitment Act at which no witness testimony will be taken; and
- at any hearing conducted under the Sexually Violent Persons Commitment Act at which no witness testimony will be taken.

The statute also allows other court appearances to be held by video conference if a waiver by the defendant is secured. (725 ILCS 5/106D-1(c)). The following is a list of statutes and Supreme Court Rules applicable to video court/conferencing systems.

#### Illinois Statutes

- 725 ILCS 5/103-6: requires that a jury waiver be in open court.
- 725 ILCS 5/106B-5: provides that a victim in a criminal assault, who is under the age of 18 or is moderately, severely, or profoundly mentally retarded, may testify via closed circuit television, if certain identified criteria are met.
- 725 ILCS 5/106D-1: allows for the appearance of a defendant via closed circuit television and video conference at certain enumerated proceedings and waiver of right to be physically present at any criminal proceedings.
- 725 ILCS 5/110-5.1(c): permits a person who is required to appear for bond setting to appear by video conferencing.

#### Illinois Supreme Court Rules

- Supreme Court Rule 401: requires a waiver of counsel to be in open court;
- Supreme Court Rule 402: requires a defendant to appear personally in open court to enter a plea of guilty or stipulation;
- Supreme Court Rule 402A: requires that a defendant appear personally in open court to admit or stipulate to a violation of probation;
- Supreme Court Rule 403: requires that a person under 18 shall not be permitted to enter a plea of guilty or to waive a trial by jury, unless he is represented by counsel in open court;

- Supreme Court Rule 416(e): provides that a defendant does not have a right to be present during depositions relating to a capital case;
- Supreme Court Rule 45(d): provides for and prescribes the types of electronic recording equipment that may be used in the circuit courts;
- Supreme Court Rule 63(a)(7): provides that the taking of photographs, broadcasting or televising of court proceedings is permitted only to the extent authorized by order of the Supreme Court. These terms are defined to include the audio or video transmissions or recordings made by telephones, personal data transmissions or recordings made by telephones, personal data assistants, laptop computers, and other wired or wireless data transmissions and recording devices;
- Supreme Court Rule 63: provides for the transmission of data for purposes of a security system.

With respect to criminal hearings, the Automation and Technology Committee recommends Supreme Court Rules 401, 402, 411 - 417, and 605 be modified as proposed below.

#### Supreme Court Rules

##### Rules 401 - 402:

Supreme Court Rules 401– 402 should be revised to include a paragraph similar to the bond statute or the initial appearance statute so that it specifically “permits a person to appear by video conferencing equipment as set forth in 725 ILCS 5/106D-1” when a defendant is required to appear before it for a hearing on a plea and the defendant has waived the right to be present.

##### Rules 411 - 417:

Supreme Court Rule 411– 417 should be revised to include a paragraph similar to the bond statute or the initial appearance statute so that it specifically “permits a person to appear by video conferencing equipment as set forth in 725 ILCS 5/106D-1” when a defendant is required to appear before it for a hearing on a discovery issue.

##### Rule 605:

Supreme Court Rules 605 should be revised to include a paragraph similar to the bond statute or the initial appearance statute so that it specifically “permits a person to appear by video conferencing equipment as set forth in 725 ILCS 5/106D-1” when a defendant is required to appear before it for a hearing on a plea and the defendant has waived the right to be present.

Should the Court adopt the Committee’s recommendations regarding video court/conference systems, statutory provisions may be implicated and require amendments.

The Automation and Technology Committee recommends that a local technology committee be established in any trial court planning to use video court/conferencing technologies. This group would assess the need and use of a video court system and evaluate its use with regard to Illinois statutes, Supreme Court Rules, and the need for local rules.

The Automation and Technology Committee also recommends that consideration be given to the planning, design and aesthetics of the courtroom, which are intended to provide an acceptable audio and video quality during proceedings. Reference materials, available from the Committee's Impact Statement, provide guidance in the planning and use of video court/conference systems.

The Automation and Technology Committee further recommends that any jurisdiction implementing a video court/conference system adopt local policies and procedures governing the use of such systems, including training, maintenance, upgrades to the system, and steps to address equipment malfunctions.

<b>Video Court/Conference System - Impact Statement</b>
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## 4. LEGISLATION, CASE LAW AND SUPREME COURT RULES

### 4.1 Civil Hearings

#### 4.1.1 Overview of Law and Use of Video Court/Conference Systems

Video court/conferencing is an interactive technology that allows judicial proceedings to be conducted with participants in different locations. Audio and visual images are simultaneously transmitted, so that all participants are able to hear and see each other in real time. This is to be distinguished from the use of videos (e.g., evidence deposition which proceeds as a conventional deposition, but the record of the deposition is initially made on videotape rather than via a stenographic transcript; and, demonstrative evidence: assembled before trial, recording it on videotape and then showing the videotape to the trier of fact as in a “Day in the Life” of a plaintiff with catastrophic permanent injuries. These types of videos are widely accepted in judicial proceedings. Although video court/conferencing systems are in regular use in some aspects of criminal proceedings, such as bond hearings, its use in civil hearings has been less frequent.

Some statutes authorize court proceedings to proceed via video conferencing while other proceedings depend upon stipulation of all parties and the court. The experience in other civil and criminal applications, however, appears to support the position that through evolving technology the quality and reliability of video court/conferencing systems are increasing exponentially while the cost continues to decrease. Also, its use enhances the efficiency of judicial proceedings.

Some current uses of video court/conferencing systems in civil proceedings include:

- Motion practice
- Settlement proceedings
- Facilitating the presence of a party at trial (e.g., an aged and disabled out-of-state plaintiff who was able to be “present” for opening and closing arguments)
- Witness testimony at trial (e.g., shareholders from multiple other states in a class action suit, medical experts from locations remote to the site of trial)
- Oral arguments in appellate court proceedings

These uses usually satisfy needs caused by one or more of the following: short notice, geographic distance, travel arrangements, health problems, financial burden and other inconveniences.

Looking forward, the use of video court/conferencing systems will accelerate at a pace driven by technology, recognition and use by members of the bar, and the Court's continued commitment to offer the most efficient administration of justice.

## Benefits of video conferencing:

- Increased efficiency
- Reduced transportation costs
- Ease of scheduling witnesses
- Accelerated resolution of cases

## Detriments of video conferencing:

- Initial expense and recurring maintenance costs
- Quality of video image and audio
- Equipment reliability
- Security to prevent unauthorized access
- Rights of parties to confront witnesses

The use of video court/conferencing technology should not be ignored for purposes of settlement conferences. When there is a party or an insurance adjuster who is unable to physically attend the pretrial, video conferencing technology may aid in bridging the gap between the motivation provided by physical presence of the key parties and the absence of such motivation when the only communication available is by telephone. In other words, it is far easier to say “no” on the telephone than when there is eye-to-eye contact.

Traditionally, testimony has been presented exclusively by witnesses located in the courtroom, with the trier of fact having the opportunity to hear and observe the demeanor of the witness, *In re C.M., B.M. and E.M.*, 319 Ill.App.3d 344; 744 N.E.2d 916; 2001 Ill. App. LEXIS 59; 253 Ill. Dec. 183 (Ill.App. 1<sup>st</sup> Dist. 2001). That opportunity has been deemed so significant that it has become a mantra for the explanation given by higher courts for the deference to which the trial court’s findings of fact are entitled, *In re Marriage of Ricketts*, 329 Ill.App.3d 173, 768 N.E.2d 834, 263 Ill.Dec. 753 (Ill.App. 2d Dist, 2002). The deference given to the trial court is nowhere greater than in matters involving children, where the trial court is considered peculiarly well suited to observe and make credibility judgments.

However, the traditional notions of trial conduct are now being challenged by three simultaneous considerations: technology, mobility, and efficiency. We now live in a society that is so mobile that parents and children often find themselves hundreds, or even thousands of miles apart. For a party, particularly in family law litigation, to present in person testimony from all of the witnesses having relevant information is often impractical, if not impossible. Furthermore, with regards to video and audio conferencing, the cost has plummeted as the quality has increased exponentially.

For most civil proceedings, the ability to use video taped evidence depositions eliminates the need for the admission and use of remote testimony. However, there are three important factors which may make the use of evidence depositions unsatisfactory. They are time, security and finances. In those circumstances, the court may want to entertain the admission of remote testimony.

In particular, two family law issues have presented logistical difficulties and evoked parochial tendencies by the courts: child custody and child support. The presence of children on milk cartons and emotionally wrenching news magazine productions resulted, in part, from a legal free-for-all system in which almost every state and country was susceptible to the pleas of its current resident that their court needed to step in to protect their child or children. Avoidance of child support obligations was all too frequently accomplished by moving across state lines; where enforcement was difficult or practically impossible.

Child custody and support decisions, particularly the determination of which State has jurisdiction, are time sensitive. The need for children to attain and maintain security is so powerful that the Supreme Court has imposed time deadlines on both trial and appellate courts. Further, the legislature has provided for accelerated temporary hearings in most matters involving children. In addition, distances between parties provide one party with strategic and financial advantages that can be ameliorated by the use of remote testimony.

Also, in the gray area between civil and criminal proceedings presented by the Domestic Violence Act, there may be security reasons why the courts should allow remotely generated testimony. Frequently, the perpetrator sees court hearings over the issuance of civil orders of protection as an opportunity to attack the victim as she or he enters or leaves for court. Allowing the victims to testify from the Sheriff's office or some other remote locations may enhance law enforcement's ability to provide for their protection.

#### 4.1.2 Statutes and Federal Rule Applicable to Video Court/Conference Systems

##### Code of Civil Procedure

As a general rule, when it comes to court appearances, the Code of Civil Procedure defers to the Supreme Court Rules. Hence, Section 2-620 (735 ILCS 5/2-620), governing motion practice, and Section 2-1004, (735 ILCS 5/2-1004) governing pre-trials provide that each shall be conducted according to Rules.

##### Family Law Statutes:

###### UIFSA:

The most recent version of UIFSA, as enacted in Illinois, provides in Section 316(f):

“In a proceeding under this [Act], a tribunal of this State shall permit a party or witness residing in another State to be deposed or to testify under penalty of perjury by telephone, audiovisual means, or other electronic means at a designated tribunal or other location in that State. A tribunal of this State shall cooperate with tribunals of other States in designating an appropriate location for the deposition or testimony. 750 ILCS 22/316(f)

###### UCCJEA:

Similarly, the UCCJEA also provides for the admission of testimony by audio/video transmission in Section 111:

## Section 111. Taking Testimony In Another State.

(a) In addition to other procedures available to a party, a party to a child-custody proceeding may offer testimony of witnesses who are located in another state, including testimony of the parties and the child, by deposition or other means allowable in this State for testimony taken in another state. The court on its own motion may order that the testimony of a person be taken in another state and may prescribe the manner in which and the terms upon which the testimony is taken.

(b) A court of this State may permit an individual residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means before a designated court or at another location in that state. A court of this State shall cooperate with courts of other states in designating an appropriate location for the deposition or testimony.

(c) Documentary evidence transmitted from another state to a court of this State by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the means of transmission.

750 ILCS 36/111

Federal Rules of Civil Procedure:

The Federal Rules allow the trial judge discretion whether to allow testimony to be received by remote testimony in Rule 43(a). It provides:

Rule 43. Taking of Testimony

(a) Form.

In every trial, the testimony of witnesses shall be taken in open court, unless a federal law, these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise. The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location. FRCP 43(a)

The last sentence was added in December, 1996, Legal Information Institute, Cornell University Law School, *Federal Rules of Civil Procedure*, 2004. The committee comments, though, make it clear that live testimony in the courtroom is the preferred practice, to be abrogated only upon appropriate circumstances.

#### 4.1.3 Supreme Court Rules Applicable to Video Court/Conferencing Systems

There are no Supreme Court Rules dealing directly with the use and admission of remote testimony during trial. However, there is substantial authority in the rules for the allowance of appearances for motions and pretrial conferences by remote means; and there are extensive authority and direction with regards to the use of evidence depositions, which is a form of remote testimony.

Rule 185 Telephone Conferences.

Arguably, Supreme Court Rule 185 would apply to audio/video transmissions as well as telephone conferences.

Rule 206 Method of Taking Depositions on Oral Examination.

Supreme Court Rule 206 contains specific requirements with regard to both the use of audio/video recordings and the use of evidence depositions. It even allows in subparagraph (h) for participation in and taking of depositions by remote electronic means.

4.2 Criminal Hearings

## 4.2.1 Overview of Law and Use of Video Court/Conference Systems

A courtroom is more than a location with seats for a judge, jury, witnesses, defendant, prosecutor, defense counsel and public observers; the setting the courtroom provides is an important element in the constitutional conception of trial, contributing a dignity essential to the integrity of the trial process. (**People v. Stroud**, 208 Ill.2d 398, 804 N.E.2d 510, 281 Ill.Dec. 545 (2004) citing **Estes v Texas**, 1965, 381 US 532.) So is there a place in our criminal justice courtrooms for the use of video court/conferencing systems?

Some ways in which video conference technology will enhance the criminal court system and benefit those who use it may include the following:

- Reduction of transportation costs for judges by reducing cross-venue hearings.  
Judges who now travel to other counties to conduct court proceedings will be able to remain in their “home” court while conducting court proceedings in another county. For example, in small counties where they do not have a judge sitting in their county every day, a judge from another county could hold a bail hearing without actually traveling to the smaller county.
- Reduction of transportation costs for people who are incarcerated.  
Not only will this benefit the local sheriffs’ departments who transport prisoners from the county jails but it will greatly benefit the State of Illinois who must transport those inmates incarcerated all over the state in the Illinois Department of Corrections. It would also greatly benefit the U.S. Marshals who transport federal prisoners who are housed in different parts of the United States. However, federal prisoners are infrequently transported to state court for hearings. The more likely benefit to federal prisoners would be that they could participate in state court proceedings that they normally would not have the opportunity to do so.
- Reduction of discomfort to defendants who are transported.  
A defendant may avoid the discomfort created by being transport to the courtroom and the wait for their case to be called.

- Reduction of release time for a defendant.  
If the defendant is to be released, he can be released quicker by not having to be returned to the jail for release.
- Reduction of security problems and costs.  
In all cases, but especially where the defendant is violent, the use of a video court/conferencing system allows for a more secure environment and would reduce security costs necessary to bring a defendant to the courthouse.
- Reduction of court time waiting for transfer of prisoners.  
A video court/conference system saves courtroom time by removing any delay in waiting for the appearance of a defendant since the defendant remains in the jail facility waiting for the court to address him via the video conference system.

Conversely, some ways in which a video court / conference system may have a negative impact on the criminal court system include the following:

- Cost of the video court/conferencing system.  
Start up and maintenance costs of a video court/conference system will be a drain on the already overburdened criminal court budgets.
- Inability of the defendant to meet personally with his attorney.  
If the defendant's attorney is in the courtroom and not with the defendant, a defendant who appears by video conference is unable to meet personally with his attorney to discuss his case either in general terms or specific to the proceedings that he is appearing by video conferencing.
- Depersonalizing the court proceedings.  
A video court/conferencing system may depersonalize the court proceedings. One reason family and friends appear in court is to show the defendant their support. With a video court system, the defendant may not be aware that his family and friends are even present. Add this to the fact that the defendant is unable to see and meet personally with his attorney, the defendant may feel that he is not being treated as a human being with the dignity essential to the integrity of the trial process.

In the Illinois Circuit Court Survey of the twenty-three (23) circuits in Illinois (See Reference Material A), the Chief Judges of eleven (11) circuits reported that their criminal courts are presently using a video court/conferencing system.<sup>1</sup> The criminal courts in those circuits reported using video court systems for: (1) Bond hearings; (2) First Appearances; (3) Arraignments; (4) Waivers of Extradition; (5) Probable Cause Hearings; and (6) Felony Presentments.

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<sup>1</sup> Cook County, 3<sup>rd</sup> Circuit, 4<sup>th</sup> Circuit, 7<sup>th</sup> Circuit, 9<sup>th</sup> Circuit, 10<sup>th</sup> Circuit, 12<sup>th</sup> Circuit, 15<sup>th</sup> Circuit, 18<sup>th</sup> Circuit, 19<sup>th</sup> Circuit, and 21<sup>st</sup> Circuit,

These video court/conferencing systems were based on the prior statutory provision of “Defendant’s Appearance by Closed Circuit Television and Video Conference” (725 ILCS 5/106D-1) which did not set out the specific proceedings in which video conferencing could be used. Instead it allowed a defendant to appear by video conference at any pre-trial or post-trial proceeding where “the defendant’s personal appearance was not required by the Constitution of the United States or the Illinois Constitution.”

The defendant’s right to be present in the courtroom is not an express right under the United States Constitution, but is implied, arising from the due process clause of the 14<sup>th</sup> Amendment of the U.S. Constitution. Both the federal and state constitutions afford a criminal defendant the general right to be present, not only at trial, but at all critical stages of the proceedings, from arraignment to sentencing. Critical stage has been recognized as any proceeding where a defendant asserts or waives his constitutional rights. (**People v. Lindsey**, 201 Ill.2d 45, 265 Ill. Dec 616, 772 N. E. 2d 1268 (2002))

As a result, the appellate courts have been required to consider whether video conferencing could be used, for various criminal proceedings including arraignments (**People v. Lindsey** supra), jury waivers (**People v. Lindsey** supra), acceptance of jury verdicts (**People v. Mendez**, 328 Ill. App. 3d 1145, 253 Ill.Dec 319, 745 N.E.2d 93 (3<sup>rd</sup> Dist, 2001), and guilty pleas (**People v. Stroud**, 208 Ill.2d 398, 804 N.E.2d 510, 281 Ill.Dec. 545 (2004)). This case by case review led to uncertainty and dampened the widespread use of video conferencing pursuant to this statutory provision.

On August 17, 2007, the Illinois legislature amended this statute (725 ILCS 5/106D-1) to provide specifically when video conferencing could be used and set forth the following proceedings:

- the initial appearance before a judge on a criminal complaint, at which bail will be set;<sup>2</sup>
- the waiver of a preliminary hearing;
- the arraignment on an information or indictment at which a plea of not guilty will be entered;
- the presentation of a jury waiver;
- any status hearing;
- any hearing conducted under the Sexually Violent Persons Commitment Act at which no witness testimony will be taken; and
- at any hearing conducted under the Sexually Violent Persons Commitment Act at which no witness testimony will be taken.

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<sup>2</sup> Note: The statute on “Person Arrested” specifically provides that “a charge may be filed against such person by way of a two-way closed circuit television system, except that a hearing to deny bail to the defendant may not be conducted by way of closed circuit television.” (725 ILCS 5/109-1(a))

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This amendment also allows other court appearances to be held by video conferencing “upon waiver of any right the person in custody or confinement may have to be present physically.” (725 ILCS 5/106D-1(c)). This means that a waiver by a defendant could allow video conferencing at a proceeding to enter a guilty plea, to waive counsel, to return a verdict, etc. Consequently, these new statutory provisions greatly expand the possible use of video conferencing far beyond those indicated in the Illinois Circuit Court Survey (Reference Material A)

But even this extensive list of statutorily permitted uses under this Illinois statute limits the potential value of a video court/conferencing system in criminal cases when compared to how it is used in other states. For example, in Wisconsin, video conferencing in criminal cases may be used in all the following proceedings:

- initial appearances;
- waiver of preliminary hearings, competency hearings or jury trial;
- motions for extension of time;
- arraignment if the defendant intends to plead not guilty or refuse to plead;
- setting, review and modification of bail and other conditions of release;
- motions for severance or consolidation;
- motions for testing of physical evidence or for protective orders;
- motions directed to the sufficiency of the complaint or the affidavits supporting the issuance of a warrant for arrest or search warrant;
- motions in limine;
- motions to postpone;
- providing victims who are incarcerated to attend court proceedings;
- permit an interpreter to act in any criminal proceeding other than a trial by telephone or live audio/visual means;
- all hearings in which oral testimony is to be presented in an action or special proceeding commenced by a prisoner shall be conducted by telephone, interactive audio/video transmission without removing the prisoner from the facility<sup>3</sup>.

In addition, New Hampshire allows the use of video conferencing in criminal cases to take the testimony of a scientist, laboratory scientist or technical specialist from the forensic laboratory of the state police or similar expert of the defendant. However, the testimony is limited to expert testimony or to the results of, and matters relating to, tests conducted at the forensic laboratory of the state police.

Any consideration to expand the Illinois statute to include the video conferencing uses in other states must be viewed in light of the Illinois caselaw in two important areas. The first is the defendant’s right to be present at all “critical stages.” There appears to be no violation of a criminal defendant’s due process rights if he appears via closed circuit television in a non-critical stage. The second issue is the statutory requirement that the defendant be present “in open court” for certain proceedings.

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<sup>3</sup> *Bridging the Distance Implementing Videoconferencing in Wisconsin*, Wisconsin Supreme Court Policy and Planning Advisory Committee (2005)

In addition, the definition of critical stage (in terms of appearance in court) has been impacted by the statutes set forth in the proceeding section. (Section 4.2.2) Some specifically require that certain stages of a criminal proceeding shall be in “open court” or specifically provide that the defendant’s right to be present can be met by appearance on closed circuit TV. In addition, the Supreme Court has required that certain criminal proceedings be held “in open court.” (Section 4.2.3)

However, the right to be present at a critical stage has been held to not be absolute. Even where a defendant has the general right to be present at a critical stage, his absence from such a proceeding will not always be a violation of his constitutional rights. The courts have decided that it is a violation only if the record demonstrates that defendant’s absence caused the proceeding to be unfair or if his absence resulted in a denial of an underlying substantial right. (**People v. Lindsey**, supra)

In **Lindsey**, the Supreme Court set forth the issues that were to be used in determining whether the defendant’s due process rights were violated by his absence at these critical stages of the criminal proceeding. These factors included the following:

- Whether the court needed to assess the defendant's demeanor;
- Whether the defendant's sixth amendment right to confront witnesses was implicated because there were witnesses to confront at the proceedings;
- Whether a defendant had the opportunity to consult privately with counsel prior to the proceedings; and
- Whether during the proceeding a defendant's ability to communicate freely with counsel was impaired because counsel was required to leave the courtroom to contact the defendant by telephone in order to consult privately with counsel.

In **Lindsey**, the Supreme Court also addressed the issue of whether the statutory provisions which require an appearance in “open court” required that defendant be physically present in the courtroom. More importantly, the Court considered whether the presence requirement could be satisfied by a closed circuit television appearance. In doing so, the Supreme Court held that

“a strict construction of the “open court” language found in sections 103-6 and 113-1 as excluding closed circuit television appearances is not warranted. Construing the provisions of sections 103-6 and 113-1 in pari materia with section 106D-1, we discern the legislature's intent to interpret the “open court” language broadly to include appearances by closed circuit television. See In re Application for Judgment & Sale of Delinquent Properties for the Tax Year 1989, 167 Ill.2d 161, 171-72, 212 Ill.Dec. 215, 656 N.E.2d 1049 (1995) (Revenue\*\*1280 \*\*\*628 Act and section 16 are in pari materia and may be construed together to determine the intent of the legislature). Consequently, we find that defendant's appearance by closed circuit television at his arraignment and jury waiver satisfied the statutory requirement that he “be called into open court” for arraignment and waive his right to trial by jury “in open court.”

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Does this interpretation of the statutory language of “being in open court” mean that all of the statutes that use this language can be satisfied by closed circuit television appearances? More importantly does it also include the Supreme Court Rules which use similar language? Would all of the previously mentioned potential uses of a video court/conference system in criminal cases in other states be acceptable if the court considers the factors set forth in **Lindsey** and determines that the defendant’s due process rights were not violated by his absence from the court room?

The answer is probably no! The Illinois Supreme Court’s position is that, notwithstanding the holding in **Lindsey**, some criminal proceedings constitutionally require the defendant to appear personally in court. In **Stroud**, the court held that “a defendant’s physical presence at a guilty plea proceeding is constitutionally required unless he consents to having the plea taken by closed-circuit television. (**People v. Stroud**, supra)

The **Stroud** Court also explained that the procedure for a defendant to make such a waiver could be done as part of the video conferencing. It stated that “it would normally satisfy constitutional considerations for the defendant to waive his physical appearance in court by stating so on the record while participating through closed-circuit television.” However, the court specifically instructed the trial judges that an admonishment of the defendant’s right to be physically present in court should be given at the beginning of the guilty plea proceedings as part of the admonitions required by Supreme Court Rule 402 unless the defendant has previously given his written consent to the closed circuit procedure.” (**People v. Stroud**, supra)

There is one other consideration which has nothing to do with the constitutional rights of the defendant. Supreme Court Rule 63(a)(7) provides that the taking of photographs, broadcasting or televising of court proceedings is permitted only to the extent authorized by order of the Supreme Court. These terms are defined to include the audio or video transmissions of recordings made by telephones, personal data transmissions, personal data assistants, laptop computers, and other wired or wireless data transmissions and recording devices. Consequently, although the legislature has provided for the use of video conferencing by statute (725 ILCS 5/106D), the Supreme Court has not specifically done so.

Several court decisions have dealt with this issue of what happens when a state statute and a Supreme Court Rule are in conflict. They have held that the Supreme Court Rule trumps the statute. The statute is a legislative infringement on the powers of the judiciary and thus void (**People v. Colclasure**, 200 Ill.App.3d 1038, 558 N.E.2d 705 (5th Dist.,1990) with regard to peremptory challenges; **People v. Jackson**, 69 Ill. 2d 252, 13 Ill.Dec.667, 371 N.E.2d 602 (1977) with regard to allowing opposing counsel the right to conduct voir dire examination of prospective jurors).

However, these court decisions are based on whether the conflict between the statute and Supreme Court Rule is procedural or substantive. If procedural, the Supreme Court Rule controls, but if substantive, the statute would control. The use of video conferencing in the courts would appear to be procedural and therefore the statute would be an infringement on the Court's power. However, the statute and Supreme Court Rule on video conferencing effects a constitutional right of the defendant to be physically present which would appear to effect a substantive right of the defendant.

Finally, this issue has been made more confusing by the fact that this apparent conflict between the video conferencing statute and the Supreme Court Rule on televising court proceedings has never been addressed even though the state statute has been on review before the Supreme Court several times.

#### 4.2.2 Statutes Applicable to Video Court/Conference Systems

- 725 ILCS 5/103-6 requires that a jury waiver be in open court.
- 725 ILCS 5/106B-5 provides that a victim in a criminal assault, who is under the age of 18 or is moderately, severely, or profoundly mentally retarded, may testify via closed circuit television, if certain identified criteria are met.
- 725 ILCS 5/106D-1 allows for the appearance of a defendant via closed circuit television and video conference at certain enumerated proceedings and waiver of right to be physically present at any criminal proceedings.
- 725 ILCS 5/110-5.1(c) permits a person who is required to appear for bond setting to appear by video conferencing.

#### 4.2.3 Supreme Court Rules Applicable to Video Court/Conference Systems

- Supreme Court Rule 401 requires a waiver of counsel to be in open court;
- Supreme Court Rule 402, requires a defendant to appear personally in open court to enter a plea of guilty or stipulation;
- Supreme Court Rule 402A requires that a defendant appear personally in open court to admit or stipulate to a violation of probation;
- Supreme Court Rule 403 requires that a person under 18 shall not be permitted to enter a plea of guilty or to waive a trial by jury, unless he is represented by counsel in open court;
- Supreme Court Rule 416(e), which provides that a defendant does not have a right to be present during depositions relating to a capital case;
- Supreme Court Rule 45 (d) provides for and prescribes the types of electronic recording equipment that may be used in the circuit courts;

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- Supreme Court Rule 63(a)(7) provides that the taking of photographs, broadcasting or televising of court proceedings is permitted only to the extent authorized by order of the Supreme Court. These terms are defined to include the audio or video transmissions of recordings made by telephones, personal data transmissions, personal data assistants, laptop computers, and other wired or wireless data transmissions and recording devices;
- Supreme Court Rule 63 provides for the transmission of data for purposes of a security system.

<b>Video Court/Conference System - Impact Statement</b>
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## 5. TECHNOLOGY - VIDEO COURT/CONFERENCING SYSTEMS

### 5.1 Components and Standards of Video Court / Conference Systems

The following are the suggested components and standards for a video court/conference system.

#### Industry Standards:

All video court/conference systems should be in compliance with the protocols adopted by the International Telecommunications Union (ITU). The ITU has three standards defined for video conferencing systems.

#### ITU H.320:

The H.320 standard is public switched telephone networks or video conferencing over integrated services digital networks (ISDN) or dedicated networks such as T-1 and satellite-based networks.

#### ITU H.323:

The H.323 standard defines requirements for transporting multimedia applications over local area networks (LANs) or older implementations of voice-over-IP networks (VoIP).

#### ITU H.324:

The H.324 standard defines transmission over the Plain Old Telephone System (POTS), including video calls on 3G mobile phones.

Traditional video conference systems were ISDN-based systems that supported the ITU H.320 standards. However, more recently, IP-based video conferencing systems have emerged as the common technology, which supports the use of the Internet and broadband or DSL high-speed connections, as defined by the ITU H.324 standard.

The IP-based video conferencing systems continue to be an attractive technology that expands functionality, uses readily available technology, and is very reasonable in cost. As well, IP-based systems are compatible with personal computer-based video conferencing systems, including webcam devices and enterprise meeting online software systems, which are emerging as a very reasonable and feature rich video conference system.

#### Dedicated Connection - from courtroom to remote location:

Many telecommunication technologies exist that could be used in a video court/conferencing system to connect a courtroom to a remote location. However, it is recommended this connection (T-1, ISDN, LAN connection, etc.) be dedicated to the video court/conference function. Other technologies, such as microwave, DSL, or

broadband circuits exist, however, these connection methods should be tested using the actual video court/conference system to confirm the responsiveness and functionality of the system.

**Security:**

It is strongly recommended that security be a key component of any video court/conferencing system, such that assurances exist for the use of such a system are exclusive to the parties involved in the video conference.

Direct data circuits (private dedicated circuits) between the courtroom(s) and the remote jail do not need security as long as this circuit is exclusively used for video court sessions and administered by the counties. A device such as a firewall should be used to encrypt a network circuit in the event the video court/conference connection is not private or dedicated to the video court function.

**Bandwidth:**

The manufacturer of a video court/conferencing system should be able to provide specific bandwidth requirements for their system. The bandwidth requirements are also dependent upon the features of the video court system, such as the use of evidence presentation components, the ability to join multiple remote locations, and the available bandwidth for the system, i.e., a microwave link on a cloudy day or a very fast data circuit but a slow codec processor has varying available bandwidth.

**Hardware:**

- ▶ The codec is the hardware or software system that digitally compresses the audio and video in a video conference, coding and decoding the transmission between the parties. Compatibility between different video conferencing systems is dependant upon the standard supported and the codec's ability to decode and code a uniform transmission.
- ▶ The video conference camera should be of a quality to capture and transmit a clear picture. The camera picture may also be impacted by the lighting in a room. Although not a requirement, a pan/tilt/zoom camera allows the picture to be adjusted for the audience.
- ▶ A TV/Monitor(s), which will present both the courtroom and the remote location, should be sized according to the courtroom or room. LCD or plasma monitors are recommended.
- ▶ Use of an uninterruptible power supply is recommended to maintain connections for momentary power outages.

## 5.2 Considerations for a Video Court/Conferencing System

The following are guidelines to consider in the use of a video court/conference system, which are intended to aid its effectiveness.

Considerations:

- ▶ Clarity of the audio and video is critical to the successful use and effectiveness of a video court/conferencing system.
- ▶ Implementing a highly secure video court/conferencing system to insure confidential communication and transmission of a signal and access to it.
- ▶ Placement of the video court equipment, such as the TV screens, for effective visibility is important.
- ▶ Consideration should be given to the needs of all users and full compliance with ADA requirements is recommended.
- ▶ The setup and configuration of the video conference equipment should consider the layout of the room and the audio requirements, which might include the need for sound-baffling to avoid feedback and inaudible sessions.
- ▶ Recognizing that the configuration of the video court/conferencing system and furniture is dependent on the space and use of the system (courtroom, conference room, jail, etc.), the system should provide flexibility and allow for reconfiguration of the space.
- ▶ Training is a key aspect of any video court/conferencing system to educate users on the proper operation, procedures, and use of the equipment. Training should also include support and protocols for equipment malfunctions.
- ▶ Because of the rapid changes in technology in video conference systems, it is important to monitor the industry and new technologies.
- ▶ Consideration should be given to the compatibility of a video conferencing system with other entities, i.e. local law enforcement, state judicial branch, or organizations that might provide video conferencing services.

5.3 Costs

The cost of a video court/conference system will vary relative to the features, specifications, and scale of the system. For example, the number of courtrooms or remote locations to be available in a video conference session or the connection type used to connect the courthouse to the remote location will impact the cost of the system.

There are generally two types of costs associated with a video court/conference system, namely, the initial one-time cost and the recurring costs. Initial costs represent the purchase price of a system (hardware and software), its installation, testing and training on the use of the system. Recurring costs of a video conferencing system include the maintenance contract for maintenance or support costs. Maintenance might include adjustments to the video conference system (low audio level, etc.), break fix of any component in the system, software updates to the system, or online diagnosis or support. Recurring costs would also include the use of the telecommunication connection, i.e. T-1 or ISDN circuit leased from a vendor.

<b>Video Court/Conference System - Impact Statement</b>
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## 6. PROPOSALS AND RECOMMENDATIONS FOR USE IN ILLINOIS

### 6.1 Civil Hearings:

#### 6.1.1 Proposed New Rules - Civil

Currently, a Supreme Court Rule does not exist to address the location of witnesses who testify before a court in a hearing. The Automation and Technology Committee recommends that such a rule be adopted in order to clarify when such testimony may be taken and under what circumstances. The Federal Rule, modified to incorporate the safeguards contained in SCR 206 for the taking of remotely generated testimony through the use of audio video equipment, incorporates both the common law preference for in person testimony and the requirements of modern legislation and society.

In addition, the Committee recommends that the Court adopt a new rule which states:  
The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location.

#### 6.1.2 Proposed Revisions to Existing Rules - Civil

The Automation and Technology Committee recommends that Supreme Court Rule 63 be amended to allow for the use of video court/conferencing technology in open court under guidelines approved by the Court.

### 6.2 Criminal Hearings:

#### 6.2.1 Statutory Implications - Criminal

Should the Court adopt the Committee's recommendations regarding video court/conference systems, statutory provisions may be implicated and require amendments.

#### 6.2.2 Proposed Revisions to Existing Rules - Criminal

##### Supreme Court Rules

##### Rules 401 - 402:

Supreme Court Rules 401– 402 should be revised to include a paragraph similar to the bond statute or the initial appearance statute so that it specifically “permits a person to appear by video conferencing equipment as set forth in 725 ILCS 5/106D-1” when a defendant is required to appear before it for a hearing on a plea and the defendant has waived the right to be present.

Rules 411 - 417:

Supreme Court Rule 411– 417 should be revised to include a paragraph similar to the bond statute or the initial appearance statute so that it specifically “permits a person to appear by video conferencing equipment as set forth in 725 ILCS 5/106D-1” when a defendant is required to appear before it for a hearing on a discovery issue.

Rule 605:

Supreme Court Rule 605 should be revised to include a paragraph similar to the bond statute or the initial appearance statute so that it specifically “permits a person to appear by video conferencing equipment as set forth in 725 ILCS 5/106D-1” when a defendant is required to appear before it for a hearing on a plea and the defendant has waived the right to be present.

6.3 Local Committee - Technology Review

A committee of potential users should be created to assess the need for video technology within the jurisdiction and outside the jurisdiction in the event the video technology involves multiple jurisdictions. This evaluation should include current and future needs. These needs should be evaluated in terms of the applicable Illinois Statutes, Illinois Supreme Court Rules, caselaw, and local rules.

6.4 Review Attached Material - for Design Issues

A jurisdiction committed to the planning for video technology should consider numerous issues within the design phase, in particular, those set forth in the attached reference material, *Bridging the Distance: Implementing Videoconferencing in Wisconsin*, 2005, updated 8/22/06, and prepared by The Planning and Policy Advisory Committee Videoconferencing Subcommittee.

6.5 Adoption of Local Policies and Procedures.

A jurisdiction adopting video technology should adopt appropriate policies and procedures. These policies and procedures should include those issues related to the use of the video technology, training, maintenance schedules, periodic reviews to determine whether the use of the technology remains viable, and the need to update equipment.

<b>Video Court/Conference System - Impact Statement</b>
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## 7. RELEVANT RULES, POLICIES, AND GENERAL ORDERS FROM OTHER STATES.

### 7.1 Existing Rules and Statutes - By State

Below is a list of some existing State rules and statutes concerning the application of video court/conferencing systems. Although many refer to criminal proceedings, they are often used as authority in civil hearings.

#### **Alabama**

*Alabama Code* §§ 15-26-1 - 15-26-6. Audio-video Communication for Criminal Pre-trial Proceeding.

#### **California**

*California Penal Code* § 977.2. Incarcerated defendant; initial appearance and arraignment; two-way electronic communications; presence of counsel.

*California Penal Code* § 3043.25. Videoconferencing in lieu of personal appearance.

#### **Kansas**

*Kansas Statutes* § 22-2082. Release prior to trial; conditions of release.

*Kansas Statutes* § 22-3205. Arraignment.

*Kansas Statutes* § 22-3208. Pleadings and Motions.

