

ANNUAL REPORT
OF THE
STUDY COMMITTEE ON COMPLEX LITIGATION
TO THE ILLINOIS JUDICIAL CONFERENCE

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I. STATEMENT ON COMMITTEE CONTINUATION

The Study Committee on Complex Litigation includes circuit court and appellate court judges across the state who possess a breadth of experience with civil or criminal complex litigation cases. The stated purpose of the Committee is to make recommendations, through proposed rules or other procedures, to reduce the cost and delay attendant to lengthy civil and criminal trials with multiple parties or issues and thereby improve the administration of justice in complex cases throughout Illinois. One of the principal endeavors of the Committee has been the creation and maintenance of the *Illinois Manual for Complex Civil Litigation* and the *Illinois Manual for Complex Criminal Litigation*. Historically, the Committee has focused its attention on providing yearly updates and supplements to both volumes. The Committee also studies and makes recommendations on rules, policies and procedures involving complex litigation as requested by the Supreme Court.

During Conference Year 2008, the Supreme Court charge to the Committee included continuation of one project/priority from Conference Year 2007 and several new projects/priorities for Conference Year 2008. Specifically, the Committee was charged with review of the Civil Manual to determine if text should be added with regard to construction cases, a task that was carried over from Conference Year 2007. For the current Conference year, the Committee was asked to (1) review the *Criminal Law and Procedure Benchbook* created by the Conferences Committee on Education and consider appropriate revisions to the Complex Litigation Criminal Manual, (2) revise the ADR chapter in the Civil Manual to add text regarding declaratory judgment cases, (3) update and revise the manuals and forms in the appendices with caselaw, court rules and legislation filed during the Conference year, and (4) undertake any such other projects or initiatives that are consistent with the Committee's charge.

The Committee believes that its work is valuable to the mission of the Conference and that the Manuals provide a unique reference for Illinois judges who hear complex cases. As such, the Committee respectfully requests that it be continued as a full standing committee of the Illinois Judicial Conference in order to complete its work on the aforementioned projects identified in the Committee's charge.

II. SUMMARY OF COMMITTEE ACTIVITIES

In addition to the several projects/priorities identified in the charge, the Committee focused on aspects of the general charge. The following offers a brief summary of the Committee's work in that regard, as well as the status of projects/priorities carried over from Conference Year 2007 and new projects undertaken for Conference Year 2008.

A. Projects identified in the General Charge

1. Development of a forum for judges to disseminate information regarding the disposition of complex cases

During Conference Year 2008, the Committee initiated research on the types of electronic forums which state court judges or federal judges use to discuss complex cases and legal issues. Data gathered on this topic suggests that online judicial forums are valuable information tools for

many judges because of the convenience, speed and timeliness of the communications.

The Committee learned that the Federal Judicial Center sets up collaborative sites for federal judges and defines particular groups by subject matter, such as a committee on civil discovery, or specific areas of law such as bankruptcy. The members are able to post discussions, participate in threaded discussion lists and use the on-line library to post documents. Research reveals that judges in these collaborative sites typically discuss ways to handle cases, caselaw, and pending legislation but do not discuss active cases.

Of paramount concern to the Committee in initiating research on this topic was the ethical considerations of judges using an electronic forum. The Committee noted that Canon 3 permits judges to "consult with court personnel whose function is to aid the judges in carrying out the judge's adjudicative responsibilities *or with other judges.*" Sup. Ct. Rule 63(A)(4)(b) (emphasis added). Additionally, discussions between judges are not discoverable because confidential communications between judges made in the course of the performance of their judicial duties and relating to official court business are protected by the judicial deliberation privilege. See *Thomas v. Page*, 361 Ill. App. 3d 484 (2005). Moreover, the various types of electronic venues utilized by judges require a user identification for participation and the sites are password protected, measures which assure both security and privacy.

In conclusion, the Committee did not identify any significant barriers to the formation of a judicial discussion forum on the Internet. It is the consensus of the Committee that such a forum would be useful, in particular, for those judges handling complex litigation. Should the Court elect to explore the creation of such a forum, the Committee offers the following issues for future consideration by the entity which the Court designates for this task:

(1) Set up, maintenance and management of the electronic discussion. Research indicates that federal and state court administrator's offices often perform this task.

(2) Defining the discussion group/groups. Research suggests it may be advantageous to start small, for example, only including those judges who handle specific types of cases, such as class actions. Of course, each member invited to the group would be issued a user identification and password for access to the site.

(3) Types of electronic communication to be used. If the group is simply a discussion group, a list serv may be an appropriate method. Alternatively, if the group is creating, revising, reviewing or commenting on documents, a collaborative website may be the best method.

(4) Types of protocols to be developed. These may include guidelines for the creation of discussion groups, internet use policy, and guidelines and training on the use of the site and the features of the site.

2. Management of Multiple Overlapping Litigation

The Committee focused on another aspect of the general charge, namely, studying and

making recommendations regarding the management of multiple overlapping litigation. In preliminary discussions, the Committee found it would be helpful in its analysis to determine, initially, whether the management of multiple parallel or overlapping litigation (defined as multiple cases involving substantially the same transaction or occurrence or the same predominant legal or factual issue with substantially the same parties) constitutes a problem in the various circuits.

