

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

Honorable Frederick J. Kapala, Chair

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I. STATEMENT ON COMMITTEE CONTINUATION

The goals of the Committee on Discovery Procedures (“Committee”) include streamlining discovery procedures, increasing compliance with existing rules, and eliminating loopholes and potential delay tactics. To accomplish these goals, the Committee continues to research significant discovery issues and respond to discovery-related inquiries. Because the Committee continues to provide valuable expertise in the area of civil discovery, the Committee respectfully requests that it be continued.

II. SUMMARY OF COMMITTEE ACTIVITIES

During the Conference year, the Committee considered proposed amendments to Supreme Court Rules 202, 204, 208, 213, and 216. The Committee also considered the possibility of mandatory disclosure and the elimination of reimbursing treating doctors.

A. Hon. William D. Maddux's Proposal to Amend Supreme Court Rule 202

This proposal would amend Rule 202 by eliminating the distinction between discovery and evidence depositions, thereby replacing the current system of dual depositions with a single deposition. The Supreme Court Rules Committee forwarded this proposal to the Committee for its review and recommendation.

The Committee considered the manner in which Rule 202 and related rules would be changed as a result of the proposed amendment, which advocates a single deposition. The Committee also considered the arguments in support of the proposed amendment, including that the current form of deposition practice may cause hostility between doctors and attorneys and may increase litigation expenses by resulting in two depositions of doctors. Those in favor of the proposal stated that it attempts to streamline and decrease the expense of depositions.

Some members of the Committee expressed serious concerns with eliminating dual depositions, which they argued provide a valuable truth-seeking tool. It was noted that a discovery deposition assists both sides in acquiring information necessary to properly evaluate whether to settle a case. It was also noted that a discovery deposition assists an attorney in preparing for trial because it allows an attorney to gather information for purposes of cross-examination at trial. It was argued that if every deposition is an evidence deposition, then depositions will be substantially lengthened because objections will be made and will result in more questions given that the rules of evidence will apply. Also, attorneys would be required to spend more time preparing for each deposition taken, which costs would be passed through to the client. Finally, long-standing members of the Committee pointed out that prior proposals to eliminate the distinction between discovery and evidence depositions have been raised and rejected each time.

After considering the various arguments, a majority of the Committee voted to reject the proposal to eliminate dual depositions. The Committee agreed that the use of discovery and evidence depositions should be maintained. The Committee therefore forwarded its recommendation to the Supreme Court Rules Committee.

B. Chicago Bar Associations' Proposal to Amend Supreme Court Rule 204

The Chicago Bar Association sought to amend Rule 204(b) with respect to compelling the appearance of a deponent when the action is pending in another state. More specifically, the proposed amendment provided that the petition to issue a subpoena to compel the appearance of the deponent, or for an order to compel the giving of testimony by the deponent, shall be filed with the circuit court in accordance with such court's procedure or local rule for issuing a subpoena for a foreign action. The Supreme Court Rules Committee forwarded this proposal to the Committee for its review and recommendation.

The Committee expressed confusion on the meaning of and reasoning behind this proposed amendment. The Committee therefore is requesting clarification from the Chicago Bar Association, specifically in regard to what problem this proposal is meant to remedy.

C. Illinois State Bar Association's Proposal to Amend Supreme Court Rule 208

The Illinois State Bar Association's proposal to amend Rule 208(d) sought to expand the fees and charges, as well as certain permitted costs, to be taxed as costs. One aspect of the proposal provided that the trial court may award to any party in whose favor judgment is entered, the reasonable cost of any appearance fee charged by any non-retained physician witness who testified at trial or at an evidence deposition or at a videotaped evidence deposition that was used at trial. The Supreme Court Rules Committee forwarded this proposal to the Committee for its review and recommendation.

The Committee recommended that Rule 208(d) not be amended as proposed and so informed the Rules Committee. The Committee expressed concern about recovering the cost of an "appearance fee" and determining the reasonableness of the cost. The Committee also indicated concern about the proposed amendment making a special category for a doctor as a witness.

