

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

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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 2008.

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.

In conjunction with its charge, the Committee considered a proposal, forwarded by the Supreme Court Rules Committee, to amend Supreme Court Rules 206 and 211 to eliminate the making of objections to the evidence presented in discovery depositions on the basis that such objections serve little or no purpose and lawyers often use them as a means of coaching the witness. The Committee disagreed with the proposal's rationale given its position that objections are a means of protecting a witness from abusive conduct by the deposing attorney. After considering the potential for abuse if objections are prohibited, the Committee concluded that the detriment to eliminating said objections outweighs any benefit. The Committee therefore rejected the proposal and forwarded its decision to the Supreme Court Rules Committee.

In further adherence with its charge, the Committee also is reconsidering its proposed amendment to Supreme Court Rule 214, which was submitted to the Supreme Court Rules Committee in Conference Year 2006 to address the problems associated with sorting through various and often voluminous documents submitted pursuant to a written request to produce. In its proposed amendment, the Committee sought to clarify Rule 214 by requiring that documents, produced pursuant to a Rule 214 request, are labeled to correspond with the specific categories in the written request. The Committee believes that labeling of documents will allow the requesting

party to reasonably identify the specific category in the request that corresponds to each produced document. Following the Annual Public Hearing in January 2007, the Committee was informed by the Supreme Court Rules Committee that its proposed amendment to Rule 214 raised concerns both in testimony at the hearing and in written comments regarding the potential burden from requiring categorization of documents as opposed to producing documents as they are kept in the usual course of business. The Committee therefore is reconsidering its proposed amendment in light of the concerns raised at the public hearing.

B. Conference Year 2006 Continued Projects/Priorities

The following subjects represent the projects/priorities assigned by the Supreme Court to the Committee for consideration in Conference Year 2006, which were extended into Conference Year 2007.

1. Requests to Admit

The Committee was asked to identify and analyze the abuses surrounding the strict requirements for responding to Supreme Court Rule 216 Requests to Admit, with the goal of identifying a means to eliminate such abuses. In analyzing the use of Rule 216 Requests to Admit, the Committee found that abuses often occur in small cases in high volume courtrooms, such as municipal court, 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*. It is in such courtrooms that the strict requirements of the rule are being misused. After much discussion, the Committee proposed 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. In Conference Year 2006, the Committee forwarded its proposed amendments to the Supreme Court Rules Committee.

The Committee was notified subsequently by the Supreme Court Rules Committee that its proposed amendments to Rule 216 generated significant comments at the Annual Public Hearing held in January 2007 regarding the limited application of the amendment, the time for filing requests, and requiring leave of court. The Committee therefore is reconsidering its proposed amendments in light of the comments raised at the public hearing.

2. Mandatory Disclosure

The Committee was asked to explore 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. Initially, the Committee considered requiring mandatory disclosure of documents relied on by the plaintiff in formulating a complaint and of documents relied on by the

defendant in formulating an answer and affirmative defense. There was concern, however, that such a requirement would encroach into work product and the thought process in developing a client's case to require disclosure of documents relied on in drafting pleadings. The Committee also considered adopting mandatory disclosure similar to Federal Rule of Civil Procedure 26, which requires the automatic disclosure of certain information and documents within a specific period after a claim is filed. The Committee discussed Federal Rule 26's apparent conflict with Supreme Court Rule 222, which has its own mandatory disclosure requirements for civil actions seeking money damages not in excess of \$50,000. The Committee also discussed the difference in philosophy between the federal and Illinois rules on discovery. The federal rules focus on whether discovery is relevant to the parties' claim or defense whereas the Illinois discovery rules focus on the relevancy of discovery to the subject matter. The Committee therefore decided not to adopt the automatic disclosure of documents set forth in the federal rules. The Committee's discussion then focused on a form of minimum disclosure whereby certain aspects of Rule 222 are made applicable to general discovery. In its discussion, the Committee examined discovery rules concerning disclosure in other states, along with the use of case management conferences and related orders. The Committee, however, agreed to defer its discussion of mandatory disclosure until a later date given its decision that e-Discovery, as discussed below, be given priority.

C. Conference Year 2007 Projects/Priorities

In Conference Year 2007, the Committee was assigned the comprehensive task of studying and defining e-Discovery. In particular, the Committee was asked to report on e-Discovery's efficacy and potential impact on trial proceedings and current Supreme Court Rules. In addressing this project, the Committee has begun exploring the electronic discovery provisions of the Federal Rules of Civil Procedure, which became effective December 1, 2006. The Committee also has begun collecting the rules from states providing for e-Discovery, and examining the case law and numerous articles written on this subject. The Committee has expressed particular concern with the issue of privileged communications in the realm of electronic documents. It is the Committee's goal to prepare a report for the Court's consideration that addresses the issues arising from the discovery of electronically-stored information; namely the preservation, collection, review and production of electronic evidence.

In addition to studying e-Discovery, several projects/priorities were identified for the Committee's work during Conference Year 2007. In light of the pressing nature of e-Discovery, however, the Committee decided to defer discussion on the following 2007 projects:

- 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 nonparty physicians prior to deciding whether to take their depositions;
- Examine whether documents obtained during discovery should be presumptively admissible without requiring foundation testimony;
- Study and report on whether general objections to interrogatories/requests to produce should be permissible; and
- Undertake any such other projects or initiatives that are consistent with the Committee charge.

III. PROPOSED COMMITTEE ACTIVITIES FOR THE NEXT CONFERENCE YEAR

During the 2008 Conference year, the Committee requests that it be permitted to continue its review of e-Discovery. The Committee further requests that it be permitted to address mandatory disclosure and its remaining Conference Year 2007 projects. Finally, the Committee 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.