*Kansas Statutes* § 38-1632. Detention hearing; waiver; notice; procedure; removal from custody of parent; audiovisual communications.

*Kansas Statutes* § 38-1633. Pretrial hearings.

#### **Montana**

*Montana Code* § 41-5-332. Custody - hearing for probable cause.

*Montana Code* § 46-7-101. Appearance of arrested person - use of two-way electronic audio-visual communication.

*Montana Code* §46-9-201. Who may admit bail.

*Montana Code* §46-9-206. Setting bail - appearance or use of two-way electronic audio-video communication.

*Montana Code* § 46-10-202. Presentation of evidence.

*Montana Code* § 46-12-201. Manner of conducting arraignment - use of two-way electronic audio-video communication - exception.

*Montana Code* § 46-12-211. Plea agreement procedure - use of two-way electronic audio-video communication.

*Montana Code* § 46-16-105. Plea of guilty - use of two-way electronic audio-video communication.

*Montana Code* § 46-16-123. Absence of defendant on receiving verdict or at sentencing.

*Montana Code* § 46-17-203. (Temporary) Plea of guilty - use of two-way electronic audio-video communication.

*Montana Code* §46-17-203. (Effective July 1,2006) Plea of guilty - use of two-way electronic audio-video communication.

*Montana Code* § 46-18-102. Rendering judgment and pronouncing sentence - use of two-way electronic audio-video communication.

*Montana Code* § 48-18-115. Sentencing hearing - use of two-way electronic audio-video communication.

*Montana Code* § 46-23-109. Parole hearings and administrative reviews - telephone video conference.

*Montana Code* § 46-23-218. Authority of board to adopt rule - purpose for training.

### **Nevada**

*Nevada Revised Statutes* § 171.1975. Use of audiovisual technology to present live testimony at preliminary examination: when permitted; notice by requesting party; opportunity to object; requirements for taking testimony; limitations on subsequent use.

*Nevada Revised Statutes* § 172.138. Use of audiovisual technology to present live testimony before grand jury: when permitted; requirements for taking and preserving testimony; limitations on subsequent use.

### **Pennsylvania**

*Pennsylvania Consolidated Statutes* § 8703. Arraignment.

*Pennsylvania Consolidated Statutes* § 9904. Referral to State intermediate punishment program.

### **Tennessee**

*Tennessee Code* § 41-21-809. Hearings conducted at jails; use of video communications technology.

### **Texas**

*Texas Code of Criminal Procedure*, Art. 15.17. Duties of arresting officer and magistrate.

*Texas Code of Criminal Procedure*, Art. 46B.001. Definitions.

### **Vermont**

*Vermont Statutes* § 502. Parole interviews and reviews.

### **Virginia**

*Virginia Code* § 26.1-276.3. Use of telephonic communication systems or electronic video and audio communication to conduct hearing.

### **In the Federal Court**

*Fed. R. Civ. P.* 43 Taking Testimony

(a) In Open Court

<b>Video Court/Conference System - Impact Statement</b>
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## 8. ACKNOWLEDGMENT

The Automation and Technology Committee is proud to present this Impact Statement on the use of video court/conferencing systems in Illinois' Trial Courts. The Committee extends its appreciation to the Illinois Supreme Court and the Judicial Conference for the assignment of developing such an important document.

The Automation and Technology Committee wishes to thank all of those contributing to this product, in particular the Chief Circuit Judges for the information they provided, the Honorable Grant S. Wegner (former Committee Chairperson) and previous Automation and Technology Committee Members.

### 2008 Automation and Technology Committee Members:

- Honorable Kenneth A. Abraham                      Chairperson
- Honorable Adrienne W. Albrecht
- Honorable Robert E. Byrne
- Honorable Francis J. Dolan
- Honorable John K. Greanias
- Honorable William G. Schwartz
- Honorable Thomas H. Sutton

### 2007 Automation and Technology Committee Members:

- Honorable Grant S. Wegner                      Chairperson
- Honorable Kenneth A. Abraham
- Honorable Adrienne W. Albrecht
- Honorable Francis J. Dolan
- Honorable James K. Donovan
- Honorable John K. Greanias
- Honorable R. Peter Grometer
- Honorable Thomas H. Sutton

<b>Video Court / Conference System - Impact Statement</b>
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## 9. REFERENCE MATERIAL

**\*\*Please advise the Administrative Office if you would like a copy of any reference materials.\*\***

## Response to Video Conference Survey to Illinois Circuit Courts

Survey Purpose: The purpose of this survey is to solicit information regarding specific experiences with the use of video court/conferencing systems in the trial courts.

Survey From: Illinois Judicial Conference - Automation and Technology Committee

Response Date: June 15, 2007

Contact Information: Skip Robertson (217) 785-3906  
Administrative Office of the Illinois Courts  
JMIS Division  
3101 Old Jacksonville Road  
Springfield, IL 62704  
[srobertson@court.state.il.us](mailto:srobertson@court.state.il.us)

### Survey Response:

- ▶ Survey Results were from June 2007.
- ▶ Of the twenty-three (23) Illinois circuits, sixteen (16) responded to the Video Court/ Conferencing questionnaire - (70%).

1) Do you use video court/video conferencing systems in the trial courts of your Circuit?  
If not, are there any plans for implementation?

If so, in which courts (civil/criminal)?

a. What is the nature of its use?

b. Do you use closed circuit television or data network video court/conferencing systems?

(1) What technology 'connects' the courtroom with the remote video conference location?

(2) What is used to secure the video court connection and who manages it?

c. Do you have a technical contact knowledgeable of your video court/conferencing system?

If so, please provide name and contact information.

d. How is your system funded?

### Survey Response:

- ▶ Of those 16 circuits responding, 11 use video court/conference systems in one or multiple counties in their circuit.

- ▶ Ten of the eleven circuits indicated that bond calls or first appearances in criminal courts were the primary use of their video court/conference system.
- ▶ The technologies used to connect courtrooms with the remote video court/conference location was a private network circuit, closed circuit connection, or local area networks.
- ▶ Funding for video court/conferencing systems were primarily local funds from the county, sheriff's office, or States Attorney's office.

2) Are there local rules or a written policy identifying where and when video court/conferencing systems are allowed within the circuit?

If so, please include a copy with your completed questionnaire.

Survey Response:

- ▶ In six of the eleven circuits using video court/conferencing systems, local rules or administrative orders existed to govern the use of the system.

3) What are the detriments and benefits you have encountered using video court/conferencing systems in the trial courts?

Survey Response:

- ▶ Pros
  - Transportation costs reduced.
  - Reduced demand for law enforcement.
  - Improved courtroom decorum/security.
  - More efficiency in scheduling and managing cases.
- ▶ Cons
  - Initial cost of video court/conferencing systems is high.
  - Private conversations between defendant and attorney are more difficult.
  - Equipment malfunctions.

## 2008 REPORT

**ANNUAL REPORT**

**OF THE**

**COMMITTEE ON CRIMINAL**

**LAW AND PROBATION ADMINISTRATION**

**TO THE ILLINOIS JUDICIAL CONFERENCE**

Hon. Mary S. Schostok, Chair

Hon. Kathleen M. Alling  
Hon. Thomas R. Appleton  
Hon. Ann Callis  
Hon. Kathy Bradshaw Elliott  
Hon. Vincent M. Gaughan  
Hon. Daniel P. Guerin  
Hon. Janet R. Holmgren  
Hon. John Knight

Hon. Paul G. Lawrence  
Hon. Leonard Murray  
Hon. Steven H. Nardulli  
Hon. Lewis Nixon  
Hon. James L. Rhodes  
Hon. Mitchell K. Shick  
Hon. Michael P. Toomin  
Hon. Walter Williams

October 2008

## I. STATEMENT ON COMMITTEE CONTINUATION

The purpose of the Criminal Law and Probation Administration Committee ("Committee") of the Illinois Judicial Conference is to review and make recommendations on matters affecting the administration of criminal law and monitor, evaluate and provide recommendations on issues affecting the probation system. The Committee is further charged to review, analyze and examine new issues arising out of legislation and case law that impact criminal law and procedures and probation resources and operations. The Committee also is charged with reviewing and commenting on changes to Illinois Supreme Court Rules that affect the administration of criminal law and/or the probation system.

Since the Committee's inception, a number of critical issues related to criminal law and probation administration have been addressed. Over the years this Committee has been instrumental in sponsoring amendments to Supreme Court Rules 604(d), 605(a), and 605(b). The Committee also has made recommendations for the enacting of new rules, specifically Rule 402A. The Committee has prepared and presented to the Conference a report entitled *The Efficacy and Trends of Speciality Courts*, a detailed inventory on Illinois Problem Solving Courts, and a pre-sentence investigation report format incorporating the principles of Evidence Based Practices (EBP). The Committee also prepared and presented to the Conference a one page EBP bench guide similar to the one created for probation officers, supervisors, and managers.

This year, the Committee continued to examine a myriad of issues concerning the feasibility of a criminal alternative dispute resolution program in Illinois. The Committee also researched and reviewed materials that addressed the charge of improving the efficiency of accepting guilty pleas. At the request of the Supreme Court Rules Committee, the Committee reviewed and commented on proposed Supreme Court Rule 404 concerning admonishments to foreign nationals of their right to inform their respective consulate of their detention. Finally, at the request of the Court, the Committee drafted and presented proposed Supreme Court Rule 430 concerning the use of restraints upon criminal defendants inside the courtroom.

The Committee is dedicated to serving the Court in meeting the assigned projects and priorities, and producing quality information and products. The Committee is requesting to continue addressing matters affecting criminal law and procedure and the administration of probation services.

## II. SUMMARY OF COMMITTEE ACTIVITIES

### Conference Year 2007 Continued Projects/Priorities:

**Project:**        ***Consider criminal alternative dispute resolution and report on the utility of such a program in Illinois.***

The subcommittee formed in 2007 to examine this charge continued to collect data from other states for review and comment by the full Committee. The Committee also received information and materials from Ms. Sally Wolf, Statewide Coordinator for the Illinois Balanced and

Restorative Justice Project, on different types of programs in Illinois which could be considered as potential models for determining the viability of a criminal alternative dispute resolution program. Based on the research and data presented by the subcommittee, along with the statutory constraints, case law, and rules concerning criminal law and procedure in Illinois, the Committee has reached a tentative consensus that if a criminal alternative dispute resolution program is to be feasible, it should be a mediation type program and limited to misdemeanors only.

The full Committee, however, believes that more time is needed to study if a criminal dispute resolution program would be viable in Illinois, and to clarify the details of such a program, which can then be presented to the Court for its consideration.

Conference Year 2008 Projects/Priorities:

***Project 1: Forward the Pre-Sentence Investigation Report to the Administrative Office and its Probation Division for consideration as a component of the Court's existing Standards of Probation Practices.***

As directed, the Committee forwarded its Pre-Sentence Investigation Report to the Administrative Office for consideration.

***Project 2: Study and consider the feasibility for improving court efficiency in the acceptance of guilty pleas.***

The Committee examined multiple different types of written guilty pleas used in other states whereby the accused and their lawyer acknowledge various waivers and stipulations in writing. After examining the documents and discussing this issue, the Committee believes that while the use

of a written form acknowledging the various waivers and stipulations of a guilty plea has some potential benefits in that such a written guilty plea could reduce claims of ineffective assistance of counsel, a statewide mandate for the use of a particular written guilty plea form is not necessary. The Committee believes that a statewide mandate is not necessary since admonishments are mandated by rule and caselaw and also must be placed on the record. However, the Committee submits that each judge should have the option of using a written guilty plea form and suggests that a sample written form be included in judicial education materials for new judges.

***Project 3: Study, examine and report on Supreme Court Rules as they relate to criminal procedure and court processes.***

Proposed Rule 404 was submitted to the Committee by the Supreme Court Rules Committee in 2007 for consideration and comment. Proposed Rule 404 would direct Illinois judges in felony proceedings to inform a foreign national at their initial appearance that they have the right to inform their consulate of their arrest or detention. At that time, the Committee decided to defer discussion pending the decision by the United States Supreme Court in the case of *Medellin v.*

Texas since the issues being addressed in that case would assist the Committee in commenting on the proposed rule. On March 25, 2008, the United States Supreme Court issued its decision in *Medellin v. Texas*, 128 S.Ct. 1346 (2008). Based on the *Medellin* decision, the Committee advised the Supreme Court Rules Committee that there appeared to be no problem with the language of Proposed Rule 404 so long as it was abundantly clear that the proposed rule applied only to felony cases and that the responsibility to notify the consulate fell to either the defendant or the defendant's attorney and not the trial court judge. The Committee also suggested to the Rules Committee that it give consideration to either drafting another paragraph to proposed Rule 404 or draft another proposed rule that incorporates the statutory mandate of warning a nonresident alien that their guilty plea could lead to deportation proceedings being initiated against them. (See 725 ILCS 5/113-8). A copy of Proposed Rule 404 is attached hereto as Appendix A.

Pursuant to the holding in the case of *People v Boose*, 66 Ill.2d 261 (1977) and its progeny, the Committee discussed the need for a rule concerning the use of restraints in criminal cases. After discussion, the Committee drafted and presented for consideration by the Court proposed Rule 430 which, if adopted, will provide guidance to trial court judges on when restraints are to be used and what findings need to be made prior to the application of restraints. A copy of proposed Rule 430 is attached hereto as Appendix B.

***Project 4: Continue to monitor the impact of Crawford v. Washington and it's progeny on the Illinois Courts.***

The Committee has continued to discuss and monitor the impact of the U.S. Supreme Court's ruling in the case of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed2d 177 (2004) and its progeny on the Illinois courts. An updated outline prepared by Judge Daniel B. Shanes that discusses the impact of *Crawford* and its progeny was presented to the Committee for information purposes and is attached hereto as Appendix C.

***Project 5: Undertake any such other projects or initiatives that are consistent with the Committee charge.***

The Committee continues to support revisions of the Illinois criminal statutes to simplify and clarify existing law, to provide trial courts with a range of effective sentencing options, and to provide trial judges with the discretion essential to a fair and effective system of criminal justice. The Hon. Michael P. Toomin is a member of the Criminal Law, Edit, Alignment, and Reform (CLEAR) Commission. Judge Toomin has informed the Committee on the status of the CLEAR Commission report in the General Assembly which has been given the designation of Senate Bill 100. The Committee will continue to monitor the status of this important initiative. Judge Toomin also informed the Committee that the CLEAR Commission began an examination of the sentencing statutes for the purpose of proposing edits, alignment and reforms similar to those proposed for the criminal code currently under consideration by the General Assembly.

### III. PROPOSED COMMITTEE ACTIVITIES FOR THE NEXT CONFERENCE YEAR

While the Committee has made significant progress addressing its charges, much of the Committee's work is ongoing and developing. The Committee is requesting to continue its work in determining the viability of a criminal alternative dispute resolution program in Illinois and if a program is deemed viable, to develop strategies for the effective implementation of such a program.

The Committee also would like to continue reviewing and making recommendations on matters affecting the administration of criminal law and the probation system. The Committee also would like to continue to study, examine and report on proposed Supreme Court Rules as they relate to criminal procedure and court process. Finally, the Committee requests to continue to monitor the effect of *Crawford v. Washington* and its progeny on the Illinois Courts.

For Conference Year 2009, the Committee requests to address one or more of the following projects: (1) explore the need for a first offender diversion program for those convicted of certain Class 4 or Class 3 felonies; (2) explore the use of a "Shock Incarceration" to the Illinois Department of Corrections for certain offenders as part of the terms and conditions of probation; and/or (3) explore the possibility of requiring a risk assessment/evaluation in all domestic violence cases prior to sentencing.

### IV. RECOMMENDATIONS

The Committee is making no recommendations to the Conference at this time.

## 2008 REPORT

2008 REPORT

# APPENDIX A

## 2008 REPORT

**PROPOSED ILLINOIS SUPREME COURT RULE 404****Rule 404. Consular Notification for Foreign Nationals**

At the initial appearance, the circuit court must advise a criminal defendant in open court that any foreign national who is arrested or detained has the right to have notice of that fact given to the consular representatives of the country of his or her nationality and the right to communicate with his or her consular representatives. The court must make a written record that such notice was given.

Committee Comment

Rule 404 is intended to ensure that the United States complies with its treaty obligations under Article 36 of the Vienna Convention on Consular Relations which requires that, if requested by a foreign national, the authorities of the receiving State shall, without delay, inform the consular post of the sending State that a national of that State has been arrested or detained. The United States is a party to the Vienna Convention on Consular Relations and, thus, the Convention is part of the supreme law of the United States by virtue of the Supremacy Clause (Article VI) of the U.S. Constitution. Because Article 36 of the Vienna Convention requires that consular notification be given without delay, notice should be given by the arresting or detaining officer in the first instance. The notice to be given by the judge is not intended to be a substitute for notice by the officer, but is intended instead to ensure that such notice is given and that a written record of notification is kept. The written record may consist of a check box on a form. By requiring that some form of written record be kept, the rule will prevent disputes regarding Article 36 compliance. The rule is written in such a manner that an Illinois circuit court judge could provide the notice to all criminal defendants charged with a felony appearing before the judge, either individually or in a group, without having to ascertain the nationality of each defendant. The Committee takes no position on the appropriate remedy for violation of the consular notification rule, which is a matter of federal treaty law.

## 2008 REPORT

# **APPENDIX B**

## 2008 REPORT

**Rule 430. Trial of Incarcerated Defendant**

An accused shall not be placed in restraints in the presence of the jury unless there is a manifest need for restraints to protect the security of the court or the proceedings. Persons charged with a criminal offense are presumed innocent until otherwise proven guilty and are entitled to defend themselves as free persons before the jury. Any deviation from this right shall be based on evidence or the stipulations of counsel on a case by case basis specifically considered by the trial court for there to be found a need for the shackling of a defendant. The trial judge shall, prior to allowing the defendant to appear before the jury restrained by shackles of any kind whether or not hidden by skirting, conduct a separate hearing on the record to investigate the need for such restraints. At such hearing, the trial court shall consider:

- 1) The seriousness of the present charge against the defendant;
- 2) Defendant's temperament and character known to the trial court either by observation or by the testimony of witnesses;
- 3) The defendant's age and physical attributes;
- 4) The defendant's past criminal record and, more particularly, whether such record contains crimes of violence;
- 5) The defendant's past escapes, attempted escapes, or evidence of any present plan to escape;
- 6) Evidence of any threats made by defendant to harm others, cause a disturbance, or to be self-destructive;
- 7) Evidence of any risk of mob violence or of attempted revenge by others;
- 8) Evidence of any possibility of any attempt to rescue the defendant by others;

- 9) The size and mood of the audience;
- 10) The physical security of the courtroom, including the number of entrances and exits and the number of guards necessary to provide security.

# **APPENDIX C**

## 2008 REPORT

Lake County Bar Association  
Criminal Law Committee Annual Seminar  
October 2007

## **CRAWFORD AND CONFRONTATION**

Hon. Daniel B. Shanes  
Associate Judge  
19<sup>th</sup> Judicial Circuit  
State of Illinois

### **Discussion notes and outline**

In 2004, the United States Supreme Court rewrote its understanding of the Sixth Amendment Confrontation Clause in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), jettisoning a quarter-century of “reliability” jurisprudence in favor of a new testimonial/non-testimonial analysis. Two years later, in Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266 (2006), the Supreme Court revisited its new confrontation jurisprudence, fleshing out its vision of testimonial hearsay. Even still, while the High Court erected this new paradigm, it left a variety of questions unanswered. Courts of review in Illinois and across the county have addressed several of these issues.

This outline primarily focuses on Supreme Court and Illinois case law development. Out-of-state cases are noted when particularly significant or in the absence of Illinois authority.

## 2008 REPORT

### I. Preliminary Issues

A. Confrontation Clause only applies in criminal prosecutions: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .” (Emphasis added.)

1. Juvenile child protection (abuse/neglect) proceedings are civil; Confrontation Clause does not apply.
  - In re C.M., 351 Ill.App.3d 913, 815 N.E.2d 49 (4th Dist. 2004)
2. Confrontation Clause does apply in juvenile delinquency cases; for example:
  - In re Rolandis G., 352 Ill.App.3d 776, 817 N.E.2d 183 (2nd Dist. 2004), appeal granted on other grounds 224 Ill.2d 575, 871 N.E.2d 56 (2007)
  - In re T.T., 351 Ill.App.3d 976, 815 N.E.2d 789 (1st Dist. 2004), vacated and remanded on other grounds 224 Ill.2d 575, 866 N.E.2d 1174 (2007), identical opinion upon remand, \_\_\_ Ill.App.3d \_\_\_, 2007 Ill. App. Lexis 993 (1st Dist. 2007) (petition for rehearing pending)
3. Sexually Dangerous/Violent Persons commitment cases do not implicate the Confrontation Clause.
  - Commonwealth v. Given, 441 Mass. 741, 808 N.E.2d 788 (2004)
  - In re Commitment of Frankovitch, 121 P.3d 1240 (Ariz. App. Ct. 2005)
  - People v. Angulo, 129 Cal.App.4th 1349 (2005) (with experts)
4. Unfitness discharge hearings are not criminal prosecutions; Confrontation Clause does not apply.
  - People v. Waid, 221 Ill.2d 464, 851 N.E.2d 1210 (2006)
5. Confrontation rights apply at trial, not pre-trial suppression hearings.
  - Vanmeter v. State, 165 S.W.3d 68 (Tex. App. Ct. 2005)
  - State v. Smith, 906 So.2d 391 (La. Sup. Ct. 2005)
  - United States v. Miramonted, 365 F.3d 902 (10th Cir. 2004)
  - United States v. Brown, 322 F.Supp.2d 101 (Mass. 2004)

## 2008 REPORT

- See United States v. Raddatz, 447 U.S. 667, 679, 100 S.Ct. 2406 (1980) (“interests at stake in a suppression hearing are of a lesser magnitude than those at a criminal trial itself.”)

### 6. Confrontation Clause does not apply at sentencing hearings.

- United States v. Luciano, 414 F.3d 174 (1st Cir. 2005) (non-capital sentencing hearing)
- United States v. Martinez, 413 F.3d 239 (2nd Cir. 2005) (non-capital sentencing hearing)

In addition, the Illinois Supreme Court has implied that Crawford does not affect the admissibility of evidence at the second stage of a capital sentencing hearing. People v. Mertz, 218 Ill.2d 1, 57, 842 N.E.2d 618, 648-49 (2005) (discussing Crawford and reaffirming that the “only requirement for the admissibility of evidence at this stage of a capital sentencing hearing is that the evidence be relevant and reliable.”). See also Thomas v. State, 148 P.3d 727 (Nev. Sup. Ct. 2006) (rejecting claim that Crawford applies to eligibility and selection phases of capital sentencing hearing).

### 7. Probation violation hearings are civil; Confrontation Clause does not apply.

- People v. Johnson, 121 Cal.App.4th 1409 (2004)
- People v. Turley, 109 P.3d 1025 (Colo. App. Ct. 2004)
- See People v. Lindsey, 199 Ill.2d 460, 771 N.E.2d 399 (2002) (probation revocation hearings civil in nature)

### B. Confrontation Clause only applies to out-of-court statements offered for their truth; in other words, hearsay. Non-hearsay evidence--statements not offered for the truth of the matter asserted--do not raise a constitutional issue.

#### 1. Evidence of co-defendant’s statement offered to rebut defendant’s claim of coercion in his statement not admitted for truth of matter asserted.

- Crawford explicitly reaffirms Tennessee v. Street, 471 U.S. 409, 105 S.Ct. 2078 (1985)
- People v. Reynoso, 2 N.Y.3d 820, 814 N.E.2d 456 (N.Y. 2004)
- United States v. Eberhart, 388 F.3d 1043 (7th Cir. 2004)

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2. Evidence offered to explain course of investigation or conduct of officers is not offered for truth of the matter asserted and does not raise confrontation issues.

- State v. Banks, 2004 Ohio 6522 (Ohio App. Ct. 2004)
- See also People v. Suastegui, 374 Ill.App.3d 635, 871 N.E.2d 145 (1st Dist. 2007) (officer's testimony that declarant's statement corroborated person's statement is not testimonial because shows officer's course of conduct of how investigation proceeded)

3. Expert witnesses can testify about testimonial evidence considered in forming an opinion; evidence not offered for truth of matter asserted.

- People v. Jones, 374 Ill.App.3d 566, 871 N.E.2d 823 (1st Dist. 2007) (gunshot residue testimony; expert may testify about findings and conclusions of nontestifying expert considered in forming opinions)
- State v. Bunn, 619 S.E.2d 918 (N.C. App. Ct. 2005) (drug chemistry) (good discussion)
- State v. Arita, 900 So.2d 37 (La. App. Ct. 2005) (fingerprints)
- State v. Watts, 616 S.E.2d 290 (N.C. App. Ct. 2005) (DNA)
- People v. Thomas, 130 Cal.App.4th 1202 (2005) (gang expert)
- State v. Delany, 613 S.E.2d 699 (N.C. App. Ct. 2005) (drug chemistry)
- State v. Keodara, 2005 Wash. App. Lexis 1703 (Wash. App. Ct. 2005) (canine handler) (unpublished)

- C. Confrontation Clause is satisfied when the declarant is available for cross-examination (regardless of whether the defendant chooses to exercise that right).  
Period.

- People v. Cookson, 215 Ill.2d 194, 830 N.E.2d 484 (2005)
- People v. Bakr, 373 Ill.App.3d 981, 869 N.E.2d 1010 (1st Dist. 2007)
- People v. Sharp, 355 Ill.App.3d 786, 825 N.E.2d 706 (4th Dist. 2005) (containing an excellent discussion of what constitutes "available for cross-examination")
- People v. Monroe, 366 Ill.App.3d 1080, 852 N.E.2d 888 (2nd Dist. 2006)
- People v. Desantiago, 365 Ill.App.3d 855, 850 N.E.2d 866 (1st Dist. 2006)
- People v. Miller, 363 Ill.App.3d 67, 842 N.E.2d 290 (1st Dist. 2005)
- People v. Johnson, 363 Ill.App.3d 1060, 845 N.E.2d 645 (2nd Dist. 2005)
- People v. Reed, 361 Ill.App.3d 995, 838 N.E.2d 328 (4th Dist. 2005)
- People v. Cannon, 358 Ill.App.3d 313, 832 N.E.2d 312 (1st Dist. 2005)
- People v. Miles, 351 Ill.App.3d 857, 815 N.E.2d 37 (4th Dist. 2004)

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- People v. Klimawicze, 352 Ill.App.3d 13, 815 N.E.2d 760 (1st Dist. 2004)
- People v. Thompson, 349 Ill.App.3d 587, 812 N.E.2d 516 (1st Dist. 2004)
- People v. Martinez, 348 Ill.App.3d 521, 810 N.E.2d 199 (1st Dist. 2004)

D. Confrontation Clause only applies against the State.

- “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .” (Emphasis added.)
- Note that when the defendant opens the door by offering portions of an (otherwise) testimonial statement, the State can cross-examine (pursuant to the “completeness doctrine”) on other relevant portions of that statement for impeachment.

E. Crawford does not affect the admissibility of a defendant’s statement by the State.

- People v. Thompson, 349 Ill.App.3d 587, 812 N.E.2d 516 (1st Dist. 2004)

F. Forfeiture by wrongdoing: a defendant forfeits a confrontation claim as a result of his wrongful conduct vis-a-vis the declarant. When the defendant causes the declarant’s unavailability at trial, he forfeits the right to confrontation.

In Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266 (2006), the Court explicitly reaffirmed what it noted in Crawford: “the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds. That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.” Davis, 126 S.Ct. at 2280 (internal quotations and citations omitted.).

Although Davis declined to establish the standards necessary to demonstrate such forfeiture, the Court observed that hearsay evidence, including the unavailable witness’s out-of-court statements, may be considered at such a hearing, and that most courts hold that the State’s burden of proof is by a preponderance of the evidence. Davis, 126 S.Ct. at 2280.

In People v. Stechly, 225 Ill.2d 246, 870 N.E.2d 333 (2007), the Illinois Supreme Court grappled with this issue, filing a series of splintered opinions, none of which obtained the approval of a majority of the court. At a minimum, however, Stechly does confirm that the forfeiture-by-wrongdoing doctrine retains vitality in Illinois. Although in separate opinions, a majority of the court agreed that hearsay (including the declarant’s statement) is admissible at a forfeiture hearing, with a plurality concluding that the State must prove the defendant intended to procure the declarant’s absence from trial to establish forfeiture.

See also:

- People v. Hampton, 363 Ill.App.3d 293, 842 N.E.2d 1124 (1st Dist. 2006), aff'd and remanded 225 Ill.2d 238, 867 N.E.2d 957 (2007) (remanding for forfeiture hearing; referring to Stechly)
- People v. Melchor, \_\_ Ill.App.3d \_\_, 2007 Ill. App. Lexis 1051 (1st Dist. Sept. 28, 2007), upon remand by 226 Ill.2d 24, 871 N.E.2d 32 (2007), vacating 362 Ill.App.3d 335, 841 N.E.2d 420 (1st Dist. 2005) (noting forfeiture by wrongdoing and concluding that defendant's skipping bail and failing to appear for several years, although wrongful, was not aimed at intentionally procuring witness's absence from trial)

II. Crawford's core holding.

When a declarant does not testify at trial, the Confrontation Clause prohibits admitting the declarant's testimonial statements unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine. It is admitting testimonial evidence absent unavailability and an opportunity for cross-examination that violates the Confrontation Clause.

Note that "unavailability" and "opportunity for cross-examination" are terms of art with their own bodies of case law. An issue frequently arises when the declarant denies at trial making the out-of-court statement or testifies that she simply does not remember doing so. In these circumstances, defendants commonly complain that they are unable to cross-examine (i.e. confront) the witness regarding that statement. This often arises with domestic violence victims and child or elderly witnesses. A strong line of precedent exists regarding the constitutional sufficiency for the "opportunity of cross-examination" under such circumstances. See:

- United States v. Owens, 484 U.S. 554, 108 S.Ct. 838 (1988)
- People v. Lewis, 223 Ill.2d 393, 860 N.E.2d 299 (2006) (citing Owens, holding that "witness is subject to cross-examination when he or she is placed on the witness stand, under oath, and responds willingly to questions", even if beyond the scope of direct examination)
- People v. Bakr, 373 Ill.App.3d 981, 869 N.E.2d 1010 (1st Dist. 2007) (holding that two declarants "physically appeared at trial" and "no confrontation clause problems exist simply because a declarant's alleged memory problems precluded the declarant from being cross-examined to the extent that defense counsel would have liked.")

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- People v. Watkins, 368 Ill.App.3d 927, 859 N.E.2d 265 (1st Dist. 2006) (sufficient opportunity for cross-examination when witness claimed could not recall events)
- People v. Sharp, 355 Ill.App.3d 786, 825 N.E.2d 706 (4th Dist. 2005) (excellent discussion including Crawford)
- People v. Flores, 128 Ill.2d 66, 538 N.E.2d 481 (1989)
- People v. Bueno, 358 Ill.App.3d 143, 829 N.E.2d 402 (2nd Dist. 2005)
- People v. Miller, 363 Ill.App.3d 67, 842 N.E.2d 290 (1st Dist. 2005)
- People v. Monroe, 366 Ill.App.3d 1080, 852 N.E.2d 888 (2nd Dist. 2006)
- People v. Desantiago, 365 Ill.App.3d 855, 850 N.E.2d 866 (1st Dist. 2006)
- People v. Learn, 371 Ill.App.3d 701, 863 N.E.2d 1173 (2nd Dist. 2007) (holding that, under the facts of that case, the child witness was not available for cross-examination)

In addition, the Crawford Court suggested (if not held) that the Confrontation Clause only applies to testimonial evidence. Crawford, 124 S.Ct. at 1364. However, many courts held that the Roberts v. Ohio, 448 U.S. 56, 100 S.Ct. 2531 (1980), sufficient-indicia-of-reliability framework continued to apply to non-testimonial hearsay. E.g., People v. Purcell, 364 Ill.App.3d 283, 846 N.E.2d 203 (2nd Dist. 2006).

In Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266 (2006), the Court reiterated that “other [non-testimonial] hearsay . . . is not subject to the Confrontation Clause.” See also Davis, 126 S.Ct. at 2274 (construing Crawford’s statement, that the text of the Confrontation Clause reflects its focus on testimonial evidence, marks out not only the Clause’s core but also its perimeter). Nonetheless, some courts continued to conclude that Roberts applied to non-testimonial evidence.

In Whorton v. Bockting, \_\_\_ U.S. \_\_\_, 127 S.Ct. 1173, 1182 (2007), the Court emphatically stated that “Crawford overruled Roberts because Roberts was inconsistent with the original understanding of the Confrontation Clause.” Accordingly, Crawford’s result was the “elimination of Confrontation Clause protection against the admission of unreliable out-of-court non[-]testimonial statements.” Thus, under Crawford, “the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.” Whorton, 127 S.Ct. at 1182-83.

As a result, it is now settled that the Confrontation Clause does not affect the admissibility of non-testimonial hearsay, and no reliability-type analysis is required in determining the admissibility of such hearsay.

III. Testimonial Evidence and Bearing “Witness”

In both Crawford and Davis, the Court discusses the trial of Sir Walter Raleigh in analyzing testimonial evidence. In that case, government investigators (then called magistrates and justices of the peace) took witness statements for use in prosecution in lieu of in-court testimony. It is this practice of “trial by affidavit” with which the Confrontation Clause is concerned. All of the Court's examples of testimonial statements share the characteristic of State actors formally questioning witnesses for subsequent use in court.

Crawford decreed that the Confrontation Clause applies to testimonial evidence, but failed to explicitly define what it meant by the term “testimonial”. Without providing a precise definition of testimonial evidence, Crawford teaches that it is the trial use of a certain type of hearsay--testimonial--that implicates the Confrontation Clause. In doing so, the Court sheds some light on those types of hearsay that constitute testimonial evidence. At the same time, it clearly identifies various types of hearsay that are not testimonial.

At a minimum, Crawford holds that testimonial evidence includes prior testimony and statements made during certain police interrogations. Testimony can come from a variety of settings, including past trials, hearings, grand jury proceedings, plea allocutions, depositions, and affidavits. In each of these, the declarant is placed under oath and provides testimony.

In Crawford, the Court noted that by its own terms the Confrontation Clause applies to “witnesses” against the accused. The Court construed the term “witnesses” as those who bear testimony. Based upon this, the Court concluded that “testimony” in a constitutional sense--in other words, testimonial evidence--requires a certain formality in the statement. “An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” Crawford, 124 S.Ct. at 1364. It is that “specific type of out-of-court statement” that triggers constitutional scrutiny. Id.

In Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266 (2006), the Court emphasized this formality in defining testimonial hearsay statements. While the Davis Court framed the issue before it as determining “which police interrogations produce testimony” (Davis, 126 S.Ct. at 2273), the Court provides much greater insight into what constitutes testimonial hearsay in other contexts as well.

To determine whether a statement made during police interrogation (as that term is used for confrontation purposes) constitutes testimonial evidence, the Davis Court established a “primary purpose” test:

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“Statements are non[-]testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” Davis, 126 S.Ct. at 2273-74.

In other words, Davis looks to the “why” and the “when” of the statement. Is the statement obtained to address a current situation--for use in the “now”? Or, is the statement obtained to determine what happened in the past for use in the future? Statements obtained to deal with ongoing situations--for use in the “now”--are not testimonial, while statements taken to memorialize past events for use in later proceedings are testimonial.

The Davis Court’s recitation of the facts in the two consolidated cases before it (Davis v. Washington and Hammon v. Indiana) reflect that dichotomy of purpose. In Davis, the statements were made during a 911 call in which a domestic-violence victim called the police for help. In that situation, the statements dealt with an ongoing emergency; the were for use by police to address an immediate situation. In Hammon, conversely, the statements were made during police investigation into the past commission of possible criminal conduct. The statements were made during structured questioning, under formal enough conditions (in a separate room where the police kept the declarant apart from the suspect), and culminated in the declarant completing an affidavit memorializing her statement. Rather than to help resolve a flaring emergency, these statements were part of a typical investigation into the past commission of a possible crime.

In Crawford, the Court began laying the framework for understanding whether an out-of-court statement constituted “testimony” in a constitutional sense. Attendant to that is the level of formality and the government’s involvement in the procurement of that evidence. Clearly, a declarant’s sworn statements, made during a court proceeding, deposition, or in an affidavit include a significant degree of formality as well as governmental involvement (if simply by placing the declarant under oath). Such statements are plainly testimonial.

In Davis, the Court refined its analysis regarding unsworn out-of-court statements, describing what constitutes “testimony” triggering the Confrontation Clause. The Court concluded that testimonial hearsay evidence is produced where the primary purpose in making the statement is to provide out-of-court testimony in lieu of the declarant testifying at trial. Thus, when “the ex parte actors and the evidentiary products of the ex parte communication align[] perfectly with their courtroom analogues,” the statement is testimonial. Davis, 126 S.Ct. at 2277. Conversely, when the declarant is not acting as a “witness”, that is, when the statement is not a solemn declaration or affirmation made for

the purpose of establishing some fact directed at proving the facts of a past crime to convict the perpetrator, the statement is not testimonial. Davis, 126 S.Ct. at 2276. As the Court observed, “[n]o ‘witness’ goes into court to proclaim an emergency and seek help.” Davis, 126 S.Ct. at 2277 (internal quotation marks in original).

