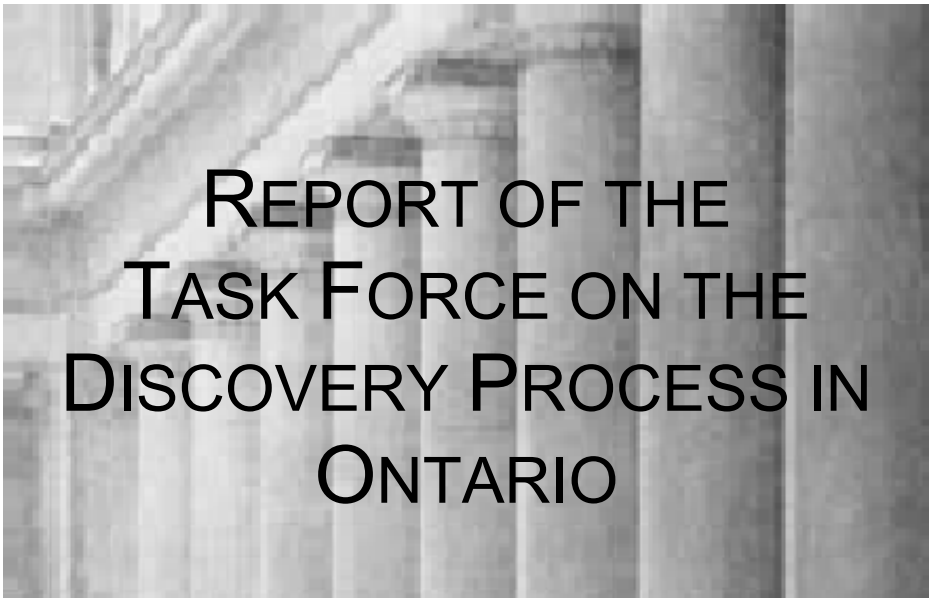
Superior Court of Justice

Ministry of the Attorney General

Ontario



# REPORT OF THE TASK FORCE ON THE DISCOVERY PROCESS IN ONTARIO

NOVEMBER 2003

Members of the Discovery Task Force

The Honourable Mr. Justice Colin Campbell (Chair)
Superior Court of Justice
Toronto Region

Debra Paulseth (Associate Chair)
Assistant Deputy Attorney General, Court Services Division
Ministry of the Attorney General

The Honourable Madam Justice Catherine Aitken
Superior Court of Justice
East Region

Ann Merritt
Director, Civil/Family Policy and Programs Branch, Court Services Division
Ministry of the Attorney General

Kristopher H. Knutsen, Q. C.
Carrell & Partners
Thunder Bay

Susan Wortzman
Lerner & Associates, LLP
Toronto

# TABLE OF CONTENTS

# INTRODUCTION TO THE REPORT

## 1. BACKGROUND

The Task Force on the Discovery Process in Ontario was appointed by the Attorney General and the Chief Justice of the Superior Court of Justice in 2001 to undertake a comprehensive review of the province's civil discovery process, identify problems with the current process and recommend options for reform.

The impetus for this review originated with the Civil Justice Review of 1995, which questioned whether the discovery process had become too expensive and time-consuming in its current form. In particular, it noted the increase in time spent in relation to oral examinations, and the proliferation of motions relating to discovery. The Civil Justice Review proposed that consideration be given to methods for achieving a more efficient discovery process to reduce costs and delay in the resolution of civil proceedings, while preserving essential disclosure principles.

Since that time, several professional organizations have noted similar problems and have proposed reform options. To date, no comprehensive review of the discovery process in Ontario has been undertaken.

## 2. TERMS OF REFERENCE

The Discovery Task Force was mandated to:

- consider all aspects of the discovery process in Ontario, including documentary, written and oral discovery, and discovery-related motions;
- consider the effectiveness of the current discovery process in Ontario;
- develop options for a more efficient discovery process; and
- make specific recommendations as to which of the proposed options would best achieve the Task Force's objective.

In conducting its review, the Task Force was given the mandate to engage in consultation with representatives of the judiciary and bar across the province, collect quantitative and qualitative data, and consider the discovery processes in jurisdictions outside of Ontario.

## 3. COMPOSITION OF THE TASK FORCE

The Discovery Task Force is comprised of the following members and staff:

- Judicial representatives, appointed by the Chief Justice of the Superior Court of Justice:
  - → Justice Colin Campbell, Superior Court of Justice, Toronto Region (Chair)
  - → Justice Catherine Aitken, Superior Court of Justice, East Region

- Ministry of the Attorney General representatives, appointed by the Attorney General:
  - → Debra Paulseth, Assistant Deputy Attorney General, Court Services Division (Associate Chair)
  - → Ann Merritt, Director, Civil/Family Policy and Programs Branch, Court Services Division
- Bar representatives, jointly appointed by the Chief Justice of the Superior Court of Justice and the Attorney General:
  - → Kristopher H. Knutsen, Q. C., Carrell & Partners, Thunder Bay
  - → Susan Wortzman, Lerner & Associates, LLP, Toronto
- Project Director: Susan Charendoff, Lead Counsel, Civil/Family Policy and Programs Branch, Court Services Division
- Research Counsel: Mohan Sharma, Counsel, Civil/Family Policy and Programs Branch, Court Services Division
- Research assistants (Civil/Family Policy and Program Branch): Nayla Mitha, Counsel; Yvonne Parkhill, Articling Student; and Andrea Bell, Articling Student

## 4. ORGANIZATION OF THE REPORT

This Report consists of seven parts:

- Part I describes the methodology adopted by the Task Force in conducting the review.
- Part II outlines the history of the discovery process in Ontario and the current discovery rules.
- Part III compares the discovery processes in Canadian, American and other common law jurisdictions.
- Part IV sets out the characteristics of the cases surveyed in the case specific questionnaire.
- Part V reviews the findings of the Task Force with respect to Ontario's discovery process, based on quantitative and qualitative data obtained through a variety of sources.
- Part VI discusses potential reform options and the Task Force's recommendations.
- Part VII sets out the conclusions of the Task Force.

## GUIDING PRINCIPLES

The Task Force established the following set of guiding principles in order to provide a framework within which to assess reform options:

(i) Reforms should promote access to justice for both represented and unrepresented litigants by reducing unnecessary delay and cost associated with discovery.

(ii) Reforms should encourage parties to engage in discovery planning and to resolve discovery issues cooperatively, with timely recourse to the court where intervention is warranted (for example in complex or problem cases).

(iii) Reforms should apply fairly in all parts of the province and be feasible in both case managed and non-case managed proceedings. Province-wide predictability with respect to procedures is important.

(iv) Reforms should promote timely and cost-effective disclosure, production and examination for discovery.

(v) Reforms should not impose unnecessary procedural steps.

(vi) The discovery process should not be "micro-managed" through the rules.

(vii) Reforms should reduce and streamline motions activity.

(viii) Reforms can only be effective if they have the support of both the bench and bar.

(ix) Rule changes alone cannot improve the discovery process. Issues relating to civility, professionalism and competence must also be addressed through legal education and training.

# SUMMARY OF RECOMMENDATIONS

### Discovery Management

[1] Develop best practices for discovery planning, with a standard checklist of items to be addressed.

[2] Establish a new rule permitting case conferences to be convened in non-case managed locations, at the request of any party or on the court's initiative.

[3] Establish a new discovery rule permitting any party to seek a case conference for the purpose of resolving issues related to discovery planning and establishing a discovery plan.

[4] In rule 77.13(3), provide express authority for the court to require or create a discovery plan at a case conference.

[5] Establish a new discovery rule providing for individualized management of the discovery process in "appropriate" cases, based on the criteria listed in rule 77.09.1(5) (Assignment of Particular Judge).

[6] Expand the criteria in rule 77.09.1(5) to include "nature of parties and whether they are represented."

[7] Authorize the court to designate a proceeding for individualized discovery management on the parties' consent, on the motion of any party, or on the court's initiative in "appropriate" cases, based on the criteria listed in rule 77.09. 1(5).

[8] Incorporate case management mechanisms from rule 77 into the new discovery management rule, including case conferences (with express authority for the court to require or create a discovery plan at a case conference, assignment of a particular judge, and any case management powers needed to give effect to the rule).

### Scope of Discovery

[9] Narrow the scope of discovery. Replace the current "semblance of relevance" standard to a standard of "relevance" by modifying the phrase "relating to" any matter in issue in an action in rules 30.02(1), 30.03 and 31.06(1) with "relevant to" any matter in issue in an action.

### Documentary Disclosure and Production

[10] Amend rule 30.03(1) to require parties to exchange affidavits of documents within 45 days after the close of pleadings, subject to the parties' agreement otherwise or a court order.

[11] Amend rule 30 to require production of documents referred to in pleadings at the time pleadings are served, unless they have been produced previously.

[12] Add a new schedule to the affidavit of documents listing documents in the possession of non-parties that will be relied on by parties.

[13] Develop best practices for standard early documentary disclosure and production for specific case types.

[14] Replace Forms 30A and 30B with new standard forms for the schedules to the affidavits of documents, to include the following fields of information:

- Date
- Document type (e.g. letter, memo, contract, etc.)
- Author
- Recipient
- Title of document or other description
- Production number/page range
- Identification of attachments, if any
- Basis of privilege claimed

[15] Develop best practices for the manner of disclosure and productions.

**Production of Documents in the Possession of Non-Parties**

[16] Modify the test for production from non-parties in rule 30.10(1) by deleting the requirement to demonstrate that it would be "unfair to require the moving party to proceed to trial without having discovery of the document". Authorize the court to order production from non-parties where the document is relevant to a material issue in the action (*as the rule currently provides*) and where the court is satisfied that the document is not privileged and that its production would not be injurious to the public interest (*new requirement*).

**Discovery of Electronic Documents**

[17] Amend rules 30.01 and 31.01 to include in the definition of document "data created and stored in electronic form."

[18] Amend rule 4.01(4) of the Law Society's Rules of Professional Conduct to include the discovery of electronic documents in documentary disclosure, in appropriate cases.

[19] Develop best practices with respect to retention of electronic records and the scope, cost and manner of electronic documentary production.

[20] Following a period of monitoring the impact of best practices, review and revise the rules relating to documentary production.

[21] Participate in processes to establish national standards for electronic discovery.

**Oral Discovery**

[22] Amend rule 31 to provide that, subject to the parties' agreement otherwise or a court order, a party will have up to a maximum of one day to examine each party adverse in interest.

[23] Develop best practices with respect to deemed authenticity of documents.

[24] Civil Rules Committee to consider a review of the provisions relating to deemed authenticity of documents.

[25] Retain the right to cross-examine at oral examination for discovery.

[26] Do not introduce amendments to the rules at this time with respect to video recording of oral examinations for discovery.

[27] Develop best practices for the conduct of oral discovery.

**Written Discovery**

[28] Amend rule 31.02(1) to allow both oral and written discovery on parties' consent, or by court order, provided that there will not be duplication and that discovery will be conducted in a cost-effective manner.

[29] Include a sanction in rule 35.05 to address the situation where written discovery (whether consented to or ordered by the court in addition to oral discovery) proves to be duplicative or is not conducted in a cost-effective manner.

[30] Develop best practices for the use of written questions and answers.

[31] Amend rule 35.02 to extend the time for responding to written questions from 15 days to 45 days, subject to agreement of the parties otherwise or court order.

[32] Amend rule 35.04(1), to extend the time for serving a further list of written questions to 15 days, while retaining the current 15 days for responding to an examining party's further list of questions.

**Examination of Corporate Representatives and Partners**

[33] Where an action is brought by or against a corporation or a partnership in its firm name, amend rules 31.03(2), (3) and (4) to permit the examination of more than one corporate representative or partner with personal knowledge of relevant information, on the parties' consent, or by court order.

**Examination of Non-Parties**

[34] Modify the test for examining non-parties in rule 31.10(2) by deleting the requirement to demonstrate that it would be "unfair to require the moving party to proceed to trial without having the opportunity of examining the person".

[35] Develop best practices to encourage parties to reach agreements on obtaining information from a non-party, subject to the non-party's consent or a court order.

**Discovery of Expert Evidence**

[36] Modify rule 53.03 so that the 90/60/30 day time limits are calculated from the date of the pre-trial conference (or, in rule 77 cases, the settlement conference), subject to:

- a court order; or
- the parties' agreement otherwise, provided that it is possible to have a meaningful pre-trial or settlement conference.

[37] Develop best practices to encourage judicial management of the timing of delivery of expert reports under rule 53.03(4) to facilitate a meaningful pre-trial or settlement conference.

[38] Amend rule 53.03 to provide that an expert who has been retained to give opinion evidence may be examined for discovery on the parties' and the expert's consent or by direction of the court on notice to the expert,

- subject to a consideration of factors including cost, time, and the expert's availability;
- provided that the examination is restricted to the expert's qualifications, area of expertise and the findings and opinions set out in the expert's report; and
- provided that the party wishing to examine the expert is responsible for paying any reasonable fees, estimated in advance, associated with the expert's attendance at oral discovery and with the preparation of responses to written questions.

[39] Amend rule 48.04(2) to permit the examination of an expert on the consent of the parties and the expert without leave of the court, notwithstanding that an action has been set down for trial.

[40] Develop best practices for the use of experts and expert reports.

[41] Monitor the impact of recommendations and other initiatives on concerns regarding the proliferation of experts in civil litigation.

**Undertakings and Refusals**

[42] Monitor refusals motions based on relevance to determine whether the proposal to preclude objections on the basis of relevance ought to be reconsidered.

[43] Amend rule 31 to require parties to answer undertakings and refusals within 45 days of their being given, subject to the parties' agreement otherwise or a court order.

[44] Amend rule 31 to provide that any question taken under advisement is deemed to be a refusal if not answered within 45 days of being asked.

[45] Develop best practices for the appropriate use of undertakings and for the prompt listing and exchange of undertakings, refusals and requests for information from non-parties.

[46] Introduce an undertakings and refusals chart as a regulated form under a new discovery rule for use in motions relating to unanswered undertakings and refusals.

[47] Require parties to collaborate in the preparation of the chart and to file the chart, along with the pleadings, prior to the hearing of an undertaking or refusals motion.

**Discovery Disputes**

[48] Establish a province-wide simplified process for resolving discovery disputes, to include the following features:

- simplified discovery motions form (based on Form 77C);
- no requirement to file a formal motion record or supporting materials (except for the undertakings and refusals chart recommended above);
- motions to be heard in person, by teleconference and in writing, where appropriate and subject to the court's discretion; and
- access to case conferences at the request of any party or on the court's initiative.

[49] As a pre-requisite to bringing a motion or requesting a case conference, require parties to demonstrate that they have communicated in an attempt to resolve the discovery dispute.

[50] Include a presumptive order for costs on the higher scale where a party is successful, unless the court orders otherwise.

**Enforcement of Discovery Obligations**

[51] While the Rules of Civil Procedure provide an adequate range of sanctions to address discovery abuse, the imposition of meaningful and predictable consequences would help to deter unjustified breaches of discovery obligations.

**Principles of Efficiency and Professionalism**

[52] Incorporate into rule 1.04 language from rule 77.02 to provide that "the rules shall be construed so as to reduce unnecessary cost and delay in civil litigation, facilitate early and fair settlements and bring proceedings expeditiously to a just determination while allowing sufficient time for the conduct of the proceeding."

[53] Incorporate the wording of rule 4.01(4) and (7) of the Rules of Professional Conduct into a new discovery rule.

**Best Practices Manual**

[54] Develop a best practices manual to address the proper conduct of discovery, including discovery planning, documentary discovery, written and oral examination for discovery, undertakings and refusals, motions, discovery of expert evidence, unrepresented litigants and other related matters.

[55] Form a steering committee to oversee the development and implementation of the best practices manual, reporting to the Attorney General and the Chief Justice of the Superior Court and comprised of the following members:

- Judicial representative as Chair
- Discovery Task Force members
- 1 representative of each of the Law Society, Advocates' Society, Ontario Bar Association, County and District Law Presidents' Association, Ontario Trial Lawyers' Association and Metropolitan Toronto Lawyers' Association
- 2 judicial representatives (1 from Toronto and 1 from outside Toronto)
- 1 representative of the Court Services Division, Ministry of the Attorney General
- 1 representative of the Civil Rules Committee Secretariat

[56] Mandate the Law Society to coordinate the production and dissemination of the best practices manual and to develop complementary bar education and training programs.

**Other**

[57] Review rules 26.01 and 53.08 to address prejudice caused by untimely amendments of pleadings, disclosure of information or delivery of documents.

# PART I: METHODOLOGY OF THE REVIEW

The Task Force employed a variety of techniques to gather both qualitative and quantitative data, as described below. To assist in the collection and analysis of quantitative data, Robert Hann and Carl Baar of Robert Hann & Associates Limited were retained.

In addition, a comprehensive review was undertaken of approaches to discovery in other jurisdictions. Previous studies on the discovery process in Ontario were also considered.

## 1. FOCUS GROUPS

Shortly after the Task Force was appointed, it convened a series of three focus groups with case management masters, leading members of the bar, and representatives of a number of bar associations, to assist in the identification of priority areas for review and to obtain input on the consultation process. Focus groups were also held prior to the release of the Task Force's report to obtain feedback on proposed reform directions. A list of focus groups and participants is attached at **Appendix A**.

## 2. CONSULTATION PAPER

A consultation paper containing a survey was developed with input from members of the bench and bar to seek feedback about the objectives of discovery, key problems with the discovery process, factors contributing to increased cost of discovery or delays in the discovery process, and possible approaches to reform. The consultation paper is reproduced at **Appendix B**.

The consultation paper was posted on the Ontario Courts' website for province-wide access. Respondents were encouraged to submit their completed surveys either electronically or by other means. The consultation paper was also distributed widely to judges, major bar associations, key client organizations and academics throughout the province. See **Appendix C** for a list of groups that were invited to review and respond to the consultation paper.

A total of 372 responses were submitted to the Task Force. Responses came almost exclusively from lawyers. Of the 346 respondents who indicated their role in the discovery process, 339 were lawyers and 7 were members of the judiciary; no respondents identified themselves as litigants. Of the 240 lawyers who indicated the location of their practice, 140 (58%) practised exclusively in Toronto, 74 (31%) practised exclusively outside Toronto and the Greater Toronto Area, and the remaining 26 (11%) practised in Toronto and the GTA, along with other areas of the province.[1]

The results of the consultation paper were used to gauge whether general perceptions about the discovery process were consistent with findings in the case specific questionnaires (discussed below).

[1] Through the special outreach efforts of the Advocates' Society, 154 consultation surveys were completed and returned by its members.

## 3. SUBMISSIONS

Requests for written submissions were made through the website and by letter to the groups outlined above. Thirty-three submissions were received from organizations, lawyers and other individuals. **Appendix D** contains a complete list of submissions.

## 4. CONSULTATIONS WITH BENCH AND BAR

The Task Force held consultation meetings in each court region and met with representatives of the following organizations to obtain input on the issues raised in the consultation paper:

- County of Carleton Law Association
- Algoma Law Association
- Sudbury District Law Association
- Hamilton Law Association
- York Region Law Association
- Essex Law Association
- Waterloo Law Association
- Metropolitan Toronto Lawyers Association
- Toronto Bench and Bar
- County and District Law Association Presidents
- Ontario Bar Association (Civil Litigation Section, Insurance Law Section, Construction Section and Young Lawyers Division)
- Crown Law Office – Civil, Ministry of the Attorney General
- Ontario Trial Lawyers Association
- Medico-Legal Society
- International Arbitrators
- Law firms (Blake, Cassels & Graydon LLP; Fasken Martineau DuMoulin LLP; Lenczner Slaght Royce Smith Griffin; McCarthy Tétrault LLP; Osler, Hoskin & Harcourt LLP; Stikeman Elliott)
- LawPro (Lawyers' Professional Indemnity Company)

The Task Force co-chairs also met on several occasions with members of the judiciary.

## 5. MOTIONS ACTIVITY STUDY

A three-month study of motions activity was conducted in six courts, each in a different region: Toronto, Ottawa, Thunder Bay, London, Peterborough and Brantford. These locations were chosen to permit a comparison of small, medium and large courts, and of case managed and non-case managed courts. The study took place from September until December 2002 (except in Ottawa, where it was conducted from October 2002 until January 2003.

The purpose of the motions activity study was to assess the types and volume of discovery-related motions in comparison to other motions. Data was captured through a specially designed two-part "Motions Data Collection Form," reproduced at **Appendix E**.

Part A of the form, which was to be completed by moving parties, contained questions to determine whether the motion was related to documentary, oral or written discovery, or cross-examination on an affidavit. Respondents were also asked to indicate the type of case, the type of discovery issue giving rise to the motion, the method of hearing, and the type of order sought. Part B, which was to be completed by the presiding judicial official, asked respondents to indicate the disposition of the motion, the cost award, if any, and the duration of the motion.

The forms were distributed to all moving parties by the motions registrar of participating courts, either in advance of or at the commencement of Motions Court, and then collected by the registrar and submitted to Task Force staff. A total of 3,660 completed forms were received and analyzed by the Task Force's consultants.

## 6. CASE SPECIFIC QUESTIONNAIRES

### Content of Questionnaires

The Task Force developed a detailed questionnaire to elicit information about respondents' experience with the discovery process in specific cases in which they were involved. The questionnaire was designed in consultation with members of the bench and bar, and with reference to similar surveys conducted in other jurisdictions.

The questionnaire, reproduced at **Appendix F**, canvassed a wide range of matters including case type, value of claim, number of parties, case activities and outcomes, discovery activities, motions activities, perceived benefits and problems with each method of discovery, impact of discovery on cost and length of proceedings, impact of case management and/or mandatory mediation, and options for reforming the discovery process.

### Sampling Cases

Questionnaires were distributed to lawyers and unrepresented parties in a random sample of civil cases in Toronto, Ottawa, Thunder Bay and London. These locations were chosen to enable a comparison between small, medium and large courts, as well as case managed and non-case managed courts.

In setting parameters for the sample of cases to be included in this study, several criteria were established. First, it was important that there be enough cases from each court location to ensure a representative sample. Because of the varying sizes and caseloads of each court, the sample size had to be different for each court. Second, in order to explore issues related to case type, sufficient numbers of each type of case had to be captured in the study. As a result, a "stratified random sampling method" was employed to select cases. Third, a sufficient number of cases in the sample must have either commenced or completed discovery. Finally, the cases were to be relatively recent, so that respondents could answer the detailed questionnaires on the basis of their recollections or records.

