

**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 2011.

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 must be served upon all other parties in a case, rather than service merely upon the party that propounded the discovery initially. The Committee expressed a concern with the apportionment of cost and with existing discovery rules that already may require availability of such information. The Committee therefore will continue to discuss this matter.

Supreme Court Rule 204 (Compelling Appearance of Deponent)

The Committee considered two proposals regarding Supreme Court Rule 204. The first proposal sought to amend Rule 204 to allow attorneys to issue subpoenas for deposition. The Committee voted to recommend adoption of the proposal. The Committee reasoned that the current practice of the clerk of the court issuing subpoenas pursuant to the rule is purely a ministerial function. The Committee further reasoned that section 2-1101 of the Illinois Code of Civil

Procedure (735 ILCS 5/2-1101), which governs subpoenas at trial, permits the clerk or an attorney to issue subpoenas for witnesses. The Committee also noted that the practice in federal court, specifically Federal Rule 45 of Civil Procedure, and in other state jurisdictions is to allow attorneys in a case to issue subpoenas. The Committee, however, took issue with the proposal's reference to an attorney issuing a subpoena "on behalf of the court" since an attorney in issuing a subpoena is not acting on behalf of the court, but is acting as an officer of the court. In addition, the Committee modified the proposal to limit the ability to issue subpoenas to attorneys of record in a pending case. Pursuant to Supreme Court Rule 3, the Committee forwarded its recommendation to the Supreme Court Rules Committee.

The next proposal sought to amend Rule 204 to put a limit on the fees that a physician can charge for the giving of deposition testimony. Specifically, the proposal sought to limit at \$400/hour the fee that a physician can charge for the giving of deposition testimony. It also sought to limit the payment of said fee to the time actually spent testifying at the deposition. The Committee voted not to recommend adoption of this proposal. The Committee noted that every doctor values his/her time differently due to the type of practice and that the current rule permits the court to determine whether a fee is reasonable. Moreover, the Committee indicated that a doctor should be compensated for time spent preparing for a deposition. The Committee therefore concluded that the proposal was not a feasible way to handle this issue. Pursuant to Supreme Court Rule 3, the Committee forwarded its recommendation to the Supreme Court Rules Committee.

Supreme Court Rule 216 (Admission of Fact or of Genuineness of Documents)

The Supreme Court sent back to the Committee for its review the Committee's proposal to amend Supreme Court Rule 216 as well as the Supreme Court Rules Committee's alternative proposal. The Rules Committee agreed in part with the Discovery Committee's limiting of the number of requests for admission to 30, absent agreement or court order for good cause shown. The Rules Committee's proposal, however, disagreed with the Committee's prior leave of court requirement as a means of curbing perceived abuses. Upon reconsideration, the Committee agreed that requiring prior leave of court in all instances could result in unnecessary court appearances. The Rules Committee proposal provided that a party must prepare requests to admit as a separate document, serve them separately, and include a boldface warning on the first page stating that a failure to respond within 28 days will mean that the facts will be deemed true and the documents will be deemed genuine. The Committee agreed with the Rules Committee's proposal. It noted that *pro se* litigants currently receive requests to admit along with other discovery and often overlook the response deadline for requests to admit. The separate service and boldface warning requirements should reduce such occurrences. While voting in favor of the Rules Committee's proposal, the Committee redrafted the Comments to provide that the rule does not prevent a judge from controlling the timing of the requests to admit or entering appropriate protective orders, as with

other discovery methods. The Committee advised Director Cobbs of its recommendation.

Supreme Court Rule 236 (Admission of Business Records in Evidence)

The proposal sought to amend Supreme Court Rule 236 to simplify the proof of reasonableness of medical bills. Specifically, the proposal provided that the reasonableness of a medical bill may be established by an affidavit of the medical provider or its agent and that the affidavit creates a rebuttable presumption of the reasonableness of the bill. The Committee voted not to recommend adoption of the proposal, which addresses the admissibility of evidence at trial, because it resembles an evidentiary rule and not a discovery rule. Pursuant to Supreme Court Rule 3, the Committee forwarded its recommendation to the Supreme Court Rules Committee.

Proposed New Supreme Court Rule - Attorney-Client Privilege

This proposal from the Illinois Association of Defense Trial Counsel sought to create a new rule concerning inadvertent waiver of attorney-client privilege. In essence, the proposal provided that if a disclosure of privileged information was inadvertent, no waiver should result. Members of the Committee noted that this issue often arises in the context of electronically stored information because the volume of such information makes a pre-production document-by-document review cost prohibitive. Because the issue relates to e-Discovery, the Committee decided to consider it along with its drafting of e-Discovery rules and/or guidelines.

B. Conference Year 2009 Continued Projects/Priorities

The following subjects represent the projects/priorities assigned by the Supreme Court to the Committee for consideration in Conference Year 2009, which were extended into Conference Year 2010.

The Committee considered 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. The Committee expressed interest in saving time and litigation costs by not deposing a doctor who has not seen the patient recently and has no opinion on the care/treatment relating to the injury giving rise to pending litigation. Some members of the Committee indicated that such questions are not necessary since there is the ability to screen whether a doctor's deposition is necessary by reviewing the medical history records. The Committee expressed concern that (1) compensation for answering any questions will become an issue; (2) a doctor may use the proposed questions as an escape mechanism to avoid a deposition; (3) the questions could be used as a means to get around the *Petrillo* limitations; or (4) privacy

concerns may become an issue. In light of its concerns, the Committee determined that the formulation of such questions would not be feasible.

Next, the Committee continued its discussion of 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 and whether a party should be required to provide copies of all correspondence or communications between counsel and the expert. The Committee did not identify any problem with requiring disclosure under Supreme Court Rule 213(f) to include a list of any other case in which the witness has testified as an expert within the preceding four years. The Committee, however, did note that more academics are being retained as expert witnesses and that usually only professional expert witnesses retain a list of prior cases. The Committee also expressed concern with requiring a party under Rule 213(f) to provide copies of any and all correspondence or communications between counsel and the expert because such materials may include discussions of counsel's theory of the case and work product. Based on the foregoing, the Committee rejected the mandated disclosure of this information under Rule 213(f).

The Committee also considered two projects, which remain under discussion. Pending with the Committee is its consideration of whether business records, produced by a party, during discovery should be presumptively admissible absent foundation testimony. In its discussions, the Committee noted that such a rule would avoid calling witnesses to authenticate documents when no genuine question exists as to the foundation of the document. The Committee noted that such a rule could be overly-inclusive in that certain documents produced by a corporate or organizational party might not qualify as the entity's business records, *per se*. The Committee considered that a procedure that would allow the producing party to object after notice would preserve the producing party's ability to require foundation testimony for any genuinely disputed documents. Such a procedure is currently provided for in Supreme Court Rule 100.7(b) in the context of expedited child support hearings.

Also pending with the Committee is consideration of the feasibility of requiring mandatory disclosure of relevant documents. The Committee deferred its discussion until it drafts proposed amendments to Supreme Court Rules regarding e-Discovery.

C. Conference Year 2010 Projects/Priorities

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. The Committee formed a subcommittee to address this task. The subcommittee has reported to the Committee that it is examining e-Discovery rules in other states (23 of which currently have such rules) and guidelines established by the Conference of Chief Justices. The subcommittee is also monitoring the review of the e-Discovery amendments currently underway in the Northern District. There has been some concern

that the amendments have contributed to increased discovery costs and that costly and time-consuming discovery disputes are becoming the focus of many lawsuits.

III. PROPOSED COMMITTEE ACTIVITIES FOR THE NEXT CONFERENCE YEAR

During the 2011 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.