ANNUAL REPORT

OF THE

COMMITTEE ON DISCOVERY PROCEDURES

TO THE ILLINOIS JUDICIAL CONFERENCE

Hon. Maureen E. Connors, Chairperson

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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 2012.

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 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.

In conjunction with its charge, the Committee considered several proposals that were forwarded to it from the Supreme Court Rules Committee.

Supreme Court Rule 201 (General Discovery Provisions)

The proposal sought to amend Supreme Court Rule 201 to make clear that all written discovery responses, including documents and other information produced, must be served upon all other parties in a case, rather than service merely upon the party that propounded the discovery initially. The Committee agreed that there should be sharing of documents; however, it expressed concern about the cost for producing the documents. The Committee also indicated that there should be the ability to "opt-out" of receiving the actual documents.

In light of its concerns with the existing proposal, the Committee voted to reject the proposal to amend Rule 201 and adopted an alternative proposal to amend Supreme Court Rules 214 and 216 to clarify the issue of whether the parties responding to Rule 214 requests and the parties serving and responding to Rule 216 requests are required to serve all parties to

the litigation copies of the request and response. Specifically, the proposal to amend Rule 214 requires the responding party to identify but not attach the materials responsive to the request and either copy them or make them available for copying or inspection. It also requires that requests and responses be served on all parties entitled to notice. The intent of the alternative proposal is that all parties entitled to notice receive the request and response and that said parties have the option of not receiving the documents, particularly where the pages are voluminous. The proposal to amend Rule 216 requires that the request to admit and the response be served on all parties entitled to notice. Pursuant to Supreme Court Rule 3, the Committee forwarded its recommendation and proposal to the Supreme Court Rules Committee.

Supreme Court Rule 208 (Fees and Charges; Copies)

The Committee considered a proposal to amend Supreme Court Rule 208 to clarify that deposition fees and expenses of controlled expert witnesses should be borne by the party who has retained the expert witness and not the party deposing the witness. The Committee voted to recommend adoption of the proposal. The Committee agreed that the person who retains the controlled expert witness should be responsible for payment of his/her fees and expenses. The Committee also noted that the proposal eliminates any discussion regarding responsibility for the payment of fees/expenses. Pursuant to Supreme Court Rule 3, the Committee forwarded its recommendation to the Supreme Court Rules Committee.

Supreme Court Rule 211 (Effect of Errors and Irregularities in Depositions; Objections)

The Committee considered a proposal to amend Supreme Court Rule 211 to provide that the rule only requires objections at evidence depositions and not discovery depositions. The Committee voted to reject this proposal since it does not achieve its goal of curing the problem of too many objections at discovery depositions given that parties would still be able to object. Moreover, the Committee noted that the recent amendment to Supreme Court Rule 212 (a)(5) reduces the distinction between discovery and evidence depositions. Pursuant to Supreme Court Rule 3, the Committee forwarded its recommendation to the Supreme Court Rules Committee.

Proposed New Supreme Court Rule - Inadvertent Disclosures in Discovery

This proposal sought to create a new Supreme Court Rule establishing a procedure for asserting privilege or work product following inadvertent disclosures in discovery. The Committee voted to recommend adoption of this proposal. The Committee agreed that a procedure was necessary for addressing situations where information is inadvertently disclosed during discovery. The Committee noted that such inadvertent disclosures often arise in cases

involving large numbers of documents. Pursuant to Supreme Court Rule 3, the Committee forwarded its recommendation to the Supreme Court Rules Committee.

B. Conference Year 2010 Continued Projects/Priorities

The following subjects represent the projects/priorities assigned by the Supreme Court to the Committee for consideration in Conference Year 2010, which were extended into Conference Year 2011.

First and foremost, the Committee has focused its attention on the issue of e-Discovery. The Court requested that the Committee draft proposed amendments to select Supreme Court Rules, which may be modeled on the federal amendments, as well as guidelines, to assist trial court judges in addressing e-Discovery issues. Last Conference year, the Committee formed a subcommittee to address this task. After surveying other states and case law, the subcommittee reported this conference year to the Committee that approximately 20 states have adopted the federal court rules on e-Discovery. Instead of merely adopting the federal rules on this issue, the subcommittee recommended that the Committee focus initially on defining electronically stored information given that Supreme Court Rule 201(b)(1) (Scope of Discovery) merely refers to "all retrievable information in computer storage." More specifically, the subcommittee suggested amending Illinois' discovery rules by adopting the definition for electronically stored information as contained in Federal Rule 34(a)(1)(A)(including writings, drawings, graphs, charts, photographs, sound recordings, images and other data or data compilations stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form). The Committee agreed to move forward with proposing amendments to current rules to incorporate this definition.

The subcommittee also has been monitoring the review of the e-Discovery federal rules currently underway in the Northern District. It reported to the Committee on the Seventh Circuit Electronic Discovery Pilot Program's Report on Phase One. That report focuses on early resolution of disputes concerning electronically stored information so as to reduce discovery disputes. For example, the report emphasizes the importance of attorneys initially meeting to propose a path of discovery and address discovery issues early on before meeting with the judge at the initial status conference. The intent is to address these matters early on so as to determine the existence of electronically stored information and to avoid discoverable material arising on the eve of trial. The subcommittee therefore recommended that there be a mandatory pre-case management conference mandating a meeting of the attorneys to address all discovery including any electronically stored information involved in the case. This

conference to discuss e-Discovery issues would occur before the case management conference with the court. The Committee adopted the subcommittee's proposal of a pre-case management conference and decided to move forward with proposing amendments to Supreme Court Rules to incorporate such a conference, including possible incorporation into Supreme Court Rule 218 with respect to the case management conference.

Also pending with the Committee is consideration of two issues that relate to its discussion of e-Discovery. First, the Committee has deferred discussion on exploring the feasibility of a rule requiring mandatory disclosure of relevant documents given the increasing problem of parties not receiving relevant information before trial. Second, the Committee has deferred discussion on whether to require that documents, produced pursuant to a Supreme Court 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. Members of the Committee have indicated that it is a great aid in moving a case along to label and organize documents. Nevertheless, given that both issues potentially impact e-Discovery, the Committee deferred its discussion on these issues until it drafts proposed amendments to Supreme Court Rules regarding e-Discovery.

Finally, the Committee continued with its consideration of proposed amendments to Supreme Court Rule 214 to permit business records produced by a party to be presumptively admissible during discovery absent foundation testimony. In its discussions, the Committee noted that such a rule could enhance the speed of the trial by avoiding calling witnesses to authenticate documents when no genuine question exists as to the foundation of the document. The Committee's discussion also focused on a concern that the proposed amendments assume that documents are admitted into evidence and that it can be a trap for the unwary. The Committee therefore decided to focus its future discussions on amending Rule 218 as opposed to Rule 214 to include language on foundation experts as a consideration at the case management conference.

III. PROPOSED COMMITTEE ACTIVITIES FOR THE NEXT CONFERENCE YEAR

During the 2012 Conference Year, the Committee requests that it be permitted to address pending projects continued from the prior Conference year. The Committee also will review any proposals submitted by the Supreme Court Rules Committee.

IV. RECOMMENDATIONS

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