Based on these considerations, and using data available from court records in each location, questionnaires were mailed to a representative of one plaintiff and one defendant (where possible) in each of:

- 1,007 cases defended in Toronto in 1999;
- 790 cases defended in Ottawa in 1999;
- 471 cases defended in Thunder Bay in 1999 and 2000 (in order to obtain a sufficient number of cases); and
- 486 cases commenced in London in 1999 (London's data management system did not permit identification of defended cases).

## Response Rates

A total of 1,240 completed questionnaires were received and analyzed by the Task Force's consultants, broken down as follows: Toronto – 503; Ottawa – 293; Thunder Bay – 232; and London – 212.

These response rates were considered to be satisfactory and representative of the original sample selected. At least one questionnaire per case was completed for:

- 44% of Toronto cases sampled;
- 35% of Ottawa cases sampled;
- 45% of Thunder Bay cases sampled; and
- 38% of London cases sampled.

Response rates were calculated after removing questionnaires identified as simplified procedures (rule 76) cases (which were not included in this study)[2] and a number of blank questionnaires that were returned.[3]

## Characteristics of Respondents

Virtually all responses were from counsel, as opposed to unrepresented litigants, with only a very few exceptions. The response rate from defendants in each location was generally higher than from plaintiffs.

Most of the respondents had considerable experience practising litigation: 61% had between six and 20 years experience and an additional 28% had more than 20 years experience. When asked what types of clients they most often represented, close to half of respondents indicated that they represented both plaintiffs and defendants.

[2] Although not identified by the court records as simplified procedure cases when originally included in the sample to be studied, a number of cases were identified as such by respondents on completed questionnaires. These cases were excluded from the returns.

[3] A number of blank questionnaires were returned (79 from Toronto, 75 from Ottawa, 36 from Thunder Bay, and 43 from London), accompanied by such explanations as "lawyer no longer with firm", "on maternity leave", "no recollection of file or can't locate file", "file closed", "no discovery". Some blank questionnaires were returned without an explanation.

Respondents represented many different types of practice. Approximately 42% were in a firm of five to 30 lawyers; 25% were in a firm of over 31 lawyers; 17% were in a firm of less than five lawyers; 11% were sole practitioners; 3% were in-house counsel; and 2% represented government.

Respondents were asked to identify the types of cases in which they were most often involved. In each of the four court locations, the case types most frequently identified (33% or more) were motor vehicle, contract commercial, negligence, and personal injury. For Ottawa and Toronto, 33% or more of the respondents were also most likely to be involved in wrongful dismissal cases.

As noted earlier, to ensure that the Task Force obtained data on a sufficient number of cases of different types, either higher percentages of certain case types were sampled, or the period of time from which cases were sampled was longer. These percentages and periods also varied from court to court. This meant that for some types of analysis, the sample of cases was not "representative" of the actual full population of cases and the results might therefore be misleading. To address this situation, cases were "weighted" to correct for the different sampling rules used. The weighted numbers of cases differed from the unweighted numbers. Specifically, weighting by case type and period sampled yielded the following total weighted numbers of cases (unweighted numbers shown in parentheses): Toronto, 2,862 (503); Ottawa, 381 (293); Thunder Bay, 230 (232); and London, 205 (212).

## 7. CROSS-JURISDICTIONAL RESEARCH AND LITERATURE REVIEW

The Task Force undertook comprehensive research on the approach to discovery in other jurisdictions to gain insights into the types of problems experienced elsewhere, approaches to reform that have been developed to address those problems, and the impact of such reforms.

Academic articles and papers on discovery were reviewed to provide a basis for analyzing the theoretical objectives of discovery, and how these objectives fit within an adversarial civil justice system. Articles comparing how discovery procedures vary among common law and civil law jurisdictions were also considered.

The Task Force conducted a comparative review of the rules of civil procedure for all Canadian jurisdictions, England, Ireland, Australia, New Zealand, and selected American jurisdictions, including contact with practitioners and judges. Where rules had undergone recent reforms, studies or commentary on the effectiveness of the reforms were examined.

Of particular interest was the introduction of specialized discovery rules in certain jurisdictions, such as discovery rules in Alberta for "very long trial actions,"[4] and the fast track litigation pilot project in British Columbia.[5] Many American states have also implemented specific reforms to curb discovery abuse,[6] and numerous scholarly articles have been written on these reforms.

[4] Alberta, Rules of Court, A.Reg. 390/68, Part 15.1, rules 218.2 – 218.91.
[5] British Columbia, Supreme Court Rules, B.C. Reg. 221/90, rule 66.
[6] See, *e.g.*, the discussion of Texas, Arizona and Arkansas in Part III of this Report.

In some jurisdictions, the rules of civil procedure have been completely overhauled. The amendments to the United Kingdom Civil Procedure Rules following Lord Woolf's Final Report on civil justice reform,[7] the study of the federal civil justice system in Australia by its Law Reform Commission,[8] and the amendments to the Federal Rules of Civil Procedure in the United States[9] are examples of some large scale procedural reforms that have had an impact on the discovery process.

Please see **Appendix G** for a bibliography and **Appendix H** for a Canadian cross-jurisdictional comparison chart.

## 8. PREVIOUS STUDIES

The Task Force also benefited from a review of recent civil justice studies that have commented on the discovery process and made reform recommendations.

### Civil Justice Review

The Civil Justice Review was established by the Government of Ontario and the Ontario Court of Justice (General Division) to conduct a broad review of the civil justice system. In its first report,[10] the Civil Justice Review noted growing concerns with oral discovery, and asked whether it had become "too cost-prohibitive and delay-engendering to continue in the present fashion without the imposition of some form of curb."[11] Anecdotes of increasing amounts of time spent in connection with oral examinations (e.g. preparing witnesses, travelling to and from examinations, attendance at examinations and re-examinations, responding to undertakings, and reporting to clients) and a significant number of discovery-related motions were cited.[12]

The Civil Justice Review expressed concern that broadening the scope of discovery in 1985, which had been designed to further the intent of eliminating "trial by ambush," may have resulted in "trial by information landslide,"[13] and unnecessarily sweeping requests for information having little to do with the matters raised by the claims or defences of the parties. This development, tied with "the explosion of information sources and available data" from increased technology, was seen as making it increasingly difficult to cope economically with the scope of discovery.[14]

---

[7] Lord Woolf, *Access to Justice Final Report (*London: Lord Chancellor's Department, July 1996).
[8] Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System,* Report 89 (December, 1999) http://www.austlii.edu.au/au/other/alrc/publications/reports/89
[9] United States, Federal Rules of Civil Procedure (2001), rules 26 – 37.
[10] *First Report of the Civil Justice Review* (Toronto: Ontario Civil Justice Review, March 1995) [hereinafter "*First Report*"].
[11] *Ibid.* at 233
[12] *Ibid*. at 234. At the time, Toronto Masters estimated that 25% of all motions before them involved discovery issues. *Ibid*. at 235.
[13] *Ibid*. at 236.
[14] *Ibid*. at 237.

The Civil Justice Review recommended (and later re-iterated this recommendation in its 1996 *Supplemental and Final Report*[15]) that a working group be established to recommend ways to improve the economic effectiveness of the discovery rules, while preserving essential disclosure principles. Areas proposed for consideration included the possible re-entrenchment of the scope of discovery to pre-1985 limits, removal of the right to cross-examine at discovery, and time parameters for the conduct of oral examinations.[16]

In addition, the Civil Justice Review supported the implementation of the simplified procedure rules for claims not exceeding $40,000, under which oral examinations for discovery would be eliminated.[17]

## Canadian Bar Association Task Force

In 1996, a Canadian Bar Association (CBA) Task Force completed its *Report of the Task Force on Systems of Civil Justice*. Its mandate, which was national in scope, was "to inquire into the state of the civil justice system and develop strategies and mechanisms to assist in the continued modernization of the system."[18]

The CBA Task Force made several recommendations with respect to disclosure and oral discovery. It was the opinion of the Task Force that mandatory early disclosure through the exchange of "will-say" statements, as soon as possible after the close of pleadings, would curtail the need for much oral discovery.[19] It recommended that selected jurisdictions implement will-say pilot project procedures to test whether will-say documents are useful and fair, and to assess the impact of such a requirement on cost and delay.[20]

The CBA Task Force also recommended that expert reports be disclosed early, and that the exchange of expert critique reports occur in a timely fashion before a trial or hearing.[21] In response to the increased use of experts at trial, the Task Force recommended that judges play a more active role in assisting parties to limit the costs and delay associated with the use of experts.[22]

Finally, oral discovery was seen as an expensive and sometimes wasteful exercise, resulting in much dissatisfaction with the litigation process.[23] Through its consultations, the CBA Task Force noted that reforms to enhance the efficient and timely use of discovery were required.[24] Accordingly, it recommended that jurisdictions limit the scope, number, and duration of oral

---

[15] *Supplemental and Final Report of the Civil Justice Review* (Toronto: Ontario Civil Justice Review, November 1996) at 133.
[16] *Ibid*. at 238.
[17] *Ibid*. at 263.
[18] *Report of the Task Force on Systems of Civil Justice* (Ottawa: Canadian Bar Association National Task Force on Systems of Civil Justice, August, 1996).
[19] *Ibid*. at 42.
[20] *Ibid*. at 43.
[21] *Ibid*. at 44.
[22] *Ibid*.
[23] *Ibid*. at 43.
[24] *Ibid*.

examinations for discovery, and that means to assist parties in scheduling discoveries and resolving discovery disputes be devised.[25]

## Advocates' Society Long Civil Trials Task Force

The Long Civil Trials Task Force of the Advocates' Society was formed to address the perceived concern that long civil trials continued to be backlogged, despite improvements in the timely resolution of other civil disputes. Among the issues examined was whether amendments to rules relating to documentary and oral discovery might assist in reducing trial time.[26] The Task Force surveyed Advocates' Society members on specific issues relating to lengthy civil trials (longer than two weeks), and published its report in 1998.[27]

The Task Force reported that for some respondents, the most important factor contributing to lengthy trials was the lack of pre-trial management of cases.[28] One respondent noted that "the effective lack of control over the length and scope of discovery is unduly delaying the start of trials and unduly lengthening them once they begin."[29] While no single discovery factor was identified by a majority of respondents as a "very serious problem," most found the listed discovery practices to be a problem in some way.[30] The problem most frequently identified (by about two-thirds of respondents) as "very" or "moderately" serious was "evasive responses, withholding information, or non-compliance."[31] Two-thirds of respondents indicated that limits on discovery by restricting the relevancy standard would shorten trial length.[32] There was also a clear trend in favour of more judicial involvement in the discovery process as a means to reduce trial length, and for the exchange of summaries of evidence to be given by witnesses.[33]

## Advocates' Society Rules Committee Proposal

In 1999, the Advocates' Society's Rules Committee submitted a proposal to the Civil Rules Committee recommending the adoption of a rule that would eliminate a party's right to refuse to answer a question at oral examination on the basis of relevance. The Advocates' Society argued that excessive objections to questions at oral examinations had led to unnecessary interruption, delay, gamesmanship and cost, resulting further in unnecessary motions to compel answers to questions. Under the proposed rule, which was similar to that adopted in the American federal jurisdiction, the person being examined would be permitted to refuse to answer a question only on specified grounds, such as protection of a privilege and enforcement of a court-ordered limit on the scope of discovery. Even where a party felt the questions were irrelevant, the party would

[25] *Ibid*.
[26] *Report of the Long Civil Trials Task Force of the Advocates' Society* (Toronto: The Advocates' Society, August, 1998)
[27] See, R. Dinovitzer, *Attitudes Towards Long Civil Trials: A Survey of the Members of the Advocates' Society* (Toronto: The Advocates' Society, August 1998).
[28] *Ibid*. at 46-47.
[29] *Ibid*. at 47.
[30] *Ibid*.
[31] *Ibid*.
[32] *Ibid*. at 60.
[33] *Ibid*. at 70, 72.

be obliged to answer. The relevance of the question and the admissibility of the answer would be determined by the trial judge.

The proposal was rejected by the Civil Rules Committee on the grounds that removing the right to refuse would lead to unduly long examinations, and would permit "fishing expeditions." Any savings from reduced motions activity would be lost by the additional time and money spent on lengthier examinations. It was further noted that the assumption on which the proposal was based – namely that discovery problems were caused only by the party being examined – was not supported by any empirical evidence.

# PART II: THE DISCOVERY PROCESS IN ONTARIO

## 1. HISTORY OF THE DISCOVERY PROCESS PRIOR TO 1985

This section discusses the evolution of Ontario's discovery process prior to 1985, when significant reforms were introduced. Ontario's early discovery process was based on the English system, which is briefly described below.

### (i) England

Discovery mechanisms may be traced back to the procedures of ecclesiastical courts,[34] in which litigants delivered pleadings and obtained answers from adversaries by means of examination under oath.[35] The questions asked during the examination were referred to as "positions," and the responses were recorded in writing as the "answers."[36]

Witnesses were examined prior to trial by means of questions (the "articles"). Their testimony, recorded by an examiner as a written "deposition," was to be kept secret until all witnesses had been examined. The adversary, who was given advance notice of witness' names and provided with a copy of the articles, could prepare written interrogatories for the purpose of cross-examination. This was the only use of interrogatories permitted in the ecclesiastical courts.[37]

The pleadings, positions and articles were eventually included in one document. This change, along with a number of other procedural reforms, is thought to be the foundation of "modern" discovery procedures.[38]

In the fifteenth century, a limited form of pre-trial discovery was achieved in England's Court of Chancery through the delivery of the plaintiff's bill of complaint, containing allegations of fact (the "stating part") together with a statement of evidence supporting the claim (the "charging part.") The defendant would then admit, deny or explain the plaintiff's allegations in the "answer."[39] By the eighteenth century, written interrogatories (the "interrogating part") were included with the plaintiff's bill of complaint and limited documentary discovery was permitted.[40]

Until the middle of the nineteenth century, common law courts in England could, in certain cases, order inspection of documents, but could not exercise a general power to compel discovery.[41]

---

[34] Peter Fraser, *Discovery of Fact in Ontario and British Columbia* (LL.M. Thesis, University of Toronto, 1970) at 7; Paul Matthews and Hodge M. Malek, *Discovery* (London: Sweet & Maxwell, 1992) at 6.
[35] Fraser, *ibid*. at 4 to 7.
[36] *Ibid*. at 6.
[37] *Ibid*. at 4 to 8.
[38] *Ibid*. at 8 to 9.
[39] Gordon D. Cudmore, *Choate on Discovery*, 2d ed. (Toronto: Carswell, 1993) at 1-2; Fraser, *supra* note 34 at 15-16; Matthews, *supra* note 34 at 7; Robert W. White, QC, *The Art of Discovery* (Aurora: Canada Law Book Inc., 1990) at 10.
[40] Cudmore, *ibid*.; Fraser, *ibid.* at 15 to 16; Matthews, *ibid*.
[41] The Honourable George Alexander Gale and Marie E. Ferguson, eds., *Holmestead and Gale on The Judicature Act of Ontario and Rules of Practice (Annotated)*, vol. 2 (Carswell, 1983) at 1692 to 1693; Matthews, *ibid*.

# PART II: THE DISCOVERY PROCESS IN ONTARIO

## 1. HISTORY OF THE DISCOVERY PROCESS PRIOR TO 1985

This section discusses the evolution of Ontario's discovery process prior to 1985, when significant reforms were introduced. Ontario's early discovery process was based on the English system, which is briefly described below.

### (i) England

Discovery mechanisms may be traced back to the procedures of ecclesiastical courts,[34] in which litigants delivered pleadings and obtained answers from adversaries by means of examination under oath.[35] The questions asked during the examination were referred to as "positions," and the responses were recorded in writing as the "answers."[36]

Witnesses were examined prior to trial by means of questions (the "articles"). Their testimony, recorded by an examiner as a written "deposition," was to be kept secret until all witnesses had been examined. The adversary, who was given advance notice of witness' names and provided with a copy of the articles, could prepare written interrogatories for the purpose of cross-examination. This was the only use of interrogatories permitted in the ecclesiastical courts.[37]

The pleadings, positions and articles were eventually included in one document. This change, along with a number of other procedural reforms, is thought to be the foundation of "modern" discovery procedures.[38]

In the fifteenth century, a limited form of pre-trial discovery was achieved in England's Court of Chancery through the delivery of the plaintiff's bill of complaint, containing allegations of fact (the "stating part") together with a statement of evidence supporting the claim (the "charging part.") The defendant would then admit, deny or explain the plaintiff's allegations in the "answer."[39] By the eighteenth century, written interrogatories (the "interrogating part") were included with the plaintiff's bill of complaint and limited documentary discovery was permitted.[40]

Until the middle of the nineteenth century, common law courts in England could, in certain cases, order inspection of documents, but could not exercise a general power to compel discovery.[41]

---

[34] Peter Fraser, *Discovery of Fact in Ontario and British Columbia* (LL.M. Thesis, University of Toronto, 1970) at 7; Paul Matthews and Hodge M. Malek, *Discovery* (London: Sweet & Maxwell, 1992) at 6.
[35] Fraser, *ibid*. at 4 to 7.
[36] *Ibid*. at 6.
[37] *Ibid*. at 4 to 8.
[38] *Ibid*. at 8 to 9.
[39] Gordon D. Cudmore, *Choate on Discovery*, 2d ed. (Toronto: Carswell, 1993) at 1-2; Fraser, *supra* note 34 at 15-16; Matthews, *supra* note 34 at 7; Robert W. White, QC, *The Art of Discovery* (Aurora: Canada Law Book Inc., 1990) at 10.
[40] Cudmore, *ibid*.; Fraser, *ibid.* at 15 to 16; Matthews, *ibid*.
[41] The Honourable George Alexander Gale and Marie E. Ferguson, eds., *Holmestead and Gale on The Judicature Act of Ontario and Rules of Practice (Annotated)*, vol. 2 (Carswell, 1983) at 1692 to 1693; Matthews, *ibid*.

Resistance to pre-trial discovery was based on the theory that parties might perjure themselves if they learned of the evidence they would face at trial.[42] In order to obtain discovery, common law litigants were required to bring a bill of discovery in the Court of Chancery.[43]

Legislation introduced in the 1850s recognized a limited right to documentary discovery and written interrogatories. *Lord Brougham's Act* (1851) authorized common law courts to order inspection of "all documents in the custody or under the control of the opposite party."[44] A few years later, the *Common Law Procedure Act* (1854) permitted common law litigants to deliver written interrogatories "upon any matter as to which discovery might be sought."[45] However, litigants could obtain discovery only of facts in support of their own case and not of facts on which the opposing parties would rely.[46]

### (ii) Ontario

Until the *Administration of Justice Act* was passed in 1873, provision for discovery in Ontario was similar to that in England.[47] In 1837, discovery was available in Ontario's Court of Chancery only by way of bill of discovery.[48] By 1850, however, oral discovery of a party "adverse in point of interest" was permitted in the Court of Chancery, and by 1856, provisions of England's *Common Law Procedure Act* (1854) allowing for written interrogatories in the common law courts had been extended to Ontario.[49] Discovery was obtained in Ontario's Court of Chancery through oral examination, and at common law, through written interrogatories.[50] Common law litigants were also permitted to seek additional discovery by bringing a bill in the Court of Chancery.[51]

The *Administration of Justice Act* of 1873 extended the availability of oral discovery to the common law courts, and amendments in 1877 permitted litigants to examine "…any party adverse in point of interest…touching the matters in question in the action."[52] Unlike in the Court of Chancery, common law litigants were required to seek an order to obtain oral discovery, but such orders were "issued as of course."[53]

Ontario's *Judicature Act* was passed in 1881, and by 1888 a set of consolidated rules combining equity and common law procedures was introduced.[54] These included a provision expressly

---

[42] Cudmore, *supra* note 39 at 1-1 to 1-2.
[43] Cudmore, *ibid*. at 1-2; Fraser, *supra* note 34 at 19.
[44] Gale, *supra* note 41.
[45] Cudmore, *supra* note 39 at 1-2 to 1-3; Fraser, *supra* note 34 at 21; Gale, *ibid*.; White, *supra* note 39 at 10 to 11.
[46] Cudmore, *ibid*. at 1-3.
[47] White, *supra* note 39 at 11.
[48] Cudmore, *supra* note 39 at 1-4; Gale, *supra* note 41 at 1693 to 1694.
[49] Cudmore, *ibid*.; Fraser, *supra* note 34 at 37; Gale, *ibid*. at 1694; *Menzies* v. *McLeod* (1915), 34 O.L.R. 572 at 573.
[50] Cudmore, *ibid*.; Fraser, *ibid.* at 37 to 38; Gale, *ibid*.
[51] Cudmore, *ibid*.; Gale, *ibid*.
[52] Cudmore, *ibid*. at 1-4 to 1-5; Fraser, *supra* note 34 at 38 to 39; Gale, *ibid*.; *Menzies*, *supra* note 49 at 573; White, *supra* note 39 at 11.
[53] Cudmore, *ibid*.; *Menzies*, *ibid*. at 573.
[54] Gale, *supra* note 41 at 1694; Fraser, *supra* note 34 at 41; *Menzies*, *ibid*. at 573.

permitting a party to conduct an oral examination of an adverse party without a court order. A party could be examined on any matter "touching the matters in question in the action."[55]

Ontario's Rules of Practice and Procedure, which were introduced later and remained in effect until 1985, provided for the following discovery procedures:

- Examination of an adverse party, and where the adverse party was a corporation, by examination of its officers or servants (rules 326-327);
- Production for inspection of documents in the possession of an adverse party (rules 347-352);
- Medical examination of an injured person in a personal injury action (*Judicature Act*, s. 77); and
- Inspection of real or personal property by a party and his or her witnesses (rule 372).[56]

## 2. 1985 RULES OF CIVIL PROCEDURE

Prior to the introduction of the Rules of Civil Procedure in 1985, Ontario's rules had not undergone comprehensive revision for approximately 70 years.[57] A key objective of the reforms was to ensure full, early disclosure of facts and evidence in order to identify the contentious issues in a lawsuit and to promote settlement.[58] The new rules were designed to broaden the scope of discovery and improve its overall effectiveness.[59] In the following sections, the key changes to Ontario's discovery rules in 1985 are discussed.