In addition, the Court in Crawford held that statements covered by most hearsay exceptions by their nature are not testimonial. Crawford, 124 S.Ct. at 1367. The Court specifically mentioned business records, co-conspirator statements, most dying declarations, pedigree and family history evidence, reputation evidence, and past recollections recorded testimony. Such statements do not share the characteristics of testimonial hearsay; by their very definitions, their primary purpose is not to establish facts for a later criminal prosecution, and they are typically not made to the police. In other words, they bear little resemblance to the evidence used to prosecute Sir Walter Raleigh. Declarants making statements that fall within most hearsay exceptions simply are not acting as “witnesses” within the meaning of the Confrontation Clause.

This analysis comports with the Supreme Court’s characterization of the statements in Bourjaily v. United States, 483 U.S. 171, 107 S.Ct. 2775 (1987), and Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210 (1970), as “clearly non-testimonial.” Davis, 126 S.Ct. at 2275.

In Bourjaily, the trial court admitted a co-conspirator’s statement to an undercover government agent pursuant to the co-conspirator exception to the hearsay rule. Included in that ruling was that the statements were made in furtherance of the conspiracy (rather than, for example, post-arrest during structured police questioning). On review, the Supreme Court held that admitting those statements did not offend the Confrontation Clause. In Crawford and Davis, the Court reaffirmed that conclusion, declaring without discussion that those statements were not testimonial.

In Dutton, the trial court admitted statements from a co-defendant implicating the defendant to another prisoner while they were all in jail. The Supreme Court affirmed admitting those statements as co-conspirator statements (despite the fact that the defendant and the others were already in custody for those offenses). As in Bourjaily, the Court in Crawford and Davis summarily declared those statements were clearly not testimonial.

This is consistent with the Supreme Court’s construction of testimonial hearsay evidence. The statements in Bourjaily and Dutton were not solemn declarations. Nor were they for the purpose of providing evidence to convict. Indeed, they were quite the opposite. In Bourjaily, a co-conspirator was making statements to the government agent to further a criminal conspiracy. In Dutton, no government agent was even involved, and the declarant certainly did not make the statement as a formal declaration or to provide evidence to convict another at trial. In sum, neither statement’s primary purpose was to assist the government in investigating a possible crime. As Davis teaches, neither

declarant was acting as a “witness” or “testifying”. Simply put, neither statement bore any resemblance to the evidence admitted against Sir Walter Raleigh. As a result, Crawford and Davis easily deemed these statements non-testimonial.

This teaching informs the analysis involving statements in other contexts. In both Crawford and Davis, the Court made clear that the Confrontation Clause is aimed at a particular practice: the trial use of formalized, ex parte statements to government officials investigating an offense. The Crawford Court held that it is governmental involvement in that statement which bears “the closest kinship to the abuses at which the Confrontation Clause was directed.” Crawford, 124 S.Ct. at 1374. Indeed, it is governmental involvement that often (but not necessarily) creates the formal and solemn environment that leads to testimonial evidence. Without governmental involvement, much of the concern of the Confrontation Clause is absent.

The Supreme Court has held that the Sixth Amendment (home of the Confrontation Clause) “becomes applicable only when the government’s role shifts from investigation to accusation.” Moran v. Burbine, 475 U.S. 412, 430, 106 S.Ct. 1135, 1146 (1986) (holding that the Sixth Amendment right to counsel only attaches after the initiation of adversarial judicial proceedings). This is consistent with the Crawford Court’s repeated concern regarding the involvement of government agents:

- It is “police interrogation [that] bear a striking resemblance to examinations by justices of the peace in England.” Crawford, 124 S.Ct. at 1364.
- The Confrontation Clause is concerned about the “[i]nvolvement of government officers in the production of testimony with an eye toward trial . . . .” Crawford, 124 S.Ct. at 1367, n.7.
- The “involvement of government officers in the production of testimonial evidence presents the same risk [of violating the Confrontation Clause], whether the officers are police or justices of the peace.” Crawford, 124 S.Ct. at 1365.

The closer a factual situation comes to Sir Walter Raleigh’s case, the more likely it will be testimonial.

A. Testimonial Evidence: Testimony and Certain Police Interrogations

1. Testimony

- a. Grand Jury testimony is testimonial. People v. Patterson, 347 Ill.App.3d 1044, 808 N.E.2d 1159 (4th Dist. 2004), aff’d 217 Ill.2d

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407, 841 N.E.2d 889 (2005); People v. Howell, 358 Ill.App.3d 512, 831 N.E.2d 681 (3rd Dist. 2005) (no discussion).

- b. Sworn statements--testimony--in petition for order of protection its testimonial. People v. Thompson, 349 Ill.App.3d 587, 812 N.E.2d 516 (1st Dist. 2004).
- c. Co-defendant guilty plea testimonial. People v. Duff, 374 Ill.App.3d 599, 872 N.E.2d 46 (1st Dist. 2007).
- d. Also includes preliminary hearing, trial, plea allocution, depositions, affidavits.

### 2. Police Interrogation

In Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266 (2006), the Supreme Court adopted a "primary purpose test" for determining whether a statement made to a police officer constitutes testimonial evidence. The Court explains that statements

"are non[-]testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." Davis, 126 S.Ct. at 2273-74.

See above for further discussion of testimonial statements.

Prior to Davis, the Illinois Appellate Court addressed this issue in several opinions:

- a. People v. Bueno, 358 Ill.App.3d 143, 829 N.E.2d 402 (2nd Dist. 2005) (court states that custodial, post-Miranda statement to police "undoubtedly" testimonial).
- b. People v. Purcell, 364 Ill.App.3d 283, 846 N.E.2d 203 (2nd Dist. 2006) (statement to police is testimonial if the officer is acting in investigative capacity to produce evidence for criminal prosecution)

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- c. People v. Gilmore, 356 Ill.App.3d 1023, 828 N.E.2d 293 (2nd Dist. 2005) (court assumes without analysis that statements made in response to police questioning during investigation of a crime are testimonial).
    - Note that the defendant in Gilmore did not challenge various statements made to medical personnel during treatment or to a friend admitted as excited utterances.
  - d. People v. McMillin, 352 Ill.App.3d 336, 816 N.E.2d 10 (5th Dist. 2004) (court assumes without analysis that statement to police during questioning is testimonial).
- B. Illinois courts' construction of "testimonial" prior to Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266 (2006)
1. Testimonial evidence is typically procured by a governmental agent.
    - a. In People v. R.F., 355 Ill.App.3d 992, 1000, 825 N.E.2d 287, 295 (1st Dist. 2005), the court squarely held that "Crawford only applies to statements made to governmental officials; Crawford does not apply to statements made to nongovernmental personnel, such as family members or physicians." In reaching this conclusion, the court thoroughly examined Crawford's analysis, noting that "Crawford repeatedly emphasized the significance of governmental involvement in determining whether a hearsay statement is testimonial." R.F., 355 Ill.App.3d at 999-1000, 825 N.E.2d at 294.
    - b. In In re T.T., 351 Ill.App.3d 976, 815 N.E.2d 789 (1st Dist. 2004), vacated 224 Ill.2d 575, 866 N.E.2d 1174 (2007), upon remand \_\_\_ Ill.App.3d \_\_\_, 2007 Ill. App. Lexis 993 (1st Dist. 2007) (identical opinion on remand; petition for rehearing pending), the court states, but then ignores, that "governmental involvement in some fashion in the creation of a formal statement is necessary to render the statement testimonial in nature."
    - c. Note In re E.H., 355 Ill.App.3d 564, 823 N.E.2d 1029 (1st Dist. 2005) (governmental involvement necessary). The Illinois Supreme Court subsequently vacated that decision. In re E.H., 224 Ill.2d 172, 863 N.E.2d 231 (2006).

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2. Testimonial involves formal, structured questioning by trained investigators used to gain information about a crime. People v. Redeaux, 255 Ill.App.3d 302, 823 N.E.2d 268 (2nd Dist. 2005).
  3. Testimonial involves “formal and systematic questioning” (but maybe not necessarily government agent). In re Rolandis G., 352 Ill.App.3d 776, 817 N.E.2d 183 (2nd Dist. 2004), appeal granted 224 Ill.2d 575, 871 N.E.2d 56 (2007).
  4. Testimonial involves “specific, purposeful questions”; officers engaged in “investigative, evidence-producing actions”. People v. West, 355 Ill.App.3d 28, 823 N.E.2d 82 (1st Dist. 2005).
  5. Other jurisdictions have reached similar conclusions. For example:
    - State v. Lewis, 619 S.E.2d 830 (N.C. Sup. Ct. 2005) (“structured police questioning is a key consideration in determining whether a statement is or is not testimonial”)
    - People v. Fisher, 9 Misc.3d 1121A (N.Y. Crim. Ct., 2005) (testimonial involves “those situations in which government officials in a solemn and formal setting produce evidence against an identified individual regarding a particular offense”)
    - Tyler v. State, 167 S.W.3d 550 (Tex. App. Ct. 2005) (testimonial statements involve a declarant’s knowing responses to structured questioning in an investigative environment or a courtroom setting where the declarant could reasonably expect that his responses could be used in future judicial proceedings)
    - United States v. Manfre, 368 F.3d 832 (8th Cir. 2004) (testimonial refers to memorialized, judicial-process evidence)
    - State v. Nelson, 2005 N.C. App. Lexis 707 (N.C. App. Ct. 2005) (statements to private security guard not testimonial)
- C. Illinois courts’ construction of “testimonial” since Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266 (2006)

In People v. Kim, 368 Ill.App.3d 717, 859 N.E.2d 92 (2nd Dist. 2006), the Appellate Court held that a Breathalyzer certification affidavit did not constitute testimonial hearsay evidence. In doing so, the court wrote that “testimonial” contemplates evidence that is compiled during the investigation of a particular crime pertaining to a particular suspect. Conversely, the court held, documents establishing the existence or absence of an objective fact, rather than detailing the criminal wrongdoing of a defendant, are not testimonial.

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Although the court did not discuss Davis in its opinion, its discussion is largely consistent with the Davis Court's analysis.

In People v. Stechly, 225 Ill.2d 246, 870 N.E.2d 333 (2007), the Illinois Supreme Court addressed whether various statements of a child victim constituted testimonial hearsay. However, a majority of the court was unable to agree upon a single analysis. Various opinions filed in Stechly discussed the statement's solemnity, the intent of the declarant versus the listener, the intent to establish a particular fact, and the presence or absence of police involvement. Because a majority of the court could not agree upon an analysis, it is difficult to discern specific guidance from the conflicting opinions. Indeed, even the plurality repeatedly "felt compelled . . . to note the limited extend of our holding", noting that it was based upon the "circumstances of this case." Stechly, 225 Ill.2d at 302, 870 N.E.2d at 366.

#### IV. Typical factual contexts: Some testimonial, some not

##### A. "Formal" statement to police

The classic situation of the police interview, in which a detective interviews an individual at the police station to memorialize her statement for future court purposes, is the essence of testimonial evidence. "Police interrogations bear a striking resemblance to examinations by justices of the peace in England." Crawford, 124 S.Ct. at 1364. The primary purpose of such a statement is clearly to establish past events potentially relevant to a later criminal prosecution. Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 2273-74 (2006).

Similarly, the typical detective interview of a child sexual-assault victim as part of the criminal investigation also constitutes testimonial evidence. It is irrelevant whether this interview takes place at a police station or Children's Advocacy Center.

Both these interviews involve a governmental agent formally interviewing a witness, often with structured questioning. In light of the Davis primary purpose test, this clearly constitutes testimonial evidence.

Examples of Illinois cases:

- People v. Purcell, 364 Ill.App.3d 283, 846 N.E.2d 203 (1st Dist. 2006)
- People v. R.F., 355 Ill.App.3d 992, 825 N.E.2d 287 (1st Dist. 2005)
- People v. West, 355 Ill.App.3d 28, 823 N.E.2d 82 (1st Dist. 2005)

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- People v. Feazell, \_\_ Ill.App.3d \_\_, 2007 Ill. App. Lexis 1145 (1st Dist. Oct. 31, 2007) (simply stating co-defendant custodial statements clearly testimonial)
- In re Rolandis G., 352 Ill.App.3d 776, 817 N.E.2d 183 (2nd Dist. 2004), appeal granted 224 Ill.2d 575, 871 N.E.2d 56 (2007)

### B. DCFS interview of child victim

Like a police interview of a child victim, the DCFS interview is often a formal, structured (although hopefully open-ended) questioning of the child-witness. As a result, it often will constitute interrogation for Crawford (even if not Miranda) purposes. However, the issue exists whether, in a particular context, questioning by a DCFS worker constitutes sufficient governmental involvement (assuming some level of governmental involvement is necessary) to render a statement testimonial.

Illinois' first analysis of this issue was in In re T.T., 351 Ill.App.3d 976, 815 N.E.2d 789 (1st Dist. 2004), vacated 224 Ill.2d 575, 866 N.E.2d 1174 (2007), identical opinion upon remand, \_\_ Ill.App.3d \_\_, 2007 Ill. App. Lexis 993 (1st Dist. 2007) (petition for rehearing pending), in which the court held that where the DCFS investigator "works at the behest of and in tandem with the State's Attorney with the intent and purpose of assisting in the prosecutorial effort, DCFS functions as an agent of the prosecution." This makes sense and is in harmony with Crawford's understanding of the Confrontation Clause. Accordingly, the T.T. court was clear that not all statements made to DCFS will necessarily be testimonial, but where the DCFS investigator acts in a prosecutorial capacity, she essentially functions as a State agent for Confrontation Clause purposes.

The Second District Appellate Court followed this portion of T.T.'s analysis in In re Rolandis G., 352 Ill.App.3d 776, 817 N.E.2d 183 (2nd Dist. 2004), appeal granted 224 Ill.2d 575, 871 N.E.2d 56 (2007), holding that a child victim's statements to both a police officer and DCFS investigator constituted testimonial evidence because the statements "were the result of formal and systematic questioning."

Note that in a case in which a DCFS worker is not working at the behest of the prosecution, an argument exists that a particular statement would not be testimonial. There are cases from other jurisdictions decided prior to Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266 (2006), specifically supporting that position.

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The United States Supreme Court's decision in Davis strengthens this analysis. For example, when a DCFS investigator conducts interviews for child welfare purposes and to assist in formulating a safety plan, those statements may not be made for the primary purpose of establishing a past fact for future criminal prosecution. See Davis, 126 S.Ct. at 2276. As a result, such statements may not be testimonial hearsay.

In People v. Stechly, 225 Ill.2d 246, 870 N.E.2d 333 (2007), the court addressed whether various statements of a child victim constituted testimonial hearsay. Although a majority of the court was unable to agree upon a single analysis, the plurality opinion notes that statements to social workers, medical personnel, or other mandated reporters may or may not be testimonial based upon the circumstances of the particular case.

### C. Statements to family/friends (non-governmental officials)

This commonly arises when child victims or witnesses make statements to family members or friends about an offense; for example, the child-outcry statement to her parent.

Crawford itself suggests such statements are not testimonial, as they bear little resemblance to ex parte statements to government agents gathering evidence against an accused (see above discussion).

Davis further suggests (although the Court declined to specifically decide) that such statements are not testimonial. The Davis Court's construction of the statements admitted in Dutton v. Evans, 400 U.S. 74, 87-89, 91 S.Ct. 210 (1970), as "clearly non-testimonial" (Davis, 126 S.Ct. at 2275) only makes sense when it is understood in light of the Davis primary purpose test; in the absence of governmental involvement in the statement, the statement cannot objectively be viewed as having the requisite formality and being made to establish a past fact to support a future prosecution.

See above for further discussion of testimonial evidence.

In Illinois, People v. R.F., 355 Ill.App.3d 992, 825 N.E.2d 287 (1st Dist. 2005), provides the clearest holding that Crawford applies only to statements made to government officials; in other words, a statement made to a non-governmental official is not testimonial.

1. Child victim statement to mother and grandmother clearly not testimonial. People v. R.F., 355 Ill.App.3d 992, 825 N.E.2d 287 (1st Dist. 2005).

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2. Adult victim statement to concerned citizen/good Samaritan not testimonial; citizen not government agent. People v. West, 355 Ill.App.3d 28, 823 N.E.2d 82 (1st Dist. 2005) (although court differently--and wrongly--analyzes issue in other contexts).

Some cases decided prior to Davis have held that a statement to a non-government agent can be testimonial hearsay, focusing on the content of the statement and finding an “accusatory” portion to be testimonial. The fault with this analysis is that it ignores Crawford’s focus on the purpose and scope of the Confrontation Clause (discussed above). In addition, Davis teaches that a statement’s testimonial nature is determined not by its content but rather by the circumstances in which it was made.

In People v. Cumbee, 366 Ill.App.3d 476, 851 N.E.2d 934 (2nd Dist. 2006), decided several days after Davis, the victim called her neighbor “very upset and crying hysterically.” The neighbor told her to come over, and the victim arrived 30 seconds later. Still crying hysterically and with visible injuries, the victim told the neighbor how the defendant attacked her. The trial court admitted these statements as excited utterances.

On appeal, without any reference to Davis, the Cumbee court followed the analysis of In re T.T., 351 Ill.App.3d 976, 815 N.E.2d 789 (1st Dist. 2004), vacated 224 Ill.2d 575, 866 N.E.2d 1174 (2007), identical opinion upon remand \_\_\_ Ill.App.3d \_\_\_, 2007 Ill. App. Lexis 993 (1st Dist. 2007) (petition for rehearing pending), and concluded that the portion of the declarant’s statement identifying the defendant were testimonial hearsay. This analysis is incompatible with Davis. (Even upon remand, the appellate court in T.T. failed to address, or even cite, the Supreme Court’s opinion in Davis.)

The Davis Court held that a victim’s answers to a governmental agent’s questions were not testimonial because a “911 call . . . is [designed] to describe current circumstances requiring police assistance.” Davis, 126 S.Ct. at 2276. Davis teaches it is the statement’s purpose that determines its testimonial nature. When the primary purpose of a police interrogation is to prove past events for later criminal prosecutions, the statement is testimonial hearsay. Conversely, when the statement is for immediate use to resolve an emergency, it is not testimonial hearsay.

In Cumbee, the victim’s statements to her neighbor were to seek help “to resolve the present emergency”. See Davis, 126 S.Ct. at 2276. In addition, she was neither responding to an “interrogation” nor speaking to a governmental agent. This factual scenario is even farther afield from the Raleigh trial than that in Davis. As the Davis Court observed, the victim “simply was not acting as a

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witness; she was not testifying. . . . No ‘witness’ goes into court to proclaim an emergency and seek help.” Davis, 126 S.Ct. at 2277 (emphasis and internal quotations in original).

In light of United States Supreme Court’s opinion in Davis, and particularly noting that the appellate court in T.T. failed to discuss or even cite Davis, it is doubtful the analysis in T.T. and Cumbee will be followed by reviewing courts in the future. In addition, T.T. is currently pending a petition for rehearing, providing the appellate court an opportunity to alter its analysis in light of Davis.

See above for further discussion of testimonial evidence.

See also below for further discussion regarding content of the statement.

### D. Police officer at scene and 911 calls

Scenarios in which a police officer responds to a call for assistance and a person places a 911 call are precisely the scenarios addressed by the Court in Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266 (2006).

Police typically question individuals for one of two reasons, either to (1) gather information to assist in an emergency situation, or (2) establish the facts of a past crime for future prosecution. The Davis Court held that statements made during the former are not testimonial, while statements made during the latter are testimonial. Thus, when an officer is attending to the “community caretaking” function of addressing an emergency concern, rather than acting in an investigative capacity for the purpose of producing evidence for a criminal prosecution, the statement is not testimonial hearsay.

The Davis Court first considered a declarant’s answers to a 911 dispatcher. In doing so, the Court noted that, at a minimum, the initial questioning in a 911 call is ordinarily not designed primarily to prove a past fact, but rather to describe current circumstances requiring police assistance. Factors the Court considered included (1) the declarant was speaking about events as they were happening, rather than describing past events, (2) the declarant was facing on ongoing emergency, (3) the nature of the questioning was objectively such to assist in resolving the emergency rather than simply learn what had happened in the past, and (4) the level of formality of the questioning. Davis, 126 S.Ct. at 2276-77.

As a result, the Court concluded that the primary purpose of questioning under these circumstances is qualitatively different than the testimonial hearsay evidence subject to the Confrontation Clause. Declarants in such circumstances simply are

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not “witnesses” as that term is used in the constitutional text. Davis, 126 S.Ct. at 2277.

On-scene questioning is guided by the same principles. The factual context in Hammon v. Indiana (the consolidated companion case with Davis) demonstrated that unlike the emergency 911 call, the on-scene questioning was “part of an investigation into possibly criminal past conduct.” The Court observed that at the time of the questioning (1) there was no emergency in progress, (2) the officer separated the victim-declarant from the suspect, (3) the statement deliberately recounted--in response to police questioning--potentially criminal past conduct, and (4) the statement took place some time after the events described were over. Based upon this, the Court concluded that the primary purpose of that questioning was to investigate a possible crime rather than address an ongoing emergency situation. As a result, those statements were testimonial hearsay. Davis, 126 S.Ct. at 2278.

While the Davis Court reached that factual conclusion based upon the evidence before it, the Court was clear that “officers called to investigate need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim. Such exigencies may often mean that initial inquiries produce non[-]testimonial statements.” Davis, 126 S.Ct. at 2279 (internal quotations and citations omitted) (emphasis in original). As a result, Davis’s legal holding remains intact: questioning--be it during a 911 telephone call or in person on-scene--is not testimonial if its primary purpose is to address an ongoing emergency situation.

- Note that non-testimonial statements may evolve into testimonial hearsay evidence. For example, questioning after an emergency ends may produce testimonial statements. Trial courts through orders in limine should exclude testimonial portions of such statements. Davis, 126 S.Ct. at 2277.

Even prior to Davis, some Illinois courts utilized this type of analysis, and those cases remain good law.

1. Adult victim’s statements to responding police officer are not testimonial; the “questions posed by the officer were preliminary in nature and for the purpose of attending to [the victim’s] medical concerns, not for the purpose of producing evidence in anticipation of a potential criminal prosecution.” People v. West, 355 Ill.App.3d 28, 823 N.E.2d 82 (1st Dist. 2005).
2. Child victim’s statement to officer “acting in an investigative capacity for the purposes of producing evidence in anticipation of a criminal

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prosecution" (citing West) is testimonial. People v. R.F., 355 Ill.App.3d 992, 825 N.E.2d 287 (1st Dist. 2005).

3. Note also United States v. Thomas, 453 F.3d 838 (7th Cir. 2006) (following Davis, holding that an anonymous 911 caller's statements were not testimonial).

### E. Statements to medical personnel for diagnosis or treatment

Determining whether statements made in the course of a medical examination was initially the subject of some controversy, although it was completely unnecessary. Regardless, the issue should now be settled in light of the Supreme Court's decision in Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266 (2006).

Statements to medical personnel do not involve police officers acting in an investigative capacity to produce evidence in anticipation of a criminal prosecution. Instead, such statements are primarily for the purpose of attending to the patient's medical concerns. As a result, these statements bear no relationship to the practices at which the Confrontation Clause was directed, and they cannot be testimonial. People v. R.F., 355 Ill.App.3d 992, 825 N.E.2d 287 (1st Dist. 2005).

In addition, medical personnel are not transformed into government agents simply because the medical examination is conducted for forensic purposes, even if it was the result of a DCFS referral. In re T.T., 351 Ill.App.3d 976, 815 N.E.2d 789 (1st Dist. 2004), vacated 224 Ill.2d 575, 866 N.E.2d 1174 (2007), identical opinion upon remand \_\_ Ill.App.3d \_\_, 2007 Ill. App. Lexis 993 (1st Dist. 2007) (petition for rehearing pending).

In T.T., the court ultimately concluded that the portions of a patient's statement identifying the offender were testimonial. In doing so, the court examined the content of the statement and segmented it into testimonial and non-testimonial portions. Prior to Davis, some panels of the Appellate Court followed this analysis. People v. Purcell, 364 Ill.App.3d 283, 846 N.E.2d 203 (2nd Dist. 2006); People v. Cumbee, 366 Ill.App.3d 476, 851 N.E.2d 934 (2nd Dist. 2006).

Contrary to T.T., however, Davis teaches that a statement's testimonial nature is determined not by its content but rather by the circumstances in which it was made. In Davis, the Court considered the admissibility of a victim's statements to a 911 operator. During the call, the 911 operator asked the victim to identify her assailant, and she did. Rather than engage in any content-based dissection of the statement, the Court examined the circumstances in which the statement was

made to determine whether it was testimonial. This analysis is inconsistent with T.T.'s content-based parsing, and necessarily rejects it.

The Davis Court concluded that the fact the declarant identified the offender did not render the statement testimonial. Indeed, the Court went further and held that the statement--with the identification of the defendant--was not testimonial even with the 911 operator's specific efforts to identify the assailant. Davis, 126 S.Ct. at 2276. In reaching that conclusion, the Court reasoned that the identity of the assailant is pertinent to the police because they "need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." Davis, 126 S.Ct. at 2279 (internal quotations omitted).

This comports with precedent from the Illinois Supreme Court regarding statements made in the course of medical treatment. In People v. Falaster, 173 Ill.2d 220, 670 N.E.2d 624 (1996), the victim was taken for a forensic medical examination. The trial court admitted the victim's statement to the nurse identifying the defendant her abuser. On appeal, the supreme court held that a victim's identification of her assailant may be considered by medical professionals in forming their diagnosis and treatment plan, and is therefore admissible.

The supreme court's analysis in Falaster is consistent with the Davis Court's conclusion that police consider the identity of a possible assailant in order to assess the situation and possible danger. Although Falaster did not address the constitutional issue, pursuant to Davis, statements of identification do not automatically obtain special status.

In light of United States Supreme Court's opinion in Davis, and particularly noting that the appellate court in T.T. failed to discuss or even cite Davis, it is doubtful the analysis in T.T. and its progeny will be followed by reviewing courts in the future. In addition, T.T. is currently pending a petition for rehearing, providing the appellate court an opportunity to alter its analysis in light of Davis.

Also note People v. Gilmore, 356 Ill.App.3d 1023, 828 N.E.2d 293 (2nd Dist. 2005), in which the defendant did not challenge various statements made to medical personnel during treatment or to a friend admitted as excited utterances.

V. Non-testimonial hearsay evidence.

The Crawford Confrontation Clause is aimed at a particular practice: the trial use of a witness's ex parte statements to government officials as evidence against the defendant. The Crawford Court notes that statements covered by most hearsay exceptions by their

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nature are not testimonial. Crawford, 124 S.Ct. at 1367. Such statements do not share the characteristics of testimonial evidence; in other words, they bear little resemblance to the evidence used to prosecute Sir Walter Raleigh. Accordingly, evidence that lacks the characteristics of State actors formally questioning witnesses to produce evidence in anticipation of a criminal prosecution are not testimonial. See above for additional discussion of testimonial evidence.

Note that the Confrontation Clause does not apply to non-testimonial hearsay. The Roberts v. Ohio, 448 U.S. 56, 100 S.Ct. 2531 (1980), sufficient-indicia-of-reliability framework does not survive Crawford in any context, and the admission of even unreliable yet non-testimonial out-of-court statements does not trigger the Confrontation Clause. Whorton v. Bockting, \_\_ U.S. \_\_, 127 S.Ct. 1173 (2007). (See above for further discussion.)

In stating that evidence covered by most hearsay exceptions is not testimonial, the Crawford Court specifically mentions business records, co-conspirator statements, most dying declarations, pedigree and family history evidence, reputation evidence, and past recollections recorded testimony.

### A. Co-conspirator statements.

1. The Crawford Court specifically identifies co-conspirator statements as not testimonial. Crawford, 124 S.Ct. at 1367.
2. The Illinois Appellate Court has followed suit. For example:
  - a. In People v. Redeaux, 355 Ill.App.3d 302, 823 N.E.2d 268 (2nd Dist. 2005), the court notes that by their very nature, the purpose of co-conspirator statements are to advance the conspiracy, not assist law enforcement in defeating it.
  - b. In People v. Cook, 352 Ill.App.3d 108, 815 N.E.2d 879 (1st Dist. 2004), the court similarly holds that co-conspirator statements do not constitute testimonial evidence.

### B. Dying declarations.

- People v. Gilmore, 356 Ill.App.3d 1023, 828 N.E.2d 293 (2nd Dist. 2005) (Crawford permits admitting dying declarations regardless whether testimonial)

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### C. Breathalyzer certification not testimonial

- People v. Kim, 368 Ill.App.3d 717, 859 N.E.2d 92 (2nd Dist. 2006)  
(Although court avoids characterizing Breathalyzer certification affidavit as business record or public document, court concludes that it is not testimonial)

### D. Although Illinois courts of review have not yet addressed evidence covered by other common-law hearsay exceptions, courts from other jurisdictions have. For example (these are only selected examples; many more exist):

#### 1. Excited utterance not testimonial:

- Anderson v. State, 111 P.3d 350 (Alaska App. Ct. 2005)  
(collecting cases)
- United States v. Luciano, 414 F.3d 174 (1st Cir. 2005)
- Rogers v. State, 814 N.E.2d 695 (Ind. App. Ct. 2004)
- State v. Banks, 2004 Ohio 6522 (Ohio App. Ct. 2004)
- State v. Wright, 701 N.W.2d 802 (Minn. Sup. Ct. 2005)
- State v. Barnes, 2004 Me. 105, 854 A.2d 208 (2004)
- People v. Corella, 122 Cal.App.4th 461 (2004)
- Leavitt v. Arave, 383 F.3d 809 (9th Cir. 2004)
- State v. Orndorff, 122 Wn. App. 781, 95 P.3d 406 (2004)

#### 2. Business records not testimonial:

- United States v. Rueda-Rivera, 396 F.3d 678 (5th Cir. 2005) (INS records)
- People v. Kanhai, 797 N.Y.S.2d 870 (N.Y. Crim. Ct. 2005)  
(Breathalyzer records)
- People v. Fisher, 9 Misc.3d 1121A (N.Y. Crim. Ct., 2005)  
(Breathalyzer records)
- Napier v. State, 827 N.E.2d 565 (Ind. App. Ct. 2005) (Breathalyzer certificates)
- Riner v. Commonwealth, 268 Va. 296, 601 S.E.2d 555 (2004)
- Johnson v. Renico, 314 F.Supp.2d 700 (U.S. Dist. Ct. E.D. Mich. 2004)
- Perkins v. State, 897 So.2d 457 (Ala. App. Ct. 2004)
- Smith v. State, 898 So.2d 907 (Ala. App. Ct. 2004)

#### 3. Other jurisdictions have also held statements admitted to other hearsay exceptions to be not testimonial, including present sense impression, state of mind, past recollection recorded, public records, statement against penal

interest, and of course prior testimony (which requires the prior opportunity for cross-examination).

VI. Illinois statutory hearsay exceptions

A. Section 115-10: Certain child-victim hearsay statements

The first statutory hearsay exception attacked after Crawford was section 115-10 of the Code of Criminal Procedure (725 ILCS 5/115-10), which allows the introduction of a child victim's hearsay statements under certain circumstances. However, Crawford only bars the testimonial statement of a non-testifying declarant. Because section 115-10 applies in other contexts, it is not facially invalid, but instead may be unconstitutionally applied in particular circumstances.

In People v. Cookson, 215 Ill.2d 194, 830 N.E.2d 484 (2005), the Illinois Supreme Court explicitly reaffirmed that the Confrontation Clause is not implicated by the admission of a hearsay statement when the declarant testifies. In Cookson, the victim testified, and the trial court also admitted the child's hearsay statements pursuant to section 115-10(b)(2)(A). On appeal, the supreme court squarely held that because of the "statutory requirement that the child be available to testify . . . [the statute] does not run afoul of Crawford." Cookson, 215 Ill.2d at 204. As a result, the Illinois Supreme Court held that portion of section 115-10 constitutional.

1. When the child-declarant testifies, the Confrontation Clause is satisfied regardless of the nature of the out-of-court statement. Under these circumstances, section 115-10 is constitutional.
  - a. People v. Cookson, 215 Ill.2d 194, 830 N.E.2d 484 (2005) (see discussion above).
  - b. In People v. Cannon, 358 Ill.App.3d 313, 832 N.E.2d 312 (1st Dist. 2005), the court found section 115-10(b)(2)(A) constitutional because the child-declarant testified. The court also held that section 115-10(b)(2)(A) would be "severable from any other allegedly unconstitutional provisions of section 115-10."
  - c. In People v. Reed, 361 Ill.App.3d 995, 838 N.E.2d 328 (4th Dist. 2005), the court (citing Cookson) found section 115-10(b)(2)(A) constitutional because the child-declarant testified. The court, following Cannon, also held that section 115-10(b)(2)(A) would be severable from section 115-10(b)(2)(B). In doing so, the court

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specifically rejected the Appellate Court's earlier opinion in E.H. (see below).

- d. In People v. Johnson, 363 Ill.App.3d 1060, 845 N.E.2d 645 (2nd Dist. 2005), the court (citing Sharp) held that when a victim is subject to cross-examination, admitting a prior statement pursuant to section 115-10 is a constitutional "nonevent" and does not violate Crawford. In doing so, the court specifically rejected the Appellate Court's earlier opinion in E.H. (see below).
- e. In People v. Sharp, 355 Ill.App.3d 786, 825 N.E.2d 706 (4th Dist. 2005), the court held that admitting statements pursuant to section 115-10 was proper where the declarant testified and was available for cross-examination; see also Justice Turner's concurrence specifically explaining why section 115-10 is facially constitutional.
- f. In People v. Monroe, 366 Ill.App.3d 1080, 852 N.E.2d 888 (2nd Dist. 2006), the victims testified but denied making the out-of-court section 115-10 statements. The Appellate Court held (following Sharp and other cases) that because the victims testified--regardless of the substance of their testimony--admitting the out-of-court statements is a constitutional nonevent.
- g. In In re E.H., 355 Ill.App.3d 564, 823 N.E.2d 1029 (1st Dist. 2005), a divided panel of the appellate court flatly stated that section 115-10 is unconstitutional. However, the Illinois Supreme Court vacated the appellate court's decision in In re E.H., 224 Ill.2d 172, 863 N.E.2d 231 (2006). Upon remand, the appellate court did not reach the constitutional issue. In re E.H., \_\_\_ Ill.App.3d \_\_\_, 2007 Ill. App. Lexis 724 (1st Dist. June 29, 2007).

In addition, several other panels of the Appellate Court have specifically rejected the appellate court's initial opinion in E.H. People v. Johnson, 363 Ill.App.3d 1060, 845 N.E.2d 645 (2nd Dist. 2005); People v. Reed, 361 Ill.App.3d 995, 838 N.E.2d 328 (4th Dist. 2005).

- 2. When the child-declarant does not testify, Crawford applies only to a statement that constitutes testimonial hearsay. If the statement is not testimonial, Crawford does not affect its admission, and section 115-10 is not unconstitutionally applied in those circumstances.

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- a. Whorton v. Bockting, \_\_ U.S. \_\_, 127 S.Ct. 1173 (2007) (Confrontation Clause only applies to testimonial hearsay; Roberts overruled by Crawford).
  - b. People v. R.F., 355 Ill.App.3d 992, 825 N.E.2d 287 (1st Dist. 2005) (declarant does not testify, section 115-10 permits admitting non-testimonial statement).
  - c. In re Rolandis G., 352 Ill.App.3d 776, 817 N.E.2d 183 (2nd Dist. 2004), appeal granted 224 Ill.2d 575, 871 N.E.2d 56 (2007) (declarant does not testify, non-testimonial statement properly admitted under section 115-10).
  - d. Note that the statutory requirements in section 115-10 must still be met to admit non-testimonial statements.
3. If the child-declarant does not testify, a defendant's confrontation rights will typically be violated if testimonial hearsay is admitted against him at trial. To the extent section 115-10 permits this, it would be unconstitutional as applied in those circumstances.
- a. In re Rolandis G., 352 Ill.App.3d 776, 817 N.E.2d 183 (2nd Dist. 2004), appeal granted 224 Ill.2d 575, 871 N.E.2d 56 (2007).
  - b. Based upon the circumstances surrounding the child-declarant's failure to testify, consider whether the forfeiture-by-wrongdoing doctrine may permit admitting the out-of-court statements. See above discussion.

### B. Section 115-10.1: Prior inconsistent statements

Section 115-10.1 of the Code of Criminal Procedure (725 ILCS 5/115-10.1) pertains to impeaching a witness with a prior inconsistent statement, which obviously requires the declarant to testify. Because the Confrontation Clause is not implicated when the declarant testifies, section 115-10.1 does not present any constitutional issues. People v. Martinez, 348 Ill.App.3d 521, 810 N.E.2d 199 (1st Dist. 2004); People v. Bakr, 373 Ill.App.3d 981, 869 N.E.2d 1010 (1st Dist. 2007). (Note discussion and cases cited above as well.)

In many ways, the issue becomes whether the defendant had a sufficient opportunity to cross-examine the declarant. Rather than Crawford, this is an issue more truly controlled by the United States Supreme Court's decision in United

States v. Owens, 484 U.S. 554, 108 S.Ct. 838 (1988), and its progeny. See the discussion and cases cited above.

- C. Section 115-10.2 of the Code of Criminal Procedure (725 ILCS 5/115-10.2) permits the admission of a prior statement under certain circumstances when the declarant refuses to testify. It requires the declarant to be “unavailable” to testify, but defines that term in a specific way. Because an unavailable witness is typically not subject to cross-examination, section 115-10.2 was considered an early casualty of Crawford. That obituary was premature.