Accordingly, the Committee wrote to the Conference of Chief Circuit Judges asking if the various circuits experience a high number of cases involving such parallel litigation and, if so, how such cases are managed. The letter further inquired whether the circuits have a particular mechanism for determining if additional parallel litigation exists outside of the circuit and, if so, how the circuits manage potential transfer or consolidation among cases filed in other circuits. Last, the circuits were asked whether the methods of managing such cases work well and, if not, what problems have been identified. As of the final draft of this Report, the Committee had received responses from eight circuits throughout the state. Of those responses from various chief circuit judges and trial court administrators, only one circuit has a mechanism in place for determining if additional parallel litigation exists outside the circuit. None of the responses received thus far have identified problems with managing parallel litigation filed either within the circuit or in other jurisdictions outside the circuit. This project is ongoing as the Committee continues to receive responses from the circuits.

B. Conference Year 2007 Continued Projects/Priorities

Review the Civil Manual to determine if text should be added with regard to Construction Cases

As part of the Conference Year 2007 charge, the Committee was asked to review the Civil Manual to determine if text should be added with regard to construction cases. The Committee reviewed the Civil Manual and noted that, while the current text does not include a section on construction cases, the ADR chapter contains discussion on dispute resolution in these types of cases. The Committee determined that any additional text to be added on the issue of construction cases would be put over to the next Conference year. During Conference Year 2008, the Committee revisited this issue and concluded that there should be additional text on construction cases which would be part of the comprehensive revisions to the Civil Manual initiated in 2008 and to be continued into Conference Year 2009 (see section C.3.i, *infra*).

C. Conference Year 2008 Projects/Priorities

1. Review of Criminal Law and Procedure Benchbook

The Committee was asked to review the Criminal Law and Procedure benchbook created by the Conference Committee on Education and to consider appropriate revisions to the *Manual for Complex Criminal Litigation* to avoid duplication of information. As the *Criminal Law and Procedure Benchbook* was not finalized as of the drafting of this report for Conference Year 2008, the Committee continued this project for Conference Year 2009.

2. Revise the ADR Chapter in the Civil Manual to Address Declaratory Judgment Cases

The Committee also was charged with revising the ADR chapter in the Civil Manual to add text regarding declaratory judgment cases. The Committee reviewed the ADR chapter in this regard and will include the requested text in the revised edition of the Civil Manual (see section C.3.i, *infra*).

3. Updates for the Civil and Criminal Manuals

As in previous years, the Committee was charged with the continuing task to revise and update both the Civil and Criminal Manuals. The Committee also was requested to review the forms contained in the appendices to both manuals to determine that they are current and remain good law, and to consider whether additional forms should be included.

i. Civil Manual.

The *Illinois Manual for Complex Civil Litigation* seeks to provide practical advice for handling those civil cases that risk becoming protracted and consuming disproportionate amounts of judicial resources. The first edition of the Civil Manual was completed in 1991. Subsequently, the Committee produced revised editions in 1994 and 1997, the last of which has been updated periodically. Over 200 judges have received copies of the manual, and it has been used as the basic text for a judicial seminar on complex litigation.

During Conference Year 2008, the Committee engaged in a thorough discussion regarding the utility of the Civil Manual. After careful consideration, the Committee determined that, since most of the text in the Civil Manual is over 10 years old, it is time to draft a complete revision. The Committee anticipates building upon the current text and, in the process, excising outdated material and revising and updating the relevant material. In so doing, the revised product will be more useful and concise. The members estimate that the complete revision will constitute much of the Committee's work during Conference Year 2009.

ii. Criminal Manual.

The Committee completed the first edition of the *Illinois Manual for Complex Criminal Litigation* in 1997. The Manual's 13 original chapters cover topics such as identifying complex criminal litigation, handling complex grand jury proceedings, and managing the pretrial, trial, and sentencing phases of complex criminal cases. Later supplements added to the main volume of the Criminal Manual included complex post-conviction review proceedings and sentencing, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), (3) jury selection and *voir dire*, (4) additional sentencing issues, (5) double jeopardy, (6) prosecutorial conduct, and (7) inconsistent verdicts. As indicated earlier in this Report, the Committee was asked to review the Conference Committee on Education Benchbook upon its completion and consider any necessary revisions to the Criminal Manual to assure it remains a unique product. Given that the benchbook had not been finalized as of the writing of this Annual Report for Conference Year 2008, the Committee continued this project to Conference Year 2009.

iii. Appendix Forms - Civil and Criminal Manuals

As part of the above-referenced revisions to both the Civil and Criminal Manuals, the Committee anticipates revising and building upon the forms available in the appendices to each manual.

During the 2008 Judicial Conference Year, the Committee members continued to monitor new caselaw, rule changes, legislation and other information specific to complex litigation. An updated Civil Manual will be distributed later this year as an interim reference source until the new revised edition is completed next year. Updates to the Criminal Manual will be included after the Committee reviews the finalized *Committee on Education Benchbook* and makes any necessary changes to the Criminal Manual. Both the Civil and Criminal Manuals will continue to be available in CD-ROM format, which affords users the convenience to download or hyperlink search capabilities.

III. PROPOSED COMMITTEE ACTIVITIES FOR THE NEXT CONFERENCE YEAR

During the next Conference year, the Committee will review and discuss caselaw, rule changes, and legislation pertinent to complex litigation in order to produce a completely revised edition of the Civil Manual. The Committee also will review the Committee on Education *Criminal Law and Procedure Benchbook* and make necessary changes to the Criminal Manual to assure that it remains a unique product, *i.e.* a "how to" guide for judges, rather than a benchbook. The Committee's review will include the forms to the manuals in order to keep them current. The Committee anticipates expanding the orders available in the appendices and will consider the feasibility of creating more uniform orders for use throughout the state.

IV. RECOMMENDATIONS

The Committee is making the following recommendation to the Conference at this time: That the Court explore the feasibility of providing an electronic forum for judges, in particular those judges dealing with complex cases, to facilitate communication and dissemination of information with regard to the management of such cases.