### Automatic and Continuing Discovery Obligations

The duty to disclose documents became automatic. Prior to 1985, a party had to first serve notice requiring the other party to disclose by affidavit, and produce documents "relating to any matters in question in the action."[60] After the 1985 reforms, an obligation was imposed on parties to serve an affidavit of documents, and a party's right to examination for discovery would not crystallize until an affidavit was delivered, unless the parties agreed otherwise.[61] A new ongoing

---

[55] Fraser, *ibid*. at 41.

[56] Gale, *supra* note 41 at 1692.

[57] A.F. Rodger, Q.C., Senior Master, S.C.O., "Foreword" in Garry D. Watson and Michael McGowan, *Ontario Supreme and District Court Practice 1985* (Toronto: The Carswell Company Limited, 1984) at v.

[58] *Ibid*. at vi.

[59] The Honourable Mr. Justice J.W. Morden, The Supreme Court of Ontario, "An Overview of the Rules of Civil Procedure" in *An Introduction to the New Rules of Civil Procedure for Solicitors* (The Canadian Bar Association - Ontario, Continuing Legal Education, January 14, 1985) at 18.

[60] Supreme Court of Ontario Rules of Practice, R.R. O. 1980, Reg. 540, as amended to March 1, 1984, rule 347 [hereinafter Ontario's Rules of Practice].

[61] Lyndon A.J. Barnes, "Pleadings, Discoveries, etc. from the Corporate Perspective" in *An Introduction to the New Rules of Civil Procedure for Solicitors* (The Canadian Bar Association - Ontario, Continuing Legal Education, January 14, 1985) at 6; W.A. Derry Millar, "Discovery of Documents, Examination for Discovery and Examinations" in *New Rules of Civil Procedure* (The Law Society of Upper Canada, The Canadian Bar Association-Ontario and The Advocates' Society, Continuing Legal Education Program, November 9 and 10, 1984) at 5-2 and 5-4; Morden, *ibid*. at 19; Garry D. Watson and Michael McGowan, *Ontario Supreme and District Court Practice 1985* (Toronto: The Carswell Company Limited, 1984) at 325.

duty of disclosure required parties to correct and supplement information provided in affidavits of documents or given during examinations for discovery.[62]

### Expanded Scope of Documentary Discovery

"Document" was defined to include a "videotape" and "information recorded or stored by means of any device," thereby extending the reach of documentary discovery to information stored electronically.[63] Where the court so ordered, documentary discovery could also be obtained from a party's subsidiary or affiliated corporations, or from corporations otherwise controlled by a party.[64] Insurance policies were expressly prescribed as discoverable documents. [65]

### Discovery by Written Questions and Answers

Whereas the former rules provided only for oral discovery, examination for discovery by written questions and answers was re-introduced as an alternative, and the timeline and procedure for submitting answers to questions were prescribed.[66]

### Scope of Permissible Questions at Oral and Written Examinations for Discovery

The permissible scope of oral and written questions was extended to permit discovery of evidence and cross-examination of deponents (except as to credibility).[67] Questions seeking the names and addresses of potential witnesses and experts, and information about experts' findings, opinions and conclusions were expressly permitted.[68] The criteria for production of documents from, and examination of, non-parties were also prescribed.[69]

Special provision was made for discovery of medical evidence within the Rules of Civil Procedure, rather than under separate legislation (i.e. *Judicature Act*). The availability of a medical examination as a discovery tool was expanded and rules providing for the exchange of medical information prior to an examination were introduced.[70]

### Sanctions

New sanctions were introduced to restrict the use at trial of information that was not disclosed and where privilege was claimed.[71]

---

[62] Barnes, *ibid*. at 6 and 8; Millar, *ibid*. at 5-3 and 5-6; Morden, *ibid*. at 18 and 20; Watson, *ibid*. at 325 to 326, 340.
[63] Millar, *ibid*. at 5-1; Morden, *ibid*. at 18.
[64] Barnes, *supra* note 61 at 6 to 7, 8; Millar, *ibid*. at 5-2; Morden, *ibid*. at 18; Watson, *supra* note 61 at 325 and 340.
[65] Barnes, *ibid*. at 6 to 7; Millar, *ibid*. at 5-1 and 5-5; Morden, *ibid*. at 18 and 20; Rodger, *supra* note 57 at vi; Watson, *ibid*. at 325 and 340.
[66] Barnes, *ibid*. at 8; Millar, *ibid*. at 5-4; Morden, *ibid*. at 20; Watson, *ibid*. at 340 and 380.
[67] Barnes, *ibid*. at 8; Millar, *ibid*. at 5-5; Morden, *ibid*. at 20; Rodger, *ibid*. at vi; Watson, *ibid*. at 340.
[68] Barnes, *ibid*. at 8; Millar, *ibid*. at 5-5; Morden, *ibid*. at 20; Rodger, *ibid*. at vi.; Watson, *ibid*. at 340.
[69] Barnes, *ibid*. at 7, 8 to 9; Millar, *ibid*. at 5-4 and 5-6; Morden, *ibid*. at 18 to 19, 20; Watson, *ibid*. at 326 and 340.
[70] Barnes, *ibid*. at 10; Millar, *ibid*. at 5-7 to 5-8; Morden, *ibid*. at 21; Watson, *ibid*. at 363.
[71] Barnes, *ibid*. at 7 and 9; Millar, *ibid*. at 5-3 to 5-4; Morden, *ibid*. at 19 to 20; Watson, *ibid*. at 326 and 341.

## 3. OVERVIEW OF CURRENT DISCOVERY RULES

Rules 30 to 35 are the primary discovery-related rules. These will be discussed in greater detail in Part VI of the Report, which explores options for reform. However, to provide some context for that discussion and for the cross-jurisdictional comparison of the discovery process presented in Part III, a summary of these rules follows.

### Documentary Discovery

Rule 30 prescribes the documentary discovery process. Each party to an action must serve a sworn affidavit of documents within ten days after all pleadings have been exchanged (or the time for their delivery has expired). The affidavit must list all documents "relating to any matter in issue in the action." The documents must be listed in three separate schedules, as follows:

(A) Documents in a party's possession, power or control that the party does not object to producing;

(B) Documents that are privileged and will not be produced, with the grounds for the claim of privilege identified; and

(C) Documents no longer in a party's possession, power or control, and a statement indicating when and how the party lost possession, power or control.

Within the affidavit, the lawyer for a party must certify that he or she has explained to the swearing party the necessity of making full disclosure and the types of documents that are likely to be relevant to the matters in issue.[72] Rule 30 prescribes the process whereby a party may request to inspect and copy documents listed in another party's affidavit of documents.[73] In practice, most lawyers simply request that copies of all listed producible documents be provided. Where a party has evidence that another party's affidavit of documents is incomplete, it may bring a motion to obtain an order for the production of a further and better affidavit of documents, or to cross-examine the person who swore the affidavit.[74]

There is an ongoing obligation to disclose any newly discovered documents that are relevant, by way of a supplementary affidavit of documents.[75] A party who fails to disclose a relevant document that is favourable to its case may not rely on it at trial, unless leave of the trial judge is obtained. Where a party who fails to disclose a relevant document that is not favourable to its case, the court has discretion to make such order as is just.[76]

Finally, the rule permits a party to bring a motion for production of documents from a non-party. The moving party must show that the document is relevant to a matter in issue, and that it would be unfair to proceed to trial without having access to that document.[77]

---

[72] Ontario, Rules of Civil Procedure [hereinafter "Ont. Rules"], rule 30.03.
[73] Ont. Rules, rule 30.04.
[74] Ont. Rules, rule 30.06.
[75] Ont. Rules, rule 30.07.
[76] Ont. Rules, rule 30.08.
[77] Ont. Rules, rule 30.10.

## Examination for Discovery

Rule 31 prescribes who may be examined for discovery, the scope of permissible questioning, and when an examination may be conducted orally or by written questions and answers. It applies to civil actions where the monetary claim is in excess of $50,000.[78]

A party may examine a party adverse in interest by way of oral examination, or written questions and answers, but not both, unless leave of the court is obtained. Where a person is to be examined by more than one party, the examination must be conducted orally, unless all parties who are entitled to examine the person agree otherwise.[79]

In the case of a corporate party, the examining party may examine any one officer, director or employee on behalf of the corporation. Leave of the court is required to examine more than one representative.[80]

Non-parties may be examined only with leave of the court. To obtain leave to examine a non-party, a party must show that it has been unable to obtain the required information from other persons, that it would be unfair for the moving party to proceed to trial without examining the non-party, and that the examination will not unduly delay the trial, entail unreasonable expense, or result in unfairness to the non-party.[81]

To initiate an examination, a party may serve a notice of examination or written questions, depending on the form of examination chosen and only after the party has served an affidavit of documents, unless the parties agree otherwise. The party who first serves a notice of examination or written questions has the right to complete the examination before the other party may begin its examination.[82]

A person who is being examined must answer "any proper question relating to any matter in issue" and no question may be objected to on the ground that the information sought is evidence, or that the question constitutes cross-examination. However, objection may be made to cross-examination solely directed to the credibility of a witness.[83] Where a party refuses to answer a proper question within 60 days before trial, the party may not rely on that information unless leave of the trial judge is obtained.[84]

A party may seek an order to divide discovery where certain information will only become relevant after a preliminary issue is determined.[85] As with documentary discovery, there is an obligation to update or correct any answers that are given in a written or oral examination for

[78] Pursuant to the simplified procedures in rule 76, actions under $50,000 are not permitted to have oral or written discovery. Ont. Rules, rules 76.02, 76.04.
[79] Ont. Rules, rule 31.02.
[80] Ont. Rules, rule 31.03.
[81] Ont. Rules, rule 31.10.
[82] Ont. Rules, rule 31.04.
[83] Ont. Rules, rule 31.06
[84] Ont. Rules, rule 31.07.
[85] Ont. Rules, rule 31.06.

discovery.[86] Information given at an examination for discovery may be read into trial as evidence, and to impeach a witness.[87]

### Inspection of Property and Medical Examination of a Party

Rule 32 provides the court with authority to order the inspection of real or personal property where it appears necessary for the determination of an issue in a proceeding. Rule 33 permits the court to order a mental or physical examination of a party where the party's mental or physical condition is in question.

### Procedure on Oral Examinations

Rule 34 prescribes the procedure for oral examination for discovery. The examination must occur in the county where the person to be examined resides, unless the court orders or the parties agree otherwise.[88] The notice of examination, which is served on the person to be examined or his or her lawyer, sets out the date, time and place of the examination.[89] The person being examined must be sworn,[90] and must answer all proper questions relating to matters in issue in the action.[91] The reason for any objection to a question must be stated and recorded.[92]

Where the person being examined does not produce all relevant documents listed in his or her affidavit of documents at the examination, the documents must be produced within two days after the examination.[93] If represented, the person being examined may be re-examined by counsel and by any party who is adverse in interest to the examining party.[94]

A party may adjourn an examination and obtain directions from the court where the right to examination is being abused by an excess of improper questions or objections, the examination is being conducted in bad faith, answers are evasive or unresponsive, or there is a failure to produce relevant documents. The court has discretion to impose a range of cost sanctions and make any other order as is just.[95] Where there has been default or misconduct by the person being examined (e.g. improper refusals or failure to produce required documents), the court may order costs, require re-attendance at the person's own cost, strike out some or all of the person's evidence, strike a party's claim or defence, or make any other order as is just.[96]

Oral examinations must be recorded, and transcripts provided within four weeks of a request.[97]

---

[86] Ont. Rules, rule 31.09
[87] Ont. Rules, rule 31.11.
[88] Ont. Rules, rule 34.03.
[89] Ont. Rules, rule 34.04.
[90] Ont. Rules, rule 34.08.
[91] Ont. Rules, rule 31.06.
[92] Ont. Rules, rule 34.12.
[93] Ont. Rules, rule 34.10.
[94] Ont. Rules, rule 34.11.
[95] Ont. Rules, rule 34.14.
[96] Ont. Rules, rule 34.15.
[97] Ont. Rules, rule 34.16 and 34.17.

### Procedure on Examination for Discovery by Written Questions and Answers

Rule 35 governs discovery by written questions and answers. A list of written questions in a prescribed form is served on the person to be examined and all other parties.[98] The questions must be answered within 15 days by affidavit in a prescribed form. Any objection to a question must be recorded, with a reason for the objection, in the affidavit.[99] Where the examining party is not satisfied with an answer, or where an answer suggests a new line of questioning, a further list of questions may be served within ten days.[100]

Where the person being examined refuses to answer a proper question or provides an insufficient answer, the court may order the person to answer the question by affidavit or submit to an oral examination. Other possible sanctions for improper refusals or failure to produce required documents include an order to strike a party's claim or defence, an order to strike some or all of the person's evidence, or such other order as is just.[101] A party may also move to terminate a written examination or limit its scope where it is being abused by an excess of improper questions or conducted in bad faith.[102]

### Expert Evidence

Discovery of expert evidence is largely restricted to the exchange of expert reports. Rule 53.03 requires a party who plans to call an expert witness at trial to serve all parties with a copy of the expert's report not less than 90 days before the trial.[103] A party who intends to call an expert to testify in response must serve the responding report not less than 60 days before trial,[104] and any supplementary expert report must be served not less than 30 days before trial.[105] These time periods may be extended or abridged by the court.[106] Where expert reports are not filed within the prescribed times, the expert may not testify at trial without leave of the trial judge.[107]

In addition, a party being examined for discovery may be questioned on an expert's findings, opinions and conclusions, as well as the name and address of any expert the party has engaged. However, a party need not disclose such information where the expert's views were obtained in preparation for litigation and the party undertakes not to call the expert at trial.[108]

Generally, experts may not be examined for discovery. Rule 31.10(1) prohibits the discovery of experts engaged by a party in preparation for contemplated or pending litigation. However, an expert who is to be called as a witness at trial may be examined for discovery for the purpose of having the testimony available as evidence at trial, but only with leave of the court or agreement

[98] Ont. Rules, rule 35.01.
[99] Ont. Rules, rules 35.02, 35.03.
[100] Ont. Rules, rule 35.04.
[101] Ont. Rules, rule 35.04.
[102] Ont. Rules, rule 35.05.
[103] Ont. Rules 53.03(1).
[104] Ont. Rules 53.03(2).
[105] Ont. Rules 53.03(3).
[106] Ont. Rules 53.03(4).
[107] Ont. Rules 53.03(3).
[108] Ont. Rules 31.06(3).

of the parties, and only after the moving party has served the expert's report on all other parties.[109] This rule is primarily intended to allow evidence to be taken before trial where there is significant cost or inconvenience in having the expert testify at trial.

Finally, section 12 of the *Evidence Act* limits the number of experts a party may call to three, unless leave of the court is obtained.[110] There is conflicting Canadian case law on whether this should be interpreted as three experts per issue in a case or three experts per case.[111] The leading Ontario case suggests that this is to be interpreted as permitting each side in a trial to call "a total of three expert witnesses *on all aspects* unless leave is granted to call more."[112]

## Special Rules That Impact Discovery

As stated earlier, cases under $50,000 that are subject to the simplified procedure under rule 76 are not permitted to have oral or written discovery. Parties are, however, required to exchange affidavits of documents (including a list of witnesses) and to produce relevant documents.

Rule 77, which establishes case management for civil proceedings in Ottawa, Toronto and Windsor also has an impact on discovery obligations. Every plaintiff in a case managed action in Toronto and Windsor must file a timetable within prescribed timelines.[113] The timetable must include a schedule for delivery of affidavits of documents, examinations for discovery, and any related motions. [114]

## Discovery Disputes

Where discovery disputes arise, they are usually dealt with by way of motion. Rule 37 sets out the procedure for bringing motions, and generally requires that a moving party serve and file a notice of motion, setting out the relief sought and grounds for the motion.[115] In addition, the moving party must serve and file a motion record containing all affidavits and other supporting material to be used at the motion.[116] Depending on the relief sought, motions may be heard by judges or masters,[117] and certain motions that are on consent or in writing may be disposed of by the registrar.[118] The notice of motion must be served at least four days before the motion,[119] and filed

---

[109] Ont. Rules 36.01(3).

[110] *Evidence Act*, RSO 1990, c. E.23, s. 12, which reads: "Where it is intended by a party to examine as witnesses persons entitled, according to the law or practice, to give opinion evidence, not more than three of such witnesses may be called upon by either side without the leave of the judge or other person presiding."

[111] See *Eli Lilly and Co*. v. *Novopharm Ltd*., [1997] F.C.J. No. 488 (QL) at para. 118, for example, where the Federal Court – Trial Division interpreted s. 7 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 to limit expert opinion evidence to five witnesses per subject matter or factual issue, not to five witnesses in total.

[112] *Bank of America Canada* v. *Mutual Trust Co*. (1998), 39 O.R. (3d) 134 (Ont. Gen. Div. [Commercial List]) at 138.

[113] Ont. Rules, rule 77.10. Note that the requirement to file a timetable applies in Toronto and Windsor, but does not apply in Ottawa. See, Ont. Rules, rule 77.10(4).

[114] Ont. Rules, rule 77.03.

[115] Ont. Rules, rule 37.06

[116] Ont. Rules, rule 37.10.

[117] Ont. Rules, rule 37.02 sets out the jurisdiction of a judge and a master to hear motions. Note that a case management master has the jurisdiction of a master conferred by the rules of court. See Courts of Justice Act, R.S.O. 1990, c. C.43, s. 86.1(4).

[118] Ont. Rules, rules 37.02(3), 76.05(4), 77.12(5).

at least three days before the hearing.[120] Motions may be heard by telephone or video conference,[121] or in writing without oral argument.[122]

For cases subject to case management or the simplified procedure, there are special rules that streamline motions procedures. Parties file a specialized motion form that allows motions to be dealt with quickly and on a less formal basis, without the need to submit supporting material or a motion record. The presiding judicial officer must record the disposition on the motion form, and no formal order is required.[123]

In case managed courts, many discovery-related matters are dealt with at case conferences. At a case conference, a case management judge or case management master may create a timetable for the proceeding or make a procedural order.[124] Often, discovery schedules are established and discovery disputes are resolved in this informal manner.

### Sanctions

The rules authorize the court to impose a wide variety of sanctions for breach of discovery obligations. These include a range of cost orders, suspension of a party's right of examination or use of evidence at trial, dismissal of an action, striking of a defence, or any other order the court considers just. The chart attached at **Appendix I** outlines the sanctions and discovery enforcement powers that are currently available to the court.

[119] Ont. Rules, rule 37.07(6).
[120] Ont. Rules, rule 37.08(1).
[121] Ont. Rules, rule 1.08.
[122] Ont. Rules, rule 37.12.1.
[123] Ont. Rules, rules 76.05(6)(7), 77.12(6)(7).
[124] Ont. Rules, rule 77.13(3)(5)(6).

# PART III: CROSS-JURISDICTIONAL COMPARISON OF DISCOVERY PROCESS

The purpose of Part III is to compare key similarities and differences in the discovery processes of Ontario and other Canadian, American and Commonwealth jurisdictions. Part VI of the Report examines some of these processes more closely as part of the analysis of potential reform options.

## 1. CANADA

With some exceptions, discovery procedures in most Canadian jurisdictions share the following features:

- an automatic duty to disclose documents;
- examination for discovery by either oral or written questions, but not both;
- primary reliance on oral examination;
- restrictions on the pre-trial examination of non-parties including experts; and
- pre-trial disclosure of expert reports.

### Documentary Discovery

#### *Scope*

Like Ontario, the majority of Canadian jurisdictions impose a broad obligation to disclose and produce documents in a party's possession, power or control "relating to any matter in issue"[125] or "relating to any/every matter in question."[126] Three jurisdictions have narrowed this obligation. In the Federal Court, for example, parties must disclose all "relevant" documents.[127] A document is relevant "if the party intends to rely on it or if the document tends to adversely affect the party's case or to support another party's case."[128] In Alberta, a party must disclose records in its possession, custody or power that are "relevant and material,"[129] as defined in the Rules of Court.[130] In Quebec, a party is only required to disclose exhibits it intends to rely on at a hearing.[131]

---

[125] Ont. Rules, rule 30.02(1), (2); New Brunswick, Rules of Court [hereinafter "N.B. Rules"], rule 31.02; Northwest Territories, The Supreme Court Rules [hereinafter "N.W.T. Rules"], rule 219; Prince Edward Island, Civil Procedure Rules [hereinafter "P.E.I. Rules"], rule 30.02; Manitoba, Court of Queen's Bench Rules [hereinafter "Man. Rules"], rule 30.01, 30.03 (Parties must disclose "all relevant documents"; however, a "relevant" document is defined as "one which relates to any matter in issue in an action".)

[126] British Columbia, Rules of Court [hereinafter "B.C. Rules"], rule 26; Newfoundland, Rules of the Supreme Court, 1986 [hereinafter "Nfld. Rules"], rule32.01; Nova Scotia, Civil Procedure Rules [hereinafter "N.S. Rules"], rule 20.01; Saskatchewan, Rules of Court [hereinafter "Sask. Rules"], rule 212; [Yukon – B .C. Rules apply].

[127] Federal Court Rules, 1998 [hereinafter "Fed. Ct. Rules"], rule 223(2).

[128] Fed. Ct. Rules, rule 222(2).

[129] Alberta, Alberta Rules of Court [hereinafter "Alta. Rules"], rule 187.1.