Note that the legislature recently amended section 115-10.2 to require that the statement was made under oath and subject to cross-examination. P.A. 94-53 (eff. June 17, 2005). While this limits the scope of statements covered by section 115-10.2, it likely ensures that it would not violate Crawford in those circumstances.

In addition, because “unavailable” is a term of art defined differently for purposes of the Confrontation Clause and section 115-10.2, a declarant can be simultaneously subject to cross-examination and statutorily unavailable. Applied in that context, section 115-10.2 is constitutional. People v. Bueno, 358 Ill.App.3d 143, 829 N.E.2d 402 (2nd Dist. 2005).

In Bueno, the State called Sergio Ruiz to testify. Sergio had earlier made several custodial, post-Miranda statements to police about the offense. During direct examination, Sergio decided he was done testifying and refused to answer further questions from the State. The defense asked Sergio some questions on cross-examination (but not about his custodial statements), he answered, and was then excused. The trial court subsequently admitted Sergio’s custodial statements to the police pursuant to section 115-10.2.

On appeal, the Second District Appellate Court nimbly concluded that Sergio was simultaneously unavailable but subject to cross-examination. The Second District agreed with the Fourth District in People v. Sharp, 355 Ill.App.3d 786, 825 N.E.2d 706 (4th Dist. 2005), and concluded that Sergio answered the defense’s questions during cross-examination. As a result, the court held that Sergio was available and “appeared” for confrontation-Crawford purposes. Accordingly, admitting Sergio’s custodial statements did not raise any constitutional issues.

Parenthetically, the court quickly noted that Sergio’s statements to the police would constitute testimonial hearsay. However, because the court held that Sergio was available for cross-examination, it is irrelevant whether the statements would be testimonial; that analysis only takes place when the declarant does not appear for cross-examination.

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The court then turned to the hearsay-evidentiary analysis. Section 115-10.2 defines “unavailable” as when the declarant refuses to testify about his prior statements despite being ordered to do so. Because Sergio did exactly that, the court held that he was unavailable as required by section 115-10.2--despite earlier holding that he appeared at trial and was subject to cross-examination. Accordingly, the court concluded that Sergio’s statements to the police were properly admitted pursuant to section 115-10.2 (having met the other statutory requirements as well).

Note also that in People v. Brown, 363 Ill.App.3d 838, 842 N.E.2d 1141 (1st Dist. 2006), the court similarly held that the former version of section 115-10.2 was not facially unconstitutional.

- D. Section 115-10.2a of the Code of Criminal Procedure (725 ILCS 5/115-10.2a) permits the admission of a prior statement under certain circumstances in domestic violence cases when the declarant is “unavailable” to testify, and defines that term in a specific way.

First, because section 115-10.2a could apply to a non-testimonial statement, it is not facially unconstitutional. (See above discussion.)

In addition, because “unavailable” is a term of art defined differently for purposes of the Confrontation Clause and section 115-10.2a, a declarant can be simultaneously subject to cross-examination and statutorily unavailable. Applied in that context, section 115-10.2 is constitutional. See People v. Bueno, 358 Ill.App.3d 143, 829 N.E.2d 402 (2nd Dist. 2005), and discussion for section 115-10.2 above.

However, section 115-10.2a does not require a prior opportunity for cross-examination. To the extent section 115-10.2a would allow admitting a testimonial statement absent an opportunity for confrontation, it may be unconstitutionally applied.

- E. Section 115-10.3 of the Code of Criminal Procedure (725 ILCS 5/115-10.3) creates a hearsay exception regarding elder adults, and essentially mirrors section 115-10. As a result, the analysis for section 115-10 applies here as well.
- F. Section 115-10.4 of the Code of Criminal Procedure (725 ILCS 5/115-10.4), which permits the admission of a prior statement under certain circumstances when the declarant is deceased, requires that the statement have been made under

oath in a court-type proceeding. As a result, any such statement would likely be testimonial. In an effort to ensure the statute's constitutionality, the legislature amended it to require that the statement was subject to cross-examination. P.A. 94-53 (eff. June 17, 2005).

- Note People v. Melchor, 362 Ill.App.3d 335, 841 N.E.2d 420 (1st Dist. 2005) (non-cross-examined prior testimonial statement unconstitutionally admitted), vacated 226 Ill.2d 24, 871 N.E.2d 32 (2007), opinion upon remand \_\_ Ill.App.3d \_\_, 2007 Ill. App. Lexis 1051 (1st Dist. Sept. 28, 2007) (decided on statutory basis; no constitutional discussion).

G. Section 115-12: Statements of identification

Section 115-12 of the Code of Criminal Procedure (725 ILCS 5/115-12) pertains to the admissibility of out-of-court statements of identification. Section 115-12 requires that the declarant testify regarding the statement, and as a result, does not present any constitutional issues. People v. Miller, 363 Ill.App.3d 67, 842 N.E.2d 290 (1st Dist. 2005).

Note also People v. Lewis, 223 Ill.2d 393, 860 N.E.2d 299 (2006) (construing section 115-12 and holding that “witness is subject to cross-examination when he or she is placed on the witness stand, under oath, and responds willingly to questions”, even if issue is beyond the scope of direct examination).

H. Section 115-13: Statements to medical personnel

1. When the patient-declarant testifies, the Confrontation Clause is satisfied, and section 115-13 of the Code of Criminal Procedure (725 ILCS 5/115-13) is not unconstitutional in these circumstances. (See discussions above.)
2. Even when the patient-declarant does not testify, a statement admissible pursuant to section 115-13 should not be testimonial. (See above discussion regarding testimonial evidence.) Crawford does not apply to non-testimonial hearsay; as a result, section 115-13 remains unaffected.

VII. Appellate and Post-Conviction Issues

A. Crawford confrontation violations are subject to a harmless error analysis; if the error is harmless beyond a reasonable doubt the violation does not warrant reversal. See Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967) (harmless error analysis).

- People v. Patterson, 217 Ill.2d 407, 841 N.E.2d 889 (2005)
- People v. Duff, 374 Ill.App.3d 599, 872 N.E.2d 46 (1st Dist. 2007)
- People v. Sullivan, 366 Ill.App.3d 770, 853 N.E.2d 754 (1st Dist. 2006)
- People v. Cumbee, 366 Ill.App.3d 476, 851 N.E.2d 934 (2nd Dist. 2006)
- People v. Purcell, 364 Ill.App.3d 283, 846 N.E.2d 203 (2nd Dist. 2006)
- People v. Brown, 363 Ill.App.3d 838, 842 N.E.2d 1141 (1st Dist. 2006)
- People v. R.F., 355 Ill.App.3d 992, 825 N.E.2d 287 (1st Dist. 2005)
- People v. Cannon, 358 Ill.App.3d 313, 832 N.E.2d 312 (1st Dist. 2005)
- People v. West, 355 Ill.App.3d 28, 823 N.E.2d 82 (1st Dist. 2005)
- People v. Thompson, 349 Ill.App.3d 587, 812 N.E.2d 516 (1st Dist. 2004)

B. Error subject to procedural default, forfeiture, and waiver

- People v. Jones, 374 Ill.App.3d 566, 871 N.E.2d 823 (1st Dist. 2007) (alleged error waived by failure to object at trial and raise in post-trial motion)
- People v. Suastegui, 374 Ill.App.3d 635, 871 N.E.2d 145 (1st Dist. 2007) (alleged error waived by failure to object at trial)
- People v. Fezell, \_\_ Ill.App.3d \_\_, 2007 Ill. App. Lexis 1145 (1st Dist. Oct. 31, 2007) (alleged error not preserved by failure to raise in post-trial motion)
- People v. Howell, 358 Ill.App.3d 512, 831 N.E.2d 681 (3rd Dist. 2005) (alleged error not preserved by failure to raise in post-trial motion)

Note that an issue not properly preserved for appeal may still be reviewed under the plain-error doctrine. For example, in People v. Fezell, \_\_ Ill.App.3d \_\_, 2007 Ill. App. Lexis 1145 (1st Dist. Oct. 31, 2007), the appellate court concluded that under the circumstances of that case, admitting the co-defendant's custodial—and obviously testimonial—statements against the defendant constituted plain error.

Note also People v. McMillin, 352 Ill.App.3d 336, 816 N.E.2d 10 (5th Dist. 2004), in which the court considered an ineffective assistance of counsel claim and stated that no reasonably effective defense attorney would fail to object to damaging testimonial evidence (as well as failing to object to prosecutors making up evidence and engaging in other egregious misconduct). Contra State v.

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Williams, 695 N.W.2d 23 (Iowa Sup. Ct. 2005) (rejecting ineffective assistance argument when defense failed to make a confrontation objection prior to Crawford).

See also:

- State v. Paoni, 331 Mont. 86, 128 P.3d 1040 (Mont. Sup. Ct. 2006) (confrontation issue waived; defendant failed to timely object)
- Patterson v. State, 280 Ga. 132, 625 S.E.2d 395 (Go. Sup. Ct. 2006).
- United States v. Luciano, 414 F.3d 174 (1st Cir. 2005) (defendant failed to object, reviewed only for plain error)
- Muhammad v. Commonwealth, 269 Va. 451, 619 S.E.2d 16 (Va. Sup. Ct. 2005)
- State v. Lee, 687 N.W.2d 237 (N.D. Sup. Ct. 2004) (defendant failed to object, waived issue)
- Parson v. Commonwealth, 144 S.W.3d 775 (Ky. Sup. Ct. 2004) (defendant waived right to confront declarant)
- Commonwealth v. Negron, 441 Mass. 685, 808 N.E.2d 294 (2004) (error waived)

### C. No retroactive application

Because a Crawford violation is subject to harmless-error analysis, it should not be applicable retroactively beyond cases on direct appeal. The United States Supreme Court recently agreed in Whorton v. Beckting, \_\_ U.S. \_\_, 127 S.Ct. 1173 (2007), in which a unanimous Court definitively held that Crawford is not retroactive to cases already final on direct review.

This comports with the Illinois Supreme Court's Apprendi analysis, as follows:

“Retroactivity is an all-or-nothing proposition. [Citation.] An error which does not seriously affect the fairness, integrity or public reputation of judicial proceedings in one or more cases cannot be such a bedrock procedural element essential to the fairness of a proceeding as to fall within the second Teague [v. Lane], 489 U.S. 288 (1989) exception, requiring retroactive application in all cases.” People v. DeLaPaz, 204 Ill.2d 426, 438, 791 N.E.2d 489, 496 (2003).

**ANNUAL REPORT**  
**OF THE**  
**COMMITTEE ON DISCOVERY PROCEDURES**  
**TO THE ILLINOIS JUDICIAL CONFERENCE**

Hon Mary Anne Mason, Chair

Hon. Deborah Mary Dooling  
Hon. James R. Glenn  
Hon. John B. Grogan  
Hon. James J. Mesich

Hon. Jeffrey W. O'Connor  
Hon. Kenneth L. Popejoy  
Mr. David B. Mueller, Esq.  
Mr. Eugene I. Pavalon, Esq.

Mr. Paul E. Root, Esq.

October 2008

## I. STATEMENT ON COMMITTEE CONTINUATION

The purpose of the Committee on Discovery Procedures (Committee) is to review and assess discovery devices used in Illinois. It is the goal of the Committee to propose recommendations that expedite discovery and eliminate any abuses of the discovery process. To accomplish this goal, the Committee researches significant discovery issues and responds to discovery-related inquiries. The Committee therefore believes that it provides valuable expertise in the area of civil discovery. For this reason, the Committee requests that it be permitted to continue its work in Conference Year 2009.

## II. SUMMARY OF COMMITTEE ACTIVITIES

### *A. Committee Charge*

The Committee is charged with studying and making recommendations on the discovery devices used in Illinois. The Committee also is charged with investigating and making recommendations on innovative means of expediting pretrial discovery and ending any abuses of the discovery process so as to promote early settlement discussions and to encourage civility among attorneys. Finally, the Committee's charge includes reviewing and making recommendations on proposals concerning discovery matters submitted by the Supreme Court Rules Committee, other committees, or other sources.

#### **1. Supreme Court Rule 204**

In conjunction with its charge, the Committee considered a proposal, forwarded by the Supreme Court Rules Committee, to amend Supreme Court Rule 204 (Compelling Appearance of Deponent) by creating a new paragraph (d) entitled "Non-Compliance by Non-Parties: Body Attachment." Specifically, the proposed amendment provides that an order of body attachment upon a non-party for non-compliance with a discovery order or subpoena shall not issue without proof of personal service of the rule to show cause or order of contempt upon the non-party. The proposed amendment also provides that a court may order a body attachment without proof of personal service upon a non-party, following a showing that there exists a reasonable likelihood of imminent and irreparable harm. In response to the Committee's concern about the type of circumstances warranted for a body attachment to issue without proof of personal service, the Committee was informed that the proposed amendment attempts to address situations where the statute of limitations or other such time constraint is at issue and the testimony of a witness is needed in a timely fashion. It also addresses situations, such as abuse of minors cases, where there is a need to bring the witness in and get his or her testimony immediately.

After considering the proposed amendment, the Committee rejected that portion permitting a body attachment without proof of personal service. Although the Committee recognized the

drafter's intent to allow for exigent circumstances, the Committee determined that personal service upon a non-party should not be excused. The Committee, however, agreed with the portion of the proposal that permits an order of body attachment upon a non-party provided that there is proof of personal service. Pursuant to Supreme Court Rule 3, the Committee forwarded its decision to the Supreme Court Rules Committee.

## **2. Supreme Court Rules 216/222**

In further adherence with its charge, the Committee continued its reconsideration of its proposed amendments to Supreme Court Rule 216 (Admission of Fact or Genuineness of Documents) in light of concerns raised at the Annual Public Hearing and the Illinois Supreme Court's decision in *Vision Point of Sale, Inc. v. Haas et al.*, 226 Ill. 2d 334 (2007). Initially, the Committee determined that abuses surrounding the use of Rule 216 often occur in small cases in high volume courtrooms, where many of the law firms are "bulk filers," who represent credit card companies and collection agencies, and many of the litigants are *pro se*. The Committee responded to such abuses by proposing certain narrow amendments to Rule 216, including requiring prior leave of court before serving a request to admit; proper notice to all parties; and prohibiting such requests from (a) being bundled with interrogatories and document requests and (b) being served more than 120 days after the filing of a responsive pleading unless there is agreement otherwise or the court so orders. The Committee limited application of its proposed amendments to civil actions not in excess of \$50,000. In limiting the scope of its proposed amendments, the Committee sought to curb the misuse of Rule 216 requests and yet retain the original purpose of the rule to clarify and simplify evidentiary issues at trial.

The Committee's proposed amendments to Rule 216 generated significant comments at the Annual Public Hearing regarding the limited application of the amendment, the time for filing requests, and requiring leave of court. As noted above, the Committee in this past Conference year reconsidered its proposed amendments in light of the comments raised at the public hearing and in conjunction with concerns in the legal community that requests are issued before discovery is completed and that requests are high in number. The Committee also considered the impact of the Illinois Supreme Court's decision in *Vision Point of Sale, Inc.*, 226 Ill.2d 334, which recognized the trial court's discretion with respect to resolving requests for admission.

In addressing the above concerns, the Committee focused on limiting the number of requests and requiring prior leave of court in all cases. The Committee sought to provide discretion to the trial court regarding the timing for issuance of requests to admit and whether discovery is, or is not, needed to provide the proper response. From a trial court's perspective, the most troubling aspect of Rule 216 is its self-executing language that carries with it the potential for resolving obviously disputed issues of fact through inadvertence by the recipient of the request. Although *Vision Point* certainly alleviates some of the more "automatic" outcomes under prior caselaw, it does not articulate, nor could it, the circumstances under which a trial court would be justified in relieving the recipient of the adverse effect of a failure to respond. Amending Rule 216

to require trial court approval prior to issuance of requests to admit will eliminate many *post hoc* disputes about whether “good cause” under Rule 183 for the failure to adhere to Rule 216’s time limitations has been shown. Given the gamesmanship often involved in utilizing requests to admit, the Committee intended to provide the trial court with the ability to control the conduct of the parties and to eliminate the “gotcha” aspect of the present rule. The Committee also sought to limit the number of requests to be consistent with Rule 213(c), in light of the experience of trial judges in dealing with dozens, if not hundreds, of requests to admit.

In conjunction with Rule 216, the Committee proposed amendments to Supreme Court Rule 222, which applies to cases seeking damages not in excess of \$50,000. Specifically, the Committee proposed limiting the timing of requests in the above cases. The Committee forwarded its revised amendments to Rules 216/222 to the Supreme Court Rules Committee.

### **3. Supreme Court Rule 214**

In addition to Rules 216 and 222, the Committee further continued its discussion of Supreme Court Rule 214 in light of comments raised at the Annual Public Hearing. As noted in last year’s Committee report, the Committee proposed changes to Rule 214 to address the problems associated with sorting through various and often voluminous documents submitted pursuant to a written request to produce. Specifically, the Committee recommended that documents, produced pursuant to a Rule 214 request, be labeled to correspond with the specific categories in the written request so as to allow the requesting party to reasonably identify the specific category in the request that corresponds to each produced document. Comments at the public hearing focused on the potential burden resulting from the obligation to categorize documents. In its subsequent discussion on this issue, the Committee continued its support of labeling documents pursuant to a Rule 214 request to produce. Members of the Committee indicated that it is a great aid in moving a case along to label and organize documents. The Committee also discussed the possibility of the trial court being authorized to require a producing party to organize and label documents following a showing of good cause by a party obtaining the documents. Nonetheless, the Committee noted that Rule 214 arises in e-Discovery issues. Therefore, the Committee decided to defer additional discussion on proposed changes to Rule 214 until the Court considers the Committee’s e-Discovery report, and directs the Committee to propose changes to discovery rules relating to e-Discovery.

#### *B. Conference Year 2007 Continued Projects/Priorities*

The following subjects represent the projects/priorities assigned by the Court to the Committee for consideration in Conference Year 2007, which were extended into Conference Year 2008.

### **1. e-Discovery**

During the past Conference year, the Committee continued its study of e-Discovery (*i.e.* discovery of electronically stored information). In particular, the Committee explored the electronic discovery provisions of the Federal Rules of Civil Procedure, which became effective December 1, 2006. The Committee also collected the rules from states providing for e-Discovery, and examined caselaw along with numerous articles written on this subject. The Committee concluded its study of e-Discovery by preparing a report, which is attached, for the Court's consideration.

The report discusses the current status of federal and state rules, case law and guidelines promulgated by various organizations regarding e-Discovery. The purpose of the report is to summarize the current state of the law on e-Discovery and to point out the issues commonly faced in the discovery of electronically stored information such as preservation, retrieval, production, disclosure of privileged or confidential communications and cost allocation. The Committee concludes its report by providing the Court with options for addressing e-Discovery issues, including whether to revamp the Supreme Court Rules to incorporate all federal amendments; to amend select rules to conform to federal amendments; and/or to promulgate standards/guidelines for trial judges.

In addition to the report, the Committee considered proposed amendments to select Supreme Court Rules addressing discovery. The Committee, however, deferred further discussion of any recommended rule changes relating to e-Discovery pending further direction from the Court following its review of the Committee's report.

### **2. Mandatory Disclosure**

The Committee was assigned the task of exploring the feasibility and nuances of a rule requiring mandatory disclosure of relevant documents given the increasing problem of parties not receiving relevant information before trial. The Committee decided to defer its discussion of mandatory disclosure because of the potential impact of e-Discovery. The Committee further decided that, prior to resuming its discussion on this matter, it would explore how well mandatory disclosure is working in the federal court.

### **3. Remaining Projects**

Due to the Committee's focus on e-Discovery and the aforementioned rules proposals, the following assigned projects were not addressed in the past Conference year:

- Define work product and privilege for purposes of objecting to discovery under Supreme Court Rule 201(b)(2) (Scope of Discovery);
- Review the use of depositions by telephone under Supreme Court Rule 206(h) (Remote Electronic Means Depositions) without requiring a stipulation or court order;

- Explore the feasibility of contention discovery as used in the federal rules;
- Study and make recommendations on whether Supreme Court Rule 210 (Depositions on Written Questions) can be used in conjunction with Supreme Court Rule 204(c) (Depositions of Physicians) to permit the formulation of questions addressed to non-party physicians prior to deciding whether to take their depositions;
- Examine whether documents obtained during discovery should be presumptively admissible without requiring foundation testimony; and
- Study and report on whether general objections to interrogatories/requests to produce should be permissible.

### **III. PROPOSED COMMITTEE ACTIVITIES FOR THE NEXT CONFERENCE YEAR**

During the 2009 Conference year, the Committee requests that it be permitted to address its remaining projects continued from the prior Conference year. The Committee also requests that, following direction from the Court, it be permitted to address any rule changes relating to e-Discovery. The Committee further requests that it be permitted to address whether the disclosures required under Rule 213(f) should include a list of any other case in which the witness has testified as an expert within the preceding four years. Finally, the Committee will review any proposals submitted by the Supreme Court Rules Committee.

### **IV. RECOMMENDATIONS**

The Committee recommends that the Conference forward its e-Discovery report to the Court for consideration.

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# APPENDIX

**REPORT OF THE COMMITTEE ON DISCOVERY  
PROCEDURES TO THE ILLINOIS SUPREME COURT  
REGARDING E-DISCOVERY<sup>1</sup>**

February 29, 2008

**Hon. Mary Anne Mason, Chair**

**Members:**

**Hon. Deborah M. Dooling**

**Hon. James R. Glenn**

**Hon. John B. Grogan**

**Hon. James J. Mesich**

**Hon. Jeffrey W. O'Connor**

**Hon. Kenneth L. Popejoy**

**Advisors:**

**Mr. David B. Mueller**

**Mr. Eugene I. Pavalon**

**Hon. Paul E. Root (ret.)**

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<sup>1</sup> The Committee wishes to thank Timothy Cox and Seth Jaffe, Law Clerks to the Honorable Mary Anne Mason, and Martin Syvertsen and Long Truong, judicial externs, for their assistance in the preparation of this Report.

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### INTRODUCTION

Much has been written of late regarding the proliferation of issues relating to the discovery of electronically stored information (“ESI”). As individuals and businesses increasingly conduct their everyday affairs in a “paperless” environment, the importance of understanding and accessing ESI has engaged lawyers, legal scholars and, certainly, judges. Although the body of law concerning e-discovery is relatively young, it is a fertile ground for debate in the legal community. The federal courts and several states have enacted new or revised existing rules to address recurring issues regarding the discovery of ESI. The purpose of this Report is to summarize for the Court the current state of rule-based and decisional law on the subject with a view toward enacting or revising rules in Illinois on this topic.

The problems posed by “big document” cases are not new. In such cases, to accommodate the sheer volume of discoverable material, opposing counsel have sometimes agreed to lease warehouse space as a common document depository with established guidelines for access and copying or have jointly hired a third party to oversee the process. Some of these same techniques translate into cases involving ESI, but there is clearly a difference in scale. The potential volume of discoverable material in these cases exceeds by many multiples the warehouse of documents in past cases.<sup>1</sup> Given the speed with which information systems become obsolete or are upgraded, discovery of ESI also entails issues relating to preservation, accessibility and the cost of restoration not

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<sup>1</sup> See, e.g., Committee on Rules of Practice and Procedures of the Judicial Conference of the United States, *Report of the Civil Rules Advisory Committee*, p. 3 (Washington, D.C. August 3, 2004): “A CD-ROM, with 650 megabytes, can hold up to 325,000 typewritten pages. One gigabyte is the equivalent of 500,000 typewritten pages. Large corporate computer networks create backup data measured in terabytes, or 1,000,000 megabytes: each terabyte represents the equivalent of 500 [m]illion typewritten pages of plain text.”

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encountered in a typical document case. Daunting as these problems may seem, they must be viewed (and particularly from a judicial perspective) with the following truism in mind: there is, in most cases, no correlation between the volume of ESI available and the volume of evidence that is relevant to the issues presented in a particular case. In other words, the information that is relevant to resolution of the issues is likely the same whether it is available in hard copy or electronically and the fact that there is a greater volume and variety of electronic information does not mean that there necessarily exists a correspondingly greater volume of relevant information. Nevertheless, when relevant information is maintained electronically, litigants and courts must address the most efficient and inexpensive way to obtain that information.

In any case likely to involve discovery of ESI, an early, proactive role, primarily by counsel and, secondarily, by the trial judge can avoid many of the more controversial issues discussed in published opinions. For example, because many organizations have e-mail retention policies that require e-mails to be deleted periodically, a discussion among the court and opposing counsel at the outset of litigation can avoid spoliation claims or motions related to the cost of restoring "inaccessible" information. The earlier issues relating to ESI are addressed and the sooner a common understanding regarding the obligations of the parties and their counsel is reached, the less problematic those issues will be.

In this Report, the Committee will discuss the current status (as of the date of this Report) of federal and state rulemaking regarding e-discovery as well as common themes emerging from caselaw on the subject. The Report will also discuss "guidelines" and "protocols" promulgated by various organizations regarding e-discovery. The final

section of this Report will discuss a variety of approaches this Court could adopt to address e-discovery issues.

I.

**FEDERAL AND STATE RULES REGARDING E-DISCOVERY**

**A. Amendments to the Federal Rules of Civil Procedures (Appendix A)**

Effective December 1, 2006, amendments to the Federal Rules of Civil Procedure (“FRCP”) addressing issues relating to e-discovery went into effect. Those amendments affected Rules 16, 26, 33, 34 and 37<sup>2</sup> (collectively, the “Federal Amendments”). The Federal Amendments are designed to cover ESI “stored in any medium” and are intended “to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.” Advisory Committee Notes to Rule 34. This expansive definition of ESI permeates the amendments to the federal rules. The Federal Amendments will be discussed grouped according to the phase of e-discovery they address.

**1. Early Attention to E-Discovery Issues (Rules 16, 26(a), (f))**

FRCP 16(b) mandates the entry of a Scheduling Order addressing deadlines for various phases of litigation such as the amendment of pleadings and the filing of dispositive motions. The amendments expand the list of suggested topics to include the following:

16(b)(5): provisions for disclosure or discovery of electronically stored information;

16(b)(6): any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production.

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<sup>2</sup> Rule 45, dealing with subpoenas to non-parties, was also amended to correspond to the amendments relating to party discovery with additional emphasis on avoiding the imposition of undue burdens on non-parties.

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Form 35, which memorializes the report of the parties' planning meeting (conducted pursuant to Rule 26(f) in advance of the Scheduling Conference), is likewise modified to include provisions corresponding to the amendments of subsections (b)(5) and (b)(6) above. The Committee Notes to Rule 16 recognize that early consideration of issues relating to the discovery and production of ESI "will help avoid difficulties that might otherwise arise."

Rule 26 has also been amended to clarify parties' duty of disclosure with respect to ESI. In particular, subsection (a)(1)(B) requires that the parties must, without awaiting a discovery request, disclose "a copy of, or a description by category and location of, all documents, electronically stored information, and other tangible objects that are in the possession, custody or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment."<sup>3</sup> Subsection (f) of Rule 26 requires the parties to add to the topics discussed prior to the Scheduling Conference "any issues relating to preserving discoverable information, and to develop a discovery plan that indicates the parties' views and proposals concerning:

\* \* \*

- (3) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;
- (4) any issues related to claims of privilege or of protection as trial-preparation material, including – if the parties agree on a procedure to assert such claims after production – whether to ask the court to include their agreement in an order;

Under the amendments to Rules 16 and 26, responsibility for initiating and resolving issues related to ESI falls primarily on counsel for the litigants, with assistance

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<sup>3</sup> The amendments also deleted "data compilations" from the list of materials to be produced because the term was a subset of both "documents" and "electronically stored information."

from the court as necessary at the Scheduling Conference. As will be discussed below, the current version of the Illinois Supreme Court Rules places no such burden on counsel for the parties in cases pending in Illinois.

**2. Necessity of and Form of Production of ESI (Rules 26(b)(2), 33 & 34 (a)&(b))**

Retrieval and production of ESI entail special considerations not generally encountered in cases involving primarily documentary evidence. Because of 1) the frequency with which many businesses change their systems for storing information electronically and 2) routine deletion or alteration of ESI in the normal course of business, certain of the Federal Amendments address issues relating to the accessibility of information sought through discovery as well as the form in which such information must be produced.<sup>4</sup>

Rule 26(b)(2)(B) addresses the accessibility of ESI and provides:

A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

The Committee Notes to this section are extensive. Although not explicit in the amendments, the Notes explain that a party responding to a discovery request that entails a search of ESI must advise the requesting party of sources of ESI that the responder is neither searching nor producing. (“The responding party must also identify, by category or type, the sources containing potentially responsive information that it is neither

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<sup>4</sup> The amendments discussed in this section pertain to discovery between and among parties to litigation. Corresponding amendments were also made to Rule 45 concerning subpoenas for ESI directed to non-parties.

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searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.”) The Committee Notes recognize that it is impossible to define by rule all of the factors that go into the determination in any given case that ESI is not “reasonably accessible” and that its location, retrieval and production will cause an undue burden. Among the factors the Committee suggests be considered in this regard are 1) the specificity of the discovery request; 2) the quantity of information available from other and more easily accessed sources; 3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; 4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; 5) predictions as to the importance and usefulness of further information; 6) the importance of the issues at stake in the litigation; and 7) the parties’ resources.<sup>5</sup>

The responding party bears the burden of demonstrating that the requested ESI is not accessible. The Committee Notes contemplate that if a claim is made that identified sources of information are not reasonably accessible, the requesting party may need discovery – production of a sample of the information contained on the identified sources, some form of inspection of such sources or the deposition of an individual knowledgeable about the responder’s information systems – to test that assertion. Once it is established that the particular source of ESI is not reasonably accessible, the burden shifts to the requesting party to show good cause for its production through examination of the factors enumerated above. Ultimately, the Committee Notes conclude that “[a]

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<sup>5</sup> The application of these, as well as other factors developed by courts is discussed, *infra*, Section II.

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requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause. But the producing party's burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery."

Rule 33 governs interrogatories to parties. The 2006 amendments to subsection (d) provide that when the answer to an interrogatory may be derived from a party's business records, including ESI, and the burden of deriving or ascertaining the answer is substantially the same for both the requesting and responding party, it is a sufficient response to specify the records from which the answer may be derived. The ability to provide ESI in lieu of a detailed answer to an interrogatory can greatly streamline the burden of responding to discovery in appropriate cases. Assume, for example, that the subject matter of litigation is the breach of a contract between two corporations. An interrogatory would reasonably ask for details regarding the dates of all internal communications regarding the contract or performance thereof. It would be burdensome to require the responding party to prepare such a detailed answer when, with appropriate search terms, the requesting party could just as easily derive the answer from a review of all the responding company's internal e-mails. The Committee Notes to Rule 33(d) caution, however, that in such situations, the responding party may be required to "provide some combination of technical support, information on application software, or other assistance."

The Amendments also address the form of production of ESI. ESI is dynamic in that it is constantly subject to change in the normal operation of an information system. In addition, ESI is maintained on any given information system in a variety of forms,

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some more or less “reasonably usable” than others. Therefore, the form that production of such information will take is an important consideration.

Rule 34(a) governing the scope of production of tangible evidence in discovery was amended to provide that the scope of a request for production may include a request to “inspect, copy, test, or sample any designated documents or electronically stored information . . . , including data compilations in any medium from which information can be obtained – translated, if necessary, by the respondent into reasonably usable form. . . .” Subsection (b) of Rule 34 governs the form of production. The requesting party may specify the form in which ESI is to be produced. The responding party may object to the specified form of production, stating the reasons for the objection and indicating the form it intends to use. The default standard for the form of production is found in Rule 34(b)(ii): if a request does not specify a particular form for production of ESI, “a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable.” Subsection (iii) provides that a party need not produce ESI in more than one form.

The Committee Notes acknowledge that courts and practitioners have long understood that the term “documents”, as used in Rule 34, encompasses ESI. However, given the proliferation of “dynamic databases” and other forms of ESI “far different from fixed expression on paper”, the amendments now make clear that discovery of ESI “stands on equal footing with discovery of paper documents.” The amendments to Rule 34 further make explicit that parties may request the opportunity to test or sample materials sought under the rule in addition to inspecting or copying them. The Notes recognize that “testing” or “sampling” in the context of ESI may entail direct access to a

party's information system and thus may raise confidentiality or privacy issues. They further caution that the inclusion of testing or sampling as a means of obtaining information "is not meant to create a routine right of direct access to a party's electronic information system."

As to the form of production, the Committee Notes indicate that different types of ESI may call for different forms of production. Requiring the parties to discuss (Rule 26(f)(3)) and expressly specify the form or forms of production of ESI is designed to "resolve disputes before the expense and work of production occurs." Although the amendments provide the option to the responding party to produce ESI in a "reasonably usable" form as opposed to the form in which it is ordinarily maintained by the party, the Notes indicate that this "does not mean that a responding party is free to convert [ESI] from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation." In particular, if the ordinary form of the ESI is searchable by electronic means, the form of production, if different, should not "remove[ ] or significantly degrade[ ] this feature."

**3. Procedures for Asserting Privilege and Work Product Protection for ESI (Rule 26(b)(5))**

Because of the volume of information involved, production of ESI often entails enormous burdens in terms of identifying and segregating information to which either the attorney-client or work product privilege may apply. ESI poses a far greater likelihood of inadvertent disclosure of privileged information than do traditional documents. Furthermore, imposing a rigid obligation on the producing party to conduct a privilege review prior to production will, in many cases, significantly increase the time and

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expense involved in producing relevant information. In recognition of the foregoing, new subsection (B) to Rule 26(b)(5) addresses the procedure for asserting a claim of privilege after production of information in discovery:

If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

Subsection (B) does not address whether the disclosure of the allegedly privileged material operates as a waiver, but instead provides the procedure by which the claim of privilege, as well as any waiver determination can be made. Whether a waiver has occurred under the circumstances of any given case is left for the court to decide.

The Committee Notes indicate that new subsection (B) is designed to be read in tandem with the amendments to Rule 26(f) (regarding the parties' obligations to discuss privilege issues) and those to Rule 16(b) (providing for the entry by the court of an order reflecting any agreements the parties have reached regarding privilege issues). Thus, if the parties have previously agreed on a mechanism for asserting privilege claims, which is later embodied in a court order, that mechanism will ordinarily control over the provisions of Rule 26(b)(5)(B).

#### **4. "Safe Harbor" for Loss of ESI (Rule 37)**

One of the more controversial amendments to the federal rules involves the addition of a "safe harbor" provision to Rule 37. The Rule itself governs the award of

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sanctions for failure to make disclosures or cooperate in discovery. The amendments added a new subsection (f), which provides:

Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Again, because of the ephemeral and changeable nature of ESI and because the ordinary operation of an information system may result in the alteration or loss of ESI without any intention to do so on the user's part, the amendment creates a rebuttable presumption that ESI lost as a result of the routine, good-faith operation of an information system is not sanctionable. The Committee Notes state that preservation obligations relating to ESI – whether imposed by common law, statute, regulation or court order - may require a party to take affirmative steps to suspend or modify the normal operations of an information system in order to prevent the loss of information. The Notes specifically recognize that, notwithstanding the “safe harbor” provisions, “a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing the operation to continue in order to destroy specific stored information that it is required to preserve.” The Notes emphasize that the amendment is limited to a court's ability to impose sanctions “under these rules” and that it does not affect “other sources of authority to impose sanctions.” Further, even if it is found that the responding party acted in good faith, a court may still take steps to ameliorate the effect of the loss of relevant information, such as providing for additional oral or written discovery.

Following passage of the 2006 Amendments, certain district courts have enacted local “guidelines” or “protocols” relating to ESI. See U.S. District Court for the District of Kansas, “Guidelines for the Discovery of Electronically Stored Information”,

<http://www.ksd.uscourts.gov>; U.S. District Court for the District of Maryland, “Suggested Protocol for Discovery of Electronically Stored Information”, <http://www/mdd.uscourts.gov>; and U.S. District Court for the Northern District of Ohio, “Default Standard for Discovery of Electronically Stored Information (“E-Discovery”)”, <http://www.ohnd.uscourts.gov>. The Federal Judicial Center has also published a handbook entitled, “Managing Discovery of Electronic Information: A Pocket Guide for Judges,” which is available at [www.fjc.gov](http://www.fjc.gov). Regarding such efforts, one publication observed: “There is much to be gained by such experimentation, but a serious risk exists that these [formal local rules or informal guidelines] will lead to rigidity and defeat the purpose of the Amended Rules to require parties, not courts, to make the tough choices that fit the particular discovery needs of a case.” See “The Sedona Principles (2d ed.), Best Practices Recommendations & Principles for Addressing Electronic Document Production”, Comment 12.c, p. 65 (June 2007).

**B. State Rules Regarding ESI (Appendix B)<sup>6</sup>**

A number of state courts, both before and after passage of the 2006 Amendments to the Federal Rules of Civil Procedure, have enacted local rules relating to the discovery of ESI. As of the date of this Report, 11 states have passed rules relating to the discovery of ESI. Of those, four have incorporated the Federal Amendments - in whole or with slight modifications - as the state standard regarding ESI. (See App. B, Arizona Rules of Civil Procedure; Minnesota Rules of Civil Procedure; Montana Rules of Civil Procedure; Utah Rules of Civil Procedure).<sup>7</sup> Several other states enacted provisions regarding the discovery of ESI that track some, but not all of the Federal Amendments, generally

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<sup>6</sup> For convenience, Appendix B is arranged alphabetically by state.

