

2012 REPORT

**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 2013.

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 two proposals that were forwarded to it from the Supreme Court Rules Committee.

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

The Committee considered the concerns raised by an attorney about a conflict in the rule

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for time periods (14 or 28 days) in responding to requests depending on whether the document is a public record. The Committee determined that there should not be a different time frame for responding when a public record is involved. Instead, a 28-day time frame should be applicable in all instances. Therefore, the Committee determined that Rule 216(d) should be modified to incorporate a 28-day time frame. Pursuant to Supreme Court Rule 3, the Committee forwarded its recommendation and proposal to the Supreme Court Rules Committee.

Supreme Court Rule 204 (Compelling Appearance of Deponent)

The Committee considered correspondence from the Illinois Association of Defense Trial Counsel (IDC) regarding its former proposal to amend Supreme Court Rule 204(c) to place a limit of \$400 per hour on the fee that physicians may charge for giving deposition testimony. This proposal was previously considered and rejected by the Committee. The IDC requested that the Committee reconsider its proposal. The Committee determined that there was not a need for an amendment to the rule since trial courts have authority under Rule 204 to apportion deposition fees for doctors if necessary. The Committee therefore decided to maintain its prior position rejecting the proposed amendment to Supreme Court Rule 204.

B. Conference Year 2011 Continued Projects/Priorities

The following subjects represent the projects/priorities assigned by the Supreme Court to the Committee for consideration in Conference Year 2011, which were extended into Conference Year 2012.

The Committee primarily 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

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judges in addressing e-Discovery issues. In a prior conference year, the Committee formed a subcommittee to address this task. After surveying other state and federal discovery rules, examining case law and discussing articles on the subject of e-Discovery, the subcommittee recommended that certain current discovery rules be amended to address four key issues: (1) scope of electronic discovery, (2) cost allocation/proportionality, (3) pretrial conference and (4) preservation, all of which parallel some of the 2006 Amendments to the Federal Rules of Civil Procedure.

Scope of Electronic Discovery

Currently, the discovery rules do not provide for discovery of electronic data. As such, the subcommittee drafted amendments to include and define "electronically stored information" (ESI), which is the common reference for discovery of electronic data. The subcommittee also proposed amendments to limit the discovery of certain categories of ESI unless requested and ordered by the court. The Committee agreed with the amendments proposed by the subcommittee, which will next focus on drafting Committee Comments for the Committee's consideration.

Cost Allocation/Proportionality

The subcommittee drafted amendments to permit the trial court to examine the likely burden or expense of producing certain ESI by empowering trial courts to apply a proportionality principle when considering protective orders. In so doing, the subcommittee noted that the issue of cost allocation is an important issue in discovery of ESI. The Committee agreed with the amendments proposed by the subcommittee, which will next focus on drafting Committee Comments for the Committee's consideration.

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Pretrial Conference

In light of the controversy that often arises with ESI, the subcommittee drafted amendments to require early discussion of any issues regarding the production of ESI at the pretrial case management conference. The subcommittee indicated that early discussions prompt resolution of such issues and thereby reduce the potential for discovery abuse and delay. The Committee agreed with the amendments proposed by the subcommittee, which will next focus on drafting Committee Comments for the Committee's consideration.

Preservation

The subcommittee drafted amendments to address the issue of when the duty to preserve ESI arises and the potential sanctions for failure to preserve ESI. The subcommittee recognized that companies often have standard deletion policies regarding ESI and seek direction from the court on this issue. The Committee continues to debate the proposed amendments given its struggle with whether to preclude sanctions where there has been a good faith destruction of ESI or to leave any said sanctions to the discretion of the trial court.

Also pending with the subcommittee is consideration of the feasibility of a rule requiring mandatory disclosure of relevant documents similar to the federal rules, which require mandatory disclosure irrespective of written requests. The subcommittee recognized that such a request would be a fundamental change for the Illinois discovery rules. As such, the subcommittee continues to discuss this issue.

Finally, the Committee deferred its consideration of whether business records produced by a party should be presumptively admissible during discovery absent foundation testimony.

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III. PROPOSED COMMITTEE ACTIVITIES FOR THE NEXT CONFERENCE YEAR

During the 2013 Conference year, the Committee requests that it be permitted to address pending projects continued from the prior Conference year. Specifically, the Committee seeks to complete its project on e-Discovery by presenting to the Court for its consideration proposed amendments to Illinois Supreme Court Discovery Rules, Committee Comments and Guidelines that will act as a roadmap for trial judges addressing the various issues surrounding e-Discovery. 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.