[130] Alta. Rules, rule 186.1, which reads: "For the purpose of this part, a question or record is relevant and material only if the answer to the question, or if the record, could reasonably be expected

***Timing and Process***

Most Canadian jurisdictions impose an automatic duty to produce an "affidavit of documents" or "affidavit of records" within a prescribed time period.[132] Generally, the affidavit must list documents with a description of those a party does not object to producing, those that are privileged, and those that are no longer in that party's possession or control. In British Columbia and New Brunswick, this obligation does not arise until a party serves a demand or notice for discovery of documents.[133]

In Ontario, there is no express restriction on the court's ability to extend the time for exchanging affidavits of documents. In Alberta, by contrast, the affidavit must be served and filed 90 days after service of the statement of defence, and the court's general authority to enlarge or abridge a time period does not apply.[134] The court may grant an order permitting late filing of an affidavit of records only if it is satisfied that the case is complex, the volume of documents requires an extension of time, or other sufficient reason exists.[135]

Other approaches include the automatic duty to produce copies of documents with the affidavit in Prince Edward Island,[136] and the requirement in Quebec that an affidavit (or notice) of documents be delivered with pleadings.[137] In Newfoundland and Nova Scotia, a party must attach to the list of documents a true copy of any non-privileged document in its possession, custody or control.[138] In several jurisdictions, any document listed in an affidavit is deemed to be authentic, unless the receiving party serves notice disputing its authenticity.[139]

In Alberta "very long trial actions," the case management judge may establish a mechanism for production or description "when the number, nature or location of the records makes production or description in the normal course unduly expensive or cumbersome."[140] Another feature of

---

(a) to significantly help determine one or more of the issues raised in the pleadings, or

(a) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings."

[131] Art. 331.1 *Code of Civil Procedure of Quebec*, R.S.Q. c. C-25 [hereinafter "C.C.P."]. Note, however, that the examination on discovery provisions provide that certain persons may be summoned "to give communication and allow a copy to be made of any document relating to the issues". See Arts. 397, 398 C.C.P.

[132] Alta. Rules, rule 187 (generally 90 days after service of the first statement of defence); Man. Rules, rule 30 (10 days after close of pleadings); Nfld. Rules, rule 32.01 (10 days after close of pleadings); N.W.T. Rules, rule 221 (30 days after close of pleadings); N.S. Rules, rule 20.01 (60 days after close of pleadings); P.E.I. Rules, rule 30 (10 days after close of pleadings); Sask. Rules, rule 212 (10 days after statement of defence is filed); Fed. Ct. Rules, rule 223 (30 days after close of pleadings).

[133] B.C. Rules, rule 26(1); N.B. Rules, rule 31.03.

[134] Alta. Rules, rules 187(2), (4), 548.

[135] Alta. Rules, rule 188.1. Note, however, that some commentators have suggested that rule 549 (which provides that the time for delivering or filing any pleading or other document may be enlarged on consent without application to the court) may be used to extend deadlines contained in the rules. See Eric Macklin, Q.C. & Alan Macleod, Q.C., *New Discovery Rules* (Law Society of Alberta, December 14, 1999). http://www.lawsocietyalberta.com/whats_new/new_dec14_discovery.asp.

[136] P.E.I. Rules, rule 30.03(4).

[137] Art. 331.1 C.C.P.

[138] Nfld. Rules, rule 32.01(4); N.S. Rules, rule 20.01(4).

[139] Alta. Rules, rule 192; Nfld. Rules, rule 32.04; N.W.T. Rules, rule 228; N.S. Rules, rule 20.03(1).

[140] Alta. Rules, rule 189.1.

Alberta's rules to encourage timely production is the provision that a party may not conduct an examination for discovery until it has filed and served an affidavit of records, unless the court orders otherwise.[141]

### *Documentary Production from Non-Parties*

Like Ontario, all Canadian jurisdictions require a court order to compel the production of a document from a person who is not a party to a proceeding.[142]

## Examination for Discovery

### *Scope*

With the exception of Alberta and the Federal Court, the scope of examination for discovery in other Canadian jurisdictions is broad. Persons being examined must answer all proper questions "relating to any matter in issue in the action,"[143] "relating to a matter in question,"[144] "regarding any matter that is relevant to the subject matter of the proceeding,"[145] "relating to the issues between the parties" or "touching the matters in issue in the action."[146] In Alberta, there is a duty to answer only "relevant and material questions"[147] and in the Federal Court, a duty to answer questions "relevant to any unadmitted allegation of fact in a pleading."[148]

### *Method of Examination*

Five Canadian jurisdictions, including Ontario, permit a party to examine an opposing party by either oral examination or written questions, but not both, unless leave of the court is obtained.[149] British Columbia, Manitoba, Nova Scotia and Newfoundland have no such restrictions.[150] Saskatchewan does not provide for written examinations[151] and Alberta permits written examinations only by court order.[152]

---

[141] Alta. Rules, rule 189.

[142] Ont. Rules, rule 30.10; Alta. Rules, rule 209, 216.1; B.C. Rules, rule 26(11); Man. Rules, rule 30.10(1); N.B. Rules, rule 31.11(1); Nfld. Rules, rule 32.07(2); N.W.T. Rules, rule 231; N.S. Rules, 20.06(2); P.E.I. Rules, rule 30.10; Art. 402 C.C.P.; Sask. Rules, rule 236; [Yukon – B.C. Rules apply]; Fed. Ct. Rules, rule 233.

[143] Ont. Rules, rule 31.06; Man. Rules, rule 31.06; N.B. Rules, rule 32; N.W.T. Rules, rule 251; P.E.I. Rules, rule 31.

[144] B.C. Rules, rule 27(22); [Yukon – B.C. Rules apply].

[145] Nfld Rules, rule 30.08; N.S. Rules, rule 18.01.

[146] Arts. 397, 398 C.C.P.; Sask. Rules, rule 222.

[147] Alta. Rules, rule 200(1.2).

[148] Fed. Ct. Rules, rule 240.

[149] Ont. Rules, rule 31.02(1). [Note: Where more than one party is entitled to examine a person, the examination shall be an oral examination, unless the parties agree otherwise, pursuant to rule 31.02(2)]; N.B. Rules, rule 32.04; N.W.T. Rules, rule 236; P.E.I. Rules, rule 31.02; Fed. Ct. Rules, rule 234.

[150] B.C. Rules, rules 27(1),(2), 29(1); Man. Rules, rule 31.02; N.S. Rules, rules 18.01, 19.01; Nfld. Rules, rules 30.01, 31.01.

[151] The rules do, however, provide that witnesses may give evidence by means of interrogatories in certain circumstances. The rules also provide for the use of written questions in family law proceedings. See Sask. Rules, e.g. rules 284, 310, 605(4).

[152] Alta. Rules, rule 216.1(2). Note, however, that Alberta's streamlined procedure rules allow a party to elect that an examination for discovery be by written interrogatories only. See Alta. Rules, rule 662(5). Note also that a

### *Examination of Non-Parties*

Most Canadian jurisdictions do not permit the examination of non-parties without leave of the court.[153] Only Newfoundland[154] and Nova Scotia[155] permit non-parties to be examined without a court order, subject to the court's discretion to limit unnecessary or vexatious examinations.

### *Examination of Corporate Parties*

The majority of Canadian jurisdictions permit a party to examine only one officer, director or employee of a corporate party, except with leave.[156] By contrast, Alberta does not restrict the number of corporate officers who may be examined,[157] and as stated above, Newfoundland and Nova Scotia permit any person to be examined.

## Expert Evidence

### *Expert Reports*

Like Ontario, most Canadian jurisdictions require an expert report to set out the expert's name, address and qualifications, as well as the substance of the proposed testimony.[158] Several also require a description of the grounds, factual assumptions, or disclosure of documents on which the opinion is based.[159]

Most jurisdictions prescribe fixed time periods for the delivery of expert reports. These are summarized in **Appendix J**. Some jurisdictions require expert reports to be delivered within a specified time before or by pre-trial.[160] Others, including Ontario, require delivery within a specified time before trial. By contrast, New Brunswick requires that expert reports be served "as soon as practicable" but no later than the trial scheduling date.[161] Under Quebec's case management regime, parties must file an agreed timetable for delivering expert reports. If they are unable to agree, the court may fix a timetable.

---

Working Committee of Alberta's Discovery and Evidence Committee has proposed that written interrogatories be permitted as an alternative to oral discovery. See Alberta Rules of Court Project, *Document Discovery and Examination for Discovery, Consultation Memorandum No. 12.2* (Edmonton: Alberta Law Reform Institute, October 2002) at 58.

[153] Ont. Rules, rule 31.10(1); Alta. Rules, rules 200, 201, 202; B.C. Rules, rule 28(1); Man. Rules, 31.10(1); N.B. Rules, rule 32.10(1); N.W.T. Rules, rule 270(1); P.E.I. Rules, rule 31.10(1); Arts. 397, 398 C.C.P.; Sask. Rules, rule 222A(1); Fed. Ct. Rules, rule 238(1)

[154] Nfld. Rules, rule 30.01(1), (2).

[155] N.S. Rules, rule 18.01(1), (2).

[156] Ont. Rules, rule 31.03(2), (3); B.C. Rules, rule 27(4), (5); Man. Rules, rule 31.03(2),(3); N.B. Rules, rule 32.02(2); N.W.T. Rules, rule 238(1),(2); P.E.I. Rules, rule 31.03(2), (3); Arts. 397, 398 C.C.P.; Sask. Rules, 223; Fed. Ct. Rules, rule 235, 237(1), (3).

[157] Alta. Rules, rule 200(1).

[158] Ont. Rule, rule 53.03(1); Alta. Rules, rule 218.1(1); BC Rules, rule 40A(5); Man. Rules, rule 53.03(1); N.B. Rules, rule 52.01(1); N.W.T. Rules, rule 279; N.S. Rules, rule 31.08(1); PEI Rules, rule 53.03(1); Sask. Rules, rule 284D(1); Yukon, same as B.C.

[159] B.C. Rules, rule 40A(5); N.W.T. Rules, rule 279(1); N.S. Rules, rule 31.08(1); PEI Rules, rule 53.03(1).

[160] Man. Rules, rule 50.01(3), 53.03(1); Sask. Rules, rule 284D(1).

[161] N.B. Rules, rule 52.01(1).

### *Number of Expert Witnesses*

Most jurisdictions limit the number of experts that may testify at trial. Ontario and five other jurisdictions, permit each party to call up to three experts, unless the court grants leave to call more.[162] In other jurisdictions, parties are restricted to five experts per side.[163] In Newfoundland and Nova Scotia, the court may limit the number of experts (including medical experts) to be called at a trial.[164] The rules in Newfoundland, Nova Scotia and New Brunswick prescribe that where the court has appointed an expert, each party may call only one expert (except with leave to call more) to respond to evidence of the court-appointed expert.[165] Alberta permits one expert per subject per party if the case is designated as a "very long trial action."[166]

### *Pre-Trial Examination of Experts*

In the four jurisdictions that permit an expert to be examined before trial, leave is required.[167] In the four jurisdictions that provide for court-appointed experts, parties may seek leave to cross-examine on the expert's findings before trial.[168] Ontario is one of three jurisdictions that expressly prohibits the examination of an expert retained by another party in anticipation of litigation.[169] The remaining jurisdictions do not refer to the examination of an expert prior to trial.

## Special Rules That Impact Discovery

Like Ontario, several Canadian jurisdictions have established "simplified," "streamlined," "fast track" or "fast process" procedures, which may restrict or modify documentary,[170] oral or written[171] discovery requirements.

---

[162] *Manitoba Evidence Act*, C.C.S.M. c. E150, s. 25; New Brunswick *Evidence Act*, S.N.B. c. E-11, s. 23; Northwest Territories *Evidence Act*, R.S.N.W.T. 1988, c. E-8, s. 9; Nunavut *Evidence Act*, R.S.N.W.T. 1988, c. E-8, s. 9; Yukon *Evidence Act*, R.S.Y. 2002, c. 57, s. 9. Note, however, that legislation in N.B., N.W.T., Nunavut and the Yukon is drafted to suggest a party may call no more than three expert witnesses *on any issue*, rather than on all issues. In contrast, s. 12 of Ontario's *Evidence Act*, R.S.O. 1990, c. E.23, s. 12 does not include the language "any issue", suggesting that each side may call a total of 3 experts. Case law has interpreted this section to mean three experts per side, per case. See *Bank of America Canada* v. *Mutual Trust Co.* (1998), 39 O.R. (3d) 134 (Gen. Div. [Commercial List]).

[163] *The Saskatchewan Evidence Act*, R.S.S. 1978, c. s-18, s. 48; *Canada Evidence Act*, R.S. 1985, c. C-5, s. 7.

[164] Nfld. Rules, rule 46.05; N.S. Rules, rule 31.06.

[165] Nfld. Rules, rule 35.05; N.S. Rules, rule 23.05; N.B. Rules, rule 54.03(8).

[166] Alta. Rules, rule 218.4.

[167] Alta. Rules, rule 218.8(1); N.S. Rules, rule 31.08(2); Que. Code, Art. 397(4), 398(3); Can. (Fed.) Rules, rule 280(3).

[168] Alta. Rules, rule 218(6); N.S. Rules, rule 23.03; N.W.T. Rules, rule 252(8); Nfld. Rules, rule 35.03.

[169] B.C. Rules, rule 28(2); Ont. Rules, rule 31.10(1); Sask. Rules, rule 222A(1).

[170] Some provinces require parties to include a list of potential witnesses with their affidavit of records or documents. See, *e.g.*, Alta. Rules, rule 661(4); Sask. Rules, rule 483(4). Time limits for delivery of affidavit of records or list of documents may also be shortened. See, *e.g.*, Alta Rules, rule 661(1) (30 days after service of statement of defence); N.S. Rules, rule 68.03(1) (Halifax case management fast process) (20 days after close of pleadings).

[171] Examination for discovery is prohibited under Saskatchewan's simplified procedure rules (r. 484), and under Federal Court simplified action rules (r. 296) is permitted only in writing, and cannot exceed 50 questions. Alberta's streamlined procedure rules (r. 662(5)) restrict written interrogatories to 1000 words. Under B.C.'s fast track litigation pilot project rule (r. 66(18)), parties need not answer interrogatories, unless a court orders otherwise. Alberta's rule 662(1) and B.C.'s rule 66(13) & (14) also impose time limits on examinations for discovery.

## Discovery Disputes

Discovery disputes in Ontario are regularly heard by motion[172] or in case managed jurisdictions, by case conference.[173] In case managed and simplified procedure cases, motions may be heard by appearance, telephone or video conference, in writing, or by fax;[174] disputes may also be heard by these methods in other cases where the parties consent and the presiding judge or officer permits it.[175] Case conferences are regularly heard in person or by telephone conference, depending on the scheduling practices of the case management masters.

Other jurisdictions permit motions to be heard by telephone or videoconference, but they require the parties to consent to such a hearing, or to have the court so order, or both.[176] A practice direction in British Columbia permits motions brought in Vancouver to be heard by teleconference only where the judge hearing the motion is sitting outside Vancouver.[177] Prince Edward Island only uncontested motions to be heard by teleconference.[178]

## Sanctions

As noted earlier, the chart at **Appendix I** sets out the range of sanctions and discovery enforcement powers that are currently available to the court in Ontario.

Sanctions of interest in other provinces include a fixed cost penalty payable forthwith in Alberta where a party fails to file an affidavit of records on time.[179] Nova Scotia authorizes the court to impose such penalty as is just where a party does not make reasonable efforts to give full discovery.[180] Several jurisdictions permit contempt orders to issue where a party fails to produce documents as required by the rules, fails to comply with a documentary discovery order, refuses to attend an examination, or refuses to answer proper questions.[181] In Saskatchewan, a person is deemed guilty of contempt where he or she neglects or refuses to attend an examination, to be sworn, to answer any lawful question, or to answer an undertaking within a reasonable time after the examination.[182]

The Discovery and Evidence Committee of the Alberta Rules of Court Project has reviewed Alberta's rule 216.1, which lists 15 remedies the court may order when a party "acts or threatens to act in a manner that is vexatious, evasive, abusive, oppressive, improper or prolix" during the

---

[172] Ont. Rules, rule 37.01.
[173] Ont. Rules, rule 77.13.
[174] Ont. Rules, rules 76.05(3), 77.12(2.1).
[175] Ont. Rules, rules 1.08(1), 37.12.1.
[176] Alta. Rules, rule 385.1(2) Note: Pursuant to a case management practice note of Sept.1, 2001, a case management judge may permit parties to attend a case management conference by teleconference; a case management practice note of April 1, 1995, permits contested "applications" to be heard by teleconference; Man. Rules, rule 37.09(1); Nfld. Rules, rule 47A.01; N.B. Rules, rule 37.09; N.S. Rules, rule 37.09(1); N.W.T. Rules, rule 389 (1)
[177] B.C. Notice to the Profession, January 22, 1997.
[178] PEI Practice Note 6, Trial Division – Contested Chambers Practice, para. 6.
[179] Alta. Rules, rule 190.
[180] N.S. Rules, rule 20.09(2).
[181] See, *e.g.* Nfld. Rules, rule 30.14; N.W.T. Rules, rule 233; N.S. Rules, rules 18.15, 20.09(1).
[182] Sask. Rules, rule 231.

discovery process, or where "the expense, delay, danger or difficulty in complying fully [with discovery obligations] would be grossly disproportionate to the likely benefit."[183] The Committee considered whether it would be more appropriate to have a general non-compliance rule (such as contempt), but preferred the current rule, which lists specific types of remedies for improper discovery conduct in the discovery process. It was felt that the court might be more comfortable in imposing such forms of relief if they were specifically prescribed.[184]

## 2. UNITED STATES

Discovery procedures in the United States resemble those in Canada in many ways. For example, oral examination is a key element of discovery, as are mechanisms for initial documentary disclosure and written interrogatories. However, distinctly American features include:

- a requirement to disclose documents only on request;
- a general right to conduct both oral discovery and written interrogatories; and
- few restrictions on the pre-trial examination of non-party witnesses.

In addition, a number of American jurisdictions have introduced discovery management mechanisms. The objective is to reduce or eliminate discovery-related problems by encouraging parties to reach an understanding (on their own, or with the assistance of the court if needed) early in the litigation process on the parameters of discovery, including:

- scope of discoverable issues and information;
- timetable for disclosure and production;
- production from non-parties;
- manner of production;
- timetable for completing examination for discovery and fulfilling undertakings;
- persons to be examined and duration of examinations; and
- expert evidence needed.

Discovery reform has been the subject of significant scholarly work in the United States. Numerous articles and reports have examined discovery rules and analyzed reform options. Others have looked at the conduct of lawyers and judges in relation to discovery abuse and its impact on civil litigation. These are included in the bibliography at **Appendix G.** Much of this work has resulted in attempts to improve the discovery process. The United States Federal Court, Arizona, California, New York and Texas are some leading jurisdictions where discovery reform is well underway. These are discussed below.

[183] Alta. Rules, rule 216.1; Alberta Rules of Court Project, *supra* note 152 at 72-74. The remedies include: (a) costs; (b) security for costs; (c) an advance payment against costs; (d) increased or decreased interest entitlement; (e) production of documents; (i) schedules or time limits; (j) written interrogatories; (m) disclosure of the aims of proposed further discovery; and (n) supervision of further discovery by a judge, master or other officer.

[184] Alberta Rules of Court Project, *supra* note 152 at 74.

## (i) Federal Court

The rules relating to discovery are found in Part V of the United States Federal Court Rules of Civil Procedure (rules 26 – 30).[185] These rules underwent significant reform in 1993 and again in 2000.[186] In response to pervasive perceptions that litigation costs too much and takes too long, the U.S. Congress passed the *Civil Justice Reform Act ("CJRA")* in 1990, which required all U.S. District Courts to implement a civil justice expense and delay reduction plan. A major target of the *CJRA* was the discovery process.[187] By 1993, amendments to the Federal Court rules were introduced that:

> consisted primarily of new duties to disclose factual information and information about experts, as well as presumptive or potential limits on the amount and type of discovery that could be undertaken. The new rules also took several steps to foster a more cooperative relationship between counsel.[188]

### Scope of Discovery

A key focus of reform was the scope of discovery. Before the 2000 amendments, any material "relevant to the **subject matter** involved in the pending action" [emphasis added] was discoverable. As a result of the reform, discovery material is now defined narrowly as material that is not privileged, and "is relevant to the **claim or defence** of any party" [emphasis added].[189]

### Methods of Discovery

Parties may obtain discovery through documentary disclosure, depositions upon oral examination or written questions, written interrogatories, production of documents or things, and physical and mental examinations.[190] A party may serve on any other party a request to produce any tangible things that constitute matters within the scope of discovery, and which are in the possession of the party upon whom the request is served.[191]

### Mandatory Initial Documentary Disclosure

A significant change in the Federal Court discovery process was the adoption of an automatic duty of initial disclosure.[192] Whereas in the past, a formal discovery request was required to invoke the duty to disclose, parties must now automatically disclose the following information early in the litigation process:

---

[185] United States Federal Rules of Civil Procedure [hereinafter, "U.S. Fed. R. Civ. P."].
[186] See Carl Tobias, "*Congress and the 2000 Federal Civil Rules Amendments*", 22 Cardozo Law Review 75 (2000) for a summary of the history of the amendments.
[187] A.Y. Shields, "The *Civil Justice Reform Act:* The Utility of Disclosure as a Reform to the Pretrial Discovery Process" (1993) 67 St. John's L. Rev. 907 at 907.
[188] P.E. Longan, E.J. Getto & W.T. Hangley, "Report of the Federal Procedure Committee of the Section of Litigation of the America Bar Association of the *Civil Justice Reform Act* and the 1993 Discovery Amendments". www.abanet.org/litigation/committee/pretrial/longan2.html.
[189] U.S. Fed.R. Civ. P., rule 26(b)(1).
[190] U.S. Fed.R. Civ. P., rule 26(a)(5).
[191] U.S. Fed.R. Civ. P., rule 34(a).
[192] U.S. Fed. R. Civ. P., rule 26(a)(1).