<sup>7</sup> In addition, the District of Columbia is required by law to follow the Federal Rules of Civil Procedure.

eliminating the “meet and confer” obligations and Scheduling Conference provisions.

(*Id.*, Idaho Rules of Civil Procedure; Indiana Rules of Trial Procedure; Louisiana Code of Civil Procedure; New Jersey Rules of Civil Procedure). It is presumed that those states that have incorporated the Federal Amendments, in whole or in part, into state law will follow federal precedents on the interpretation and application of those provisions.

Certain other states, like Illinois, have included the concept of ESI in their discovery rules, but have not enacted detailed provisions regarding applicable procedures. (*Id.*, Mississippi Rule 26; Rules of the Superior Court of the State of New Hampshire; Texas Rule of Civil Procedure 196.4).

Texas was the first state to enact a rule regarding discovery of ESI. In 1999, Rule 196 of the Texas Rules of Civil Procedure was amended to include the following provision:

196.4 *Electronic or magnetic data.* To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot – through reasonable efforts – retrieve the data or information requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

(App. B). The Texas rule differs from the Federal Amendments in certain significant respects including requiring the requesting party to “specifically request” “electronic or magnetic data.” Further, no “default” form of production is provided for; the requesting party “must” specify the form of production. Finally, in the event that production is ordered over the responding party’s objection, the court “must” order the requesting party

to pay the reasonable expenses of production. The court lacks the discretion to engage in the balancing test contemplated by the Federal Amendments. Mississippi enacted a similar provision in 2003 that differs only with respect to the discretion of the court in cost-shifting: “the court **may** also order that the requesting party pay ....” (Id.)

**C. Other Promulgations Regarding ESI**

In addition to rulemaking, the discovery of ESI has been addressed by a variety of other bodies, including the Conference of Chief Justices, the National Conference of Commissioners on Uniform State Laws , the American Bar Association and the Sedona Conference Working Group on Electronic Document Retention & Production. Each group’s work product is discussed below.

**1. Conference of Chief Justices: “Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information” (Appendix C)**

The Conference of Chief Justices is an organization, founded in 1949, whose membership consists of the highest judicial official in each state, territory and commonwealth of the United States. It is dedicated to improving the administration of justice throughout the United States.

In August 2006, the Conference approved “Guidelines For State Trial Courts Regarding Discovery of Electronically-Stored Information.” The Conference describes the purpose of the Guidelines as follows: “The Guidelines should not be treated as model rules that can simply be plugged into a state’s procedural scheme. They have been crafted only to offer guidance to those faced with addressing the practical problems that the digital age has created ....” (App. C, p. vii). The Guidelines were promulgated in recognition of the fact that in many jurisdictions, discovery decisions are rarely, if ever, the subject of reported appellate decisions and, therefore, the development of a definable

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body of law will proceed at a glacial pace. The Guidelines are “intended to help in identifying the issues and determining the decision-making factors to be applied in the circumstances presented in a specific case.” (Id., p. ix).

The Guidelines define ESI as “any information created, stored, or best utilized with computer technology of any type,” and goes on to identify a non-exclusive list of types of ESI. “Accessible information” is defined as ESI “that is easily retrievable in the ordinary course of business without undue cost and burden.” (Id., Guideline 1, p. 1).

Guideline 2 defines the responsibility of the parties’ counsel to be informed regarding their respective client’s relevant information management systems and suggests that the trial judge should, “when appropriate,” encourage counsel to be well-informed about their clients’ electronic records. Guideline 3 addresses the court’s involvement in facilitating the production of ESI. Subsection A provides that the court should encourage counsel to come to agreement on the types of ESI to be disclosed as well as the manner and scheduling of disclosure. In the absence of an agreement, subsection B provides that the trial judge should direct counsel to exchange certain information including:

- 1) a list of the persons most knowledgeable regarding the relevant computer systems or networks;
- 2) a list of the most likely custodians of relevant ESI other than the party, together with a description of the custodian’s responsibilities and the ESI maintained by each custodian;
- 3) a list of each electronic system that may contain relevant ESI and each potentially relevant system that was operating during relevant time periods;
- 4) an indication whether relevant ESI may be of limited accessibility or duration of existence;
- 5) a list of relevant ESI stored off-site or off-system;
- 6) a description of efforts taken to preserve ESI;

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- 7) the form of production preferred by the party; and
- 8) notice of problems reasonably anticipated to arise in connection with requests for ESI.

The comments to Guideline 3 observe that in an effort to alleviate perceived burdens on responding parties, the party need only list those information systems believed to store relevant ESI. Obviously, requiring a large corporation to list and describe (by indicating the hardware and software used by each system, and the scope, organization and formats each system employs) all of its information systems would be unreasonable when only certain systems would be expected to store relevant ESI.

Guideline 4 outlines the procedure for an initial discovery conference at which the court and the parties will address what ESI is to be produced, the form of production, what steps the parties will take to preserve relevant ESI, procedures for the inadvertent disclosure of privileged ESI and the allocation of costs. Regarding the scope of discovery of ESI, Guideline 5 lists 13 factors a trial judge may consider in deciding whether to require production of ESI. These include, stated variously, the factors enumerated in the Committee Comments to Federal Rule 26(b)(2)(B), as well as a number of other factors, including the responding party's need to protect privileged, proprietary or confidential information, whether the information or software necessary to access the ESI is itself proprietary or confidential and whether the ESI is stored in such a way that makes it more costly or burdensome to access than is reasonably warranted by legitimate personal, business or other non-litigation-related reasons. Unlike the two-step process envisioned by the Federal Amendments (responding party establishes that ESI not "reasonably accessible"; then burden shifts to requesting party to show good cause

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for its production), the Guidelines include consideration of all of the relevant factors in the context of a motion to compel or for a protective order. The Comments to Guideline 5 note that this approach is unlike the presumption approach embodied in the Federal Rule 26(b)(2)(B) (“reasonably accessible” vs. “not reasonably accessible”) and the Sedona Principles (“active data” vs. “deleted” information) and is designed instead to provide a framework for decisionmaking.

With respect to the form of production of ESI, Guideline 6 provides that the judge should ordinarily require ESI to be produced in only one form and should select the form in which the ESI is ordinarily maintained or one that is reasonably usable. Guideline 6 presumes that the parties have been unable to agree and have provided the court with information sufficient to determine the appropriate form of production. This Guideline generally tracks the provisions of Federal Rule 34(b).

Reallocation of discovery costs is addressed in Guideline 7. To large extent, these considerations overlap with those enumerated in Guideline 5 as relevant to the determination of whether ESI should be produced in the first instance and include consideration of the specificity of the discovery request, the availability of the information from other sources, the cost of production compared to both the amount in controversy and the relative resources of the parties, the parties’ ability and incentive to control costs, the importance of the issues at stake and the relative benefits of obtaining the information. The comment to Guideline 7 indicates that it is largely drawn from the analysis in Zubulake v. UBS Warburg LLC, 216 F.R.D. 280 (S.D.N.Y. 2003), discussed in more detail below.

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Guideline 8 concerns inadvertent disclosure of privileged information. Unlike the Federal Amendments and various state rules, which provide the process for asserting a claim of privilege after inadvertent disclosure, but do not purport to address whether the disclosure acts as a waiver, Guideline 8 lists those factors to be taken in to account in determining whether a waiver has occurred. In addition to the existence of agreements reflecting the common understanding of counsel regarding the disclosure of privileged information, four other factors are listed as relevant in this regard:

- The total volume of information produced by the responding party;
- The amount of privileged information disclosed;
- The reasonableness of the precautions taken to prevent inadvertent disclosure; and
- The promptness of the actions taken to notify the receiving party and otherwise remedy the error.

Guideline 8 thus addresses the substantive law of waiver and provides a framework for resolving such issues in the context of ESI.<sup>8</sup>

Guideline 9 concerns preservation orders for ESI and states that generally, “a judge should require a threshold showing that the continuing existence and integrity of the [ESI] is threatened” before entering a preservation order.<sup>9</sup> Once that showing is

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<sup>8</sup> It is debatable whether addressing substantive determinations such as waiver specifically in the context of ESI is necessary. Most jurisdictions have developed a body of common law on the subject of whether the inadvertent disclosure of privileged or confidential information constitutes a waiver. Although there are certainly considerations unique to the production of ESI – the sheer volume of information being produced and the cost and burden of conducting a comprehensive privilege review prior to production – it is not apparent that the principles articulated in existing caselaw are inadequate to address this issue.

<sup>9</sup> Again, the issuance of preservation orders is not a judicial function unique to cases involving ESI and Guideline 9, like Guideline 8, articulates substantive considerations applicable to such motions. Judges have often been called upon to decide at the outset of litigation whether an order requiring the preservation of evidence should be entered. Such orders are used sparingly given the common law obligation of preservation attaching upon the filing of litigation. It is not clear that a different approach should apply in cases involving ESI.

made, Guideline 9 suggests consideration of the following factors in determining the nature and scope of any preservation order:

1. The nature of the threat to the continuing existence or integrity of the ESI;
2. The potential for irreparable harm in the absence of a preservation order;
3. The ability of the responding party to maintain the ESI in its original form; and
4. The burden on the responding party of ordering preservation.

Finally, Guideline 10 addresses the imposition of sanctions as a result of the destruction of ESI, which the Comments indicate was designed to closely track the then pending amendment to Federal Rule 37. Like Rule 37, Guideline 10 establishes a presumption against the imposition of sanctions “absent exceptional circumstances.” Unlike Federal Rule 37, however, which appears to place the burden on the responding party to show that the loss of ESI was due to the “routine, good-faith operation of an electronic information system”, Guideline 10 instead provides that sanctions should be imposed “only if” a) there was a legal obligation to preserve the information at the time of its destruction; b) the destruction was **not** the result of the routine, good faith operation of the relevant system; and c) the destroyed information was subject to production under the applicable state standard for discovery (e.g., relevant or designed to lead to the discovery of relevant evidence). The phrasing of the foregoing standards implies that the burden of persuasion falls on the requesting party. The Comments further distinguish these standards from the “stringent standards” for the imposition of sanctions proposed in the *Sedona Principles*, discussed in more detail below.

**2. National Conference of Commissioners on Uniform State Laws: “Uniform Rules relating to Discovery of Electronically Stored Information” (Appendix D)**

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The National Conference of Commissioners on Uniform State Laws (“NCCUSL”) is a 116-year-old organization, based in Chicago, which, according to its website, “provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of the law.” [www.nccusl.org](http://www.nccusl.org). NCCUSL members must be lawyers and its current membership consists of lawyer-legislators, private attorneys, state and federal judges, law professors and legislative staff attorneys. Members are appointed by state governments, the District of Columbia, Puerto Rico and the U.S. Virgin Islands.

In August 2007, the NCCUSL approved “Uniform Rules Relating to Discovery of Electronically Stored Information.” (“Uniform Rules”). The Uniform Rules contemplate the enactment of legislation, which would supplement each jurisdiction’s code of civil procedure. As discovery in Illinois is governed not by the Illinois Code of Civil Procedure, but by this Court’s Rules, the Uniform Rules are discussed only to compare their provisions to those of the Federal Rules and other materials discussed above.

The Uniform Rules contain procedural provisions that largely track the Federal Amendments. For example, Uniform Rule 3 imposes “meet and confer” obligations upon counsel and requires that such a conference take place “not later than 21 days after each responding party first appears....” (Compare Fed.R.Civ.P 26(f): conference to take place at least 21 days prior to Scheduling Conference under Fed. R. Civ. P. 16, which itself must take place “as soon as practicable but in any case within 90 days after the appearance of a defendant.”). While Uniform Rule 3 requires the parties to memorialize the discovery plan reached (or any areas of disagreements that remain following the conference) in a written submission to the court, the Federal Amendments contain no such requirement. Finally, although Uniform Rule 3 refers to a conference with the court at which the results of the

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parties' conference will be addressed, it does not specify a time by which such a conference should occur.

Uniform Rule 4 provides that a court may issue an order governing the discovery of ESI on motion of a party, by stipulation or on its own motion. The order may address whether discovery of ESI is reasonably likely to be sought and, if so, may also address preservation of the information, the form of production, time limits for production, the permissible scope of discovery, procedures for asserting privilege claims, the method for preserving confidential or proprietary information belonging to a party or a third party and allocation of the expense of production. With slight, non-substantive variations, Uniform Rule 5 mirrors the "safe harbor" provisions of Fed. R. Civ. P. 37(f) regarding the loss of ESI as a result of the routine, good-faith operation of an electronic information system.

Uniform Rule 6 governs requests for production of ESI. It provides for requests for production of ESI and "for permission to inspect, copy, test, or sample the information." The responding party must serve a response that states with respect to each category of ESI sought either that the copying, testing, etc., will be permitted or an objection to the request stating the reasons for the objection. This provision runs counter to the presumption in the Federal Amendments that an order allowing testing or sampling of ESI should not be routine. (See, Committee Comments, Fed. R. Civ. P. 34: the inclusion of testing or sampling as a means of obtaining ESI "is not meant to create a routine right of direct access to a party's electronic information system.") Uniform Rule 7, which addresses the form of production, generally tracks the provisions of Fed. R. Civ. P. 34(b).

With respect to the allocation of expenses, Uniform Rule 8, entitled "Limitations on Discovery", provides that a court may direct the production of ESI from a source that is not

“reasonably accessible” if the requesting party demonstrates that the likely benefit of the discovery outweighs the likely burden or expense taking into account the amount in controversy, the resources of the parties, the importance of the issues and the importance of the requested discovery in resolving the issues. Although Uniform Rule 8 is more specific than Amended Fed. R. Civ. P. 26(b)(2)(B) regarding the necessary showing by the requesting party (i.e., Rule 26(b)(2)(B) requires a showing of “good cause” for the production of ESI that is not “reasonably accessible”), the factors that go into the balancing determination under Uniform Rule 8 are less expansive than those suggested by the Comments to Rule 26 and the caselaw to date.

Inadvertent disclosure of privileged information is addressed in Uniform Rule 9. Again, like Fed. R. Civ. P. 26 (b)(5)(B), the Provisions of Uniform 9 are purely procedural and define the parties’ respective responsibilities following the disclosure of ESI later claimed to be privileged. The procedure outlined in Uniform Rule 9 closely tracks Rule 26, but does not include the explicit obligation on the producing party imposed by Rule 26 to preserve the information on its information system until the claim of privilege is resolved.

### **3. The Sedona Principles (2d ed.) (Appendix E)**

The mission of the Sedona Conference, founded in 1997, is “to allow leading jurists, lawyers, experts, academics and others, at the cutting edge of issues in the area of antitrust law, complex litigation, and intellectual property, to come together – in conferences and mini-think tanks (Working Groups) – and engage in true dialogue, not debate, all in an effort to move the law forward in a reasoned and just way.”

[www.thesedonaconference.org/tsc\\_mission](http://www.thesedonaconference.org/tsc_mission). The first Working Group (“WG1”) was formed in mid-2002 to address “best practices” in the area of electronic document

retention and production. The first version of “The Sedona Principles for Electronic Document Production” was issued in 2004. The second edition was issued in 2007 to reflect changes as a result of the passage of the Federal Amendments. See “The Sedona Principles (Second Edition): Best Practices Recommendations & Principles for Addressing Electronic Document Production” (June 2007) (collectively, “the Principles”), available at [www.thesedonaconference.org](http://www.thesedonaconference.org).<sup>10</sup>

In many respects, the Principles address issues that are beyond the scope of court rules. For example, Principle 1 states, in part, that “[o]rganizations must properly preserve electronically stored information that can reasonably be anticipated to be relevant to litigation.” Comment 1.b to Principle 1 addresses the importance of proper internal records and information management policies and programs applied uniformly and in advance of litigation. (Id., Principle 1, Comment 1.b, p. 13: “Implementing policies ... can provide a solid basis to plan for the treatment of electronic documents during discovery. By following objective, preexisting policy, an organization can formulate its responses to electronic discovery not by expediency, but by reasoned consideration.”) Principle 2 concerns the balancing involved in determining whether ESI should be preserved, retrieved, reviewed and/or produced, but also addresses in Comment 2.d the need for coordination of internal efforts in these areas. (“The team approach permits an organization to leverage available resources and expertise in ensuring that the organization addresses its preservation and production obligations thoroughly, efficiently and cost-effectively.” Id., Principle 2, Comment 2.d, p. 19). Similarly, Principle 5,

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<sup>10</sup> In order not to burden the Court with too much information, only the Principles themselves are included in the Appendix. The Second Edition is accompanied by extensive commentary and annotations, which may be accessed on the website. WG1 has also published a Glossary of relevant ESI terms, which may also be accessed via the website.

which concerns preservation obligations, addresses the necessity for organizations to prepare in advance for production requests relating to ESI (Id., Principle 5, Comment 5.b, p. 30) as well as the manner and form of communicating “litigation holds” when litigation is threatened (Id., Comment 5.d, p.32). While these discussions of “best practices” are enlightening and could guide decisionmaking in certain circumstances, they concern pre-litigation conduct and thus are not an appropriate subject of rulemaking.

Many of the Principles address the subject matter of the Federal Amendments and, as noted above, the Principles were revised following the latter’s enactment. With respect to the obligation to produce ESI, the concept of “accessibility” in the Federal Amendments has been incorporated into the Principles, although the focus of the Principles is still somewhat different. As discussed above, under amended Rule 26(b)(2)(B), a party “need not provide discovery of [ESI] from sources that the party identifies as not reasonably accessible because of undue burden or cost.” In its original formulation, Principle 8 provided:

The primary source of electronic data and documents for production should be active data and information purposely stored in a manner that anticipates future business use and permits efficient searching and retrieval. Resort to disaster recovery backup tapes and other sources of data and documents requires the requesting party to demonstrate need and relevance that outweigh the cost, burden and disruption of retrieving and processing the data from such sources.

“The Sedona Principles: Best Practices recommendations & Principles for Addressing Electronic Document Production” (January 2004) (hereafter, “The Sedona Principles (January 2004)”), Principle 8.

As revised, Principle 8 states:

The primary source of [ESI] should be active data and information. Resort to disaster recovery backup tapes and other sources of [ESI] that are not reasonably accessible requires the requesting party to demonstrate need and relevance that

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outweigh the costs and burdens of retrieving and processing [ESI] from such sources, including the disruption of business and information management activities.

App. E, Principle 8. Under the revised formulation of Principle 8, once the responding party establishes that the ESI requested is not comprised of “active data”, it will be presumed that the information is not “reasonably accessible.” Comment 8.b to Principle 8 notes that the revised version “addresses the technical accessibility and the purpose of the storage, rather than simply the burdens and costs associated with access.” (Principle 8, Comment 8.b, p. 46). In contrast, under Rule 26(b)(2)(B), the burden falls on the responding party to demonstrate that the information is not “reasonably accessible because of undue burden or cost.”

The Principles also address the form of production. The 2004 version of Principle 12 provided that “[u]nless it is material to resolving the dispute, there is no obligation to preserve and produce metadata absent agreement of the parties or order of the court.”

The Sedona Principles (January 2004), Principle 12. As revised, Principle 12 provides:

Absent party agreement or court order specifying the form or forms of production, production should be made in the form or forms in which the information is ordinarily maintained or in a reasonably usable form, taking into account the need to produce reasonably accessible metadata that will enable the receiving party to have the same ability to access, search, and display the information as the producing party where appropriate or necessary in light of the nature of the information and the needs of the case.

App. E, Principle 12.

Issues relating to metadata have surfaced in many cases involving the discovery of ESI. Metadata is information embedded in the document or in the system that created

it that is not ordinarily visible to the naked eye.<sup>11</sup> For example, a document created using Microsoft Office software transmitted by e-mail will normally display only the final text, but if the recipient accesses the “Details” view of the folder and right clicks on the column titles, metadata embedded in the document will reveal information such as the date of its creation, the author and revisions made to the document.<sup>12</sup> Depending on the issues presented in any given case, production of ESI in a form that allows the recipient to access metadata may be appropriate and, in certain circumstances, crucial. Metadata can also be useful in authenticating documents stored electronically.<sup>13</sup>

The revisions to Principle 12 follow the amendments to Rule 34 that require production of ESI either in the form in which it is ordinarily maintained or in a “reasonably usable” form. Although neither Rule 34 nor the Committee Notes specifically address the production of metadata, the requirement of production of ESI in the “form in which it is ordinarily maintained” (i.e., enabling the user to access metadata), implies that the default standard for production generally includes metadata. The burden would then fall on the producing party to demonstrate that disclosure of

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<sup>11</sup> For an informative discussion of the types and uses of metadata, see, Craig Ball, “Understanding Metadata: Knowing Metadata’s Different Forms And Evidentiary Significance Is Now An Essential Skill For Litigators,” 13 Law Tech. Prod. News 36 (Jan. 2006).

<sup>12</sup> Several states have issued ethics opinions regarding the producing lawyer’s, as well as the receiving lawyer’s obligations regarding the production of ESI containing metadata. See, Alabama Sate Bar, Office of General Counsel Formal Op. 2007-02 (lawyer has affirmative duty to take reasonable precautions to ensure that confidential metadata is properly protected, but receiving lawyer may not ethically mine metadata); Florida Bar Assn. Comm. On Professional Ethics, Formal Op. 06-2 (2006) (lawyers have duty to pay attention to metadata); Maryland Bar Assoc. Comm. on Ethics Op. 2007-09 (receiving attorney does not have ethical obligation to notify sender of inadvertent transmission of privileged information, but producing attorney has affirmative duty to avoid such inadvertent disclosures); New York Ethics Opinions 749 (2001) (lawyer has duty to use reasonable care when transmitting a document by e-mail to prevent disclosure of metadata containing client confidences or secrets; receiving lawyer has duty not to exploit the inadvertent or unauthorized transmission of client confidences or secrets); Id., Op. 782 (2004); but see, ABA Standing Committee on Ethics and Professional Responsibility, Formal Op. 06-442 (2006) (no specific prohibition against receiving lawyer reviewing and using embedded metadata).

<sup>13</sup> See Ball, supra, fn 11.

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metadata is either not relevant or is unwarranted given other considerations such as privilege or confidentiality.

The Principles also address cost-shifting in the context of an order requiring production of ESI. Initially, Principle 13 adopted the approach of Texas Rule 196.4, which requires cost-shifting in the event that “unavailable” ESI is ordered produced. (“If the data or formatting of the information sought is not reasonably available to the responding party in the ordinary course of business, then, absent special circumstances, the costs of retrieving and reviewing such electronic information **should** be shifted to the requesting party.” The Sedona Principles (January 2004), Principle 13 (emphasis supplied). Consistent with the discretion embodied in Rule 26 (“The court may specify conditions for the discovery”), Principle 13 now provides that in the event that the information sought is not reasonably available to the responding party in the ordinary course of business, then, absent special circumstances, the cost of retrieving and reviewing the information “**may** be shared by or shifted to” the requesting party. However, unlike the neutral provisions of Rule 26, Principle 13 persists in the presumption that cost-shifting or sharing is the norm “absent special circumstances”, a phrase not found in Rule 26.

Finally, Principle 14 deals with sanctions for the loss of ESI. In its original version, Principle 14 provided: “Sanctions, including spoliation findings, should only be considered by the court if, upon a showing of a clear duty to preserve, the court finds that there was an intentional or reckless failure to preserve and produce relevant electronic data ....” The Sedona Principles (January 2004), Principle 14. As revised, Principle 14 contemplates consideration of sanctions only if the court finds, inter alia, “a culpable

failure to preserve and produce relevant” ESI. This standard, although certainly less limiting than the “intentional or reckless” standard embodied in the original version, is nevertheless more stringent than amended Rule 37’s “good faith” standard.

## II.

### CASELAW ADDRESSING ISSUES RELATING TO DISCOVERY OF ESI

Courts have been faced with issues relating to the discovery of ESI for many years. Although most published decisions, both before and after the Federal Amendments, have been in federal cases, issues relating to the discovery of ESI are surfacing in state court decisions as well. In this section, this Report will discuss, by subject matter, some of the more salient reported decisions.

#### A. Scope of Electronic Discovery

The language of Rule 34(a), while broad, does not allow unfettered access to a responding party’s electronic files.<sup>14</sup> While “it is not unusual for a court to enter an order requiring the mirror image of the hard drives of any computers that contain documents responsive to an opposing party’s request for production of documents,” where the request is extremely broad or the nexus between the computers and the cause of action unsubstantiated, courts are very reluctant to do so.<sup>15</sup> Discovery involving mirror imaging

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<sup>14</sup> *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production (Second Edition 2007)* (“*The Sedona Principles*”), Principle 6, Comment 6.b; In re Ford Motor Co., 345 F.3d 1315, 1317 (11th Cir. 2003) (“Rule 34(a) does not give the requesting party the right to conduct the actual search.”); *McCurdy Group v. Am. Biomedical Group, Inc.*, 9 Fed. Appx. 822, 831 (10th Cir. 2001) (finding that mere skepticism that defendant had not produced everything from the relevant computers, without more, did not justify physical inspection of defendant’s hard drives) (unpublished opinion).

<sup>15</sup> *Balboa Threadworks, Inc. v. Stucky*, 2006 U.S. Dist. LEXIS 29265 (D. Kan. Mar. 24, 2006); see also *Ameriwood Indus., Inc. v. Liberman, et al.*, 2006 U.S. Dist. LEXIS 93380 at \*8 (E.D. Mo. Dec. 27, 2006) (“Courts have found that such access is justified in cases involving both trade secrets and electronic evidence, and granted permission to obtain mirror images of the computer equipment”) (internal quotes omitted).

or expert inspection necessarily raises issues of court- appointed experts and privilege concerns, both of which are discussed in more detail below.

### B. Form of Production

Although courts have not yet articulated a cohesive analysis regarding issues relating to the form of production under amended Rule 34, one thing is clear: where ESI is requested and the data is maintained in electronic form, courts will require production in some comparable electronic format.<sup>16</sup> Courts have given effect to Rule 34's provisions allowing the responding party, in the absence of a specified form of disclosure, to select the form in which the ESI will be produced.<sup>17</sup> If the responding party chooses to provide the data as it is kept in the ordinary course of business, generally, no labeling is required, as in normal document discovery.<sup>18</sup> This does not mean that documents can be produced in an unreadable or unintelligible form, e.g., e-mail attachments must be produced along with the corresponding e-mail.<sup>19</sup>

Courts have not specifically addressed maintenance in the "ordinary course of business" in the context of ESI. As discussed above, the same ESI may be stored in multiple locations and formats, all of which are kept in the ordinary course of business. Courts have held that the burden rests on the producing party to show that the documents

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<sup>16</sup> See *Goss Int'l Americas, Inc. v. Graphic Mgmt. Assoc., Inc.*, 2007 U.S. Dist. LEXIS 3601 (N.D. Ill. Jan. 11, 2007) ("[T]he Swiss Defendants misunderstand the nature of Goss's request; Goss is not asking the Swiss Defendants to scan copies of the paper documents onto a CD but rather to produce the e-mails and attachments in native format.").

<sup>17</sup> See *MGP Ingredients, Inc. v. Mars, Inc.*, 2007 U.S. Dist. LEXIS 76853, \*14 (D. Kan. Oct. 15, 2007) (finding that responding party met its burden under Rule 34 where it was not asked to provide data in specific format and it subsequently decided to provide it as kept in the ordinary course of business); *CP Solutions PTE, LTD., v. General Electric Co.*, 2006 U.S. Dist. LEXIS 27503, \*11 (D. Conn. May 4, 2006);

<sup>18</sup> *MGP Ingredients*, 2007 U.S. Dist. LEXIS 76853 at 10 ("If the producing party produces documents in the order in which they are kept in the usual course of business, the Rule imposes no duty to organize and label the documents").

<sup>19</sup> *CP Solutions*, 2006 U.S. Dist. LEXIS at \*14.

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were disclosed as kept in the normal course of business.<sup>20</sup> Where hard copies are scanned into electronic format, the documents are not produced in the normal course of business, and courts may require further labeling by the producing party to make the production meaningful.<sup>21</sup> Moreover, some courts have found that converting electronic documents into a TIFF format does not constitute documents as kept in the ordinary course of business.<sup>22</sup> In fact, converting the files to TIFF format creates a new set of documents.<sup>23</sup> The better practice in general is to provide documents in native format, including metadata, because the data may contain important chronological information.<sup>24</sup>

Nevertheless, when production of ESI in native format would result in a voluminous number of additional documents, courts may be hesitant to order production absent specific need and a defined method to protect privileged information.<sup>25</sup> Courts are also hesitant to order discovery in the format requested where the responding party would be unduly burdened because it does not keep the documentation in the specific format.<sup>26</sup> Courts have noted, however, that the parties may agree to the form of production, or the requesting party may petition the court to order a specific form before any requests are propounded. If the requesting party requests discovery in such a manner that leaves

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<sup>20</sup> *Bergersen v. Shelter Mut. Ins. Co.*, 2006 U.S. Dist. LEXIS 17452, \*4 (D. Kan. Feb. 13, 2006).

<sup>21</sup> *Id.* at \*5.

<sup>22</sup> TIFF format is simply a picture of the electronic document as it exists on a hard drive. *See Hagenbuch v. 3B6 Sistemi Elettronici Industriali S.R.L.*, 2006 U.S. Dist. LEXIS 10838, \*6 (N.D. Ill. Mar. 8, 2006).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* Moreover, this court found that providing such data that included chronological information did not constitute “fishing” or “unfettered access” as described in *In re Ford Motor Co.* *Id.*; note 14 and accompanying text.

<sup>25</sup> *CP Solutions*, 2006 U.S. Dist. LEXIS at \*13.

<sup>26</sup> *Equal Employment Opportunity Com’n., v. Lexus Serramonte*, 2006 U.S. Dist. LEXIS 58915, \*5–6 (N.D. Cal. Aug. 9, 2006) (holding that if responding party did not maintain the information in the requested format, then it would produce the information in whatever format it was maintained, because it would be unduly burdensome to require responding party to create a new electronic format for production).

format uncertain or so general that the disclosure is overwhelming, courts may require the requesting party to live with the requests it made.<sup>27</sup>

### C. Computer Access, Mirror Images, and Experts

A party may bring a motion to compel seeking to inspect the adverse party's hard drives or make a mirror image of such hard drives. Direct inspection by an opposing party, however, is the exception to the normal rule.<sup>28</sup> Imaging a computer hard drive or otherwise having access is appropriate where the court finds that the party's production has been inadequate, inconsistent, or the computer was used to commit the wrong.<sup>29</sup> For example, where a party has allegedly downloaded trade secrets onto a hard drive or there exists evidence that files were deleted intentionally or unintentionally, access may be warranted.<sup>30</sup> However, mere suspicion by the requesting party that discovery was

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<sup>27</sup> See *MGP Ingredients*, 2007 U.S. Dist. LEXIS 76853 at 12 ("Plaintiff was the party who formulated the requests in the manner it did and Plaintiff must take responsibility for undertaking the task of determining which documents relate to each set of its twenty-some requests.")

<sup>28</sup> *Diepenhorst v. City of Battle Creek*, 2006 U.S. Dist LEXIS 48551, \*3 (W.D. Mich. Jun. 30, 2006); see also FED. R. CIV. P. 34(a) ("Rule 34(a) . . . is not meant to create a routine right of direct access to a party's electronic information system, although such access might be justified in some circumstances.")

<sup>29</sup> *Diepenhorst*, 2006 U.S. Dist. LEXIS 48551 at \*3; see also *Calyon v. Mizuho Sec. U.S.A., Inc.* 2007 U.S. Dist. LEXIS 36961, \*17 (S.D. N.Y. May 18, 2007) (not allowing expert inspection of computer hard drives where the proponent did not argue lack of production, discrepancies or inconsistencies, or deletion that would entitle them to inspection); *Cenveo Corp. v. Slater*, 2007 U.S. Dist. LEXIS 8281, \*1-3 (E.D. Pa. Jan. 31, 2007) (finding inspection and mirror imaging appropriate where the issue in the case was transmission of trade secrets and confidential information through the computers in question); *Orrell v. Motorcarparts of Am., Inc.*, 2007 U.S. Dist. LEXIS 89524, \*19 (E.D. La. Aug. 29, 2007) (allowing inspection and mirror imaging of computer where relevant data was lost either because the computer crashed or was wiped clean); *Experian Info. Solutions, Inc. v. I-Centrix, LLC*, 2005 U.S. Dist. LEXIS 42868, \*2 (N.D. Ill. July 21, 2005) (finding a mirror image solution appropriate where appropriation of trade secrets was involved); *Simon Prop. Group L.P. v. MySimon, Inc.* 194 F.R.D. 639, 640 (S.D. Ind. 2000) (finding that plaintiff was entitled to inspection of computers because of troubling discrepancies in the discovery record); *Playboy Enters. v. Welles*, 60 F. Supp. 2d 1050, 1053-54 (S.D. Cal. 1999) (allowing party to inspect adverse party's computers where deleted emails could be recovered and relevant emails were not produced during the first round of discovery); *In re Ford Motor Co.*, 345 F.3d at 1317 (noting that improper conduct during discovery may necessitate the requesting party to check data compilations).

<sup>30</sup> *Balboa*, 2006 U.S. Dist. LEXIS 29625 at \*7-8; *Cenveo*, 2007 U.S. Dist. LEXIS 8281 at \*1-3; *Ameriwood*, 2006 U.S. Dist LEXIS 93380 at \*8, \*13; *Orrell*, 2007 U.S. Dist. LEXIS 89524 at 19; *Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645, 652 (D. Minn. 2002) (ordering forensic inspection of computer equipment where relevant emails and files had been deleted); *In re Honza*, 2008 Tex. App. LEXIS 20, \*6 (10th Dist. 2008) (following federal procedure in granting access to computer hard drives to retrieve deleted files and to create a timeline for file alteration).

inadequate or incomplete will not suffice to show access or imaging is needed.<sup>31</sup>

When a court does grant access or imaging, it will also outline specific protocols to protect against “fishing” and to protect confidential information. The court generally will outline each step in the process of imaging or inspecting, including the appointment or approval of an independent expert to inspect the computer.<sup>32</sup> The exact list of procedures may vary from case to case and among jurisdictions, but most include an independent computer expert inspecting the data, the requesting party creating search terms agreeable to both parties, the responding party reviewing the data for privileged or confidential information, and the responding party’s objections to specific data on confidentiality grounds.<sup>33</sup> Once the data is imaged, the court, the expert, or both will keep the imaged or copied data, usually under a protective order.

#### D. Privilege and Confidentiality

Each jurisdiction has already developed a body of common law relating to disclosure of privileged or confidential information. Many of the principles articulated in

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<sup>31</sup> See, e.g., *Scotts Co. LLC v. Liberty Mut. Ins. Co.*, 2007 U.S. Dist. LEXIS 43005, \*6 (S.D. Ohio Jun. 12, 2007); *Williams v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 144, 146 (D. Mass. 2005) (declining to allow inspection based on highly speculative conjecture, because “permitting such an intrusion” was inappropriate absent reliable information of misleading or inaccurate discovery); *Powers v. Thomas M. Cooley Law Sch.*, 2006 U.S. Dist. LEXIS 67706, \*14 (W.D. Mich. Sept. 21, 2006) (denying a motion to compel that requested inspection and production of computer hard drives because such “intrusive examination” should not be granted as a matter of course or on mere suspicion).

<sup>32</sup> See, e.g., *Cenveo*, 2007 U.S. Dist. LEXIS 8281 at \*5–9 (establishing a procedure consisting of (1) plaintiff choosing forensic expert, (2) expert executing confidentiality agreement with parties and submitting to jurisdiction of court, (3) expert making images at defendant’s place of business, (4) expert taking away imaging data and inspecting it with defendant’s expert present, (5) expert to provide defendant with recovered materials, (6) defendant to review for privilege and responsiveness); *Ameriwood*, 2006 U.S. Dist. LEXIS 93380 at 16–21 (providing a three phase protocol of imaging, recovery, and disclosure); *Balboa*, 2006 U.S. Dist. LEXIS 29265 at 14–16 (allowing computer hard drive imaging and instructing the parties to establish a protocol to do so to protect privileged and non-business related personal information); *Antioch*, 210 F.R.D. 645 at 653–54; *Rowe Entm’t, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 432–433; *Quotient, Inc. v. Toon*, 2005 WL 4006493, \*4 (Md. Cir. Ct. 2005) (outlining a ten-point protocol for the limited production and imaging of hard drives for recovery of unintentional deletions, including an independent expert, defendant observation of process, and secure holding by the expert of the data).

<sup>33</sup> See *id.*

those decisions apply to ESI as well.<sup>34</sup> Yet, ESI discovery presents special challenges regarding the disclosure of privileged information in two areas. First, when hard drive imaging or copying occurs, as described above, courts must create protocols sufficient to protect privileged or confidential information. Second, inadvertent disclosures of privileged information are more likely to occur in connection with production of ESI because of the enormous volume of ESI.

