

**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 2010.

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.

Supreme Court Rule 212(a)(5)

In conjunction with its charge, the Committee drafted a proposal to amend Supreme Court Rule 212(a)(5) (Purposes for Which Discovery Depositions May Be Used), which currently provides that discovery depositions may be used as evidence at trial if the court finds that the deponent is neither a controlled expert witness nor a party, the deponent's evidence deposition has not been taken, and the deponent is unable to attend or testify because of death or infirmity. In discussing the current rule, which precludes the use at trial of a party's discovery deposition in all circumstances, the Committee concluded that in limited cases the current rule is unfair. Specifically, the Committee was prompted to examine this issue by a Fifth District Appellate Court opinion (*Berry v. American Standard, Inc.*, 382 Ill. App.3d 895 (5th Dist. 2008)), which affirmed a trial court's decision precluding the use of plaintiff's discovery deposition as evidence at trial.

In *Berry*, plaintiff's attorney, knowing that plaintiff was suffering from terminal mesothelioma and had a short life expectancy, noticed plaintiff's evidence deposition.

Defendants, asbestos manufacturers, distributors and end users, objected to plaintiff's evidence deposition preceding his discovery deposition. The trial court allowed the discovery deposition to proceed and given the number of defendants (47), the deposition spanned many days over several months. Soon after the deposition was completed, plaintiff was admitted to the hospital and died shortly thereafter. Plaintiff's evidence deposition was never taken. On defendant's *motion-in-limine*, the trial court found that Supreme Court Rule 212(a)(5), without exception, barred the use of a party's discovery deposition at trial. Due to the lack of plaintiff's testimony, his estate could not prevail at trial and summary judgment was granted, a result that was affirmed on appeal.

In response to what the Committee perceived to be a harsh result, the Committee concluded that there can arise rare but compelling circumstances under which a party's discovery deposition should be permitted to be used at trial. The Committee therefore drafted an amendment to Supreme Court Rule 212(a)(5) to give the trial court discretion to permit the use of a party's discovery deposition at trial. The Committee, however, decided not to include a controlled expert's discovery deposition in its proposed amendment because, unlike a party, a controlled expert can be replaced. Pursuant to Supreme Court Rule 3, the Committee forwarded its proposal to the Supreme Court Rules Committee.

B. Conference Year 2009 Projects/Priorities

The following subjects represent the projects/priorities assigned by the Court to the Committee for consideration in Conference Year 2009, some of which were extended from the prior Conference Year.

During the past Conference year, the Committee reviewed the use of depositions by telephone under Supreme Court Rule 206(h) (Remote Electronic Means Depositions). Members of the Committee indicated that current practice has been the acceptance of telephonic and other remote electronic depositions such that there is no need to require a party to obtain a court order. The Committee therefore adopted a proposal to amend Supreme Court Rule 206(h) to permit electronic depositions on notice without leave of court. Specifically, a party may take a deposition by telephone, video conference or other remote electronic means by stating in the notice the specific electronic means to be used for the deposition. Pursuant to Supreme Court Rule 3, the Committee forwarded its proposal to the Supreme Court Rules Committee.

Next, the Committee considered and rejected various projects. First, the Committee considered whether to define work product and privilege for purposes of objecting to discovery under Supreme Court Rule 201(b)(2) (Scope of Discovery). After substantial debate, the Committee agreed that a more detailed definition would not be useful and that the issue should

be addressed on a case by case basis.

The Committee also considered whether general objections to interrogatories/requests to produce should be prohibited. Specifically, Committee members noted a wide spread practice to include several pages of "General Objections" in discovery responses (*e.g.*, "to the extent that plaintiff seeks information protected by the attorney client and/or work product privileges, defendant objects") in addition to objections to specific requests. Although the Committee's consensus was that such boilerplate objections are bothersome and generally non-productive, a ban on their use was not deemed appropriate.

Finally, the Committee explored and rejected the feasibility of contention discovery as recognized under the federal rules. It was the Committee's position that Illinois case law will not recognize contention discovery because it potentially invades the area of work product.

The Committee also considered several projects, which remain under discussion. The Committee discussed 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. The Committee attempted to create a limited number of standard routine questions that would be sent to any nonparty physician to answer in writing under oath within 28 days. The Committee expressed interest in saving time and money by not deposing a doctor who has not seen the patient recently and has no opinion on the care/treatment relating to the accident. The consensus of the Committee, however, was that, particularly in the present litigation climate, doctors will not cooperate in answering such questions and that compensation for answering any questions will become an issue. The Committee therefore left open for discussion whether such questions should be drafted in a different format or should be limited to certain cases.

The Committee also left open to consider whether business records obtained during discovery should be presumptively admissible without requiring foundation testimony. While this did not seem to be an issue in most cases, the Committee noted potential issues with third party records.

Likewise, the Committee continued its discussion of required expert witness disclosures under Supreme Court Rule 213(f)(Identity and Testimony of Witnesses). 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, expressed concern with requiring a party under Rule 213(f) to provide copies of any and all correspondences or communications between counsel and the expert. The Committee noted that such correspondence and communications may include discussions of counsel's theory of the case.

As a final matter, the Committee deferred discussion on any Supreme Court Rule

changes relating to e-Discovery and the feasibility of mandatory disclosure of relevant documents following the Court's consideration of the Committee's e-Discovery Report, which remains pending with the Court.

III. PROPOSED COMMITTEE ACTIVITIES FOR THE NEXT CONFERENCE YEAR

During the 2010 Conference year, the Committee requests that it be permitted to address pending projects continued from the prior Conference year. The Committee also requests that, following direction from the Court, it be permitted to address any Supreme Court Rule changes relating to e-Discovery and mandatory disclosure of relevant documents. 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.