- names, addresses, and telephone numbers of all potential witnesses;
- description and location of all documents, data and other things in the possession of a party that the disclosing party may use to support its claim or defence;
- computation of any category of damages claimed, with supporting documents and material;
- any relevant insurance agreement; and
- names of potential experts.[193]

These initial disclosures must be made at or within 14 days after the parties' first meeting to discuss a discovery plan (described below).[194]

### Discovery Planning

Parties are required to have a meeting ("discovery conference") to consider the nature and basis of their claims and defences and the possibilities for prompt settlement or resolution of the case. In addition to making the required disclosures, they must develop a proposed discovery plan. The lawyers on record and all unrepresented parties "are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan" and for submitting it to the court within the prescribed timelines.[195]

The discovery conference must occur at least 21 days before a "scheduling conference" (discussed below). The discovery plan must address the parties' views and proposals concerning any deviations from prescribed disclosure requirements, the subjects on which discovery is needed and when it will be completed, any limitations on discovery, and any other orders that the parties believe should be obtained.[196]

Within 14 days after the discovery conference, the parties must submit to the court a discovery plan for review at a scheduling conference. At the scheduling conference, the court may enter an order prescribing the time within which discovery and related motions are to be completed. The court may also include the dates for pre-trial and trial, and make any other necessary order.[197]

### Written Interrogatories and Oral Depositions

A party may serve up to 25 written interrogatories on another party. Leave to serve additional interrogatories may be granted in certain circumstances.[198] In addition to written interrogatories, a party may require the oral deposition of any person (including a non-party). Attendance may be compelled by subpoena.[199] A party may also depose any person identified as an expert whose opinions may be presented at trial.[200]

---

[193] *Ibid.*
[194] *Ibid.*
[195] U.S. Fed.R. Civ. P., rule 26(f).
[196] U.S. Fed.R. Civ. P., rule 26(f).
[197] U.S. Fed.R. Civ. P., rule 16(b).
[198] U.S. Fed.R. Civ. P., rule 33(a).
[199] U.S. Fed.R. Civ. P., rule 30(a).
[200] U.S. Fed.R. Civ. P., rule 26(4)(A).

### Discovery Disputes

Motions for orders compelling discovery and related sanctions must include a certification that the moving party has in good faith conferred or attempted to confer with the opposing party in an effort to secure the disclosure without court action.[201]

## (ii) Arizona

The discovery process in Arizona is prescribed by the Rules of Civil Procedure for the Superior Courts of Arizona. In 1992, the discovery rules were significantly reformed following a review of the civil discovery process.[202] The amendments placed overall limits on the scope of discovery, required initial disclosure of specified information, limited most depositions to a maximum of four hours, and increased judicial involvement in managing the discovery process.[203]

### Scope of Discovery

The scope of discovery in Arizona is relatively broad. Parties may obtain discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defence of the party seeking discovery or to the claim or defence of any other party."[204] The definition of discoverable information provides that "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."[205] This is similar to the broad "semblance of relevance" test used in Ontario.

### Methods of Discovery

Parties may obtain discovery by a variety of methods, including depositions upon oral examination or written questions, written interrogatories, and production of documents or things. The frequency of use of these methods may be limited by court order.[206]

### Mandatory Initial Documentary Disclosure

Arizona, like the U.S. Federal Court, introduced mandatory initial disclosure as part of its discovery reform initiative. Within 40 days after the filing of a defence (or as otherwise agreed by the parties or ordered by the court),[207] each party must disclose in writing to every other party:

- the factual basis of the claim or defence;
- the legal theory upon which the claim or defence is based;

---

[201] U.S. Fed.R. Civ. P., rule 37(A)(2)(a).

[202] Arizona's discovery rule amendments are often referred to as the "Zlaket Rules". Chief Justice Thomas A. Zlaket, who was a lawyer at the time of the amendments in 1992, headed the commission which examined civil discovery reform. See, "An Interview with Thomas Zlaket", http://aja.ncsc.dni.us/courtrv/cr37/cr37-3/CR37-3Zlaket.pdf.

[203] *Ibid*.

[204] Rules of Civil Procedure for the Superior Courts of Arizona, [hereinafter, "Ariz. R. Civ. P."], rule 26(b)(1).

[205] *Ibid*.

[206] Ariz. R. Civ. P., rule 26(a).

[207] Ariz. R. Civ. P., rule 26.1(b)(1).

- identification of witnesses expected to testify, along with a fair description of the substance of each witness' expected testimony;
- names and addresses of all persons whom the party believes may have knowledge relevant to the action, and who have given statements;
- names and addresses of experts the party expects to call at trial, limited to one per side per issue, and the substance of their testimony;
- computation of damages and documents in support thereof;
- the existence and general description of relevant documents that the disclosing party plans to use at trial; and
- a list (and a copy) of documents the party believes may be relevant to the subject matter of the action and those which appear reasonably calculated to lead to the discovery of admissible evidence.[208]

### Medical Malpractice Cases

Following a study on medical malpractice procedure by a special committee appointed by the Arizona Supreme Court, a new rule was established in 2000 to address the exchange of documents and limits on discovery in such cases.[209] The rule requires parties to exchange all available medical records relevant to the subject matter in the action soon after pleadings are closed and before discoveries occur.[210] Parties are also permitted to exchange certain limited written interrogatories before a comprehensive pre-trial conference (discussed below).

### Discovery Planning

The concept of a comprehensive pre-trial conference was introduced for medical malpractice cases,[211] but it is also available for other types of cases on the written request of any party.[212] Within five days of receiving answers or motions from all defendants who have been served, the plaintiff must notify the court so that a comprehensive pre-trial conference can be scheduled. At the conference, the court and the parties will:

- determine a schedule for the discovery to be undertaken (including depositions, documents to be exchanged, and any medical examinations that may be required);
- determine a schedule for the disclosure of standard of care and causation expert witnesses;
- determine the order of and dates for the disclosure of all other expert and non-expert witnesses, as well as limits on the number of expert witnesses;
- determine the number of non-uniform interrogatories;
- resolve any discovery disputes that have been presented; and
- set a date for a mandatory settlement conference and trial date.[213]

---

[208] Ariz. R. Civ. P., rule 26.1(a).
[209] See State Bar Committee Notes to Annotated Arizona Rules of Court, rule 26.1 (2003).
[210] Ariz. R. Civ. P., rule 26.2(a)(1) and (2).
[211] Ariz. R. Civ. P., rule 16(c).
[212] Ariz. R. Civ. P., rule 16(b).
[213] Ariz. R. Civ. P., rule 16(c).

### Experts

In all cases, including medical malpractice cases, each side is presumptively entitled to only one independent expert per issue, except upon a showing of good cause. In medical malpractice cases, each party is presumptively entitled to only one standard of care expert.[214]

### Written Interrogatories

A party may serve on any other party up to a maximum of 40 written interrogatories.[215] If a party believes that good cause exists for additional interrogatories, it must consult with the party to be served and attempt to secure a written agreement for additional interrogatories.[216] If no agreement can be reached, leave of the court is required.[217]

### Discovery Disputes

The court will not consider discovery motions unless moving counsel attaches a separate statement certifying that, after personal consultation and good faith efforts, counsel have been unable to satisfactorily resolve the matter.[218] To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.[219]

## (iii) California

The California Code of Civil Procedure[220] sets out the requirements for discovery in California. It incorporates the *Civil Discovery Act of 1986*, the first major revision of discovery procedures in California since 1957.[221] The Act was the product of a multiple-year study by a joint bar and judicial commission, whose mandate included the elimination or reduction of discovery abuses.[222]

### Scope and Methods of Discovery

Discovery covers any matter that is not privileged and is relevant to the subject matter of the case, including inadmissible matters, so long as the request is reasonably calculated to lead to the discovery of admissible evidence.[223]

A variety of discovery mechanisms are available, including depositions upon oral examination or written questions, and written interrogatories.[224] However, the court may limit the scope or

---

[214] Ariz. R. Civ. P., rule 26(b)(4)(D).
[215] Ariz. R. Civ. P., rule 33.1(a).
[216] Ariz. R. Civ. P., rule 33.1(b).
[217] Ariz. R. Civ. P., rule 33.1(c).
[218] Ariz. R. Civ. P., rules 26(g); 37(a)(2)(C).
[219] Ariz. R. Civ. P., rule 7.1(c)(2).
[220] Hereinafter, "Cal. Code Civ. P."
[221] P.E. Bruggman, *Reducing the Costs of Civil Litigation: Discovery Reform* (Public Law Research Institute, 1995) http://www.uchastings/edu/plri/fal95tex/discov.html.
[222] P.E. Bruggman, *Reducing the Costs of Civil Litigation: Discovery Reform* (Public Law Research Institute, 1995) http://www.uchastings/edu/plri/fal95tex/discov.html.
[223] Cal. Code Civ. P., § 2017(a).

manner of discovery if it determines that the burden, expense, or intrusiveness of that discovery outweighs the likelihood that the information sought will lead to the discovery of admissible evidence, or is duplicative or unnecessary.[225]

### Discovery Abuse

Discovery abuse is defined to include:

- persisting in obtaining information that is outside the scope of discovery;
- using a discovery method that does not comply with its specified procedures;
- employing a discovery method that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense;
- failing to respond or submit to an authorized method of discovery;
- making an unmeritorious objection to discovery;
- making an evasive response to discovery;
- disobeying a court order to provide discovery;
- making or opposing, without substantial justification, a motion to compel or to limit discovery; and
- failing to confer with an opposing party or attorney in a good faith attempt to resolve any dispute concerning discovery (where a motion requires the filing of a certificate that good faith efforts were made).[226]

Upon a finding of discovery misuse, five types of sanctions are authorized:

1. Monetary sanctions, which may be imposed on a party, its attorney, or both. Where a monetary sanction is authorized by the Code, the court shall impose the sanction unless there was substantial justification for the conduct.[227]
2. Issue sanctions, which are orders that deem certain facts to be established or prohibit a party from supporting or opposing claims or defences.[228]
3. Evidence sanctions, which are orders that prohibit a party from introducing designated matters in evidence.[229]
4. Terminating sanctions, which are orders that strike pleadings, stay a proceeding, dismiss an action, or render default judgment.[230]
5. Contempt sanctions, which are contempt orders.[231]

[224] Cal. Code Civ. P., § 2019(a).
[225] Cal. Code Civ. P., § 2017(c), 2019(b).
[226] Cal. Code Civ. P., § 2023(a).
[227] Cal. Code Civ. P., § 2023(b)(1).
[228] Cal. Code Civ. P., § 2023(b)(2).
[229] Cal. Code Civ. P., § 2023(b)(3).
[230] Cal. Code Civ. P., § 2023(b)(4).
[231] Cal. Code Civ. P., § 2023(b)(5).

### Discovery Disputes

The court is required to impose a monetary sanction against any party who unsuccessfully brings or opposes a discovery-related motion, unless it is shown that the party acted with substantial justification.[232] Most discovery motions must be accompanied by a declaration showing a reasonable and good faith attempt at informal resolution of each issue to be addressed at the motion.[233]

### Written and Standard Form Interrogatories

The restricted use of written and standard form interrogatories is an interesting feature of California's rules. The California Judicial Council has prepared a list of standard form interrogatories, divided by case type, that reflect questions commonly asked in specific case types.[234] A party may ask as many standard form interrogatories as are relevant to the subject matter of the pending action, but may only ask a maximum of 35 individually prepared interrogatories, except in prescribed circumstances. [235]

### Depositions

A party may, by oral or written questions, take the deposition of any party to the action and any expert listed on another party's expert witness list.[236] A non-party may be examined by oral or written deposition. While no court order is needed, a court-issued subpoena is required to examine a non-party.[237]

### Discovery Period

Discovery must be completed at least 30 days before the initial trial date, and any motions arising from discovery must be completed at least 15 days before the initial trial date.[238] As of these dates, the discovery period is closed and cannot be extended even if the trial date is postponed, unless a court order is obtained.[239]

## (iv) New York

The New York Civil Practice Law and Rules[240] govern discovery in civil judicial proceedings in New York State, and include the features described below.

---

[232] Cal. Code Civ. P., § 2017(c), (d), 2023.
[233] *E.g.,* see Cal. Code Civ. P., § 2030(l).
[234] Cal. Code Civ. P., § 2033.5. The standard form interrogatories and requests for admission of the genuineness of any relevant documents or of the truth of any relevant matters of fact were developed for use in civil actions relating to personal injury, property damage, wrongful death, unlawful detainer, breach of contract, family law, or fraud, and any others the Judicial Council deems appropriate. Use of these standard forms is optional.
[235] Cal. Code Civ. P., § 2030(c)(1) & (2).
[236] Cal. Code Civ. P., § 2025, 2028.
[237] Cal. Code Civ. P., § 2020.
[238] Cal. Code Civ. P., § 2024(a).
[239] Cal. Code Civ. P., § 2024(e).
[240] Hereinafter, "N.Y. Civ. Prac. L. & R."

### Scope of Discovery

Discovery covers all matters that are material and necessary in the prosecution or defence of an action, regardless of the burden of proof.[241]

### Methods of Discovery

Parties may obtain discovery by various methods, including depositions upon oral examination or written questions, and written interrogatories.[242] Document production is commenced by serving a notice to produce documents. Once served, a party may inspect the documents designated in the notice.[243] Written interrogatories may be served at any time after an action is commenced. A party may not serve interrogatories and orally examine the same party if the action is based on personal injury, injury to property, or wrongful death.[244] A party may take the testimony of any person by deposition upon oral or written questions.[245]

### Protective Orders

At any time, the court may make a protective order, on its own initiative or on the motion of any party, limiting the use of any method of disclosure in order to prevent discovery abuse. Such orders shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the court.[246]

### Discovery Management

The court has express authority to supervise discovery. On its own initiative, or on a party's motion, the court may appoint a judge or a referee to supervise all or part of the discovery process. The court may select a hearings officer to act as referee, or the parties may agree on a named lawyer. The referee has the powers of the court with respect to supervising discovery, and any orders relating to discovery are binding on the parties. In the case of a lawyer-referee, the parties pay the lawyer's fees as a disbursement. The court may review a referee's order on a party's motion no later than five days after the order is made.[247]

### Medical and Personal Injury Cases

There are special rules for dental, podiatric and medical malpractice actions. The chief administrator of the courts must adopt special calendar control rules, including a pre-calendar conference soon after an action has commenced, to encourage settlement, simplify or limit issues, establish a timetable for disclosure, offers, depositions, future conferences, and set a trial date.[248]

---

[241] N.Y. Civ. Prac. L. & R., § 3101.
[242] N.Y. Civ. Prac. L. & R., § 3102(a).
[243] N.Y. Civ. Prac. L. & R., § 3120(a).
[244] N.Y. Civ. Prac. L. & R., § 3130(1).
[245] N.Y. Civ. Prac. L. & R., § 3106(a).
[246] N.Y. Civ. Prac. L. & R., § 3103(a).
[247] N.Y. Civ. Prac. L. & R., see § 3104 generally.
[248] N.Y. Civ. Prac. L. & R., § 3406 (b).

Any party may offer to make available for oral examination the expert witnesses it expects to call at trial. If all parties accept the offer, each party must produce its own expert witnesses for examination upon oral deposition.[249] Finally, where a plaintiff is terminally ill as a result of another party's conduct, the court may establish a schedule for the completion of all discovery proceedings within 90 days after the pre-calendar conference.[250]

## (v) Texas

The discovery process in Texas is prescribed in detailed provisions under the Texas Rules of Civil Procedure.[251] The discovery rules were revised in 1999 in order to impose limits on the volume of discovery, curb abuses, reduce cost and delay, modernize and streamline current discovery practice, reorganize and reword several discovery rules.[252]

### Scope of Discovery

The scope of discovery includes any non-privileged matter that is relevant to the subject matter of the case, including inadmissible matters, so long as the request is reasonably calculated to lead to the discovery of admissible evidence.[253] It also extends to discovery of a party's legal contentions and the factual bases for those contentions.[254] Despite the broad scope of discovery, the court has express power to limit discovery where the information sought is unreasonably cumulative, duplicative, or is obtainable from a less burdensome or less expensive source.[255] The court may also limit discovery where the burden of the proposed discovery outweighs its likely benefit.[256]

### Discovery Control Plans

Parties may obtain discovery by various means, including requests for documentary disclosure, depositions upon oral examination or written questions, and written interrogatories. However, each case (and method of discovery) must be governed by a "discovery control plan."[257] There are three levels of discovery control plan, each of which features: (1) a prescribed "discovery period" within which all discovery must be completed; (2) time limits on oral discovery; and (3) limits on the number of written interrogatories. These are summarized below:

Level 1 [258]

- Used where the suit seeks only monetary relief of $50,000 or less;
- Discovery period runs from the date the suit is filed to 30 days before the trial date;

[249] N.Y. Civ. Prac. L. & R., § 3101(d)(1).
[250] N.Y. Civ. Prac. L. & R., § 3407(b).
[251] Texas Rules of Civil Procedure, [hereinafter, "Tex. R. Civ. P."]
[252] Hon. N. Hecht and R. H. Pemberton, *A Guide to the 1999 Texas Discovery Rules Revisions* (Texas Supreme Court: November, 1998) at G-1.
[253] Tex. R. Civ. P., rule 192.3(a).
[254] Tex. R. Civ. P., rule 192.3(j).
[255] Tex. R. Civ. P., rule 192.4(a).
[256] Tex. R. Civ. P., rule 192.4(b).
[257] Tex. R. Civ. P., rule 190.1.
[258] Tex. R. Civ. P., rule 190.2.

- Each party has a maximum of six hours in total to examine and cross-examine all witnesses by oral deposition; and
- Any party may serve up to 25 written interrogatories on any other party.

Level 2 [259]

- Basic "default" level governs most cases (applies where the conditions for Level 1 are not satisfied and the court has not entered a tailored Level 3 discovery plan);
- Discovery period is the earlier of (a) the date the suit is filed to 30 days before the trial date or (b) nine months after the first oral deposition or the due date of answers to written questions;
- Each party has a maximum of 50 hours in total to examine and cross-examine all parties, witnesses and experts on the opposing side; and
- Any party may serve up to 25 written interrogatories on any other party.

Level 3 [260]

- Court-managed discovery, as requested by a party or ordered by the court;
- Tailored discovery plan is designed for more complex cases that do not easily fit into Levels 1 or 2, although the court may enter a Level 3 plan on the motion of any party or on its own initiative in any type of case; and
- Plan must include a date for trial, or for a conference to fix a trial, and set the discovery period, appropriate time limits on the amount of discovery, and deadlines for joining new parties, amending pleadings, and designating expert witnesses to be established.

### Requests for Disclosure

The request for disclosure enables parties to obtain prescribed discoverable information, including the subject matter on which a party's expert will testify and discoverable witness statements. Information subject to disclosure includes the name, address and phone number of witnesses, the amount and calculation of damages, and the legal theories on which a party's claims or defences are based.[261] This procedure is similar to the "initial disclosures" under U.S. Federal Court rules, except that disclosure is only required where it has been requested.[262]

A party may also serve on another party written interrogatories to inquire about any matter within the scope of discovery.[263] The number permitted depends on the discovery level of the case. Oral depositions may also be conducted of "any person or entity."[264]

[259] Tex. R. Civ. P., rule 190.3.
[260] Tex. R. Civ. P., rule 190.4.
[261] Tex. R. Civ. P., rule 194.2.
[262] Tex. R. Civ. P., rule 194.1.
[263] Tex. R. Civ. P., rule 197.1.
[264] Tex. R. Civ. P., rule 199.1(a).

### Code of Conduct

Another unique feature of the Texas rules is the discovery code of conduct, which states:

> Parties and their attorneys are expected to cooperate and to make any agreements reasonably necessary for the efficient disposition of the case. All discovery motions or requests for hearings relating to discovery must contain a certificate by the party filing the motion or request that a reasonable effort has been made to resolve the dispute without the necessity of court intervention and the effort failed.[265]

## 3. OTHER COMMONWEALTH COUNTRIES

Unlike North American jurisdictions, those described below do not incorporate oral examination as a regular discovery mechanism. As discussed in Part II of the Report, oral discoveries evolved in Ontario to become the primary method of discovery. This evolution did not occur in other commonwealth countries.

### (i) United Kingdom

In the U.K. the conduct of litigation in the county courts, High Court, and Civil Division of the Court of Appeal is governed by the Civil Procedure Rules.[266] These rules came into force in 1999 after Lord Woolf, in his on *Access to Justice Final Report*, recommended numerous justice system reforms.[267] The rules seek to streamline the civil justice process and to resolve as many cases as possible without resorting to court proceedings. The overriding objective, as prescribed in the rules and which parties and the court are obliged to further, is to have cases dealt with justly, with due regard to:

- ensuring parties are on equal footing;
- saving expense;
- dealing with cases in a manner that is proportionate to the amount of money involved, the complexity of the issues, and the financial position of the parties; and
- ensuring that cases are dealt with expeditiously and fairly within existing court resources.[268]

---

[265] Tex. R. Civ. P., rule 191.2.

[266] U.K. Civil Procedure Rules, Statutory Instrument 1998 No. 3132 (L.17), [hereinafter, "U.K. C.P.R."], Part 2, rule 2.1.

[267] Lord Wolf, *Access to Justice, Final Report*, (July 1996: Lord Chancellor's Department, London) http://www.lcd.gov.uk/civil/rpt-bfg3.htm#top, [hereinafter, "Lord Woolf Report"].

[268] U.K. C.P.R., Part 1, rules1.1(2), 1.3, 1.4.

### Scope of Discovery

The Civil Procedure Rules define "standard disclosure," as the minimum required in any case, unless a court orders further disclosure. Standard disclosure requires a party to disclose:

(a) the documents on which the party relies;

(b) the documents which adversely affect the party's own case, adversely affect another party's case or support another party's case; and

(c) the documents which the party is required to disclose by a relevant practice direction.[269]

### Documentary Discovery

Cases are allocated by the court to a small claims track, a fast track, or a multi-track, based on parties' responses to a questionnaire.[270] The duty of disclosure varies with each track. There is no automatic obligation to disclose documents.

For small claims track cases, parties are obliged only to provide copies of documents on which they intend to rely at the hearing.[271] For fast track or multi-track cases, the court gives directions on documentary disclosure.[272] Courts usually order "standard disclosure."

### Duty to Search

Where disclosure is ordered, parties have a positive obligation to conduct a reasonable search for documents, proportionate to the issues involved in the case. Proportionality is determined with regard to the number of documents involved, the nature and complexity of the proceedings, the ease and expense of retrieving any particular document and the significance of any document that is likely to be located during the search.[273]

### Witness Statements

Oral deposition of witnesses at the pre-trial stage is rare, and is only permitted with a court order.[274] Instead, parties are required to exchange witness statements of their respective fact witnesses,[275] and expert evidence is given by written report.[276] A party who is unable to obtain a witness statement may apply for permission to serve a witness summary instead, which summarizes of the evidence that would otherwise be included in a witness statement.[277]

---

[269] U.K. C.P.R., rule 31.6.
[270] U.K. C.P.R., rule 26.5(1).
[271] U.K. C.P.R., rule 27.4(1)(a), 27.4(3)(a).
[272] U.K. C.P.R., rule 28.3(1).
[273] U.K. C.P.R., rule 31.7.
[274] U.K. C.P.R., rule 34.8(1).
[275] U.K. C.P.R., rule 32.4.
[276] U.K. C.P.R., rule 35.5.
[277] U.K. C.P.R., rule 32.9.