In the first instance, courts handle confidentiality concerns when imaging or copying data from computer hard drives by appointing independent experts.<sup>35</sup> Most courts then allow some type of privilege review by the responding party before disclosing the contents.<sup>36</sup> In contrast, some courts will allow the requesting party to review the ESI first under an “attorney eyes only” policy.<sup>37</sup> The requesting party will then turn over information it deems relevant to the responding party for privilege review. Many courts will also have the independent expert execute a protective order, further protecting confidential materials.<sup>38</sup>

The second major area concerns the inadvertent disclosure of privileged information, which is more likely given the volume of data stored electronically. Courts

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<sup>34</sup> Courts still need to update normal confidentiality and privilege rules to ESI. *See, e.g.,* Expert Choice, Inc. v. Gartner, Inc., 2007 U.S. Dist. LEXIS 21208, \*19 (D. Conn. Mar. 27, 2007) (finding that emails simply forwarded to attorneys or ones in which simply copy the attorney do not fall within the attorney client privilege); Bitler Investment Venture II, LLC v. Marathon Ashland Petroleum LLC, 2007 U.S. Dist. LEXIS 9231, \*16–17 (N.D. Ind. Feb. 7, 2007) (finding that where an expert was forwarded emails, expert printed them off and placed them in his court file, expert had “considered” them for purposes of Rule 26(a)(2)(B), and disclosure was required).

<sup>35</sup> *Cenveo*, 2007 U.S. Dist. LEXIS 8281 at 5; *G.D. v. Monarch Plastic Surgery, P.A.*, 239 F.R.D. 641, 648 (D. Kan. 2007); *Ameriwood*, 2006 U.S. Dist. LEXIS 93380 at 17; *Quotient*, 2005 WL 4006493 at 4; *Rowe*, 205 F.R.D. 421 at 433.

<sup>36</sup> *Cenveo*, 2007 U.S. Dist. LEXIS 8281 at 5; *Monarch*, 239 F.R.D. 641 at 648; *Ameriwood*, 2006 U.S. Dist. LEXIS 93380 at 17; *Quotient*, 2005 WL 4006493 at 4.

<sup>37</sup> *Rowe*, 205 F.R.D. 421 at 433.

<sup>38</sup> *See* notes 35–37 and accompanying text.

routinely follow normal precedent in their respective jurisdictions to determine whether waiver of the attorney-client or work product privilege has occurred for ESI documents.<sup>39</sup>

Courts have not fashioned one test in determining whether waiver occurs, but most courts have developed at least two tests: (1) whether the responding party took reasonable precautions to prevent possible inadvertent disclosure and (2) whether disclosure of the privileged information was timely objected to once the party had notice of the disclosure.<sup>40</sup> While no universal test exists, several cases regarding the inadvertent disclosure of ESI are instructive. A Texas court found waiver where a privileged e-mail was disclosed to opposing counsel, no objection was raised when the providing party's witness was questioned about the e-mail during deposition, and a second witness was questioned during deposition where an objection was waived.<sup>41</sup> The court stated that objection to the e-mail was not timely enough under common law to protect privilege against inadvertent waiver.<sup>42</sup> In a separate case, a New York court found waiver where a non-attorney employee at a company forwarded a CD with privileged material to outside counsel, who in turn forwarded it to opposing counsel without any privilege review.<sup>43</sup> The court stated that the party seeking non-waiver did not take reasonable precautions to prevent disclosure.<sup>44</sup> Finally, a Rhode Island court found that a two-week delay in

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<sup>39</sup> See *Hopson v. City Council of Baltimore*, 232 F.R.D. 228, 232–34 (D. Md. 2005) (stating that courts have developed principles for determining whether waiver occurs in particular cases, but there is no uniform position taken by the different districts); see also *Hernandez v. Esso Standard Oil Company*, 2006 U.S. Dist. LEXIS 47738 (D.P.R. Jul. 11, 2006) (summarizing the tests districts have utilized and stating that districts have adhered to three separate tests: (1) privilege is never waived where the disclosure was inadvertent, (2) a balancing test weighing the totality of the circumstances, and (3) a strict waiver test).

<sup>40</sup> See notes 41–44 and accompanying text.

<sup>41</sup> *Crossroads Systems, Inc. v. Dot Hill Systems*, 2006 U.S. Dist. LEXIS 36181 (W.D. Tex. May 31, 2006).

<sup>42</sup> *Id.*

<sup>43</sup> *Gragg v. International Mgmt Group*, 2007 U.S. Dist. LEXIS 25780, 18–19 (N.D.N.Y. Apr. 5, 2007).

<sup>44</sup> *Id.* (stating that the procedure was “woefully deficient”); see also *Hernandez*, 2006 U.S. Dist. LEXIS 47738 at \*15 (“This Court is not compelled to protect privileged information inadvertently disclosed by an errant mouse click.”).

providing a privilege log after learning of an inadvertent disclosure, coupled with lack of reasonable precautions in providing the documents waived any privilege.<sup>45</sup>

In light of the problems posed by the inadvertent disclosure of privileged materials, courts have endorsed the use of party agreements, court orders approving of those agreements, or protective orders that provide for initial disclosure without waiving privilege.<sup>46</sup> Several courts, addressing both ESI discovery and normal document discovery, have approved of such agreements.<sup>47</sup> These agreements are not any guarantee of non-waiver, however, because some courts have declined to adhere to them.<sup>48</sup> Further, it has been observed that such agreements may not be binding on non-parties.<sup>49</sup>

### E. Data Preservation and Spoliation

It is clear that the common-law duty to preserve evidence related to pending or

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<sup>45</sup> *Corvello v. New England Gas Co., Inc.*, 243 F.R.D. 28, 37 (D. R.I. 2007).

<sup>46</sup> *See, e.g., Id.* 232–234 (finding that initial agreements are advantageous, even though there are sometimes drawbacks in their application).

<sup>47</sup> *See Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (stating that the parties are free to enter into such “claw-back” agreements to forego privilege review); *VLT Corp. v. Unitrode Corp.*, 194 F.R.D. 8 (D. Mass. 2000) (approving of party stipulation to non-waiver of inadvertently produced privileged documents); *Ames v. Black Entertainment T.V.*, 1998 U.S. Dist. LEXIS 18503 (S.D.N.Y. Nov. 20, 1998) (finding no waiver where parties agreed in a deposition that witness could answer question without waiving any privilege); *Dowd v. Calabrese*, 101 F.R.D. 427 (declining to entertain party’s waiver argument where parties had stipulated to non-waiver of privileged statements in deposition); *Western Fuels Assoc. v. Burlington N.R. Co.*, 102 F.R.D. 201 (D. Wyo. 1984) (finding that a Magistrate’s order allowing expedited discovery without waiving privilege prevented parties from raising argument in the later proceedings); *Eutectic Corp. v. Metco*, 61 F.R.D. 35 (following language in protective order, which stated that privilege was not waived); EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE*, 278–88 (4th ed. 2001) (“Because courts will give effect to [non-waiver agreements], the parties by contract . . . can avoid the general rule that partial disclosure on a given subject matter will bring in its wake total disclosure.”).

<sup>48</sup> *See, e.g., Koch Materials Co. v. Shore Slurry Seal Inc.*, 208 F.R.D. 109, 118 (D.N.J. 2002) (declining to follow party agreement because of the fear that such agreements could lead to sloppy attorney review and jeopardize client cases); *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 192 F.R.D. 575, 579 (M.D. Tenn. 2000) (rejecting the doctrine of selective waiver and finding an agreement to produce without waiver invalid).

<sup>49</sup> *See, The Sedona Principles*, Principle 10, Comment 10.d., p. 54.

reasonably anticipated litigation encompasses electronically stored information (“ESI”).<sup>50</sup> It is also clear that the policies and sanctions for spoliation of evidence apply as well to ESI.<sup>51</sup> Novel issues arise, however, in the application of these established discovery practices to the increasingly important area of e-discovery, including when the duty to preserve attaches, what ESI must be preserved, how the duty to preserve affects existing corporate procedures for the routine backup and/or destruction of ESI, and how the rules for imposing sanctions for spoliation of ESI differ from the traditional rules.

## F. The Duty to Preserve ESI

### 1. *When Does the Duty to Preserve Attach?*

The consensus rule for when the duty to preserve attaches is the same for ESI as for other discoverable evidence.<sup>52</sup> Generally, the duty to preserve potential evidence arises when a party knows or should know that the evidence may be relevant to pending or anticipated litigation.<sup>53</sup> The litigation need not be imminent; if litigation is probable, the duty to preserve will attach.<sup>54</sup> Notice may be express, for example through the filing of a lawsuit or through a “preservation letter,” in which a party notifies another party that

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<sup>50</sup> AAB Joint Venture v. United States, 75 Fed. Cl. 432, 441 (2007) (citing Renda Marine, Inc. v. United States, 58 Fed. Cl. 58, 61 (2003); Thompson v. United States HUD, 219 F.R.D. 93, 100 (D. Md. 2003); Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216-17 (S.D.N.Y. 2003) (commonly and hereinafter referred to as “Zubulake IV”). See also *The Sedona Principles*, Principle 5, Comment 5.a.

<sup>51</sup> *The Sedona Principles*, Principle 14.

<sup>52</sup> *Id.*

<sup>53</sup> See, e.g., Silvestri v. General Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001); Rambus, Inc. v. Infineon Techs. AG, 220 F.R.D. 264, 281 (E.D. Va. 2004); *Zubulake IV*, 220 F.R.D. at 216-217.

<sup>54</sup> In Re Napster, Inc. Copyright Litigation, 462 F. Supp. 2d 1060, 1068 (N.D. Cal. 2006).

litigation is anticipated.<sup>55</sup> The duty to preserve may also arise when a party is on notice that the evidence may be relevant to contemplated litigation.<sup>56</sup> Whether and when the duty to preserve has attached is a factual question that must be decided on a case-by-case basis.<sup>57</sup>

## 2. *What is the Scope of the Duty to Preserve?*

Because of the myriad ways ESI can be created, duplicated, transmitted, stored, and backed up, it is virtually impossible to fashion a single rule for requiring its preservation.<sup>58</sup> Generally speaking, the preservation obligation requires that a party “preserve what it knows, or reasonably should know, will likely be requested in reasonably foreseeable litigation.”<sup>59</sup> Courts have held that this duty extends only to evidence that is in the party’s possession, custody, or control, whether directly or indirectly.<sup>60</sup> An entity’s duty to preserve extends to its “key players,” meaning those

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<sup>55</sup> See, e.g., *King Lincoln Bronzeville Neighborhood Ass’n v. Blackwell*, 448 F. Supp. 2d 876, 879 (S.D. Ohio 2006); *Krumwiede v. Brighton Assoc., LLC*, No. 05 C 3003, 2006 U.S. Dist. LEXIS 31669, at \*22-23 (E.D. Ill. May 8, 2006); *Wiginton v. Ellis*, No. 02 C 6832, 2003 WL 22439865, at \*5 (N.D. Ill. Oct. 27, 2003). Courts have held that such a letter must be unequivocal in its terms. See *AAB Joint Venture*, 75 Fed. Cl. at 441-42 (“letter did not provide sufficient certainty or specificity of impending litigation, nor did it apprise Defendant of the scope of the claims which would be filed”); *Cache La Poudre Feeds, LLC v. Land O Lakes, Inc.*, 244 F.R.D. 614, 623 (D. Colo. 2007) (letters from opposing party prior to litigation that did not explicitly threaten litigation or demand preservation were inadequate to trigger duty to preserve).

<sup>56</sup> *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998); *Consol. Aluminum Corp. v. Alcoa, Inc.*, 244 F.R.D. 335, 342 (M.D. La. 2006).

<sup>57</sup> *Cache La Poudre Feeds, Inc.*, 244 F.R.D. at 621.

<sup>58</sup> See generally *The Sedona Principles, Principle 5 and Comments*.

<sup>59</sup> *MOSAID Techs., Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332, 336 (D.N.J. 2004) (quoting *Scott v. IBM Corp.*, 196 F.R.D. 233, 247-48 (D.N.J. 2000)); accord *Zubulake IV*, 220 F.R.D. at 217.

<sup>60</sup> *Phillips v. Netblue, Inc.*, No. C-05-4401 SC, 2007 WL 174459, at \*3 (N.D. Cal. Jan. 22, 2007) (plaintiff was under a duty to preserve emails, which it did, but was not required to preserve the images linked thereto) (citing *MacSteel, Inc. v. Eramet North America*, No. 05-74566, 2006 WL 3334011, at \*1 (E.D. Mich. 2006)); *Towsend v. Am. Insulated Panel Co.*, 174 F.R.D. 1, at \*5 (D. Mass. 1997)). But see *World Courier v. Barone*, No. C-06-3072 TEH, 2007 WL 1119196, at \*1 (N.D. Cal. April 16, 2007) (wife was under an affirmative duty to preserve hard drive of home computer that was destroyed by her husband because she “maintained indirect control” over it) (citing *King v. Am. Power Conversion Corp.*, 181 Fed. Appx. 373 (4th Cir. 2006); *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001)).

employees who are likely to have relevant information.<sup>61</sup> Thus, depending on the nature of the claims and defenses in any given suit and the types of ESI generated by the parties, the scope of the duty to preserve can vary widely.<sup>62</sup>

*3. How Does the Duty to Preserve Affect Corporate Policy?*

Most entities that maintain a computer network have in place a routine system for storing and backing up data. These computer networks often are programmed to archive data or create “disaster recovery” sources such as backup tapes or optical discs, and to delete files that have not been recently used.<sup>63</sup> These backup media in turn are often recycled, destroying data that is itself outdated.<sup>64</sup> Even those backup tapes that do contain relevant information are often designed only to restore entire systems, rather than to identify and produce specific files or data, making it extremely expensive and inefficient to do so.<sup>65</sup> For obvious reasons, this may have an impact on the extent to which an entity is under a duty to preserve ESI in its daily operations.

Further complicating matters is the number of people who are in some way responsible for managing an organization’s ESI.<sup>66</sup> Aside from the people who create the files initially, there are system analysts, IT staff people, and in many cases outside contractors and internet service providers, all of whom play some role in the entity’s duty to preserve ESI.<sup>67</sup> Unfortunately, most entities do not have formal lines of

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<sup>61</sup> *Zubulake IV*, 220 F.R.D. at 218, followed in *Consol. Aluminum Corp. v. Alcoa, Inc.*, 244 F.R.D. 335, 341 (M.D. La. 2006).

<sup>62</sup> *The Sedona Principles Principle 5, Comment 5.c.*

<sup>63</sup> Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH. & INTELL. PROP. 171, 189 (2006).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 179.

<sup>67</sup> *Id.* at 179-80.

communication among these data custodians to ensure compliance once a duty to preserve arises.<sup>68</sup>

Once a party's duty to preserve has attached, courts have generally held that an entity must suspend its routine document destruction and/or retention policies in order to ensure that no potentially relevant evidence is lost.<sup>69</sup> This has come to be known as a "litigation hold," and entities are required to communicate this hold to all those who have the potential to destroy discoverable information.<sup>70</sup> When the failure of an entity to suspend its routine document retention processes results in the loss of relevant evidence, the entity may be subject to sanctions.<sup>71</sup> Courts have not mandated the form in which potentially relevant ESI must be preserved; however, courts will not allow a party's

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<sup>68</sup> *Id.* at 180.

<sup>69</sup> *See, e.g.*, *Consol. Aluminum Corp. v. Alcoa, Inc.*, 244 F.R.D. 335, 342 (M.D. La. 2006); *Reino de Espana v. Am. Bureau of Shipping*, No. 03 Civ. 3573 LTS/RLE, 2006 WL 3208579, at \*8 (S.D.N.Y. Nov. 3, 2006) (Spain's failure to issue a litigation hold until one year after the casualty of the *Prestige*, which was the subject of the litigation, was not timely and constituted a "failure to adequately preserve evidence"); *Zubulake IV*, 220 F.R.D. at 218. *But see* *Crandall v. City and County of Denver, Colorado*, No. 05-cv-00242-MSK-MEH, 2006 WL 2683754, at \*2 (D. Colo. Sept. 19, 2006) ("Mere existence of a document [in this case e-mail] destruction policy within a corporate entity, coupled with a failure to put a comprehensive "hold" on that policy once the corporate entity becomes aware of litigation, does not suffice to justify a sanction absent some proof that, in fact, it is potentially relevant evidence that has been spoiled or destroyed").

<sup>70</sup> *Miller v. Holzmann*, No. 95-01231 (RCL/JMF), 2007 WL 172327 (D.D.C. Jan. 17, 2007); *Alcoa*, 244 F.R.D. at 341-42; *3M Innovative Prop. Co. v. Tomar Elec., Inc.*, No. 05-756 MJD/AJB, 2006 U.S. Dist. LEXIS 80571, at \*20 (D. Minn. July 21, 2006); *Zubulake IV*, 220 F.R.D. at 218. *See also* *The Sedona Principles, Second Edition (2007)*, *cmt. 5.c*; *Withers, supra* note 63, at 189-90.

<sup>71</sup> *See, e.g.*, *Aero Prod. Int'l, Inc. v. Intex Recreation Corp.*, No. 02 C 2590, 2005 U.S. Dist. LEXIS 44169, at \*9 (N.D. Ill. Feb. 11, 2005) (allowing an adverse-inference jury instruction regarding evidence lost as a result of routine retention policy). *See also infra*, Section I.B. Under the new Rule 37, "[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." FED. R. CIV. P. 37(e). The comment to this section notes that suspension of such a system is required in order to show good faith once an entity's duty to preserve has attached: "When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a 'litigation hold.'" FED. R. CIV. P. 37 note to Subdivision (f) of Advisory Committee on 2006 amendments. *See also* *Doe v. Norwalk Cmty. Coll.*, No. 3:04-CV-1976 (JCH), 2007 WL 2066497, at \*4 (D. Conn. July 16, 2007) ("in order to take advantage of the good faith exception [in Rule 37], a party needs to act affirmatively to prevent the system from destroying or altering information, even if such destruction would occur in the regular course of business").

decision in this respect to affect its responsibility to produce evidence in response to discovery requests.<sup>72</sup>

#### 4. Preservation Orders

Because of the inherent duty to preserve potential evidence, courts generally do not enter preservation orders over a party's objection absent a showing of necessity by the moving party.<sup>73</sup> Courts have been more responsive to agreed preservation orders, which can help to resolve discovery disputes before they arise.<sup>74</sup> Ex parte preservation orders are very rarely entered by courts.<sup>75</sup>

### G. Spoliation of ESI and Sanctions

As discussed above, a party who fails to preserve potentially relevant evidence once its duty to preserve has attached may be subject to sanctions.<sup>76</sup> This situation often

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<sup>72</sup> AAB Joint Venture v. United States, 75 Fed. Cl. 432, 441 (2007) (where defendant decided to preserve emails on backup tapes, it was still under an obligation to produce relevant emails) (citing Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 316-17 (S.D.N.Y. 2003) (commonly and hereinafter referred to as "Zubulake I"); In Re Brand Name Prescription Drugs, Nos. 94 C 897, MDL 997, 1995 WL 360526, at \*1 (N.D. Ill. July 15, 1995)).

<sup>73</sup> See, e.g., Capricorn Power Co. v. Siemens Westinghouse Power Corp., 220 F.R.D. 429, 433-34 (W.D. Pa. 2004), cited in *The Sedona Principles, Second Edition (2007)*, cmt. 5.f (setting out three considerations to weigh in considering a preservation order: "1) the level of concern the court has for the continuing existence and maintenance of the integrity of the evidence in question in the absence of an order directing preservation of the evidence; 2) any irreparable harm likely to result to the party seeking the preservation of evidence absent an order directing preservation; and 3) the capability of an individual, entity, or party to maintain the evidence sought to be preserved, not only as to the evidence's original form, condition or contents, but also the physical, spacial and financial burdens created by ordering evidence preservation"). But see ACS Consulting Co. v. Williams, No. 06-11301, 2006 U.S. Dist. LEXIS 16785, at \*23 (E.D. Mich. April 6, 2006) (entering protective order prohibiting defendant from deleting data or "wip[ing] clean" any computer hard drive); Quotient, Inc. v. Toon, No. 13-C-05-64087, 2005 WL 4006493, at \*3 (Md. Cir. Ct. 2005) (granting a preservation order allowing plaintiff's expert to make a mirror image of defendant's hard drive to avoid a "substantial probability" that relevant evidence could be lost by defendant's routine computer use).

<sup>74</sup> See, e.g., Palgut v. City of Colo. Springs, No. CIVA 06CV01142 WDMMJ, 2006 WL 3483442, at \*1 (D. Colo. Nov. 29, 2006) (entering a jointly stipulated e-discovery plan); *The Sedona Principles, Second Edition (2007)*, cmt. 5.f.

<sup>75</sup> See, e.g., Adobe Sys., Inc. v. South Sun Prod., Inc., 187 F.R.D. 636, 641 (S.D. Cal. 1999) ("The extraordinary remedy of *ex parte* injunctive relief cannot be justified by merely pointing to the obvious opportunity every defendant possesses to engage in such unlawful deceptive conduct [as destruction or concealment of evidence]. Rather, a plaintiff must present specific facts showing that the defendant it seeks to enjoin will likely conceal, destroy, or alter evidence if it receives notice of the action.").

<sup>76</sup> See *supra*, notes 69-72 and accompanying text.

arises when a party fails to issue a “litigation hold,” allowing its routine data retention policies to continue uninterrupted, resulting in the loss of actually relevant evidence.<sup>77</sup> It may also occur where a party is simply negligent in fulfilling its duty to preserve.<sup>78</sup> Sanctions for this kind of infraction are limited in some jurisdictions to awarding costs to the aggrieved party, based on the relatively low level of culpability on the part of the offending party.<sup>79</sup> In other jurisdictions, however, more severe sanctions may be warranted by a party’s failure to preserve, even if that party’s conduct was merely negligent.<sup>80</sup>

Spoliation, on the other hand, is defined as the intentional destruction of evidence.<sup>81</sup> The concept of spoliation carries with it the inherent implication of wrongful conduct on the part of the offending party, and therefore the sanctions for its commission

<sup>77</sup> See *supra* notes 69-71 and accompanying text.

<sup>78</sup> Even where data that is the subject of a discovery request has been lost in this fashion, courts have held that the party seeking sanctions harsher than mere costs must make a showing that the lost evidence was relevant. *Doe v. Norwalk Cmty. Coll.*, No. 3:04-CV-1976 (JCH), 2007 WL 2066497, at \*7 (D. Conn. July 16, 2007), *Crandall v. City and County of Denver, Colorado*, No. 05-cv-00242-MSK-MEH, 2006 WL 2683754, at \*2 (D. Colo. Sept. 19, 2006); *Phoenix Four, Inc. v. Strategic Res. Corp.*, No. 05 Civ. 4837(HB), 2006 WL 1409413, at \*4 (S.D.N.Y. May 23, 2006).

<sup>79</sup> See, e.g., *Optowave Co., Ltd. v. Nikitin*, No. 6:05-cv-1083-Orl-22DAB, 2006 WL 3231422, at \*8 (M.D. Fla. Nov. 7, 2006) (“An adverse inference is drawn from a party’s failure to preserve evidence only when the absence of that evidence is predicated on bad faith; thus, negligence in losing or destroying records is not enough for an adverse inference”); *Consol. Aluminum Corp. v. Alcoa, Inc.*, 244 F.R.D. 335, 346 (M.D. La. 2006) (declining plaintiff’s request for an adverse-inference instruction in part because plaintiff “failed to convince the Court that the email deletions at issue were motivated by ‘fraud or a desire to suppress the truth’ or that Alcoa ‘intended to prevent use of the [emails] in this litigation.’”) (quoting *Concord Boat Corp. v. Brunswick Corp.*, No. LR-C-95-781, 1997 WL 33352759, at \*6 (E.D. Ark. Aug. 29, 1997)).

<sup>80</sup> See, e.g., *World Courier v. Barone*, No. C-06-3072 TEH, 2007 WL 1119196, at \*2 (N.D. Cal. April 16, 2007) (noting evidence that the defendant was at least negligent in her duty to preserve her home computer in awarding plaintiff an adverse-inference instruction); *Easton Sports, Inc. v. Warrior Lacrosse, Inc.*, No. 05-72031, 2006 WL 2811261, at \*3-5 (E.D. Mich. Sept. 28, 2006) (finding defendant negligent for failing to prevent its employee from canceling an email account and allowing an adverse-inference instruction as a sanction); *In Re Napster, Inc. Copyright Litigation*, 462 F. Supp. 2d 1060, 1077-78 (N.D. Cal. 2006) (finding that defendant’s failure to suspend routine deletion of emails that resulted in the loss of relevant evidence was grossly negligent, and constituted grounds for imposing adverse-inference jury instructions and the preclusion of evidence, even absent a showing of willful or intentional conduct); *Phoenix Four, Inc.*, 2006 WL 1409413, at \*4 (noting that a party seeking an adverse inference instruction must show, among other things, that the party had a “culpable state of mind,” and stating that “[t]he ‘culpable state of mind’ requirement is satisfied in this circuit by a showing of ordinary negligence.”); *Doe*, 2007 WL 2066497, at \*5 (same).

<sup>81</sup> BLACK’S LAW DICTIONARY 1401 (6<sup>th</sup> ed. 1990).

may be more severe. There are three main ways a court may sanction a party who is guilty of spoliation of ESI: by giving an adverse-inference instruction to the jury, by excluding evidence, or, in extreme cases, by dismissing or defaulting the responsible party.<sup>82</sup> The rules for determining which type of sanction is appropriate for spoliation of ESI in any given case are substantially the same as those in cases of spoliation of traditional evidence.<sup>83</sup>

## H. Costs and Cost Allocation

### 1. Cost-Shifting

The most widely adopted approach to the issue of cost-shifting problem was first articulated in *Zubulake v. UBS Warburg LLC*, in which the court stressed that “[w]hen evaluating cost-shifting, the central question must be, does the request impose an ‘undue burden or expense’ on the responding party? Put another way, ‘how important is the sought-after evidence in comparison to the cost of production?’”<sup>84</sup> The court in *Zubulake* identified seven factors to be considered in determining whether a request is unduly burdensome, in descending order of the weight they should be accorded: 1) the extent to which the request is specifically tailored to discover relevant information; 2) the availability of such information from other sources; 3) the total cost of production, compared to the amount in controversy; 4) the total cost of production, compared to the resources available to each party; 5) the relative ability of each party to control costs and

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<sup>82</sup> Phillips v. Netblue, Inc., No. C-05-4401 SC, 2007 WL 174459, at \*2 (N.D. Cal. Jan. 22, 2007) (citing In Re Napster, Inc. Copyright Litigation, 462 F. Supp. 2d 1060, 1068 (N.D. Cal. 2006)).

<sup>83</sup> See, e.g., In Re Napster, Inc. Copyright Litigation, 462 F. Supp. 2d at 1070-78; Gen. Med., P.C. v. Morning View Care Ctrs., No. 2:05-cv-439, 2006 WL 2045890, at \*5 (S.D. Ohio July 20, 2006)

<sup>84</sup> *Zubulake I*, 217 F.R.D. 309, 322-23 (S.D.N.Y. 2003).

its incentive to do so; 6) the importance of the issues at stake in the litigation; and 7) the relative benefits to the parties of obtaining the information.<sup>85</sup>

This approach is very fact-intensive, and the court in *Zubulake* warned against performing the required balancing analysis based on speculation about what evidence might be found from the inaccessible sources in question.<sup>86</sup> The court instead endorsed the “test run” approach articulated in *McPeek v. Ashcroft* as a means to establish a factual basis that will inform the analysis.<sup>87</sup> This approach requires the responding party to produce a sampling of the requested data in order to determine its probable relevance and probity, from which the court can make a determination about whether production of all the requested data will ultimately be required.<sup>88</sup> The *Zubulake* approach has been widely, though not uniformly, followed in the federal courts, as well as in some state courts.<sup>89</sup>

## 2. Costs of Non-party ESI Discovery

While the approach outlined above is generally applicable to the discovery of ESI from parties to a lawsuit, a different analysis is required when the responding party is a

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<sup>85</sup> *Id.* at 322.

<sup>86</sup> *Id.* at 323.

<sup>87</sup> *Id.* (citing *McPeek v. Ashcroft*, 202 F.R.D. 31, 34-35 (D.D.C. 2001)).

<sup>88</sup> *Id.* at 323-24 (citing *McPeek*, 202 F.R.D. at 34-35). The court in *McPeek* introduced the economic concept of “marginal utility” to the cost-shifting analysis when one party is a government agency, stating that “[t]he more likely it is that the [inaccessible source] contains information that is relevant to a claim or defense, the fairer it is that the government agency search at its own expense.” *McPeek*, 202 F.R.D. at 34. This approach is still sometimes followed in the District of Columbia. See, e.g., *J.C. Assoc. v. Fid. & Guar. Ins. Co.*, No. 01-2437 (RJM/JMF), 2006 WL 1445173, at \*2 (D.D.C. May 25, 2006).

<sup>89</sup> See, e.g., *AAB Joint Venture v. United States*, 75 Fed. Cl. 432, 443-44 (2007); *Semsroth v. City of Wichita*, 239 F.R.D. 630, 636 (D. Kan. 2006); *Hagemeyer N. Amer., Inc. v. Gateway Data Scis. Corp.*, 222 F.R.D. 594, 602-03 (E.D. Wisc. 2004); *OpenTV v. Liberate Techs.*, 219 F.R.D. 474, 477 (N.D. Cal. 2003); *Xpedior Creditor Trust v. Credit Suisse First Boston (USA), Inc.*, 309 F. Supp. 2d 459, 465-67 (S.D.N.Y. 2003); *Delta Fin. Corp. v. Morrison*, 819 N.Y.S.2d 908, 917 (Sup. Ct. 2006). But see *Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 572-73 (N.D. Ill. 2004) (modifying the *Zubulake* factors by adding an eighth: “the importance of the requested discovery in resolving the issues at stake in the litigation”); *Analog Devices, Inc. v. Michalski*, No. 01 CVS 10614, 2006 WL 3287382, at \*40 (N.C. Super. Nov. 1, 2006) (rejecting the *Zubulake* approach and others in favor of analyzing cost-shifting under the North Carolina Rules of Civil Procedure); *Toshiba Am. Elec. Components, Inc. v. Superior Court of Santa Clara County*, 21 Cal. Rptr. 3d 532, 540-41 (Ct. App. 2004) (rejecting trial court’s cost-shifting analysis under federal law, citing a controlling California statute).

non-party. This becomes important when one considers the nature of ESI dispersion and preservation – there are multiple layers of data custodians and recipients all of whom may control relevant and probative ESI.<sup>90</sup> Federal Rule of Civil Procedure 26, from which the *Zubulake* analysis descended, applies only to parties to the litigation.<sup>91</sup> On the other hand, discovery from non-parties in federal court is governed by Federal Rule 45, which provides greater protection to non-party discovery respondents than exists for parties under Federal Rule 26.<sup>92</sup> Under Rule 45, a non-party objecting to a request for production need only make a showing that to comply with the request would be unduly burdensome.<sup>93</sup> Courts applying this rule to non-party discovery of ESI have generally been more sympathetic to the non-party from whom the data is sought, and are usually more apt to require the requesting party to pay for all or part of the costs of production.<sup>94</sup>

### III.

#### OPTIONS FOR ADDRESSING ESI IN ILLINOIS

There are a variety of options available for addressing issues relating to the discovery of ESI in Illinois. At a minimum, it would appear that the Supreme Court Rules should be revised to reflect the modern view that a request for production of ESI should be addressed on a par with a traditional request for documents, but with certain important caveats. Although Rule 201's definition of "documents" has, since 1995,

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<sup>90</sup> See *supra* notes 66-68 and accompanying text.

<sup>91</sup> FED. R. CIV. P. 26.

<sup>92</sup> FED. R. CIV. P. 45. See also *United States v. Amerigroup Ill., Inc.*, No. 02 C 6074, 2005 WL 3111972, at \*4-5 (N.D. Ill. Oct. 21, 2005) ("it has been consistently held that 'non-party status' is a significant factor to be considered in determining whether the burden imposed by a subpoena is undue" (citing cases)), cited in *Withers*, *supra* note 63, at 205.

<sup>93</sup> FED. R. CIV. P. 45(c)(3)(A)(iv) ("the issuing court must quash or modify a subpoena that ... subjects a person to undue burden"). See also *Withers*, *supra* note 63, at 205.

<sup>94</sup> See, e.g., *Guy Chem. Co., Inc. v. Romaco AG*, 243 F.R.D. 310, 313 (N.D. Ind. 2007) ("Simply put, it is not [the non-party's] lawsuit and they should not have to pay for the costs associated with someone else's dispute"); *Amerigroup Ill., Inc.*, 2005 WL 3111972, at \*7 (quashing a subpoena directed at non-party Illinois Department of Healthcare and Family Services requiring it to produce ESI).

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included “all retrievable information in computer storage”, the direction is that such information will be produced “on paper.” (Definition of “documents” to include “all retrievable information in computer storage” “obligates a party to produce on paper those relevant materials that have been stored electronically.” Committee Comments to Illinois Supreme Court Rule 201; Rule 214: “A party served with the written request shall (1) produce the requested documents, including in printed form all retrievable information in computer storage...”). Given the evolution of technology since 1995, production “on paper” is likely the most expensive and least efficient form of production. Further, the concept of “retrievable” information needs to be revisited in light of the reality that any ESI is literally “retrievable”, but potentially at a cost and effort disproportionate to the issues at stake in the litigation. Therefore, it would appear that, at a minimum, certain language of the existing Rule and the Committee Comments should be revised to reflect current circumstances.

Beyond these rather minor modifications, the Committee sees three options: 1) revamp the Rules entirely to incorporate all of the Federal Amendments, including the “meet and confer” obligations of counsel and the requirement of a Scheduling Conference early in the litigation; 2) selectively amend the Rules regarding interrogatories, discovery of documents, subpoenas to non-parties and, possibly, sanctions, to conform to the Federal Amendments; and 3) separately, or in conjunction with the foregoing option, promulgate standards along the line of the CCJ Guidelines as the standards to be used under Illinois law. Each of these options is discussed below.

The incorporation of the Federal Amendments in their entirety into the Court’s Rules would require significant changes affecting not only the manner in which discovery

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is conducted, but also the procedures to be followed throughout litigation. Many of the Federal Amendments are premised on the obligation of counsel to meet and confer regarding various issues prior to a Scheduling Conference with the court. While Supreme Court Rule 218 requires that a Case Management Conference be held no later than 182 days following the filing of the complaint and specifies the issues to be addressed, the Rule imposes no obligation upon counsel to resolve or even address any issues, including discovery issues, prior thereto. In practice, counsel often meet each other for the first time at the Initial Case Management Conference and have no meaningful views regarding what issues relevant discovery may entail.

There is a general consensus in the literature that waiting any substantial period of time following the filing of a lawsuit to address concerns regarding the discovery of ESI greatly enhances the likelihood of disputes over accessibility and spoliation. Given the importance of early consultation among counsel and, if necessary, court intervention with respect to the discovery of ESI, the Court's Rules would have to be amended to require consultation among counsel (and, in particular, regarding discovery of ESI) prior to the Initial Case Management Conference, which itself would ideally be held earlier. The Rules, if amended in this manner, should also specify the court's ability to enter orders reflecting the parties' agreements or, in the absence thereof, the court's determinations regarding issues relating to the production of ESI.

Revisions of the Court's Rules in this manner would necessarily entail a statewide effort to educate the bar regarding the new responsibilities imposed upon counsel in cases likely to involve the discovery of ESI. Under the current Rules, in the majority of cases, the first time the court sees counsel for the parties is at the Initial Case Management

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Conference, which, as noted above, occurs too late in most cases to effectively address issues relating to ESI. For example, in six months, a corporation that has a legitimate, uniform policy of deleting e-mails every 30, 60 or 90 days, will have relegated potentially relevant information to “not reasonably accessible” status, to use the terminology of the Federal Rules. Therefore, the court will necessarily be required to engage in an after-the-fact analysis of the parties’ conduct to gauge the effect and consequences, if any, of the loss of this information. In order to avoid this result (which itself can entail a significant expenditure of time and expense on an issue not directly related to the merits of the lawsuit), counsel would have to understand their primary responsibility to confer early on regarding these issues and, if necessary, seek the court’s involvement.

The drawback to this approach is that it would necessarily apply generally to all cases, even those that do not potentially involve discovery of ESI. There is no method by which the court can ascertain at the outset of litigation whether discovery of ESI is, or is likely to be involved. Although the ratio will certainly change over time, most cases presently do not involve discovery of ESI or at least not on such a level as to require the court’s early involvement. Creating new Rules requiring counsel to meet and confer and requiring the court to conduct an early Scheduling Conference would necessarily apply to all cases, even those that may not benefit from such provisions. Thus, the drawbacks to engrafting the Federal Amendments onto this Court’s Rules may outweigh the current benefits.

The second option, which, as noted above, has been adopted by several states thus far, is to amend selectively this Court’s Rules to incorporate provisions relating to the discovery of ESI – modeled on the Federal Amendments, but tailored as necessary to

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reflect differences in state practice. Revisions to Rules 201 (General Discovery Provisions), 213 (Written Interrogatories), 214 (Discovery of Documents, Objects and Tangible Things) and, potentially, 219 (Consequences of Refusal to Comply with Rules or Order Relating to Discovery), along with revisions to the Committee Comments, would accomplish this goal. Further, the Committee notes that the Court's Rules do not presently contain provisions regarding subpoenas to non-parties other than Rule 214's general statement that the Rule does not preclude "an independent action against a person not a party for production of documents . . . ." Consistent with the need to protect non-parties from being unfairly saddled with the burden and expense of discovery of ESI, it would appear appropriate to enact more detailed provisions regarding non-party subpoenas, either as an amendment to Rule 214 or as a stand-alone Rule.