D. Chicago Bar Association's Proposal to Amend Supreme Court Rule 213

The Chicago Bar Association's proposal to amend Rule 213(g) sought to preclude testimony disclosed in an evidence deposition from acting as a disclosure under Rule 213. The Supreme Court Rules Committee forwarded this proposal to the Committee for its review and recommendation. The Committee recommended that Rule 213(g) be amended as proposed and forwarded its recommendation to the Rules Committee.

E. Committee's Proposal to Amend Supreme Court Rule 216

The Committee initially considered amending Rule 216(c) in response to the Appellate Court opinion in *Moy v. Ng*, 341 Ill.App.3d 984 (1st Dist. 2003), which departed from the practice of allowing attorneys to sign an answer to a request to admit facts on behalf of a party. Rather, the *Moy* decision requires that the party responding to a request to admit facts pursuant to Rule 216 sign and swear to the answer, which must be served on the requesting party. Members of the Committee pointed out that often times a party is not familiar with many facts regarding an admission, which relate to information an attorney knows because it is gathered through discovery such that a party cannot "vouch" for it. The Committee therefore considered amending Rule 216

to permit an attorney to sign a statement or objection for the party in response to a request to admit, to serve a signed copy on the requesting party, and to file the original with the circuit clerk.

Some members of the Committee expressed concern about amending Rule 216 to allow an attorney to sign on behalf of a client because of the possibility of a client taking the stand at trial and indicating that he/she did not sign the response and never saw the document. This scenario raised a potential conflict between an attorney and client. To avoid such a potential conflict, it was suggested that a request to admit should be based on the facts in the personal knowledge of the person so admitting.

After considering such a potential conflict, it was agreed that Rule 216 should not be amended to permit an attorney to sign but should continue to require a party to sign a statement or objection in response to a request to admit. The Committee therefore withdrew its initial proposal to amend Rule 216 in the manner discussed.

Next, the Committee considered allegations of abuse surrounding the strict requirements for responding to a Rule 216 request to admit. It was noted that requests to admit are often buried with numerous other discovery requests, where they are more likely to go undetected by the responding party until after the deadline has passed. Consequently, they are often used as a tactic to ambush the other side. It was agreed by the Committee that the purpose of Rule 216 is to eliminate disputes on matters readily admitted by the parties so as to simplify the issues. The Committee therefore plans to consider a means of eliminating such abuse of Rule 216 in the next Conference year, including the possibility of requiring leave of court before filing a request to admit.

F. Mandatory Disclosure

The Committee discussed the increasing problem of receiving relevant information before trial. In response, the Committee considered creating a rule to require mandatory disclosure of relevant documents similar to the disclosure requirements set forth in Rule 222 (Limited and Simplified Discovery in Certain Cases). The Committee expressed an interest in requiring a plaintiff to disclose all documents relied on in drafting a complaint and in requiring a defendant to disclose all documents relied on in drafting an answer and in supporting any affirmative defenses. It was suggested that the sooner parties receive information, the earlier settlement discussions can begin. The Committee plans to continue discussing the feasibility and nuances of such a mandatory disclosure rule in the next Conference year.

G. Reimbursement of Treating Doctors

The Committee considered the elimination of reimbursing treating doctors. Some members of the Committee noted that treating doctors have become a separate class of witnesses, who unlike other witnesses, are paid. Discussion occurred on whether treating doctors are affected differently than other witnesses since they are taken away from their practice. After considering the above factors, the Committee decided to table discussion on this issue.

III. PROPOSED COMMITTEE ACTIVITIES FOR THE NEXT CONFERENCE YEAR

During the 2006 Conference year, the Committee plans to continue its discussion of the Chicago Bar Association's proposal to amend Rule 204, eliminating the abuses associated with the

application of Rule 216, and the feasibility of mandatory disclosure. The Committee also plans to study the production of documents and responses in interrogatories. 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.

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