### Expert Evidence

The rules restrict expert evidence to that which is "reasonably required to resolve the proceedings."[278] As such, no party may call an expert or put an expert's report in evidence without the court's permission.[279] If two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence be given by one expert only.[280] A party may put written questions about an expert's report to another party's expert or to a jointly appointed expert.[281]

### Pre-Action Protocols

Pre-action protocols have been introduced under the rules for certain types of cases, setting out codes of sensible practice that parties are expected to follow when faced with the prospect of a lawsuit. The overall aim is to encourage more pre-action contact between the parties, better and earlier exchange of information and a more co-operative approach to dispute resolution, with litigation as a last resort.[282] There are currently protocols in six areas: construction and engineering disputes; defamation; personal injury claims; resolution of clinical disputes; professional negligence; and judicial review.[283]

By way of example, the personal injury pre-action protocol:

- requires plaintiffs to notify opposing parties early of any damages suffered, and to deliver a letter of claim (a precedent is included in the protocol);
- provides defendants with a standard of time (3 months) to respond to any demand;
- encourages early document disclosure (lists of documents likely to be material in a personal injury action are provided); and
- encourages joint selection of experts through a defined procedure (a precedent letter to a medical expert is included in the protocol).

Early evaluation of the pre-action protocols suggests they are working to encourage pre-litigation settlement and to reduce the number of unnecessary actions.[284] Anecdotally however, concerns have been raised about the potential for the protocols to front-end load costs for parties.

---

[278] U.K. C.P.R., rule 35.1.
[279] U.K. C.P.R., rule 35.4.
[280] U.K. C.P.R., rule 35.7.
[281] U.K. C.P.R., rule 35.6.
[282] Lord Woolf Report at c.10.
[283] U.K. C.P.R., Pre-Action Protocols.
[284] See, B.C. Justice Review Task Force, *Exploring Fundamental Change: A Compendium of Potential Justice System Reforms* (July 2002). http://www.bcjusticereview.org/recent_announcements/2002/potential_reforms_07_02.pdf. See also, Lord Chancellor's Department, *Further Findings – A continuing Evaluation of Civil Justice Reforms* (August 2002). http://www.lcd.gov.uk/civil/reform/ffreform.htm.

## (ii) Australia Federal Court

Discovery in the Federal Court of Australia is set out in the Federal Court Rules.[285]

### Documentary Discovery and Scope

Documentary discovery is triggered by a request to "require any other party to give discovery of documents."[286] Once such a request is received, a party must list the documents on which it relies and those that adversely affect its own case, documents that adversely affect or support another party's case, and any documents required to be disclosed by a relevant practice direction.[287]

### Duty to Search

As in the United Kingdom, parties must conduct a reasonable search for documents, proportionate to the issues involved in the case. The determination of proportionality is based on the same factors as in the United Kingdom.[288]

### Written Interrogatories

Oral examinations for discovery are rare.[289] Parties may serve written interrogatories with leave of the court. There is significant judicial support for the use of written interrogatories.[290] The interrogatories may relate to any matter in question between the interrogating party and the party being served.[291]

### Expert Evidence

If a question for an expert witness arises in a proceeding, the court may appoint a court expert to inquire into and report on the question.[292] If a court expert has made a report on any question, any party may adduce evidence of one other expert on the same question.[293] Upon application by any party, the court must order cross-examination of the court expert by all parties.[294]

---

[285] Australia Federal Court Rules, Statutory Rules 1979 No. 140 as amended made under the *Federal Court of Australia Act 1976*, [hereinafter, "Aus. Fed. Ct. R."]

[286] Aus. Fed. Ct. R., Order 15, rule 1.

[287] Aus. Fed. Ct. R., Order 15, rule 2(3).

[288] Aus. Fed. Ct. R., Order 15, rule 2(5). Proportionality is determined by the number of documents involved, the nature and complexity of the proceedings, the ease and expense of retrieving any particular document, and the significance of any document that is likely to be located during the search.

[289] Note: Some forms of pre-trial oral discovery are permitted, with leave of the court, to identify a respondent (Aus. Fed. Ct. R., Order 15A, rule 3), or to add a party to an existing action (Aus. Fed. Ct. R., Order 15A, rule 5). The general authority to order an oral examination is found in Aus. Fed. Ct. R., Order 24, rule 1.

[290] S.D. Simpson, D.L. Bailey, E.K. Evans, *Discovery and Interrogatories*, 2 ed. (Melbourne: Butterworths, 1990) at 5.

[291] Aus. Fed. Ct. R., Order 16, rule 1.

[292] Aus. Fed. Ct. R., Order 34, rules 2, 3.

[293] Aus. Fed. Ct. R., Order 34, rule 6.

[294] Aus. Fed. Ct. R., Order 34, rule 4.

## (iii) New Zealand High Court

The High Court Rules establish civil discovery procedures in New Zealand's High Court.[295]

### Scope of Discovery

Upon being served with a notice, a party is required to give discovery of the documents that are or have been its possession relating to any matter in question in the proceeding.[296]

### Written Interrogatories

As in Australia and the U.K., oral examinations for discovery rarely occur. The parties may question each other by way of written interrogatories. After the pleadings between any parties are closed, any party may serve on another party a notice requiring it to answer interrogatories relating to any matter in question between them.[297] The court may, on a party's application, order that an answer to an interrogatory is not required or limit the extent to which an answer is required.[298]

### Witness Statements

Before trial, parties are required to serve on each other statements of the proposed evidence in chief of each witness to be called.[299]

### Expert Evidence

In certain proceedings, if a question for an expert witness arises, the court may appoint an independent expert to inquire into and report on any question of fact or opinion not involving questions of law or construction.[300] Any party may, within a prescribed period after receiving a copy of the report, apply to the court for leave to cross-examine the court expert on the report.[301]

[295] High Court Rules, S.N.Z. [hereinafter, "N.Z. H. Ct. R."]
[296] N.Z. H. Ct. R."], rule 293.
[297] N.Z. H. Ct. R., rule 278.
[298] N.Z. H. Ct. R., rule 280.
[299] N.Z. H. Ct. R., rule 441B, 441C.
[300] N.Z. H. Ct. R., rule 324.
[301] N.Z. H. Ct. R., rule 328.

# PART IV: CHARACTERISTICS OF CASES SURVEYED IN CASE SPECIFIC QUESTIONNAIRES

In order to properly compare the results of the case specific questionnaire across court locations with respect to the discovery process, it was important to understand how cases from each location compared in other respects. Respondents were therefore asked to provide information about a variety of case characteristics.

## 1. DESCRIPTION OF CASES

### Case Management

In Ottawa, more than 80% of cases and in Toronto 28% of cases were case managed under rule 77. In Thunder Bay and London, no cases were case managed.

### Type of Case[302]

Case types accounting for the largest proportion of responses overall were: "other" i.e.non-specified (18%), personal injury (18%), contract/commercial (14%) and negligence (12%).[303]

### Number of Parties[304]

Responses from all locations were similar with respect to the number of parties. Approximately 63% of all cases surveyed had 2 parties, 22% had 3 parties, 7% had 4 parties, 5% had 5 parties and 3% had 6 or more parties.

### Type of Representation

For all locations, approximately 94% of responses were for cases in which all parties were represented. Approximately 3% of responses were for cases in which all of the plaintiffs, but none of the defendants, were represented. Less than 1% of responses were for cases in which none of the plaintiffs, but all of the defendants were represented.[305]

[302] For a detailed breakdown, see Chart 1 - "Case Type" at Appendix K.

[303] There were some differences among court locations in the mix of case types. Medical malpractice cases comprised a larger percentage of responses in Ottawa and Toronto than in London and Thunder Bay. Toronto had the largest proportion of "other professional malpractice" cases. Thunder Bay and London had a larger proportion of personal injury cases than Ottawa and Toronto. London had the larges proportion of responses involving motor vehicle cases.

[304] For a detailed breakdown, see Chart 2 -"Number of Parties" at Appendix K.

[305] The fact that unrepresented parties were less likely to complete a survey than counsel likely accounts for the low numbers of responses from unrepresented parties.

## 2. PROGRESS OF CASES

### Rate of Disposition[306]

As noted earlier, cases defended in 1999[307] were selected to allow sufficient time – in a substantial majority of cases – for all steps in the litigation process to have been completed, in order to provide a context for examining the discovery process. Disposition rates varied in each court location. Most cases in Ottawa (86%) and Toronto (74%) had been disposed. Only 59% of Thunder Bay cases had been disposed, largely because defended cases from both 1999 and 2000 were sampled to obtain sufficient numbers of cases. London's 64% disposition rate was due to the fact that cases commenced (as opposed to defended) in 1999 were sampled.

In Ottawa, Toronto and London, certain case types had a disposition rate that was significantly lower (at least 18% lower) than the overall rate for each court location:

- Ottawa: estates, trust and fiduciary duty, other professional malpractice, and "other" (i.e. non-specified) case types;
- Toronto: medical malpractice, other professional malpractice and class actions; and
- London: motor vehicle, trust and fiduciary duty cases.

### Type of Disposition[308]

In all four locations, less than 5% of disposed cases were disposed by judgment at trial. Settlement was the most common type of disposition reported (in between 80% and 85% of responses).

### Time to Disposition[309]

Ottawa disposed of cases faster than the other courts. The typical time to disposition was 14 months in Ottawa, compared with 19 in Toronto, 20 months in Thunder Bay and 22 months in London. At least 75% of cases in Ottawa were disposed within 21 months, compared with 28 months in Toronto, 26 months in Thunder Bay and 34 months in London.

### Next Scheduled Event[310]

Respondents were asked to indicate the next scheduled event in cases that had not been disposed. In Ottawa, 7% of responses indicated that no future events were scheduled, in contrast with Toronto (26%), London (32%) and Thunder Bay (35%). Examination for discovery was the next scheduled event for 46% of Ottawa responses, 23% of Toronto responses, 14% of Thunder Bay responses and 11% of London responses.

---

[306] For a detailed breakdown, see Chart 3 - "Disposition Status of Case" at Appendix K.
[307] Since the date of defence was not available for London cases, date of **commencement** was used there.
[308] For a detailed breakdown, see Chart 4 - "Type of Disposition" at Appendix K.
[309] For a detailed breakdown, see Chart 5 - "Time from Commencement to Disposition (months)" at Appendix K.
[310] For a detailed breakdown, see Chart 6 - "Next Scheduled Event (if case not disposed)" at Appendix K.

## 3. AMOUNT OF CLAIMS AND AWARDS

### Amount of Claim[311]

In all locations combined, approximately 18% of responses were for claims of $50,000 or less. Another 18% were for claims between $50,001 and $100,000. About 40% of responses were for claims in the $100,001 to $500,000 range. Approximately 14% of responses were for claims between $501,000 and $1,000,000, and 12% were over $1,000,000.

### Amount of Award[312]

For all locations, 60% of respondents indicated judgments or settlements of $50,000 or less, 18% indicated judgments or settlements between $50,001 and $100,000, and 18% indicated judgments or settlements in the range of $100,001 to $500,000. Only 2% of responses were from cases with judgments or settlements between $501,000 and $1,000,000, and 1% were over $1,000,000.

## 4. DISCOVERY ACTIVITY

Discovery was commenced and/or completed in approximately 64% of cases.[313] Surprisingly, the analysis indicated that the likelihood of discovery occurring was higher in undisposed cases (76%) than in disposed cases (60%). The likelihood of discovery occurring varied with the manner in which cases were disposed, with similar patterns in all four courts.[314] Cases disposed by judgment at trial were most likely to have completed discovery, followed by cases that settled. Cases disposed by default judgment, summary judgment or discontinued by plaintiff (without a settlement) had the lowest likelihood of discovery being commenced. There was also significant variation in the likelihood of discoveries occurring, based on case type.[315] The likelihood of discoveries occurring was relatively low for collection cases and construction lien cases and relatively high for motor vehicle and personal injury cases.

Respondents were asked to indicate which specific discovery activity or activities they had undertaken.[316] Of the 64% of respondents who had discovery activity, 100% indicated that documentary discovery had occurred, 72% indicated that oral discovery had occurred and 1% indicated that written discovery had occurred. Approximately 36% indicated they had produced expert or medical reports and close to 18% indicated there had been medical examinations.

---

[311] For a detailed breakdown, see Chart 7 - "Amount of Claim" at Appendix K.

[312] For a detailed breakdown, see Chart 8 - "Amount of Judgment or Settlement (excluding costs)", Chart 9 - "Comparison of Cumulative Amount Claimed and Awarded" and Chart 10 - "Comparison of Amounts Claimed and Awarded (disposed cases)" at Appendix K.

[313] This analysis was conducted by examining whether respondents indicated that any of a list of discovery activities set out in Part E of the questionnaire had taken place. Respondents' answers to Question 8B, Part E were used to determine whether or not discovery was complete. To the extent that respondents failed to fill out any discovery related questions, the statistics would underestimate the occurrence of discovery activities. For a detailed breakdown see Chart 11 - "Discovery Process" at Appendix K.

[314] For a detailed breakdown, see Chart 12 - " Discovery Process by Disposition Type" at Appendix K.

[315] This figure includes both disposed and undisposed cases.

[316] For a detailed breakdown, see Chart 13 - "Occurrence of Different Types of Discovery Activity" at Appendix K.

# PART V: TASK FORCE FINDINGS

## 1. INTRODUCTION

This part of the Report discusses the findings regarding the current discovery process, including the key objectives, benefits and problems with discovery, as well as the perceived impact of potential reforms. Findings are based on responses to the case specific questionnaire and consultation paper, and feedback from submissions, focus groups and consultation meetings.

Overall, the Task Force has found that while many lawyers are satisfied with Ontario's discovery process, many others consider the costs and delays associated with discovery to be an impediment to access to justice.

Discovery-related problems do not arise in the majority of cases, but primarily in larger, "complex" cases, or where there is a lack of cooperation between opposing counsel. Local culture also plays a key role. A common perception is that there are fewer discovery-related difficulties where the bar is collegial, for example in smaller geographical communities or within specialty bars. Another prevalent view is that greater judicial intervention and more consistent enforcement of discovery obligations would go a long way to address problem situations. The following comments reflect views expressed most frequently to the Task Force:

> At the end of the day, the expectation is most lawyers have some grumblings with the present system: tinkering rather than wholesale changes are warranted and would be of benefit to civil litigators.[317]
>
> Problems usually relate to the behaviour of particular lawyers and not to the discovery process itself.[318]

The Task Force received several submissions from litigants, some of whom recounted their difficult and costly experiences with the discovery process. As noted by one litigant:

> My husband and I have spent 12 years trying to get to court and finally gave up. It was a dreadful experience impacting our health and our lives. We were discovered until we gave up. The discovery we were submitted to was atrocious. We did not get to discoveries until 1999. Our… issue happened in 1990. I do not understand why it took so long. The questions were asked in open-ended fashion – therefore the answer was every file that ever existed…. They then asked the same question in a different format. There were 9 days of discoveries over 4 years and they wanted more. The cost of the discoveries I am sure exceeded what we were asking for [in] damages. The lawyers were very aggressive at times… I believe a system that allows this kind of treatment is wrong![319]

[317] Submission of County & District Law Presidents' Association, dated June 17, 2002.
[318] Comment made during Essex Bar Association consultation meeting, June 19, 2002.
[319] Submission dated October 7, 2002.

## 2. KEY OBJECTIVES AND BENEFITS OF THE DISCOVERY PROCESS

In its consultation paper, the Task Force asked respondents to identify the key objectives of discovery from a list of 18 choices. The most frequently identified objectives were:

- To enable parties to assess strengths and weaknesses of each side's case prior to trial (99%);
- To obtain admissions (97%);
- To narrow issues for trial (96%);
- To assess credibility of person being examined as a witness (93%);
- To facilitate settlement (94%);
- To identify new documents that may affect outcome (90%);
- To get a recorded version of the witness' memory prior to trial, which may be used to impeach opponent or expert witness (87%);
- To strengthen the case in specific ways (84%); and
- To dispense with the time and expense of proof at trial (82%).

Feedback provided during consultations suggests that discoveries often permit other lines of inquiry to open up, revealing new issues in the litigation. In addition, once oral discoveries are scheduled, counsel must set aside time for preparation, turn their minds to the case and assess its strengths and weaknesses, which permits them to frankly and intelligently discuss settlement options. The sooner discoveries take place, the sooner the parties are able to meaningfully discuss settlement, which lowers costs for clients. However, use of the discovery process as a "fishing expedition" or a "weapon" to slow down cases (e.g. by producing boxes of irrelevant documents or delaying production of relevant documents)was not considered a legitimate objective by those consulted.

Respondents to the case specific questionnaire were asked to consider a list of 12 potential benefits of discovery and to indicate the extent to which any of these were realized in their case. The two top benefits (realized in 80% to 90% of cases in all four sites) were:[320]

- Strengthened the case in specific ways; and
- Obtained better understanding of the parties.

## 3. PERCEIVED DISCOVERY PROBLEMS AND IMPACT OF POTENTIAL REFORMS

A total of 26 potential problems were canvassed in the case specific questionnaire. For cases in which discovery had commenced, respondents were asked to indicate whether or not each problem was present, and if so, whether the problem had a significant impact on increasing (1) the cost of discovery (i.e. by 20% or more) to litigants or (2) the number of delays or disputes in the discovery process. In a majority of cases, most of the listed problems were not present. In fact, the top four problems were present in only 18% to 28% of all cases. The next nine problems were present in 6% to 10% of cases in at least one court location. The remaining problems were present in less than 10% of cases.

[320] See Appendix L for detailed results.

Similarly, a series of 27 reform options were explored in relation to cases in which discovery had taken place. Respondents were asked to indicate whether each reform would have had a positive, negative or no impact on their specific case. The seven reforms that received the greatest support were endorsed as having a positive impact by at least 40% of respondents in two or more court locations. The next eight were endorsed by at least 30% of respondents. The six reforms with the least support were considered to have a negative impact by at least 40% of respondents. Responses to the others were not as clearly divided between positive, negative or no impact.

The same problems and reforms were canvassed in the consultation paper. Respondents were asked to provide their views in general, and not in relation to specific cases. The results were used to gauge whether general perceptions about the discovery process were consistent with the findings in the case specific questionnaires. The ranking of problems and reforms followed a similar pattern to that in the case specific questionnaire, although overall percentages were higher in the consultation paper. Key problems and reforms identified by respondents to the surveys are summarized below:[321]

| **Key Discovery Problems** | **Key Reform Options** |
|---|---|
| • Insufficient or incomplete disclosure/production<br>• Untimely disclosure/production<br>• Disorderly disclosure/production<br>• Excessive disclosure/production; production of irrelevant documents<br>• Untimely production of expert reports<br>• Excessive requests for information and documents<br>• Vague requests for information and documents<br>• Disclosure only after motion to compel<br>• Difficulty/delay in scheduling examinations<br>• Cost of oral discovery disproportionate to value of claim<br>• Contentious relationship among clients<br>• Inappropriate attitude/behaviour of other parties<br>• Improper refusals based on relevance | • Standard disclosure protocols for certain case types<br>• Guidelines for orderly production of documents<br>• Mandatory production of Schedule A documents with pleadings<br>• Mandatory early disclosure of certain aspects of claim with pleadings<br>• Greater specificity in Schedule B about basis of privilege<br>• Serious sanctions for untimely, excessive or disorderly production of documents<br>• Discovery plan<br>• Access to immediate rulings on oral discovery disputes<br>• Deem questions taken under advisement to be refusals if not answered within fixed time<br>• Time limits and sanctions on completing undertakings<br>• Have parties prepare list of undertakings and refusals at end of oral discovery<br>• Tougher cost sanctions for unnecessary discovery-related motions<br>• Stricter enforcement of sanctions by judiciary |

[321] See Appendix M for detailed results.

## 4. COSTS OF DISCOVERY

The literature on discovery and anecdotal information from clients reveal a great dissatisfaction with the costs of discovery. Task Force members heard about numerous scenarios in which individual or small business litigants were forced to abandon claims or accept less than adequate settlements as a result of excessive discovery costs. The Task Force therefore wished to elicit data from respondents to the case specific questionnaire that might shed some light on the actual costs of discovery and whether those costs influenced clients' decisions in the proceedings.

The results discussed in this section must be read with the caveat that virtually no clients responded directly to the case specific questionnaires. Secondly, it should be noted that the results do not, for the most part, reflect costs after the introduction of the costs grid, which came into effect on January 1, 2002.

Respondents were asked to estimate their billings and the proportion that related to discovery.[322] The typical (or median) amount "billed or to be billed" for "legal work done on the case to date" was similar for Ottawa, Toronto and Thunder Bay – between $10,001 and $16,000 in all three locations – compared to a median of $5,001 to $10,000 in London. About 8% of respondents in Ottawa, Toronto and Thunder Bay indicated that they had billed over $50,000, compared with 2% of respondents in London. Details are shown in the chart below.

**Cost of Legal Work on Case to Date**

| Amount billed to client for legal work done on case to date | Ottawa | Toronto | Thunder Bay | London | All locations combined |
|---|---|---|---|---|---|
| less than $5,000 | 16.9% | 20.5% | 17.8% | 28.1% | 20.5% |
| $5,001 to $10,000 | 21.4% | 25.9% | 27.1% | 34.4% | 26.1% |
| $10,000 to $16,000 | 33.1% | 27.2% | 25.4% | 24.2% | 27.5% |
| $16,001 to $31,000 | 17.6% | 13.7% | 12.7% | 10.2% | 13.8% |
| $31,001 to $50,000 | 3.5% | 4.6% | 9.3% | .8% | 4.5% |
| $50,001 to $75,000 | 6.1% | 4.2% | 2.5% | .8% | 4.1% |
| over $75,000 | 1.5% | 3.9% | 5.1% | 1.6% | 3.5% |

Subject to variations from one site to another, the overall percentage of billings associated with discovery activities (including motions) was approximately: 25% or less of total billings to date in 32% of cases; 26% to 50% of total billings to date in 44% of cases; and over 50% of total billings to date in 23% of cases. Discovery costs comprised a much smaller percentage of total billings in Thunder Bay than in the other three court locations. Details are shown in the following chart.