Finally, in lieu of or in tandem with either of the foregoing options, this Court could promulgate Guidelines to accompany revisions to the Rules and identify factors relevant to the decisions trial judges will be called upon to make in this emerging area of the law. Consistent with the above analysis, the Committee does not recommend promulgation of guidelines on substantive legal issues such as waiver of privilege or the standards for entry of orders to preserve evidence as these are already addressed in caselaw. While Guidelines tailored to the Rules revisions are not essential, particularly given the wealth of information already in existence regarding the discovery of ESI, they would have the advantage of synthesizing for trial judges in Illinois those factors this Court considers important.

CONCLUSION

The Committee on Discovery Procedures was charged with the task to “study and define e-Discovery, report on its efficacy and potential impact on trial proceedings and current Supreme Court Rules.” The Committee trusts that this Report accomplishes that result and awaits further direction from the Court on these issues.

Respectfully submitted,

Committee on Discovery Procedures

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Hon. James R. Glenn  
Hon. John B. Grogan

Hon. James J. Mesich  
Hon. Jeffrey W. O'Connor  
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Advisors:

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Mr. Eugene I. Pavalon  
Hon. Paul E. Root (ret.)

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**APPENDIX**

- A. 2006 Amendments to the Federal Rules of Civil Procedure**
- B. Various State Rules (Arizona, Idaho, Indiana, Louisiana, Minnesota, Mississippi, Montana, New Hampshire, New Jersey, Texas and Utah)**
- C. Conference of Chief Justices Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information (2006)**
- D. National Conference of Commissioners on Uniform State Laws - Uniform Rules Relating to Discovery of Electronically Stored Information (2007)**
- E. The Sedona Principles for Electronic Document Production (Second Edition)**

*\*\*Please advise the Administrative Office if you would like a copy of the materials contained in the Appendix\*\**

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Hon. Lisa Holder White

October 2008

**I. STATEMENT ON COMMITTEE CONTINUATION**

The Committee on Education was established to identify ongoing education needs for the Illinois judiciary and to develop short and long term plans to address those needs. In Conference Year 2008, the Committee received a continuing charge to identify emerging legal, sociological, cultural, and technical issues that may impact decision making and court administration and, based on these emerging issues, to recommend and develop programs for new and experienced Illinois judges.

To accomplish this general charge, the Committee was tasked with assessing the judicial education needs, expectations and program participation of Illinois judges and recommending topics and faculty for the annual New Judge Seminar, Seminar Series, Education Conference and the Advanced Judicial Academy. The Committee also was charged with the review and recommendation of judicial education programs offered by organizations and entities other than the Supreme Court for approval and award of continuing judicial education credit.

To achieve its overall charge, the Supreme Court established several specific projects and priorities for the Committee for the Conference Year, as follows:

- a. In collaboration with the Administrative Office of the Illinois Courts, deliver and evaluate the inaugural 30-hour curriculum for Education Conference 2008 January and March sessions, in accordance with the Court's Minimum Continuing Judicial Education requirements;
- b. Prepare, produce and distribute comprehensive judicial benchbooks in each of six core curriculum areas: civil law and procedure, criminal law and procedure, evidence, family law and procedure, DUI/traffic issues and domestic violence law and procedure;
- c. Implement the plan developed in Conference Year 2006 for enhanced identification, recruitment and preparation of judicial education faculty members in each of the recommended core curriculum areas;
- d. Continue development of plans for advanced use of technology to deliver judicial education programs and resources, including web-casting, web archiving, CD and DVD tutorials and other "distance learning" options and benchbooks through electronic media;
- e. Plan and prepare subject matter and schedule for the 2008 - 2009 Seminar Series;
- f. Initiate planning for Education Conference 2010;
- g. Initiate planning for the Advanced Judicial Academy 2009;
- h. Undertake any other such projects or initiatives that are consistent with the Committee's charge.

The Committee requests that it be permitted to continue its work in Conference Year 2009.

## II. SUMMARY OF COMMITTEE ACTIVITIES

### A. *Presentation of Education Conference 2008*

The centerpiece goal of the Committee achieved fruition in Conference Year 2008 through the delivery of the inaugural expanded 30- hour curriculum of continuing judicial education provided during the Education Conference, held January 29 - February 2, and March 4 - 7, 2008, in Chicago. The Supreme Court, in 2006, charged the Committee with crafting the vehicle to implement the Minimum Continuing Judicial Education (MCJE) provisions adopted for all circuit, associate and appellate judges, through the presentation of an expanded 30-hour Education Conference. The expanded Conference, similar to previous Education Conferences, would be held in alternate years, with the 30-hour format to begin in 2008. Under the Court's direction, the Committee provided for the expansion of curriculum to include core curriculum classes and four hours of content addressing judicial conduct, ethics and professionalism issues. Today, the Education Conference serves as a vehicle by which all Illinois judges can attain the minimum of 30 hours of continuing judicial education.

#### ***Goals Achieved for Education Conference 2008***

A comprehensive description of planning and preparation efforts undertaken by the Committee to present the Education Conference and other judicial education programs is summarized extensively in Conference Year reports 2006 and 2007. The guiding principles used to establish the core curriculum template, which serves to govern the planning for future Education Conferences and other judicial education programs, are noteworthy.

#### ***Curriculum Development***

With Court approval, the Committee established that the core curriculum developed for future Education Conferences should embody the following elements:

- Both “basic” and “advanced” sessions to provide judges an opportunity to choose among sessions and customize a curriculum which meets their judicial education needs and experience levels with each topic;
- Interactive techniques, application and “problem-solving” elements, which will enable judges to address “real-life” situations with their colleagues, while learning different perspectives and approaches and applying new information and skills to their work;
- Varied session lengths and types, based on the scope and complexity of the topics taught;
- Opportunities to learn from experts and practitioners in other fields on clinical topics related to a judge’s work; and

- Concrete ties between sessions, the objectives for those sessions and the work of Illinois judges.

Based on these goals, the Committee and the Administrative Office created an extensive new curriculum development model which, for each of the core curriculum areas (*civil law, criminal law, juvenile law, family law, evidence and ethics/judicial conduct*), asks and answers the following questions:

- In these cases, what are the judge's key *responsibilities, decisions and tasks*?
- For each area of major responsibilities or decisions, what *knowledge* is needed (including legal knowledge, specialized knowledge, information on related fields, etc.)?
- What *judicial skills* are needed (including case management, communication strategies, settlement skills, etc.)?
- What *ethics and/or judicial conduct* issues arise in these cases?
- Are there *specialized or difficult issues* which must be addressed in these cases, such as *pro se* litigation, indigent litigants, case management challenges, media issues, etc.?
- Is there *information from related fields* which would assist judges in handling these cases?

### **Session Development**

Based upon consideration of these questions, the Committee developed specific sessions and courses for inclusion in the Education Conference curriculum. Committee members considered the overall goals for the curriculum, the responsibilities of judges in each case type and the knowledge and skills needed for each major judicial activity and developed individual session worksheets based on these key questions:

- What are the primary learning *objectives* for this session? What key things will judges *know* or be able *to do* as a result of this session?
- What *key topics* and *subtopics* must be addressed? Which topics are beyond the scope of the session and should be excluded or covered in other sessions?
- What is the *targeted experience or skill level* for this session (including entry level/refresher, advanced/experienced or updates/emerging issues)?
- What are the suggested *teaching methods* to achieve this goal?
- How many and what type of *faculty* (knowledge, skills, experience and geographical composition) are needed to teach this session?
- What *session length* will achieve the goals established?

### ***Schedule Development***

Once the Committee developed each session in accordance with the above described process, the individual sessions were merged to create a comprehensive schedule for the four-day conference which allowed maximum flexibility for attendees to choose the topics and sessions that would be of most benefit.

A total of 56 individual sessions, taught by more than 80 judicial faculty and guest speakers, were presented for Education Conference 2008. Each individual session was assisted by staff of the Administrative Office and members of the Committee on Education. Presentations in core curriculum areas, including Appellate Issues and Administrative Issues, were as follows:

<u>Core curriculum areas:</u>	<u>Number of individual sessions presented:</u>
Criminal Law and Procedure	15
Civil Law and Procedure	8
Family Law and Procedure	9
Judicial Conduct and Ethics	11
Juvenile Law	4
Evidence	5
Appellate Issues	2
Administrative Issues	2

### ***Summary of Education Conference***

Under the auspices of the Court, the Committee on Education and the Administrative Office presented the bi-annual Education Conference, held January 29 - February 2, and March 4 - 7, 2008, in Chicago.

- **Attendance:** A total of 890 judicial attendees, and more than 70 judges serving as faculty, attended the January and March conferences.
- **Sessions:** Topic tracks, half-day sessions, concurrent, and workshop sessions featured 56 distinct presentations on criminal law, family law, civil law, evidence, juvenile law, judicial conduct and ethics, appellate issues, and administrative issues.
- **Overall Ratings:** The January and March conferences garnered an overall rating of 4.4, consistent with prior conferences, which indicates that the Education Conference, in its expanded format, continues to be well-received and well-evaluated by judicial attendees.

Through their numerical ratings and evaluation comments, participants indicated that the conference provided useful information, updates and hot topics, and resources which will benefit them in adjudicating and managing cases. Participants indicated that they highly value the opportunity the conference provides for judges to meet, explore common questions and problems

and exchange ideas. The Committee wishes to thank judicial faculty for Education Conference 2008, each of whom invested significant time and effort to prepare for the program. Their commitment and expertise made the fifth presentation of the Education Conference a success. Judicial faculty and Committee liaisons for each session were assisted by staff of the Administrative Office. Appendix A lists the overall evaluation ratings for each Education Conference session. The Committee believes that evaluating training programs and their impact is an essential component in determining whether a program has accomplished its objectives.

***B. Preparation of Comprehensive Judicial Benchbooks in Six Core Curriculum Areas***

***Overview***

A unique and equally important goal, which also achieved fruition in Conference Year 2008, was the preparation and production of judicial benchbooks in five of six core curriculum areas: Evidence, Civil Law and Procedure, Family Law and Procedure, Domestic Violence, and DUI/Traffic. Completion of the Criminal Law and Procedure benchbook is anticipated for later in the 2008 calendar year. As previously reported, judicial education needs assessments conducted in 2004 and 2006 were the genesis for the development of judicial education materials in a “benchbook” format. In early 2006, the Committee convened a Reference Materials Workgroup to further analyze the need for reference material and develop recommendations to meet those needs. Later in 2006, the Workgroup transitioned governance of the benchbook project to an Editorial Board comprised of seven Committee members, charged with overseeing all phases of benchbook planning, drafting, editing and finalization for print. Orientation was held, commencing in December 2006, for each of the six panels of judges and law professors comprising the benchbook teams. Appendix B lists the Editorial Board and members of each Benchbook team.

The Workgroup Board and Administrative Office developed detailed plans, methods and timelines to achieve the following goals:

- Six comprehensive benchbooks – in the areas of civil law and procedure, criminal law and procedure, evidence, family law, DUI/ traffic law and domestic violence – prepared by and for the exclusive use of Illinois judges.
- Each book containing materials, such as caselaw outlines checklists and other reference tools to be of high value to Illinois judges.
- Each book was well-organized and contained a detailed user-friendly index to maximize utility with consistent formatting, organization and content.
- Content and format designed to facilitate transition from “paper-based” reference documents, to resources that can be provided to judges on CD ROM and/or through the Internet, in accordance with the Court’s charge to the Committee to enhance the use of technology to deliver judicial education resources.

- While all reference materials were reviewed and approved by judicial faculty, the law professors were charged with preparing the concise outlines of governing law to be contained in each benchbook. Professors were also charged with verifying case citations and references, and ensuring accuracy of the materials.
- Topic Editors, which generally consisted of two trial judges and one appellate justice for each book, worked closely with the law professor to select and develop the benchbook content, reviewed and selected from existing judicial-authored material for inclusion in the books, created and developed checklists and other needed practice aids, created a thorough, user-friendly index and table of contents for the book, and reviewed and guided the work of the professor. Because the DUI/traffic benchbook faculty did not include a law professor, faculty included six trial court judges serving as Topic Writers, two serving as Topic Editors, and two serving as Peer Reviewers.
- Peer Reviewers, generally consisting of two trial judges and one appellate justice for each book, were charged with reviewing the drafts of the books for accuracy of content, scope of materials and ease of use. Their suggestions were provided to the Topic Editors on an ongoing basis, for consideration in conjunction with the law professor, until the books were finalized.

### ***Project Outcome***

Five of six Illinois Judicial Benchbooks have been produced and disseminated to Illinois judges in either hard copy or CD-ROM, or both. The sixth benchbook is anticipated for production later in the calendar year. In total, over 1,800 hardbound versions and 1,000 CD-ROM formats of the benchbooks have been delivered to Illinois judges. The Editorial Board is developing proposed mechanisms to update the benchbooks on a regular basis, similar to that conducted for the *Juvenile Law Benchbook*.

### ***C. Ongoing Faculty Development and Support***

The importance of faculty development and training cannot be over-emphasized. Effective identification, recruitment and preparation of faculty for seminars is a foundation for meeting judges' expectations for excellence in education programs. The skills, expertise, and effective curriculum preparation by judicial faculty determines not only whether judges choose to attend optional programs, but also whether participants fully engage and benefit from mandatory programs such as the New Judge Seminar and the Education Conference.

The Court's adoption of MCJE provisions, and the resulting expansion of Education Conference to a 30-hour curriculum, greatly increases the need for *skilled, knowledgeable, and dedicated* judges to serve as judicial education faculty. Faculty development and training results in quality control and improved faculty skills, which ultimately leads to excellence in teaching.

In its effort to ensure that volunteer judicial faculty are equipped to prepare and present sessions using interactive and engaging methods, culminating in presentation of future Education Conferences, the Committee and Administrative Office are working together to present a Faculty Development Workshop. Faculty and prospective faculty, who will teach seminars during 2008-

2009, were invited to attend the Workshop, scheduled for September 9, 2008 at the AOIC office in Springfield. Faculty development programs launched in 2007 were based substantially on the expertise and contributions of Hon. Mark Drummond, 8<sup>th</sup> Judicial Circuit, who continues to volunteer considerable time to these continuing education efforts. The Committee wishes to acknowledge and thank Judge Drummond and all judicial faculty for their service which greatly benefits the entire Illinois judiciary.

#### ***Faculty Recognition***

During Education Conference 2008, judges who have served as judicial faculty and have taught at a minimum of five Illinois Judicial Conference seminars were recognized by the Supreme Court. Chief Justice Robert Thomas expressed the Court's appreciation to judges who serve as faculty, especially recognizing those judges who serve often and repeatedly, in their fields of judicial expertise.

#### ***D. Enhanced Use of Technology to Deliver Judicial Education Programs and Resources***

With escalating demands on judges' time, enhancing the use of technology in the planning, preparation and presentation of judicial education resources is increasingly important. In Conference Year 2008, the Committee and Administrative Office continued the use of e-mail, list serves, conference calling and video-conferencing to enhance communication and reduce judges' need to travel to meetings, whenever possible. Selected seminar notebooks were also provided to judges on CD-ROM, in addition to paper versions, upon request. Content and organization of each of the six benchbooks has been designed to facilitate transition from "paper-based" reference documents to resources that can be provided electronically to judges. The consistent formatting, clearer organization and concise content of each book is expected to greatly increase judges' interest in receiving and using these materials on CD-ROM and/or through the Internet, in accordance with applicable policies and protocols.

#### ***E. Summary of Other Projects***

##### ***New Judge Seminar***

The Committee also oversaw presentation of the annual New Judge Seminar in December 2007. For the fourth consecutive presentation, the program received an excellent overall participant rating of 4.8 on a scale of 1 to 5. Seventy-seven new judges attended the program and their evaluations indicate that the program will not only facilitate successful transition to the bench, but enhance judicial performance throughout their careers.

Faculty teaching at the New Judge Seminar continued to utilize a "skills-based" approach to assist new judges in developing the skills of successful, effective jurists while maintaining

sessions on substantive law on key topics. This approach asks faculty to refrain from attempting to convey all the black letter law relevant to a particular topic, which is difficult or impossible in the given time frames. Rather, seminar faculty work with the new judges to identify the key information and knowledge new judges need and then focus on the critical skills and abilities new judges will need to develop. This curriculum approach requires faculty to include interaction, question-and-answer and problem-solving elements, whenever possible.

The program continues to include informational “kiosks” at the close of the day to provide brief, informal sessions on topics of specific interest or concern to new judges, such as conducting weddings, lingering issues in transition from a law practice, requests to seal court files, economic interest statements, SOJ motions and completing travel vouchers appropriately. These informal sessions provide a small-group forum for new judges to ask questions and receive practical tips from experienced judges. Based on the continued success of the skills-development approach, a similar agenda and faculty pool will be utilized for the next presentation, approved by the Supreme Court for presentation January 26 - 30, 2009, in Chicago.

### ***Seminar Series***

The Committee also oversaw presentation of an abbreviated seminar series in fall 2007, and spring 2008, to allow for planning of Education Conference 2008. In addition to the Judicial Conference programs, two seminars were conducted by the Supreme Court Committee on Capital Cases, pursuant to Supreme Court Rule 43, while the Court’s Appellate Court Administrative Committee presented the annual appellate conference. The Committee also developed, and submitted to the Supreme Court for approval the proposed 2008-09 Seminar Series. Now approved by the Court, the Seminar Series will commence in October 2008. A listing of seminars planned for the 2008-09 Seminar Series is attached as Appendix C. Each Judicial Conference program will be presented by judicial faculty appointed by the Court at the recommendation of the Committee, and assisted by staff from the Administrative Office of the Illinois Courts. The Committee wishes to thank all judicial faculty members, each of whom contribute significant time and expertise, for their contributions to continuing judicial education programs for Illinois’ judges. A listing of seminar topics, dates, locations, and participant totals for both Judicial Conference and non-Judicial Conference programs during 2007-08 is attached as Appendix D.

### ***Lending Library***

In its fourteenth year of operation, the Resource Lending Library continues to serve as a valuable resource. The library includes loan items available on CD-ROM, DVD, videotapes, and publications. Permanent use items include judicial-authored benchbooks, manuals, and specialty bench guides. The library also serves as a central repository of Illinois Judicial Conference seminar materials prepared by Illinois judges since 1990.

- Items provided: During Fiscal Year 2008, a total of 772 loan and permanent use items, independent of seminars, were disseminated to judges, as compared to 906 items disseminated in 2007. The overwhelming majority of items disseminated were permanent use materials consisting of seminar reading materials, benchbooks, and other materials prepared by, and for, Illinois judges.
- Patrons: During Fiscal Year 2008, 429 judges requested one or more items from the library, as compared to 218 judges in Fiscal Year 2007. One hundred twenty-three (123) (29%) judges were from Cook County while 301 (70%) were from other circuits, and five (1%) were appellate judges.

The Administrative Office is in the process of updating the Resource Lending Library Catalog and will disseminate the catalog to all Illinois Judges by the end of Conference Year 2008.

### III. PROPOSED COMMITTEE ACTIVITIES FOR THE NEXT CONFERENCE YEAR

The members of the Committee believe that providing ongoing judicial education is an essential function of the justice system. The importance of judicial education is recognized in the Court's Comprehensive Judicial Education Plan for Illinois' Judges, which states:

"It is an obligation of office that each judge in Illinois work to attain, maintain and advance judicial competency. Canon 3 of the Code of Judicial Conduct (Illinois Supreme Court Rule 63) states that a judge should 'be faithful to the law and maintain professional competence in it' and 'maintain professional competence in judicial administration.' Judicial education is a primary means of advancing judicial competency." (*Comprehensive Judicial Education Plan for Illinois Judges*, Section I, p.1)

The Committee therefore requests that its work to develop ongoing judicial education resources for Illinois' judges be continued in Conference Year 2009, to assist in the transition of new judges to the bench and to continue to provide challenging, meaningful judicial education resources to all Illinois judges through the implementation of the Court's Minimum Continuing Judicial Education provisions and through optional programs and resources.

Specifically, the Committee requests that the Court and the Judicial Conference continue support and planning for the 2009 Advanced Judicial Academy, Education Conference 2010, New Judge Seminar and 2008-2009 Seminar Series, and consider exploring electronic and secure access to Illinois Judicial Benchbooks.

### IV. RECOMMENDATIONS

The Committee is making no recommendations to the Conference at this time.

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# **Appendix A**

**Education Conference 2008  
Overall Participant Evaluation Scores**

**EDUCATION CONFERENCE 2008**  
January 29 - February 2 - March 4-7, 2008  
Hyatt Regency Chicago

<b>EVALUATION SCALE</b>	<b>Poor</b>			<b>Excellent</b>	
	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>
					<b>Rating</b>
<b>Overall Conference Evaluation</b>					4.4
<b>Plenary: Judging in the Modern Era and the Challenges to Administering Justice</b>					3.9
<b>Plenary: Evolving into the Judge You Hoped You Would Be</b>					3.2
<b>Plenary: Ethics Breakout Discussion Groups</b>					4.0
<b>Administrative Issues I: The Challenges (And Rewards) of Serving as a Chief, Presiding or Supervising Judge</b>					4.3
<b>Administrative Issues II: Judge or Council Chairperson, Collaborator and Social Service Program Initiator</b>					4.1
<b>Appellate Issues I: Frivolous Litigation, Appeals, and Granting Sanctions</b>					3.0
<b>Appellate Issues II: The Costs of Justice</b>					3.3
<b>Civil Law: Updates and Hot Topics</b>					4.6
<b>Civil Law: Anatomy of a Civil Case</b>					4.7
<b>Civil Law: Bankruptcy Issues for Trial and Appellate Court Judges</b>					4.5
<b>Civil Law: Challenging Civil Motions: An In-Depth Look</b>					4.6
<b>Civil Law: Civil Liens</b>					4.4
<b>Civil Law: Damages in Civil Cases</b>					4.1
<b>Civil Law: Privilege Issues</b>					4.3
<b>Civil Law: Writing Trial Court Orders - When, Why and What?</b>					3.6
<b>Criminal Law: Criminal Updates &amp; Hot Topics</b>					4.9
<b>Criminal Law: Criminal Law &amp; Procedure</b>					4.3

<b>Criminal Law: Calculating the Sentence</b>	3.6
<b>Criminal Law: Discovery Issues Unique to Criminal Cases</b>	4.3
<b>Criminal Law: Domestic Violence: Evaluating and Sentencing</b>	3.8
<b>Criminal Law: Evidence Based Practice (EBP) Part I: What Works in Managing Offenders, What Doesn't and Why?</b>	4.7
<b>Criminal Law: Evidence Based Practice (EBP) Part II: Applying the Principles of EBP in the Real World</b>	4.4
<b>Criminal Law: Handling Guilty Pleas</b>	4.6
<b>Criminal Law: Is "Effective Case Management of a Criminal Call" An Oxymoron?</b>	3.2
<b>Criminal Law: Interstate Compact Issues: What do judges need to know? What do judges need to do?</b>	3.4
<b>Criminal Law: Managing Adult and Juvenile Sex Offenders</b>	4.2
<b>Criminal Law: Managing Juries in Criminal Cases I: Selection to Instruction</b>	4.4
<b>Criminal Law: Managing Juries in Criminal Cases II: Post-Instruction to Verdict</b>	4.7
<b>Criminal Law: The Pitfalls of Post Conviction Petitions</b>	4.5
<b>Criminal Law: Proper Communications Between Judge and Defendant</b>	4.4
<b>Evidence: Civil Evidentiary Issues</b>	4.1
<b>Evidence: Criminal Evidence: Selected Issues</b>	4.6
<b>Evidence: Dead-Man's Act in Probate</b>	4.1
<b>Evidence: Dead-Man's Act in Tort Cases</b>	4.6
<b>Evidence: Proper Foundations</b>	4.6
<b>Family Law: Family Law Updates</b>	4.4
<b>Family Law: Hot Topics &amp; Supreme Court Rule 900 Series</b>	4.5
<b>Family Law: Can I Take the Baby With Me: Removal Cases</b>	4.3
<b>Family Law: He Said/She Said: <i>Pro Se</i> Litigants &amp; Resources</b>	4.3

<b>Family Law: Kids Say the Darndest Things: Conducting Child Interviews</b>	4.4
<b>Family Law: Mediation in Family Law Cases</b>	4.2
<b>Family Law: Where Do Babies Come From: Reproductive Technology and the Law</b>	4.2
<b>Family Law: Who Gets to See the Baby, When, Where, and How: Visitation Issues</b>	4.6
<b>Family Law: Who Pays and When Does it Stop: Financial Issues in Family Cases</b>	4.4
<b>Judicial Conduct &amp; Ethics: Courtroom Management &amp; Demeanor</b>	4.1
<b>Judicial Conduct &amp; Ethics: Ethics of Participation in Community Activities</b>	4.4
<b>Judicial Conduct &amp; Ethics: <i>Ex Parte</i> Issues</b>	4.8
<b>Judicial Conduct &amp; Ethics: Faculty Development: An Introduction to Effective Presentations</b>	4.8
<b>Judicial Conduct &amp; Ethics: Interacting with the Media</b>	4.0
<b>Judicial Conduct &amp; Ethics: A Judge's First Amendment Rights</b>	4.4
<b>Judicial Conduct &amp; Ethics: Judicial Campaign Issues</b>	4.2
<b>Judicial Conduct &amp; Ethics: Judicial Ethics in Literature - Is it Justice or My Own Agenda? (Literature &amp; Law I)</b>	4.3
<b>Judicial Conduct &amp; Ethics: Judicial Ethics in Literature - The Role of Punishment (Literature &amp; Law II)</b>	4.3
<b>Judicial Conduct &amp; Ethics: Tools to Challenge Judicial Stress</b>	3.8
<b>Juvenile Law: Adolescent Development: What Judges Need to Know About the Teenage Brain</b>	4.6
<b>Juvenile Law: Child Protection Updates &amp; Challenges</b>	4.6
<b>Juvenile Law: Delinquency Updates &amp; Challenges</b>	4.4

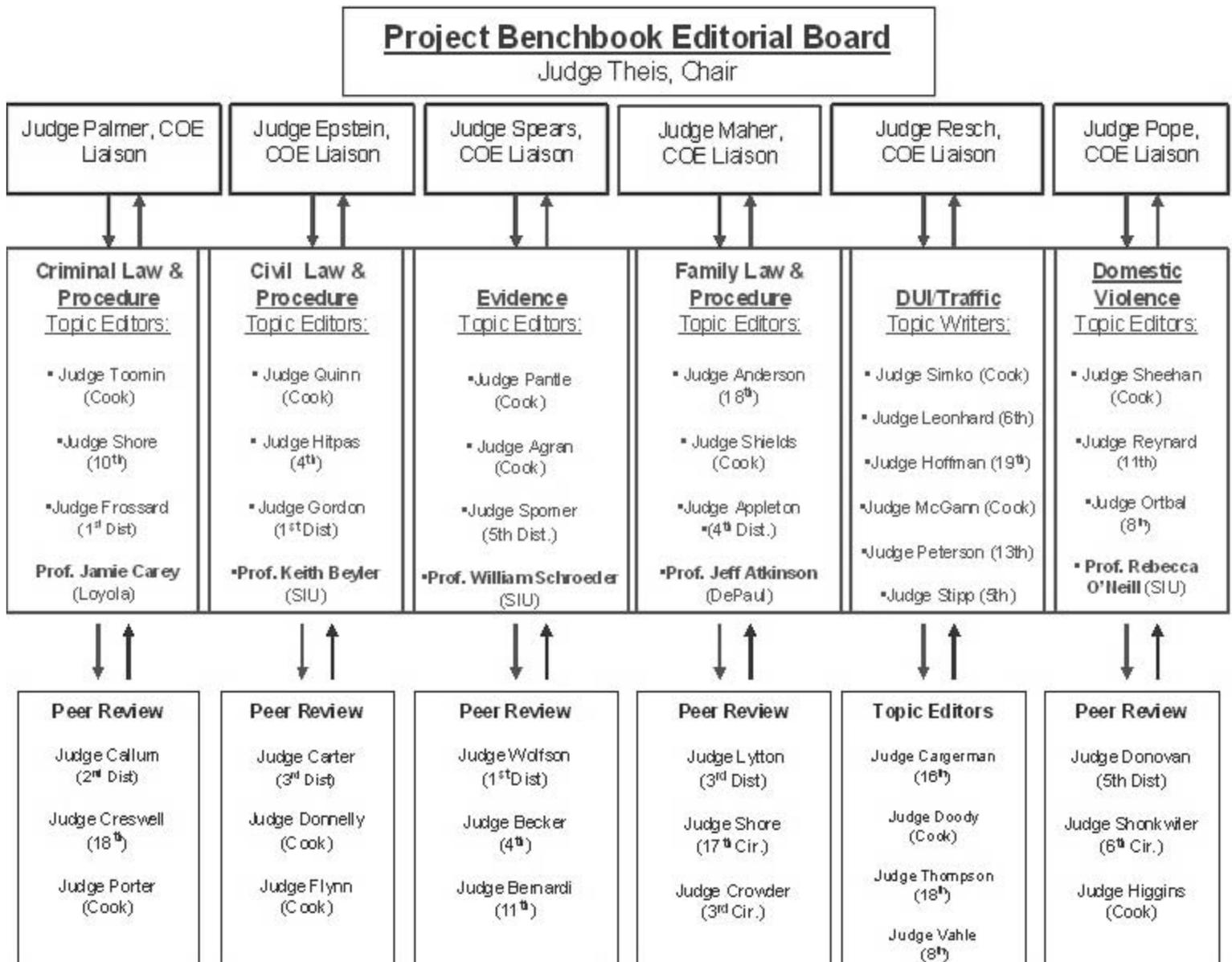
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# **Appendix B**

**Editorial Board of Project Benchbook**

**and**

**Members of the Benchbook Teams**



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## **Appendix C**

**2008 - 09 Seminar Series Schedule**

**Illinois Judicial Conference Seminar Series 2008 - 2009**

**A Judge's Roadmap to Presiding Over Property- Related Litigation  
from Foreclosure to Tax Deeds and Stops in Between**

October 7 - 8, 2008 - Oak Brook  
and November 6 - 7, 2008 - Springfield

**The Hidden Traps of Sentencing**

November 20, 2008 - Springfield  
and March 5, 2009 - Chicago

**Tort Immunities**

February 19, 2009 - Matteson

**Cyber Issues: Traditional Rules and Modern Technology**

March 19 - 20, 2009 - Oak Brook  
and April 2 - 3, 2009 - Springfield

**Powerful Innocence: The Conflicting Promise  
of Protection for the Young**

Literature and the Law

April 23 - 24, 2009- Springfield

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## **Appendix D**

**2007-08 Seminar Series and Other Programs  
Attendance and Evaluation Summaries**

<i>Topic</i>	<i>Date</i>	<i>Location</i>	<i>Rating</i>	<i>Enrollment</i>
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**Specialized Programs:**\*

Capital Cases: 4 <sup>th</sup> Series	September 6 - 7, 2007	Springfield	4.6	86
Appellate Court Conference	September 20 - 22, 2007	Oak Brook	4.5	54
New Judge Seminar	December 10 - 14, 2007	Chicago	4.8	77
Capital Cases: 4 <sup>th</sup> Series	June 19 - 20, 2008	Chicago	4.5	82

**Regional & Mini Seminars:**

Administrative Issues for Judges	November 15 - 16, 2007	Chicago	4.6	46
Education Conference	February / March 2008	Chicago	4.4	all
DUI Offenders in the Courts	May 8 - 9, 2008	Oak Brook	4.2	35

\* *Capital Cases Seminars are presented, pursuant to Supreme Court Rule 43, by the Supreme Court Committee on Capital Cases. The Appellate Seminar is presented by the Supreme Court Appellate Court Administrative Committee.*

**ANNUAL REPORT**  
**OF THE**  
**STUDY COMMITTEE ON COMPLEX LITIGATION**  
**TO THE ILLINOIS JUDICIAL CONFERENCE**

Hon. Eugene P. Daugherty, Chair

Hon. Mary Ellen Coghlan  
Hon. Michael J. Gallagher  
Hon. Dorothy Kirie Kinnaird

Hon. Dennis J. Porter  
Hon. Daniel J. Stack  
Mr. William R. Quinlan, Esq.

October 2008

## I. STATEMENT ON COMMITTEE CONTINUATION

The Study Committee on Complex Litigation includes circuit court and appellate court judges across the state who possess a breadth of experience with civil or criminal complex litigation cases. The stated purpose of the Committee is to make recommendations, through proposed rules or other procedures, to reduce the cost and delay attendant to lengthy civil and criminal trials with multiple parties or issues and thereby improve the administration of justice in complex cases throughout Illinois. One of the principal endeavors of the Committee has been the creation and maintenance of the *Illinois Manual for Complex Civil Litigation* and the *Illinois Manual for Complex Criminal Litigation*. Historically, the Committee has focused its attention on providing yearly updates and supplements to both volumes. The Committee also studies and makes recommendations on rules, policies and procedures involving complex litigation as requested by the Supreme Court.

During Conference Year 2008, the Supreme Court charge to the Committee included continuation of one project/priority from Conference Year 2007 and several new projects/priorities for Conference Year 2008. Specifically, the Committee was charged with review of the Civil Manual to determine if text should be added with regard to construction cases, a task that was carried over from Conference Year 2007. For the current Conference year, the Committee was asked to (1) review the *Criminal Law and Procedure Benchbook* created by the Conferences Committee on Education and consider appropriate revisions to the Complex Litigation Criminal Manual, (2) revise the ADR chapter in the Civil Manual to add text regarding declaratory judgment cases, (3) update and revise the manuals and forms in the appendices with caselaw, court rules and legislation filed during the Conference year, and (4) undertake any such other projects or initiatives that are consistent with the Committee's charge.

The Committee believes that its work is valuable to the mission of the Conference and that the Manuals provide a unique reference for Illinois judges who hear complex cases. As such, the Committee respectfully requests that it be continued as a full standing committee of the Illinois Judicial Conference in order to complete its work on the aforementioned projects identified in the Committee's charge.

## II. SUMMARY OF COMMITTEE ACTIVITIES

In addition to the several projects/priorities identified in the charge, the Committee focused on aspects of the general charge. The following offers a brief summary of the Committee's work in that regard, as well as the status of projects/priorities carried over from Conference Year 2007 and new projects undertaken for Conference Year 2008.

### A. Projects Identified in the General Charge

#### 1. Development of a forum for judges to disseminate information regarding the disposition of complex cases

During Conference Year 2008, the Committee initiated research on the types of electronic forums which state court judges or federal judges use to discuss complex cases and legal issues. Data gathered on this topic suggests that online judicial forums are valuable information tools for

many judges because of the convenience, speed and timeliness of the communications.

The Committee learned that the Federal Judicial Center sets up collaborative sites for federal judges and defines particular groups by subject matter, such as a committee on civil discovery, or specific areas of law such as bankruptcy. The members are able to post discussions, participate in threaded discussion lists and use the on-line library to post documents. Research reveals that judges in these collaborative sites typically discuss ways to handle cases, caselaw, and pending legislation but do not discuss active cases.

Of paramount concern to the Committee in initiating research on this topic was the ethical considerations of judges using an electronic forum. The Committee noted that Canon 3 permits judges to "consult with court personnel whose function is to aid the judges in carrying out the judge's adjudicative responsibilities *or with other judges.*" Sup. Ct. Rule 63(A)(4)(b) (emphasis added). Additionally, discussions between judges are not discoverable because confidential communications between judges made in the course of the performance of their judicial duties and relating to official court business are protected by the judicial deliberation privilege. See *Thomas v. Page*, 361 Ill. App. 3d 484 (2005). Moreover, the various types of electronic venues utilized by judges require a user identification for participation and the sites are password protected, measures which assure both security and privacy.

In conclusion, the Committee did not identify any significant barriers to the formation of a judicial discussion forum on the Internet. It is the consensus of the Committee that such a forum would be useful, in particular, for those judges handling complex litigation. Should the Court elect to explore the creation of such a forum, the Committee offers the following issues for future consideration by the entity which the Court designates for this task:

(1) Set up, maintenance and management of the electronic discussion. Research indicates that federal and state court administrator's offices often perform this task.

(2) Defining the discussion group/groups. Research suggests it may be advantageous to start small, for example, only including those judges who handle specific types of cases, such as class actions. Of course, each member invited to the group would be issued a user identification and password for access to the site.

(3) Types of electronic communication to be used. If the group is simply a discussion group, a list serv may be an appropriate method. Alternatively, if the group is creating, revising, reviewing or commenting on documents, a collaborative website may be the best method.

(4) Types of protocols to be developed. These may include guidelines for the creation of discussion groups, internet use policy, and guidelines and training on the use of the site and the features of the site.

## **2. Management of Multiple Overlapping Litigation**

The Committee focused on another aspect of the general charge, namely, studying and

making recommendations regarding the management of multiple overlapping litigation. In preliminary discussions, the Committee found it would be helpful in its analysis to determine, initially, whether the management of multiple parallel or overlapping litigation (defined as multiple cases involving substantially the same transaction or occurrence or the same predominant legal or factual issue with substantially the same parties) constitutes a problem in the various circuits.