[322] Note: These included legal fees for cases that had not yet been disposed (i.e. with only partial legal fees set to date). The numbers thus likely understate the total legal fees that were billed for disposed cases.

**Cost of Discovery as % of Total Billed to Client to Date**

| Discovery costs as % of total billed to client to date | Ottawa | Toronto | Thunder Bay | London | All locations combined |
|---|---|---|---|---|---|
| over 0 to 10% | 5.3% | 5.8% | 8.3% | 10.0% | 6.2% |
| over 10% to 15% | 6.4% | 3.0% | 14.7% | 3.6% | 4.1% |
| over 15% to 20% | 11.1% | 11.8% | 8.3% | 4.5% | 11.0% |
| over 20% to 25% | 13.1% | 9.7% | 24.8% | 7.3% | 10.9% |
| over 25% to 30% | 10.2% | 9.9% | 13.8% | 10.9% | 10.2% |
| over 30% to 35% | 4.5% | 7.0% | 2.8% | 7.3% | 6.5% |
| over 35% to 50% | 17.1% | 29.4% | 16.5% | 33.6% | 27.7% |
| over 50% to 65% | 14.6% | 7.6% | 4.6% | 10.9% | 8.3% |
| over 65% to 80% | 16.6% | 12.6% | 3.7% | 8.2% | 12.1% |
| over 80% | 1.1% | 3.2% | 2.8% | 3.6% | 3.0% |

When asked to rank the costs associated with each type of discovery conducted in their case, respondents in all locations ranked oral discovery costs as the highest proportion of total discovery costs and documentary discovery costs as the second highest. Written discovery ranked third in Ottawa and fourth in all other locations. Responding to undertakings ranked fourth in Ottawa and third in all other locations.

One of the most important questions relating to costs was whether, "[o]n the whole, the cost of discovery was too high, too low, or about right relative to your client's stake in this case." The Task Force acknowledges that this question would have been answered very differently by litigants, who may be unfamiliar with the costs of litigation, than by lawyers, who can anticipate large discovery costs.

As expected, a strong majority of respondents in all locations (about 80% overall) indicated that costs were about right. On the other hand, a notable minority of respondents – 20% in Ottawa and 19% in Toronto – indicated that costs were relatively too high compared to their clients' stake in the case.[323]

It is significant that 25% of respondents indicated that the cost of discovery led their client to pursue an alternative course of action. Two percent of respondents said that their client discontinued or abandoned the claim or defence, 8% settled on less satisfactory terms than would have been achieved had the client continued with the litigation, and 18% took "other" action, including "attempt to resolve case" and "plaintiff out of business."

However, the Ontario Trial Lawyers Association,[324] whose membership is composed primarily of plaintiffs' personal injury counsel, submitted that the cost of discovery is not generally a problem for plaintiffs and that many cases settle with no or limited discovery. Moreover,

> [p]laintiffs' lawyers in ordinary cases have learned how to manage time and expense. We have had to do so because our clients will not pay for scorched earth tactics. It is

[323] 10% of Thunder Bay respondents and 12% of London respondents indicated that the cost of discovery was relatively too high.

[324] Submission of the Ontario Trial Lawyers Association, dated January 24, 2003.

> the very rare Plaintiff's lawyer who can attract a case that will justify an investment in litigation as full-scale warfare, characterized by lengthy discovery, discovery motions, stonewalling and other roadblocks to settlement or trial. No Plaintiff's lawyer is going to put more time and expense into a case than the case can possibly recoup for him or her. …
>
> The changing dynamics of the defence bar, with many more in-house counsel and detailed cost control by insurers of outside defence counsel has resulted in less aggressive and time extended discovery.

## 5. SCOPE OF DISCOVERY

While most lawyers surveyed did not consider the current scope of discovery (i.e. "semblance of relevance" test) to be overly broad, some support was expressed in consultations and submissions for narrowing the scope.

In the case specific questionnaire, fewer than 10% of respondents identified the scope of discovery as a problem, ranking it in the bottom 13 out of 26 potential problems. Similarly, most respondents to the consultation paper ranked this problem in the bottom 13, although 35% considered the scope of discovery to be too broad.

On the other hand, a number of groups and individuals proposed that the scope of discovery be narrowed, noting that the "semblance of relevance" standard gives rise to unduly long and costly oral discoveries, which can lead parties to settle their disputes simply to avoid discovery. This was seen as particularly troublesome where parties have unequal financial resources. It was suggested that a narrower scope would be consistent with the objective of improving access to justice.

It was also pointed out to the Task Force that some lawyers abuse the "semblance of relevance" test by seeking productions and asking questions that are of marginal relevance, and that others go as far as harassment by repeating questions that are clearly irrelevant. A narrower test of relevance, it was observed, would help to curb this type of conduct.

Those opposed to restricting the scope of discovery indicated that, in the interest of adequate disclosure, it would be preferable for the scope to be too broad than too narrow. There was concern about limiting avenues of inquiry early in the proceedings, when these might prove to be relevant later on. As stated in the Ontario Bar Association's submission, "by restricting the scope of disclosure, key evidence may not be obtained before the trial."[325]

Concern was also expressed that a new, narrower test might lead to more disagreements, motions activity and judicial interpretation, as well as more expansive pleadings. In its submission, The Advocates' Society pointed out that changing the definition of relevance "will not, in and of itself, result in improvement and could actually lead to increased motions and increased debate about

[325] Submission of the Ontario Bar Association, dated September 12, 2002.

what, for example, is directly relevant to a substantive issue."[326] Similarly, the Ontario Bar Association noted in its submission:

> Changing the rules with respect to required disclosure, i.e., relevance, may not be workable. Lawyers may not be able to agree on what evidence is clearly relevant. Semblance of relevancy is a more workable definition.

## 6. ADEQUACY AND TIMING OF DOCUMENTARY DISCLOSURE/PRODUCTION

Problems related to documentary discovery were among the most significant reported to the Task Force. The highest ranked problems, identified by at least 20% of respondents to the case specific questionnaire, were:

- 1st Insufficient or incomplete disclosure/production (27% overall); and
- 2nd Untimely disclosure/production; withholding material information until late in the process (20% overall).

Other documentary discovery problems identified in 10% or more of responses in at least one court location, include, in order of ranking:

- 6th Disorderly disclosure/production (12% - Ottawa; 16% - Toronto);
- 7th Excessive requests for information and documents (13% - Toronto);
- 9th Disclosure only after motion to compel (11% - Toronto);
- 10th Excessive disclosure/production/production of irrelevant documents (10% - Toronto); and
- 11th Vague requests for information and documents (10% - Thunder Bay).

As noted earlier, respondents were also asked whether each problem they identified had a significant impact on costs, delay or the number of discovery-related disputes; a majority of respondents stated that they did.

In the consultation paper, documentary discovery problems were ranked as follows:

- 1st Insufficient or incomplete disclosure/production (71%);
- 2nd Untimely disclosure/production and withholding material information until late in the process (64%);
- 3rd Excessive requests for information and documents (61%);
- 5th Disorderly disclosure/production (48%); and
- 6th Disclosure only after motion to compel (47%).

### Incomplete and Untimely Disclosure/Production

Feedback provided to the Task Force during consultations and in written submissions supported these statistical findings. There was widespread concurrence that the prevalence of untimely, unsworn and incomplete affidavits of documents is a serious problem. As stated by the Advocates' Society in its submission:

[326] Submission of the Advocates' Society, dated October 9, 2002.

> [U]ntimely and incomplete disclosure…strike at the heart of discovery's key purposes. Without complete and timely disclosure of relevant information, discovery is thwarted….

The Task Force was told that incomplete, untimely disclosure and productions frequently leads to a further round of productions and examinations. Much needless time is wasted ensuring complete disclosure, or in giving undertakings to provide documents that should have been disclosed prior to the commencement of oral discoveries. According to the Advocates' Society:[327]

> We have come to experience what essentially is a two-stage discovery process, which is caused by initial incomplete production. This results in the first discovery appointment being used to request information, followed by receipt of the information (many times after contested motions and many times information is not complete or truly responsive), after which a second attendance is required to conduct the true discovery. An enforceable and efficient mechanism that allows a party to request and receive relevant documents after receipt of an affidavit of documents and prior to the initial discovery date should be available.

This concern was echoed in the submission of the Metropolitan Toronto Lawyers Association:[328]

> Detailed requests for further documents are made at the time of the examination for discovery, which usually leads to substantial further production of documents necessitating a further round of examinations for discovery to address the new productions. The effect of this practice is to delay the proceedings and to increase the costs associated with litigation.

A frequently cited problem was the absence of adequate descriptions of documents in schedules to the affidavits of documents. The Task Force heard that Schedule A documents are often bundled together in groups rather than individually itemized, and details of Schedule B privileged documents are not provided.

It was suggested during consultations that prompt production of documents is easier for certain case types (e.g. commercial cases), than for others (e.g. personal injury). Moreover, there are often delays in obtaining documents from large institutional parties such as hospitals and government agencies. In addition, the broad definition of "document," coupled with the proliferation of electronic document sources such as e-mail, make it more difficult for parties to provide a complete and timely affidavit of documents.

As shown in the following chart, respondents to the case specific questionnaire indicated that sworn affidavits were exchanged in approximately three quarters of cases, with two exceptions: affidavits of documents were exchanged in 98% of Ottawa undisposed cases, and in 84% of London disposed cases.

[327] Submission of the Advocates' Society, dated October 9, 2002.
[328] Submission of the Metropolitan Toronto Lawyers Association, dated September 19, 2002.

**Cases with Documentary Discovery:**
**Whether Clients' Affidavit of Documents was Delivered**

| | Was client's affidavit of documents delivered? | Not Disposed | Disposed | Unspecified* | Total |
|---|---|---|---|---|---|
| Ottawa | Yes | 98.2% | 76.5% | 47.6% | 79.1% |
| | No | 1.8% | 23.5% | 52.4% | 20.9% |
| Toronto | Yes | 75.6% | 78.8% | 65.5% | 76.0% |
| | No | 24.4% | 23.2% | 34.5% | 24.0% |
| Thunder Bay | Yes | 71.0% | 78.9% | 50.0% | 74.8% |
| | No | 29.0% | 21.1% | 50.0% | 25.2% |
| London | Yes | 76.2% | 84.3% | 100.0% | 81.1% |
| | No | 22.2% | 15.7% | | 18.3% |

*Respondent did not indicate disposition of case.

Approximately one quarter of cases where discovery had commenced were disposed (often through settlement) without an exchange of sworn affidavits of documents. Of those that were not disposed, affidavits of documents were not exchanged in 24% of Toronto cases, 29% of Thunder Bay cases and 22% of London cases, even though these cases were commenced in 1999 or 2000. By contrast, there were only 2% of undisposed cases in Ottawa in which affidavits of documents were not exchanged.

## Volume of documents

Given anecdotal information about the proliferation of documents in civil proceedings, the Task Force was interested in quantifying the volume of documents exchanged in the cases sampled. In framing a question for the case specific questionnaire, the Task Force was aware of the time consuming efforts that would be required for counsel to count the number of pages produced in each case, and decided instead to ask respondents to indicate the number of documents referenced in their affidavits of documents. In any event, a fairly high percentage of respondents did not answer this question. The results shown in the chart below, are, therefore, of somewhat limited utility.

**Volume of Documents by Court Location**

| | Ottawa | Toronto | Thunder Bay | London |
|---|---|---|---|---|
| 50% or more respondents indicated that their affidavits referenced a minimum of: | 56 documents | 35 documents | 40 documents | 27 documents |
| 25% or more respondents indicated that their affidavits referenced a minimum of: | 200 documents | 60 documents | 74 documents | 66 documents |
| 5% or more respondents indicated that their affidavits referenced a minimum of: | 500 documents | 500 documents | 260 documents | 200 documents |

The case specific questionnaire also asked whether the presence of a large volume of discoverable documents was a factor in the case, and whether it had an impact on cost and delay. A significant minority of respondents noted the presence of this factor in their case (42% in Ottawa, 40% in

Thunder Bay, 26% in Toronto and 17% in London) and its impact on cost and/or delay (49% in Toronto, 33% in Ottawa, 26% in Thunder Bay and 25% in London).

In consultations and submissions, the Task Force heard that there is a much larger volume of discoverable documents today than ten years ago. This problem can be exacerbated in cases where one of the parties is a large institution or in "document heavy" cases, such as construction matters. Excessive document requests or productions are sometimes attributed to inexperienced lawyers, who are concerned about "leaving any stone unturned."

Almost all of those consulted urged that steps be taken to improve compliance with the rules. As noted earlier, there was substantial support for reforms designed to address problems relating to documentary discovery, including stricter enforcement of the rules by the judiciary, serious cost sanctions, guidelines for orderly production of documents and standard disclosure protocols for certain case types. These were supported by between 35% and 45% of respondents to the case specific questionnaire, and by at least 70% of respondents to the consultation paper.

Other reform proposals made during consultations include:

- Prescribe a longer, more realistic timeframe for exchanging affidavits of documents;
- Require parties at a minimum to produce documents referred to in the pleadings;
- Establish standard formats for Schedules A, B and C;
- Discovery planning by parties to clarify the scope of discoverable documents and information, as well as the timing for production especially in cases with a large volume of documents;
- Prohibit parties from commencing examination for discovery until all relevant documents are produced; and
- Mandatory disclosure of certain aspects of the claim with pleadings, such as a list of witnesses or the calculation of damages.

These reform proposals will be discussed in greater detail in Part VI of the Report.

## 7. PRODUCTION OF DOCUMENTS IN THE POSSESSION OF NON-PARTIES

Respondents to the case specific questionnaire were asked whether the need to obtain records in the possession of a non-party was a factor in their case, and if so, whether it had a significant impact on increasing costs (by 20% or more), delay or the number of disputes. Over a third of respondents identified this factor as being present, and at least one third of those indicated that it had an impact on increasing costs, delays or the number of disputes. This factor was more prevalent for medical malpractice cases in Ottawa, personal injury cases in Toronto, motor vehicle cases in Toronto and Thunder Bay, and negligence cases in Thunder Bay.

During consultations, the Task Force heard that obtaining information from non-parties through undertakings can increase cost and delay, and that many disputes are based on whether the other side has exercised best efforts in obtaining non-party documents. Frequently, "two-stage" oral discovery arises from the late production of hospital and medial records. Similar problems occur in commercial cases where relevant documents are in the hands of third parties. Lawyers

representing hospitals, physicians, and government agencies expressed concern about the costly and time-consuming efforts required to produce documents, noting that plaintiffs often have easier access to records than doctors and hospitals.

The Task Force heard that many lawyers find it difficult to bring a successful motion to compel production from a non-party based on the current onus of proof, which requires the moving party to demonstrate that it would be unfair to proceed to trial without the document.

## 8. DISCOVERY OF ELECTRONIC DOCUMENTS

The burgeoning growth of computer technologies has given rise to challenges in the discovery process, both in terms of the large volume of electronically generated documents and in terms of issues relating to the form, content and cost of documentary productions. On the other hand, technology also presents opportunities in the form of new tools with which to manage the production of documents.

In spite of the extensive business use of computers, the Task Force has found that many lawyers and judges are still unfamiliar with the impact of technology on litigation, as reflected in the discussions at consultation meetings, and in responses to the case specific questionnaires. For example, only 4% of respondents indicated that the discovery of electronic documents was a factor in their case.

Task Force members met with Martin Felsky, a specialist in litigation support document management services and an advisor to the Canadian Judicial Council on litigation document production. Mr. Felsky also prepared a submission to the Task Force, which offered insights as to why the majority of lawyers have been slow to fully appreciate the important role of technology in the litigation process.[329] For one thing, many lawyers historically have been and continue to be very print-oriented. Often, lawyers and their clients are not aware of what electronic documents they have or of their importance. Many do not recognize the need to produce and ask for electronic documents. Mr. Felsky's submission also identified other barriers to the effective use of technology by the legal profession:

> For example, though the definition of "document" is very broad in Rule 30, the rest of the rules on document production assume the parties are dealing with photocopies and printed affidavits:
>
> - The rules do not address the mechanics or cost of producing scanned images or databases.
> - The rules do not require a party that may have scanned documents to provide scanned images to the opposing side.
> - Conversely, the rules do not prevent a party from requiring printed copies even where the other side has imaged all the production documents.

[329] Submission of Martin Felsky, Commonwealth Legal Inc., dated March 31, 2003.

Many judges and lawyers have little knowledge of the available technology and little incentive to become aware:

- The Law Society of Upper Canada Practice Management Guidelines do not consider the use of technology in large document cases to be mandatory.
- The Rules of Professional Conduct are silent on the issue, though the Law Society commentary suggests that the rules "may" require the use of technology in some cases.
- The profession has not established any guidelines for the use of technology and the sharing of costs to eliminate uncertainty and excessive caution in its use.
- Lawyers have few opportunities and little time to learn about technology or about the strategic importance of document management in the litigation process.

The Task Force has found that there is a need for further review of emerging electronic discovery issues and proactive steps to encourage greater familiarity with technology by the legal profession. This will be discussed in greater detail in Part VI of the Report.

## 9. ORAL DISCOVERY

### Scheduling Difficulties and Delays

Scheduling problems and delays in commencing or completing discoveries were identified as a significant concern. Of the 26 potential problems canvassed in the case specific questionnaire, the problem of scheduling ranked as the third most serious. It was identified by 19% of respondents overall, the majority of whom reported that this problem had an impact on cost and delay in the discovery process.[330]

The time that elapsed between case commencement and the start of oral discovery was also canvassed in the case specific questionnaire. The typical (median) time period was a minimum of 11 months in all four locations.[331] For at least 25% of Toronto and Ottawa cases, a minimum of 17 months passed before the beginning of oral discovery compared with 21 months in Thunder Bay and 19 months in London. In at least 5% of cases, oral discovery did not commence until 25 months had elapsed in all locations.[332]

[330] The scheduling problem was also identified by 36% of respondents to the consultation paper, ranking 13th.

[331] Ottawa – 11 months; Toronto - 12 months; Thunder Bay – 13 months; London – 14 months.

[332] Ottawa – 25 months; Toronto – 29 months; Thunder Bay – 30 months; London – 33 months. Note that, given the limited sample size for certain case types, it was difficult to analyze precisely how the time to commencement of oral discovery varied by case type, other than to note that negligence cases generally took longer than other case types to begin discoveries (except in London).

Scheduling was considered to be particularly problematic with multiple parties or lawyers. Some lawyers' busy schedules make it impossible to schedule discoveries until months in the future. Responses to the case specific questionnaire indicated that multiple parties or multiple lawyers were factors in a notable proportion of cases. There were multiple parties in just under half of the cases in Ottawa, Toronto and Thunder Bay, and in about one quarter of London cases. There were multiple lawyers representing different parties in a third of cases in Ottawa, Toronto and Thunder Bay and about 10% of London cases.

As stated by the County and District Law Presidents' Association in its submission:

> The greater the number of counsel involved, the greater the delay in the simple task of scheduling examinations for discovery. The parties are entitled to have litigation move forward in a timely manner. Discoveries scheduled, for example, 9 months down the road don't serve that end.

One strategy proposed by some of those consulted is to serve a notice of examination proposing a reasonable date, knowing that opposing counsel are not available. Opposing counsel is then force to attend, and if not, the examining lawyer may obtain a certificate of non-attendance and bring a motion to fix the date for discovery within a reasonable time.

The Task Force heard that two other principal causes of delay in the oral discovery process are the prolonged duration of oral discovery, as discussed below, and the need for re-attendance as a result of motions relating to undertakings and refusals. This issue is discussed in Part V, Section 14 below. In the context of case managed proceedings in Toronto, the case management masters advised the Task Force during consultations that the inability of counsel to complete discoveries within case management timetables is problematic. There was substantial support for the incorporation of discovery planning mechanisms into the discovery process as a means of addressing scheduling and delay problems. Approximately one-third of lawyers surveyed in the case specific questionnaire and one-half of those who responded to the consultation paper agreed that discovery plans would have a positive impact.

**Location of Examinations**

One factor that can increase the cost of discovery is the time and expense of travel to examinations for discovery. Respondents to the case specific questionnaire reported that it was relatively common for lawyers or parties to be located outside the county where the action was commenced. This was a factor in a third of Ottawa and Thunder Bay cases, and 26% of London cases. In Toronto, lawyers located outside the county was a factor in 12% of cases and parties located outside the county was a factor in 18% of cases.

At consultations, the Task Force was told that in cases where there are multiple lawyers in one location, it may be more economical for the deponent to travel to the county in which the lawyers are located or to a mutually convenient location, rather than have the lawyers incur the time and expense of travelling to where the deponent resides. It can be burdensome for individual litigants to take time away from their job and travel long distances to attend discoveries. For Aboriginal

clients, unfamiliar settings such as an examiner's office can be uncomfortable.[333] Suggestions were made for greater flexibility in Rule 34 regarding the location of examinations. Teleconferencing and videoconferencing are also available as possible alternatives to in-person examinations, although lawyers consulted were generally reluctant to explore these technologies.

**Duration of Examinations**

Respondents to the case specific questionnaire were asked to provide information on the time taken from the beginning to end of oral discovery. Results varied from one court location to another. The typical (median) time from beginning to end of oral discovery was 5 months in Ottawa, 6 months in Toronto and Thunder Bay, and 13 months in London. In at least 25% of cases, it took one year or more to complete oral discovery in Toronto and Thunder Bay, 19 months or more in London, and 8 months or more in Ottawa.

For cases involving up to four parties, the time between the start and finish of oral discovery appeared to increase as the number of parties being examined increased. However, for cases in all locations involving five or more parties, this impact ceased to be present and the duration did not tend to increase with the number of parties being examined. The reason for this apparent anomaly could not be derived from the data collected.

The typical (median) number of days spent in oral examination in total (both as examining counsel and representing the client being examined) was 2 days in Ottawa, versus 1 day in the other three sites. In at least 25% of cases in Ottawa and Toronto the respondent spent 3 days or more in examinations, and 2 days or more in Thunder Bay and London. In approximately 5% of cases, the total number of days spent in oral examination was 14 or more in Ottawa, 6 or more in Toronto, 7 or more in Thunder Bay, and 3 or more in London.