Accordingly, the Committee wrote to the Conference of Chief Circuit Judges asking if the various circuits experience a high number of cases involving such parallel litigation and, if so, how such cases are managed. The letter further inquired whether the circuits have a particular mechanism for determining if additional parallel litigation exists outside of the circuit and, if so, how the circuits manage potential transfer or consolidation among cases filed in other circuits. Last, the circuits were asked whether the methods of managing such cases work well and, if not, what problems have been identified. As of the final draft of this Report, the Committee had received responses from eight circuits throughout the state. Of those responses from various chief circuit judges and trial court administrators, only one circuit has a mechanism in place for determining if additional parallel litigation exists outside the circuit. None of the responses received thus far have identified problems with managing parallel litigation filed either within the circuit or in other jurisdictions outside the circuit. This project is ongoing as the Committee continues to receive responses from the circuits.

#### **B. Conference Year 2007 Continued Projects/Priorities**

##### **Review the Civil Manual to determine if text should be added with regard to Construction Cases**

As part of the Conference Year 2007 charge, the Committee was asked to review the Civil Manual to determine if text should be added with regard to construction cases. The Committee reviewed the Civil Manual and noted that, while the current text does not include a section on construction cases, the ADR chapter contains discussion on dispute resolution in these types of cases. The Committee determined that any additional text to be added on the issue of construction cases would be put over to the next Conference year. During Conference Year 2008, the Committee revisited this issue and concluded that there should be additional text on construction cases which would be part of the comprehensive revisions to the Civil Manual initiated in 2008 and to be continued into Conference Year 2009 (see section C.3.i, *infra*).

#### **C. Conference Year 2008 Projects/Priorities**

##### **1. Review of Criminal Law and Procedure Benchbook**

The Committee was asked to review the Criminal Law and Procedure benchbook created by the Conference Committee on Education and to consider appropriate revisions to the *Manual for Complex Criminal Litigation* to avoid duplication of information. As the *Criminal Law and Procedure Benchbook* was not finalized as of the drafting of this report for Conference Year 2008, the Committee continued this project for Conference Year 2009.

## **2. Revise the ADR Chapter in the Civil Manual to Address Declaratory Judgment Cases**

The Committee also was charged with revising the ADR chapter in the Civil Manual to add text regarding declaratory judgment cases. The Committee reviewed the ADR chapter in this regard and will include the requested text in the revised edition of the Civil Manual (see section C.3.i, *infra*).

## **3. Updates for the Civil and Criminal Manuals**

As in previous years, the Committee was charged with the continuing task to revise and update both the Civil and Criminal Manuals. The Committee also was requested to review the forms contained in the appendices to both manuals to determine that they are current and remain good law, and to consider whether additional forms should be included.

### **i. Civil Manual.**

The *Illinois Manual for Complex Civil Litigation* seeks to provide practical advice for handling those civil cases that risk becoming protracted and consuming disproportionate amounts of judicial resources. The first edition of the Civil Manual was completed in 1991. Subsequently, the Committee produced revised editions in 1994 and 1997, the last of which has been updated periodically. Over 200 judges have received copies of the manual, and it has been used as the basic text for a judicial seminar on complex litigation.

During Conference Year 2008, the Committee engaged in a thorough discussion regarding the utility of the Civil Manual. After careful consideration, the Committee determined that, since most of the text in the Civil Manual is over 10 years old, it is time to draft a complete revision. The Committee anticipates building upon the current text and, in the process, excising outdated material and revising and updating the relevant material. In so doing, the revised product will be more useful and concise. The members estimate that the complete revision will constitute much of the Committee's work during Conference Year 2009.

### **ii. Criminal Manual.**

The Committee completed the first edition of the *Illinois Manual for Complex Criminal Litigation* in 1997. The Manual's 13 original chapters cover topics such as identifying complex criminal litigation, handling complex grand jury proceedings, and managing the pretrial, trial, and sentencing phases of complex criminal cases. Later supplements added to the main volume of the Criminal Manual included complex post-conviction review proceedings and sentencing, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), (3) jury selection and *voir dire*, (4) additional sentencing issues, (5) double jeopardy, (6) prosecutorial conduct, and (7) inconsistent verdicts. As indicated earlier in this Report, the Committee was asked to review the Conference Committee on Education Benchbook upon its completion and consider any necessary revisions to the Criminal Manual to assure it remains a unique product. Given that the benchbook had not been finalized as of the writing of this Annual Report for Conference Year 2008, the Committee continued this project to Conference Year 2009.

### iii. Appendix Forms - Civil and Criminal Manuals

As part of the above-referenced revisions to both the Civil and Criminal Manuals, the Committee anticipates revising and building upon the forms available in the appendices to each manual.

During the 2008 Judicial Conference Year, the Committee members continued to monitor new caselaw, rule changes, legislation and other information specific to complex litigation. An updated Civil Manual will be distributed later this year as an interim reference source until the new revised edition is completed next year. Updates to the Criminal Manual will be included after the Committee reviews the finalized *Committee on Education Benchbook* and makes any necessary changes to the Criminal Manual. Both the Civil and Criminal Manuals will continue to be available in CD-ROM format, which affords users the convenience to download or hyperlink search capabilities.

### III. PROPOSED COMMITTEE ACTIVITIES FOR THE NEXT CONFERENCE YEAR

During the next Conference year, the Committee will review and discuss caselaw, rule changes, and legislation pertinent to complex litigation in order to produce a completely revised edition of the Civil Manual. The Committee also will review the Committee on Education *Criminal Law and Procedure Benchbook* and make necessary changes to the Criminal Manual to assure that it remains a unique product, *i.e.* a "how to" guide for judges, rather than a benchbook. The Committee's review will include the forms to the manuals in order to keep them current. The Committee anticipates expanding the orders available in the appendices and will consider the feasibility of creating more uniform orders for use throughout the state.

### IV. RECOMMENDATIONS

The Committee is making the following recommendation to the Conference at this time: That the Court explore the feasibility of providing an electronic forum for judges, in particular those judges dealing with complex cases, to facilitate communication and dissemination of information with regard to the management of such cases.

**ANNUAL REPORT**  
**OF THE**  
**STUDY COMMITTEE ON JUVENILE JUSTICE**  
**TO THE ILLINOIS JUDICIAL CONFERENCE**

Hon. John R. McClean, Jr., Chair  
Hon. C. Stanley Austin  
Hon. Susan Fox Gillis  
Hon. Diane M. Lagoski  
Hon. Patricia M. Martin  
Hon. Mary W. McDade  
Hon. Elizabeth A. Robb  
Hon. Karen G. Shields  
Hon. Lori M. Wolfson

Prof. Lawrence Schlam, Reporter

October 2008

## I. STATEMENT ON COMMITTEE CONTINUATION

It is the function of the Study Committee on Juvenile Justice (Committee) to review and assess practices related to the processing of juvenile delinquency, abuse, neglect, and dependency cases. The Committee's stated purpose is to provide judges with current developments in the processing of juvenile court cases through up-dating and distributing the *Illinois Juvenile Law Benchbook*.

The Juvenile Law Benchbook, which consists of Volumes I and II, is designed to provide judges with a practical and convenient guide to procedural, evidentiary, and substantive issues arising in juvenile court proceedings. Each volume is organized transactionally, whereby issues are identified and discussed in the order in which they arise during the course of a case. In general, the discussions begin with an examination of how a case arrives in juvenile court and end with post-dispositional matters such as termination of parental rights proceedings, termination of wardship, and appeal. The appendix in each volume contains procedural checklists and sample forms that can be used or adapted to meet the needs of each judge and the requirements of a particular county/circuit. Each volume is intended to provide judges with an overview of juvenile court proceedings, to direct them to relevant statutory provisions and caselaw, to highlight recent amendments, and to identify areas that present special challenges. Historically, the Committee has focused its attention on creating and updating this benchbook, each volume of which is updated every other year.

The Committee therefore believes that its work in providing instruction on the continually developing area of juvenile law is a valuable source of information for judges who preside over juvenile matters in Illinois. For this reason, the Committee requests that it be permitted to continue its work in Conference Year 2009.

## II. SUMMARY OF COMMITTEE ACTIVITIES

### A. *Committee Charge*

The Committee is charged with studying and making recommendations on the processing of juvenile delinquency, abuse, neglect, and dependency cases. The Committee also is charged with preparing supplemental updates to the juvenile law benchbook for distribution to judges presiding over juvenile proceedings. Finally, the Committee's charge includes making recommendations regarding training for juvenile court judges on emerging issues of juvenile law identified during the course of the Committee's work on the benchbook or during Committee meetings. This charge provides the framework to guide the Committee's work during the Conference year.

Consistent with its charge, during this Conference year, the Committee will complete its update of Volume II of the Juvenile Law Benchbook. Volume II, published in 2002 and most

recently updated in 2006, addresses proceedings brought in juvenile court that involve allegations of abused, neglected and dependent minors. In preparing the update to Volume II, the Committee researched statutory changes and relevant case law through June 2008. The Committee reasonably anticipates that its update to Volume II will be available for the New Judge Seminar in January 2009. Through its work on the benchbook, along with member participation in various juvenile law seminars, the Committee remains interested in the education of judges in juvenile issues.

The Committee also remains interested in other matters affecting juvenile law, including the status of pending juvenile law legislation and the implementation of Illinois' Program Improvement Plan in response to the federal Child and Family Services Review.

#### *B. Conference Year 2007 Continued Projects/Priorities*

The following subjects represent the projects/priorities assigned by the Court to the Committee for consideration in Conference Year 2007, which were extended into Conference Year 2008.

##### *1. "Problem-Solving Courts"*

The Court requested that the Committee study, examine and report on the efficacy of "Problem-Solving Courts" in the management of juvenile delinquency, abuse, neglect, and dependency cases. In response to this request, the Committee sent a letter to the chief judges in the state to canvass the existence/nature of any specialty courts handling juvenile cases. Due to the limited responses received, the Committee considered the results of the problem-solving courts survey that was prepared by the IJC Criminal Law and Probation Administration Committee. That survey rendered information on juvenile problem-solving courts from Cook County, Kane County, Peoria County and Will County. The Committee formed a subcommittee to review the referenced survey responses and to follow up with the judges and the probation departments responding to the survey about additional details, including the number of juveniles in the program and its effectiveness. After consulting with judges and other court personnel, it appears there are differing opinions as to the effectiveness of the juvenile specialty courts.

Cook County has two specialty courts that address juvenile matters; namely, Project RENEW (Reclaim Empower Nurture Embrace Womanhood) otherwise known as Girls' Court and Juvenile Drug Court. The Girls' Court was created to have specialized units which only serve a segment of the female population of juvenile delinquents. The Cook County Gender Responsive Initiatives noted several differences in behaviors of females versus males involved in delinquency matters. For example, girls average two years on probation while boys only spend an average of one year on probation. Girls tend to run from placements more than boys. Girls have pregnancy issues to contend with while males have lack of responsibility as their issue. Because of these and

other noted issues, a specialized court was created for a segment of the female delinquent offenders. The Girl's Court committee consists of representatives from the judiciary, Cook County Juvenile Probation, Chicago Police Department, Cook County Juvenile Detention Center, Cook County State's Attorney, Cook County Public Defender, Girls Link, Illinois Department of Corrections, and consultants.

This court is viewed by judges overseeing the call as being effective although there is no analytical data to measure its effectiveness. One female minor gave a testimonial as to how this court changed her life at a recent awards ceremony. C.P. had been on probation at age 15 and became a teenage mother of two children. Her boyfriend was beating her and her two children. She stated that the Girls' Court gave her the confidence to move forward in her life. She left her boyfriend, returned to high school, moved to her own apartment, and enrolled her children in daycare while she worked a part time job. She graduated with honors from high school and is now enrolled in a college nursing program.

Cook County also has a Juvenile Drug Court. The Juvenile Drug Court Team consists of the Deputy Chief Probation Officer, treatment providers, judicial officers, and probation officers. The program has collected statistics on the number of referrals, the number of youth enrolled, and the number of successful completions. However, there is no reported data regarding recidivism rates for those successfully completing the program. One minor, J.H. reported his success from his participation in the Juvenile Drug Court Program. J.H. was referred to the program because of a possession of a controlled substance case. At the time of the referral, he was repeating the 9<sup>th</sup> grade and would often cut classes or not even go to school. After completion of the program, he planned to take the GED since he would be older than the other students in his class upon returning to school. J.H., however, changed his mind and wanted to earn his high school diploma. He enrolled in school and joined the basketball team. He has remained substance free since November 2006 after a brief relapse following his discharge from treatment. He has been informed that basketball scouts are showing an interest in him. J.H. contributes his change of life style in part to his participation in Juvenile Drug Court.

Kane County also has a Juvenile Drug Court modeled after several different state models as well as utilizing the best practices outlined by the federal government. The Juvenile Court Drug Team consists of the Judge, State's Attorney, Public Defender, Treatment Provider, Evaluator, Coordinator, Educational Representative, Mental Health Provider, Community Representative and a Juvenile Court Services Representative. The funding for the Juvenile Drug Court was previously provided in part from a grant from the Bureau of Justice Administration and Office of Juvenile Justice Programs but is currently being funded in part by donations as well as funding allocated by the county board. Kane County reports using recidivism rates and continued abstinence from substances as a way to measure the efficacy of the court. Limited statistics are available as to the program's effectiveness. However, the judges who preside over the drug court view it as being effective.

Peoria County likewise has a Juvenile Drug Court which is funded through the probation department; however, the local treatment provider operates the program. The Drug Court Team is comprised of the Judge, State's Attorney, Public Defender, Treatment Provider and Probation Department. One limitation of the program is that little input is allowed from any of the Drug Court Team other than the treatment provider who operates the program. It is a voluntary program and the juvenile has to test substance free for at least six months in order to graduate from the program. Once they complete the program, their probation can be terminated. Most cases do not terminate early. Moreover, juvenile offenders are aware that this program is usually longer than serving a probation sentence, and therefore they do not opt to participate in it. This county reports its drug court is not very effective at this time due to the above limitations. In response, some consideration is being given to making the program an involuntary one

Finally, Will County's Juvenile Drug Court is modeled after the Adult Drug Court program and the Peoria Juvenile Court program. It has been in existence since April 1, 2002. It is funded by the county. The Juvenile Drug Court Team consists of the Juvenile Probation Department, State's Attorney's Office, Public Defender's Office, Will County Health Department, Juvenile Judge, and Drug Court Coordinator. The team determines appropriateness of juveniles for the program, maintains monthly compliance, and determines appropriate sanctions if necessary. Judicial inquiries indicated the Juvenile Drug Court to be very effective as it appears there is a decrease in repeat offenders. Again, there is no mechanism in place to record data from the Juvenile Drug Court. One noted desire for change is the ability for the court to order a minor into the program. The Juvenile Court Judge may be in a better position than the minor to ascertain if the juvenile offender would benefit from drug court. Nonetheless, at this time, the program is strictly a voluntary one.

After considering the information obtained about the above specialty courts, the Committee is struggling with making any recommendations to the Court on this subject because there appears to be a lack of conformity when it comes to gathering data on the effectiveness of specialty courts; no standards for follow-up data to measure the success of the program are in place; and no statewide uniform standards exist to measure and collect data with regard to these courts. The Committee therefore hopes to continue its work in this area with the goal of addressing these noted concerns and offering recommendations to the Court.

## *2. Mental Health Services*

The Committee was assigned the project of gathering information from each circuit court regarding their need for mental health evaluations and services for juveniles. In addressing this project, the Committee conducted a survey, in the form of a questionnaire, whereby each circuit was asked to describe the nature and availability of mental health evaluations/services it offers for juveniles. Each circuit offering such services also was asked to provide some statistical

information and to comment on the adequacy of its services and application of assessment results in rendering a dispositional order.

All but three of the reporting circuits indicate they have access to mental health evaluations for juveniles. However, some specific counties within those circuits do not have access to mental health evaluations for juveniles. More specifically, four circuits reported at least one county not having access to juvenile substance abuse resources. At least seven circuits have some counties that do not offer sex offender evaluations for juveniles. In-patient psychiatric treatment is not available for juveniles in at least one county of six of the reporting circuits. The same is true for juvenile sex offender treatment programs. A chart with the results on the responding circuits is attached for further explanation, including comments about mental health services. The survey results indicate there is an obvious lack of mental health services available to juveniles in various regions of Illinois, often because of scarcity of providers, funding and lack of transportation. The Committee therefore seeks to continue its work in this area to explore possible remedies to this identified issue.

### **III. PROPOSED COMMITTEE ACTIVITIES FOR THE NEXT CONFERENCE YEAR**

During the 2009 Conference Year, the Committee seeks to update Volume I of the *Illinois Juvenile Law Benchbook*, which addresses juvenile court proceedings involving allegations of delinquency, addicted minors, minors requiring authoritative intervention, and truant minors in need of supervision. The Committee requests that it be permitted to continue its work in regards to the availability of mental health services for juveniles in Illinois, including researching the issue in other states in order to gain insight on practices that might prove beneficial in Illinois. Lastly, the Committee would like to continue its work with specialty courts to try and assess any data collected in the counties and create some standards and conformity for data collection.

### **IV. RECOMMENDATIONS**

The Committee is making no recommendations to the Conference at this time.

2008 REPORT

# ATTACHMENT

## Mental Health Resources in Illinois

Circuit	County	Description of Services/Comments	Mental Health Evaluations	Substance Abuse	Sex Offender Evaluations	In-Patient Psychiatric	Sex Offender Treatment
1 <sup>st</sup>		<ul style="list-style-type: none"> <li>▶ Scarcity of providers</li> <li>▶ Cost</li> </ul>	No	No	No	No	No
2 <sup>nd</sup>		<ul style="list-style-type: none"> <li>▶ 70% of youth receive services</li> <li>▶ Additional Services, especially in rural communities, are needed</li> <li>▶ 10% of youth receive in-patient services</li> <li>▶ Assessments are utilized by court</li> <li>▶ Lack of transportation plays a role in many services being inaccessible</li> </ul>	Yes	Yes	Yes	Yes	Yes
3 <sup>rd</sup>		<ul style="list-style-type: none"> <li>▶ 8 juvenile sex offenders receive treatment</li> <li>▶ Other statistics not available</li> <li>▶ Anger Management or Aggression Reduction Therapy is difficult to assess due to service provider funding loss.</li> <li>▶ Occasionally psychiatric evaluations are ordered pre-dispositionally.</li> <li>▶ Funding issues have caused a reduction in program service delivery.</li> </ul>	Yes	Unclear from survey response	Yes	Yes	Yes
4 <sup>th</sup>							
	Shelby	<ul style="list-style-type: none"> <li>▶ 15 out of 40-50 seek mental health or substance abuse treatment</li> <li>▶ No juvenile sex offender treatment</li> <li>▶ Counseling referrals for assessments are post disposition only</li> </ul>	Yes	Yes	No	Yes	No
	Effingham	<ul style="list-style-type: none"> <li>▶ Sex offender treatment 3-4 clients</li> <li>▶ Limited services available</li> </ul>	Yes	Yes	Yes	No	Yes

<b>Circuit</b>	<b>County</b>	<b>Description of Services/Comments</b>	<b>Mental Health Evaluations</b>	<b>Substance Abuse</b>	<b>Sex Offender Evaluations</b>	<b>In-Patient Psychiatric</b>	<b>Sex Offender Treatment</b>
4 <sup>th</sup> cont'd.	Christian	<ul style="list-style-type: none"> <li>▶ No psychological or sex offender treatment</li> <li>▶ 53% of juveniles have some kind of mental health treatment</li> <li>▶ In patient - None</li> </ul>	Yes	Yes	No	No	No
	Clinton	<ul style="list-style-type: none"> <li>▶ All mental health referred to community partners</li> <li>▶ Evaluations are done one hour away and take at least 60 days</li> <li>▶ 17/49 receiving services</li> <li>▶ 50% of juveniles have evaluations</li> <li>▶ Inadequate services</li> <li>▶ Sex offender evaluations 30 to 60 miles away</li> <li>▶ Problem with medical card</li> <li>▶ Inpatient - Rarely - nearest hospital 60 miles away</li> </ul>	No	No	No	No	No
	Marion	<ul style="list-style-type: none"> <li>▶ Limited mental health services</li> <li>▶ 25% of juveniles receive services</li> <li>▶ Services inadequate</li> <li>▶ Few in-patients</li> </ul>	Yes	Unclear from survey response	Yes	Yes	Yes
	Montgomery	<ul style="list-style-type: none"> <li>▶ Mental health and assessments</li> <li>▶ 20% of minors receiving services</li> <li>▶ Post Dispo - needs treatment groups</li> </ul>	Yes	Unclear from survey response	Unclear from survey response	Unclear from survey response	Unclear from survey response
5 <sup>th</sup>							
	Coles/ Cumberland	<ul style="list-style-type: none"> <li>▶ 20% of caseload receive services</li> <li>▶ Services are inadequate through providers other than probation</li> </ul>	Yes	Yes	Yes	Yes	Yes
	Vermilion	<ul style="list-style-type: none"> <li>▶ 10% of juveniles receive services</li> <li>▶ Lack of residential treatment</li> <li>▶ Assessments are utilized by Court</li> </ul>	Yes	Yes	Yes	Yes	Yes

Circuit	County	Description of Services/Comments	Mental Health Evaluations	Substance Abuse	Sex Offender Evaluations	In-Patient Psychiatric	Sex Offender Treatment
6 <sup>th</sup>	Piatt	<ul style="list-style-type: none"> <li>▶ 2 - 4 youth will be referred to a residential treatment program</li> <li>▶ Assessments not being utilized</li> </ul>	Yes	Yes	No	No	No
7 <sup>th</sup>							
	Sangamon	<ul style="list-style-type: none"> <li>▶ 30% of caseload receiving mental health services</li> <li>▶ Probation has in-house services</li> <li>▶ Sex offender treatment inadequate</li> <li>▶ Less than 10% - in-patient</li> <li>▶ Assessments are utilized</li> </ul>	Yes	Yes	Yes	Yes	No
8 <sup>th</sup>	Adams		No	No	No	No	No
	Calhoun		No	No	No	No	No
	Cass	<ul style="list-style-type: none"> <li>▶ 25% receive services</li> <li>▶ Assessments not utilized</li> <li>▶ Scarcity of providers and transportation and cost</li> </ul>	Yes	No	No	No	No
	Mason		No	No	No	No	No
	Pike	<ul style="list-style-type: none"> <li>▶ Scarcity of providers</li> </ul>	No	No	No	No	No
	Menard	<ul style="list-style-type: none"> <li>▶ One out of seven using services</li> </ul>	Yes	Unclear from survey response	No	Unclear from survey response	No
9 <sup>th</sup>		In Patient - Rare Assessments not done in a timely manner Assessments utilized by Court					
	Knox	<ul style="list-style-type: none"> <li>▶ 20 to 25 juvenile sex offenders</li> <li>▶ 28% Receive Services</li> </ul>	No	Unclear from survey response	Yes	Yes	Yes

<b>Circuit</b>	<b>County</b>	<b>Description of Services/Comments</b>	<b>Mental Health Evaluations</b>	<b>Substance Abuse</b>	<b>Sex Offender Evaluations</b>	<b>In-Patient Psychiatric</b>	<b>Sex Offender Treatment</b>
	Fulton	<ul style="list-style-type: none"> <li>▶ Treatment 10% of caseloads</li> <li>▶ 25% Receive Services</li> </ul>	No	Unclear from survey response	Yes	No	Yes
	Hancock	<ul style="list-style-type: none"> <li>▶ Assessments - utilized</li> <li>▶ 48% Receive Services</li> </ul>	No	Unclear from survey response	Yes	No	Yes
	Henderson	<ul style="list-style-type: none"> <li>▶ 0% Receive Services</li> </ul>	No	Unclear from survey response	Yes	No	Yes
	McDonough	<ul style="list-style-type: none"> <li>▶ Sex offender treatment: adequate</li> <li>▶ 25% Receive Services</li> </ul>	No	Unclear from survey response	Yes	No	Yes
	Warren	<ul style="list-style-type: none"> <li>▶ 10% of caseload - in-patient</li> <li>▶ 5% Receive Services</li> </ul>	No	Unclear from survey response	Yes	No	Yes
10 <sup>th</sup>	Peoria	<ul style="list-style-type: none"> <li>▶ 63 Received Services - 11% of caseload</li> <li>▶ Inadequate services</li> <li>▶ Small in-patient population</li> <li>▶ Assessments utilized by Court</li> </ul>	Yes	Yes	Yes	Yes	Yes
11 <sup>th</sup>	Ford Livingston Logan McLean Woodford	<ul style="list-style-type: none"> <li>▶ 60-70% of caseload receives some service</li> <li>▶ All counties other than McLean report lack of local resources</li> <li>▶ Few counties have local sex offender treatment</li> <li>▶ 3-5% in-patient services</li> <li>▶ Assessments are not good or timely</li> </ul>	Yes	Yes	Yes	Yes	Yes

<b>Circuit</b>	<b>County</b>	<b>Description of Services/Comments</b>	<b>Mental Health Evaluations</b>	<b>Substance Abuse</b>	<b>Sex Offender Evaluations</b>	<b>In-Patient Psychiatric</b>	<b>Sex Offender Treatment</b>
12 <sup>th</sup>	Will	no response					
13 <sup>th</sup>	Bureau Grundy LaSalle	<ul style="list-style-type: none"> <li>▶ Reporter approximates services up to 80% of caseload</li> <li>▶ Inadequate number of service providers</li> <li>▶ 10% in-patient</li> <li>▶ Assessments not utilized at sentencing</li> </ul>	No	No	No	No	No
14 <sup>th</sup>	Rock Island	<ul style="list-style-type: none"> <li>▶ 39% of caseload receive mental health services</li> <li>▶ Psychiatric evaluations - inadequate</li> <li>▶ Inadequate service providers</li> <li>▶ Short term psychiatric in-patient</li> <li>▶ Assessments utilized at sentencing</li> </ul>	Yes	Yes	Yes	Short-Term	Yes
15 <sup>th</sup>	Carroll	<ul style="list-style-type: none"> <li>▶ 50% of minors receive services</li> <li>▶ Adequate Services</li> <li>▶ 1 out of 5 minors receive in-patient services</li> <li>▶ Cost is an issue that renders a dispositional order</li> <li>▶ Cost and Transportation are issues for not offering services</li> </ul>	Yes	Yes	Yes	Yes	Yes
	Lee	<ul style="list-style-type: none"> <li>▶ Individualized Treatment Services</li> <li>▶ Specialized Family Services</li> <li>▶ Psychiatric Services</li> <li>▶ Community Related Services</li> <li>▶ Alliances Counseling provides sex offender evaluations, victim services, sex offender services, and domestic violence groups</li> <li>▶ Lutheran Social Services provides in-school counseling, individual and family counseling, UDIS Program for Youth and Intensive Outpatient Program</li> </ul>	Yes	Yes	Yes	Yes	Yes

<b>Circuit</b>	<b>County</b>	<b>Description of Services/Comments</b>	<b>Mental Health Evaluations</b>	<b>Substance Abuse</b>	<b>Sex Offender Evaluations</b>	<b>In-Patient Psychiatric</b>	<b>Sex Offender Treatment</b>
15 <sup>th</sup> cont.d	JoDaviess	<ul style="list-style-type: none"> <li>▶ 45% of minors receive mental health services</li> <li>▶ Juveniles receive individual and family services</li> <li>▶ 5% of minors have received in-patient mental health services</li> <li>▶ Mental health assessment results are reviewed and taken into consideration at the minor's disposition</li> </ul>	Yes	Unclear from survey response	No	No	No
	Stephenson	<ul style="list-style-type: none"> <li>▶ 31% of active caseload receive mental health and/or sex offender services</li> <li>▶ Concerns about high turnover rate of the mental health staff, too long of waiting period for the beginning of services, no dual diagnosis programs, transportation issues, no sex offender group</li> <li>▶ 13 minors receive in-patient services</li> </ul>	Yes	No	Yes	No	Yes
16 <sup>th</sup>	Kane	<ul style="list-style-type: none"> <li>▶ 85 psychological evaluations for minors, of the 85 there are 8 sex offender evaluations</li> <li>▶ 1600 hours of therapy provided</li> <li>▶ Adequate Services</li> <li>▶ Assessments utilized for sentencing</li> </ul>	Yes	Yes	Yes	Yes	Yes
17 <sup>th</sup>	Winnebago	<ul style="list-style-type: none"> <li>▶ 30% of juveniles receive mental health services</li> <li>▶ Sex offender treatment</li> <li>▶ Small percent in-patient treatment</li> <li>▶ Assessments utilized for sentencing</li> </ul>	Yes	Unclear from survey response	Yes	Yes	Yes

<b>Circuit</b>	<b>County</b>	<b>Description of Services/Comments</b>	<b>Mental Health Evaluations</b>	<b>Substance Abuse</b>	<b>Sex Offender Evaluations</b>	<b>In-Patient Psychiatric</b>	<b>Sex Offender Treatment</b>
18 <sup>th</sup>	DuPage	<ul style="list-style-type: none"> <li>▶ Significant mental health services with 52% of detainees receiving medication</li> <li>▶ 40% of females and 20% males were indicated for mental health services</li> <li>▶ Lack of Spanish speaking service providers</li> <li>▶ Small percent in-patient</li> <li>▶ Assessments utilized</li> </ul>	Yes	Yes	Yes	Yes	Yes
19 <sup>th</sup>	Lake	<ul style="list-style-type: none"> <li>▶ 71% youth received assessments</li> <li>▶ 71% youth received treatment</li> <li>▶ 20% youth received residential treatment</li> <li>▶ Adequate Services</li> <li>▶ 107 out of 476 youth were provided residential treatment</li> <li>▶ Assessments utilized</li> </ul>	Yes	Yes	Yes	Yes	Yes
20 <sup>th</sup>	St. Clair Monroe Perry Randolph Washington	<ul style="list-style-type: none"> <li>▶ 22% have been identified with mental health services</li> <li>▶ Lack of psychiatric care</li> <li>▶ Limited residential placements</li> <li>▶ Lack of services to juveniles with mild to moderate diagnosis</li> <li>▶ Assessments are utilized</li> <li>▶ Sex offender treatment available</li> </ul>	Yes	Unclear from survey response	Yes	Yes	Yes
21 <sup>st</sup>	Kankakee	<ul style="list-style-type: none"> <li>▶ 45-50% of clients received mental health services</li> <li>▶ Transportation Issues</li> <li>▶ Lack of Spanish speaking counselors</li> <li>▶ Male counselors are in short supply</li> <li>▶ Assessments utilized</li> </ul>	Yes	Yes	Unclear from survey response	Yes	Unclear from survey response

<b>Circuit</b>	<b>County</b>	<b>Description of Services/Comments</b>	<b>Mental Health Evaluations</b>	<b>Substance Abuse</b>	<b>Sex Offender Evaluations</b>	<b>In-Patient Psychiatric</b>	<b>Sex Offender Treatment</b>
22 <sup>nd</sup>	McHenry	<ul style="list-style-type: none"> <li>▶ 20% of juveniles receive mental health services</li> <li>▶ Lack of residential mental health services</li> <li>▶ 12% of juveniles are receiving in-patient services</li> <li>▶ Assessments are utilized</li> </ul>	Yes	Yes	Yes	Yes	Yes
	Cook	<ul style="list-style-type: none"> <li>▶ 35% of adjudicated youth and 20% of diverted youth scored as needing mental health or substance abuse assessment</li> <li>▶ 63 youth received Mental Health evaluations</li> <li>▶ Assessments are utilized by court</li> </ul>	Yes	Yes	Yes	Yes	Yes

## 2008 REPORT

## Alternative Dispute Resolution Coordinating Committee

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### **CONFERENCE YEAR 2007**

#### *Statement of Purpose:*

The Committee shall examine the range of civil and criminal dispute resolution processes, utilized in other jurisdictions, convene alternative dispute resolution program administrators for the purpose of facilitating informational exchanges to promote program efficacy, and monitor the progress of all court-sponsored alternative dispute resolution programs.

#### *General Charge:*

The Committee shall examine the range of civil and criminal dispute resolution processes utilized in other jurisdictions and make recommendations regarding programs and various types of dispute resolution techniques suitable for adoption in Illinois, including methods for ongoing evaluation. The Committee shall develop recommendations for implementing and administering dispute resolution programs that remain affordable, appropriate, and provide an efficient alternative to protracted litigation. The Committee shall monitor and assess on a continuous basis the performance of circuit court dispute resolution programs approved by the Supreme Court and make regular reports regarding their operations. The Committee shall develop uniform reporting requirements for circuit courts in the collection and monitoring of statistical information for alternative dispute resolution cases. The Committee will also examine and develop training programs in ADR techniques and practices to promote consistency in ADR services. The Committee shall also explore the feasibility of expanding ADR into other courts.

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Kent Lawrence

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## Automation and Technology Committee

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### **CONFERENCE YEAR 2007**

#### *Statement of Purpose:*

The Automation and Technology Committee shall provide consultation, guidance, and recommendations regarding standards, policies and procedures relating to the use of technology and automation within the judicial branch.

#### *General Charge:*

The Committee shall develop general guidelines which promote the effective and efficient use of technology and automation in the trial courts including recommendations for statewide standards, protocols, or procedures. The Committee shall analyze and develop recommendations related to rules and statutory changes that will manage the use of technology within the courts. The Committee's work also includes the review and evaluation of technology applications and their impact on the operation and workflow of the court. The Committee will also research and recommend response protocols to resolve security issues which may affect the use of technology.

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#### **Advisors**

None

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## Committee on Criminal Law and Probation Administration

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### **CONFERENCE YEAR 2007**

#### *Statement of Purpose:*

To advise the Judicial Conference in matters affecting criminal law and procedures and the administration of probation services.

#### *General Charge:*

The Committee shall review and make recommendations on matters affecting the administration of criminal law and shall monitor, evaluate and provide recommendations on issues affecting the probation system. The Committee will review, analyze and examine new issues arising out of legislation and case law that impact criminal law and procedures and probation resources and operations.

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None

#### **Advisors**

None

**COMMITTEE STAFF LIAISONS: Cheryl Barrett & B. Paul Taylor**

## Committee on Discovery Procedures

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### CONFERENCE YEAR 2007

#### *Statement of Purpose:*

The Committee on Discovery Procedures shall review and assess discovery devices used in Illinois, with the goal of making recommendations to expedite discovery and to eliminate any abuses of the discovery process.

#### *General Charge:*

The Committee shall study and make recommendations on the discovery devices used in Illinois including, but not limited to, depositions, interrogatories, requests for production of documents or tangible things or inspection of real property, disclosures of expert witnesses, and requests for admission. The Committee shall investigate and make recommendations on innovative means of expediting pretrial discovery and ending any abuses of the discovery process so as to promote early settlement discussions and to encourage civility among attorneys. The Committee will also review and make recommendations on proposals concerning discovery matters submitted by the Supreme Court Rules Committee, other Committees or other sources.

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## Committee on Education

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### **CONFERENCE YEAR 2007**

#### *Statement of Purpose:*

The Committee shall identify education needs for the Illinois judiciary and develop short and long term plans to address these needs.

#### *General Charge:*

The Committee shall develop and recommend a “core” judicial education curriculum for Illinois judges which identifies the key judicial education topics and issues to be addressed through the judicial education activities each Conference year. This will include identifying emerging legal, sociological, cultural, and technical issues that may impact decision making and court administration by Illinois judges. Based on the core curriculum, the Committee shall recommend and develop programs for new and experienced Illinois Judges. To do so, the Committee shall recommend topics and faculty for the annual New Judge Seminar and Seminar Series, and, in alternate years, the Education Conference and the Advanced Judicial Academy. The Committee will also assess the judicial education needs, expectations and program participation of Illinois judges. The Committee shall also review and recommend judicial education programs, offered by organizations and entities other than the Supreme Court, to be approved for the award of continuing judicial education credits.

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None

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## Study Committee on Complex Litigation

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### CONFERENCE YEAR 2007

#### *Statement of Purpose:*

The Study Committee shall make recommendations, through proposed rules or other procedures, to reduce the cost and delay attendant to lengthy civil and criminal trials with multiple parties or issues. The Committee shall provide yearly updates to its Manual for Complex Litigation (Civil and Criminal).

#### *General Charge:*

The Committee shall prepare revisions, updates, and new topics as necessary, for the Manual for Complex Litigation, including the maintenance of forms accurate to the Manual Appendix. Additionally, the Committee will study and make recommendations regarding the development of a forum for judges to disseminate information regarding practices and procedures that have successfully brought complex cases to fair and prompt disposition. The Committee shall study and make recommendations regarding the management of multiple overlapping litigation and other problems commonly associated with complex litigation.

### **COMMITTEE ROSTER**

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None

#### **Advisors**

William R. Quinlan

**COMMITTEE STAFF LIAISON: Marcia M. Meis**

## Study Committee on Juvenile Justice

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### **CONFERENCE YEAR 2007**

#### *Statement of Purpose:*

The Study Committee on Juvenile Justice shall review and assess practices related to the processing of juvenile delinquency, abuse, neglect, and dependency cases. The Committee shall provide judges with current developments in the processing of juvenile court cases through up-dating and distributing the juvenile law benchbook (Volumes I and II).

#### *General Charge:*

The Committee shall study and make recommendations on the processing of juvenile delinquency, abuse, neglect, and dependency cases; prepare supplemental updates to the juvenile law benchbooks for distribution to judges reviewing such proceedings brought in juvenile court; and, make recommendations regarding training for juvenile court judges on emerging issues of juvenile law identified during the course of the Committee's work on the benchbook or during Committee meetings.

### **COMMITTEE ROSTER**

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Lawrence Schlam, Professor-Reporter

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