Respondents were asked to estimate the duration of the longest individual examination. In Ottawa, at least 50% of the individual examinations were over in 1 day or less and at least 75% were over in 1.6 days or less. In Toronto, Thunder Bay and London, at least 75% of the individual examinations were over in 1 day or less. In approximately 5% of cases, the longest individual examinations were at least 6 days in Ottawa, at least 4 days in Toronto and Thunder Bay, and at least 2 days in London. However, fewer than 8% of respondents to the case specific questionnaire identified the length of examinations as a problem,[334] which is somewhat surprising in light of the feedback provided during consultations and in submissions suggesting that unduly long oral discoveries are a concern to many lawyers.

The case specific questionnaire canvassed the number of persons examined at oral discovery.[335] In all locations, the typical or median number of persons examined was two per case. As well,

[333] Submission of Aboriginal Legal Services of Toronto, dated September 11, 2002.

[334] In the consultation paper, the length of examinations was considered a problem by 32% of respondents, ranking 17th.

[335] The question asked how many parties and non-parties were examined. Since very few respondents indicated that non-parties were examined, results are based on a total of parties and non-parties.

there was at least a 5% chance in Ottawa, Toronto and Thunder Bay of more than six persons being examined in oral discoveries (five in London).[336]

The following are representative of the concerns raised at consultations and in submissions with respect to the duration of oral discoveries:

- Some counsel unduly prolong discovery. As stated in one submission:[337]

  > Some counsel plod along with questions that are ponderous, repetitive, boring and arcane. For the most part, we have to sit there and take it but usually we survive and press ahead. This is only an occasional problem in my experience. Most good counsel know what they want; they get it, (or try to), and move on. This is not a problem that requires rule changes.

- Much time is taken in oral discovery to confirm what should already have been done.
- Lack of preparation and understanding on the part of counsel prolong the discovery process.
- Counsel ask too many irrelevant questions.
- Discoveries involving Toronto lawyers (especially from large firms) are usually longer, whereas discoveries in smaller communities, where opposing counsel are familiar with one another, are rarely longer than one day.

Reaction among those consulted to the imposition of time limits on oral discovery was mixed. On one hand, it was generally conceded that time limits would require counsel to better prepare for discoveries and to avoid repetitious and irrelevant questions. Time limits were also seen as helpful in containing the cost of oral discoveries. Many lawyers indicated that most of their cases could be handled fairly if they were provided with one full day of discovery per party. For example, the Metropolitan Toronto Lawyers Association proposed in its submission that each party be limited to six hours of oral discovery, except where extended discovery is needed and agreed to by the parties or ordered by the court.

On the other hand, there were concerns that time limits would be arbitrary, might unduly limit access to important information, or could be difficult to comply with where witnesses need a great deal of time to tell their story. The Advocates' Society opposed time limits based on the value of a claim, on the grounds that the complexity of issues and the time required for oral examinations is not necessarily directly related to the amount at stake.

---

[336] Given the small number of responses for certain case types, it was only possible to make a limited analysis of whether the number of persons examined differed by type of case within each court location. In Toronto, the examination of more than two parties was more likely to occur in motor vehicle cases (71%), negligence cases (64%) and personal injury cases (65%). In Ottawa, the examination of more than two parties was more likely to occur in contract commercial cases (67%), compared to motor vehicle cases (46%) and negligence cases (33%).

[337] Submission of D.P. Nolan, dated June 3, 2002.

### Disproportionate Cost of Oral Discovery

In the case specific questionnaire, 15% of respondents reported that the cost of discovery was disproportionate to the value of the claim in their case, ranking this as the fifth most serious problem. This concern was echoed at consultations. It was generally agreed that the amount of money at stake in a claim must be considered in determining how much time to spend at discovery. The client must be clearly advised how much the discovery will cost. The Task Force was told that lengthy discoveries are particularly problematic in smaller cases. In addition, attending oral discoveries takes individual litigants away from their jobs and businesses, which has an impact on their livelihood.

### Inadequate Preparation for Oral Discovery

Prevalent among those consulted is the perception that opposing counsel often attend unprepared for oral discovery, asking too many irrelevant questions and demanding unnecessary undertakings. Surprisingly, only 5% of respondents to the case specific questionnaire identified this as a problem in their case.[338]

The Task Force also heard during consultations that parties frequently fail to make best efforts to complete documentary production before oral discovery, and that counsel do not regularly conduct any planning with opposing counsel prior to the oral discovery, for example, with a view to ensuring that witnesses have produced all relevant documents and are sufficiently informed to speak to the issues.

These comments were consistent with the results of the case specific questionnaire. For cases in which oral or written discovery took place, respondents were asked whether they had discussed areas of inquiry with opposing counsel before commencing oral discovery. Such discussions occurred in only 20% of Toronto cases, 32% of Ottawa cases and 15% of London cases. However, they did occur in 55% of Thunder Bay cases.

In addition, only a small majority of respondents reported that they had received relevant documents from opposing parties prior to oral discovery. Relevant documents were received in 61% of Toronto cases, 64% of Ottawa cases, 69% of Thunder Bay cases and 52% of London cases. In the remaining cases, relevant documents were not received in advance of oral discovery.

Requests to admit were made in fewer than 10% of cases overall, with minor regional variations.[339] The majority of these requests were made before discovery commenced.

As noted above, there was a general consensus among those consulted believe that the use of discovery planning prior to the commencement of examinations for discovery would be beneficial.

---

[338] The problem of "opposing counsel unprepared or incompetent" was identified by 33% of respondents to the consultation paper, ranking 16th.

[339] Requests to admit were present in 10% of Toronto cases, in 7 % of Ottawa and Thunder Bay cases and in 6% of London cases.

### Attitude/Behaviour of Counsel

Statistically, few respondents to the case specific questionnaire considered uncivil and unprofessional conduct or incompetence on the part of counsel at oral discovery to be problematic. However, participants in consultations noted that aggressive cross-examination can be problematic. This behaviour was sometimes attributed to lawyers acting on their clients' instructions, or to inexperienced counsel (although this was disputed by a number of younger lawyers).

Some lawyers suggested that aggressive behaviour is especially prevalent among Toronto counsel. Others did not view such conduct as the exclusive domain of any particular locale. At one consultation meeting the comment was made that lawyers act in whatever manner they consider to be in the best interest of their clients; this may include aggressive conduct, which can only be curbed by sanctions. Many lawyers indicated that there is a general erosion of civility in the conduct of discoveries. Anecdotal reports from persons examined on discovery cited incivility towards witnesses in a number of cases. This is discussed further in Part V, Section 17 below.

### Attitude/Behaviour of Parties

Only a small minority of respondents to the case specific questionnaire and the consultation paper identified the conduct of parties as a problem, except in Ottawa, where 10% of respondents to the case specific questionnaire reported that other parties had an inappropriate attitude or behaviour. On the other hand, the presence of a contentious relationship among clients was identified by 18% of respondents to the case specific questionnaire, ranking fourth overall (although very few indicated that this problem had a significant impact on cost and delay).

## 10. WRITTEN DISCOVERY

The findings indicate that written discovery is a seldom-used tool. In the cases surveyed, discovery by written questions occurred in only 1% of cases that had discovery, as contrasted with oral discovery, which took place in about three-quarters of cases. Demands for particulars were also used infrequently – in fewer than 4% of disposed cases in which documentary discovery occurred.[340]

While very few lawyers consulted viewed written discovery as an alternative to oral examinations, many saw it as a helpful supplement in cases that rely heavily on documentary evidence, such as financial disputes. The Task Force was told that written discovery is effective and cost-efficient in obtaining disclosure of certain documents or information that can later be examined on orally, and where only a limited number of questions are asked. It is also useful where witnesses have difficulty attending in person or are no longer available.

[340] The only exception was in Ottawa, where respondents reported making demands for particulars in over 50% of undisposed cases. The data showed that demands for particulars were largely made by defendants; however, the relatively small number of responses did not permit an analysis of the reason for this.

During consultations, lawyers who have used written discovery in appropriate cases ascribed a number of benefits to this method of discovery, including the following:

- They result in clear, concise answers that can be used at trial.
- They can be less time consuming and expensive than oral discovery.
- They force parties to review their documents and focus on the issues early on in the case, which expedites the possibility of settlement, thereby minimizing costs.

However, lawyers did not consider written discovery to be a viable method of obtaining admissions for use at trial, since it provides no opportunity to assess the credibility of a witness.

## 11. EXAMINATION OF CORPORATE REPRESENTATIVES AND PARTNERS

This issue was not directly canvassed in the case specific questionnaire or in the consultation paper, although respondents were asked whether inadequate knowledge of the case by client representatives who attended discovery was a problem. Six percent of respondents to the case specific questionnaire and 28% of respondents to the consultation paper identified this as a problem. However, the Task Force heard at consultations that the current rule, which permits the examining party to examine only one corporate representative (except with leave of the court), can lead to unnecessary cost and delay in the discovery process where the representative in attendance has inadequate knowledge of the facts in issue.

## 12. EXAMINATION OF NON-PARTIES

The case specific questionnaire focused primarily on the issue of non-party production, and did not canvas the issue of examining non-parties. However, a few submissions suggested that the test for obtaining leave to examine non-parties is too onerous.

As with non-party production, obtaining information from non-parties is largely achieved through undertakings given by the party being examined. The Task Force heard that this can increase cost and delay since the examined party must contact the non-party for answers to those undertakings, which may lead to additional questions and further undertakings. Because a non-party is not required to provide the requested information, even if it may be relevant, disputes often arise as to whether the examined party exercised best efforts to obtain answers from non-parties.

## 13. DISCOVERY OF EXPERT EVIDENCE

Three key concerns regarding the discovery of expert evidence were articulated to the Task Force. The untimely production of expert reports and the proliferation of expert reports were both seen as factors that increase cost and delay in the discovery process. The unavailability of pre-trial examination of expert was identified as a third problem.

The case specific questionnaire canvassed a number of issues pertaining to the frequency, nature and impact of expert discovery. Slightly more than 50% of Ottawa and Toronto respondents and

slightly less than 50% of Thunder Bay and London respondents indicated that the need for expert evidence was a factor in their case. Between 20% and 30% of those respondents also indicated that it had a significant impact on cost and delay.

Other areas of inquiry included whether there had been production of an expert report, physical or mental medical examination of a party, production of a medical report or document relating to a person to be examined, or production of a medical report of examining health practitioner. Respondents indicated that at least one of these activities occurred in 36% of Toronto cases in which discovery took place, 42% of Ottawa cases, 30% of Thunder Bay cases and 47% of London cases.

While the sample size was too small for certain case types to fully explore the correlation between the production of expert or medical reports and type of case, it was possible to observe that reports tended to be present in the following types of cases:

- Ottawa: over 75% of motor vehicle, personal injury and negligence cases;
- Toronto: 75% of motor vehicle cases, 61% of personal injury cases and 57% of negligence cases;
- Thunder Bay: 43% of motor vehicle cases and 55% of personal injury cases; and
- London: 74% of motor vehicle cases, 67% of personal injury cases and 54% of negligence cases.

Untimely production of experts' reports was identified as a problem by 10% of respondents in London, 7% of respondents in Toronto and Thunder Bay, and 6% in Ottawa, ranking 12th out of 26 potential problems.[341] In Ottawa, Toronto and London there was a direct correlation between the likelihood of a case involving expert discovery or medical examinations and the length of time between the start and end of discovery. This relationship was, however, not present for Thunder Bay cases.

During consultations, the Medico-Legal Society of Toronto noted that expert reports are rarely prepared early in a proceeding. Because many lawyers assume experts can easily complete reports within the time prescribed in the rules (90 days before trial), they do not request reports until late in the process, often in the few months preceding trial. As busy professionals, experts may have to prepare reports outside of regular working hours. The experts consulted urged greater lead-time for the preparation of reports. They also advised that it is difficult to provide responding and supplementary reports within the respective 60-day and 30-day periods prescribed by the rules.

When an expert is unable to provide a responding or supplementary report within the times prescribed by the 90/60/30 day rule, the court often finds it necessary to adjourn the date of trial. The Task Force heard that this can result in lengthy delays in the resolution of proceedings, especially in regions with long trial lists. In Toronto, for example, late production of expert reports can lead to postponement of long trials for significant periods of time.

[341] 46% of respondents to the consultation paper identified this as a problem, ranking it 7th out of 26.

The Task Force was also advised that while experts are very helpful, particularly in cases dealing with technical matters, there is an over-reliance on experts in Ontario. The culture of litigation has resulted in an "industry" of competing experts' on every issue, which unduly increases costs. According to one submission:

> As lawyers, we have abdicated our responsibility to make decisions about lawsuits when we retain too many experts. We do this because it our hope that the expert will make the decisions for us. We have rules limiting the number of experts in a case, but they are very rarely enforced. One suggestion…is that the pre-trial conference judge should make binding orders with regard to what expert evidence can be called at trial. Cases involving complex legal or factual issues always result in more costs to litigants, but they should not necessarily result in delays.[342]

It was suggested to the Task Force that some judges contribute to the overuse of experts. The Task Force was told, for example, that in personal injury actions, some judges now permit expert evidence on the calculation of certain loss claims, whereas in the past they would have been satisfied with calculations made by counsel. It was observed that in cases where opposing experts have conflicting opinions, judges sometimes want to hear additional experts rather than make a decision on the basis of the competing opinions.

On the other hand, certain cases by their very nature, such as medical malpractice matters, must rely more extensively on expert evidence than others. In its submission to the Task Force, the Medical Malpractice Coverage Committee (MMCC)[343] pointed out that in medical malpractice litigation, medical experts provide opinions not only on damages, but also on causation and liability. The MMCC expressed concern about the unavailability of pre-trial examination and cross-examination of experts:

> The quality and credibility of the opinions offered by experts will often determine the outcome of the litigation. Current discovery practice makes it difficult for the adversaries to test the expertise of their opponent's expert witnesses. Those experts are likely to be present at trial and this is likely to be the first opportunity for the opposing counsel to confront the expert and to test the opinions proffered.
>
> The necessity for proceeding to trial to deal with this important aspect of controversy acts as a shield for experts, minimizing their accountability. The MMCC has concluded that there may be value in a process that allows parties to conduct pre-trial examination under oath of expert witnesses. This would provide the opportunity for examination and cross-examination of the expert. It would educate each of the parties as to the relative merits and demerits of their positions. It would allow litigants to more accurately valuate their position in litigation without incurring the great expenses of attending a trial.

[342] Submission of Paul Iacono, dated May 1, 2002.

[343] Submission of the Medical Malpractice Coverage Committee, dated May 1, 2003. The committee is a joint committee of the Ministry of Health and Long-Term Care, the Ontario Medical Association and the Canadian Medical Protective Association, created to address medical malpractice indemnity issues.

## 14. UNDERTAKINGS AND REFUSALS

Undertakings and refusals were reviewed to determine their impact on the length and cost of discovery, and on the volume of discovery disputes and related motions. Respondents to the case specific questionnaire were asked to quantify the number of questions they asked as examining counsel and that their clients were asked by opposing counsel during oral discovery, as well as the number of undertakings and refusals in response to those questions. Respondents were asked to refer to transcripts in order to retrieve such information, or to make reasonable estimates. As shown in the following chart, the typical number of questions asked in each case by respondents as examining counsel was lowest in Ottawa. The typical number of undertakings and refusals given by opposing parties was highest in Toronto.[344]

**Undertakings & Refusals – Respondent as Examining Counsel**

| Respondent as examining counsel | Ottawa | Toronto | Thunder Bay | London |
|---|---|---|---|---|
| Typical (median) number of questions asked (of all parties) by respondents as examining counsel | 150 | 300 | 250 | 300 |
| Typical (median) number of undertakings given to respondents by opposing parties | 10 | 14 | 10 | 11 |
| Minimum number of undertakings given to respondents by opposing parties in at least 25% of case | 20 | 21 | 20 | 20 |
| Typical (median) number of refusals by opposing parties | 1 | 3 | 0 | 0 |
| Minimum number of refusals by opposing parties in at least 25% of cases | 5 | 8 | 1 | 2 |

The following chart shows that the typical number of questions put to the clients of respondents by all other parties was highest in Toronto. The typical number of undertakings arising from these questions was the same in Ottawa, Toronto and Thunder Bay and lowest in London. The typical number of refusals was highest in Toronto.[345]

**Undertakings & Refusals – Respondent's Client as Examined Party**

| Respondent's client as examined party | Ottawa | Toronto | Thunder Bay | London |
|---|---|---|---|---|
| Typical (median) number of questions put to respondent's client by all other parties | 200 | 300 | 200 | 175 |
| Typical (median) number of undertakings given by respondent's client | 10 | 10 | 10 | 6 |
| Minimum number of undertakings given by respondent's client in at least 25% of cases | 22 | 20 | 15 | 18 |
| Typical (median) number of refusals by respondent's client | 1 | 2 | 0 | 0 |
| Minimum number of refusals by respondent's client in at least 25% of cases | 3 | 8 | 1 | 2 |

[344] In 25% of cases in all locations, the number of undertakings was a minimum of 20; the minimum number of refusals was 8 in Toronto, 5 in Ottawa, 2 in London, and 1 in Thunder Bay.

[345] In Ottawa, at least 25% of cases had a minimum of 22 undertakings, compared with minimums of 20 in Toronto, 18 in London and 15 in Thunder Bay. In Toronto, at least 25% of cases had a minimum of 8 refusals, compared with 3 in Ottawa.

Further examination after answers to undertakings or refusals were provided occurred in 19% of cases in Toronto and Ottawa, and in approximately 10% of cases in Thunder Bay and London. The correlation between the number of undertakings and the number of discovery motions was as expected – as their number increased, so did the percent of cases with discovery motions.

The extent to which undertakings and refusals contribute to cost and delay in the discovery process was addressed at consultation meetings and in submissions to the Task Force. While some lawyers considered excessive refusals and the failure to answer undertakings as occasional problems, others viewed delays in answering undertakings and improper refusals to be principal causes of unnecessary costs and delays in the discovery process.

The Advocates' Society, in its submission, pointed to unreasonable delays in obtaining answers to undertakings and related motions, as well as improper refusals on the basis of relevance as serious problems. Similarly, the County and District Law Presidents' Association submission stated:

> The all too often mindset of letting undertakings sit post-discoveries must be broken. There is no reason why 'substantial compliance' cannot be expected within a set timeframe.

It was suggested to the Task Force that there are fewer refusals when both sides are genuinely interested in reaching a settlement; conversely, there are more unnecessary refusals in cases where parties do not share the objective of reaching a settlement or where a lawsuit is initiated as a business tactic to work financial hardship on the defendant.

The Task Force heard that getting information from non-parties through undertakings increases costs and delays, and that many disputes are based on whether best efforts have been made to obtain information and documents from non-parties. It was suggested that limited written discovery in advance of oral discovery in such situations would not only shorten oral discovery, but also reduce the number of undertakings and related motions. It was also observed that unnecessary delays also occur when counsel wait until transcripts are produced before taking steps to fulfill undertakings or to request information from non-parties. Some lawyers do not fully comprehend the purpose of undertakings or give undertakings that they cannot fulfill.

During consultations, lawyers expressed concern about the amount of time spent in preparing for undertakings and refusals motions and the duration of such motions, noting that they can last several days. In an effort to streamline undertakings and refusals motions, judges and case management masters in Toronto have developed a chart, which counsel are required to complete. Counsel must indicate the issue that is the subject of the undertaking or refusal, the question number and page reference on which the question appears, the precise question asked, and the answer given or the basis of the refusal.[346] Case management masters and lawyers have found the chart to be successful in reducing the number of disputed issues and the time needed to dispose of such motions. The case management masters also suggested that requests to admit and written interrogatories could reduce the frequency of motions.

[346] The undertakings and refusals chart is discussed in greater detail in Part VI, Section 12.

## 15. DISCOVERY DISPUTES

In light of anecdotal reports about the proliferation of such motions, especially in Toronto, the Task Force has reviewed the volume of discovery disputes and related motions.

Data concerning motions activity was obtained from several sources. A three-month motions study, as described in Part I of the Report, was conducted in six courts to assess the types and volume of discovery-related motions in comparison to other motions. The case specific questionnaire canvassed the types and number of motions in particular cases. Finally, feedback was solicited through the consultation paper, submissions and at consultation meetings.

Both the case specific questionnaire and the consultation paper asked whether "excessive discovery-related motions arising from abuses or lack of cooperation" was a problem. Fewer than 10% of respondents to the case specific questionnaire identified this as a problem, compared with 40% of respondents to the consultation paper (whose responses reflect general perceptions rather than experiences in specific cases). Key issues giving rise to discovery-related motions included inadequate or untimely disclosure/production, failure to complete undertakings, and disagreement regarding responsibility and cost of producing documents.

The data from the motions study did not permit a calculation of the average time spent on discovery-related motions compared to other motions. However, as noted in the previous section, the Task Force was advised that motions on refusals and undertakings often require several days of the court's time, particularly in Toronto.

### Motions Study Results

A total of 3,660 completed Motions Data Collection Forms were returned to the Task Force.[347] In Toronto, 20% of all motions were discovery-related, compared to Ottawa, for example, where only 2.4% were discovery-related or Peterborough, where 9% were discovery-related.[348]

In describing the types of motions that were brought – that is documentary, oral or written examinations, or cross-examination on an affidavit – it is important to note that 38% of the motions sought two or more of these three types of orders.

Three-quarters of discovery motions were related to documentary discovery. Of these, the most frequent orders sought were:

- To compel disclosure/production (30%); and
- To produce an affidavit of documents (10%).

Two-thirds of discovery motions related to oral and/or written discovery. Of these, the most frequently sought orders were:

- Answers to undertakings (information held by party examined) (51%);

[347] The breakdown was as follows: Toronto – 2,539; Ottawa – 250; London – 106; Peterborough – 44; Brantford – 719; Thunder Bay – 2.

[348] Data limitations did not permit a comparison of the volume of discovery related motions with other motions in the remaining locations.

- Answers to refusals based on relevance (36%);
- To compel attendance or answer written questions (21%);
- Answers to undertakings (information held by non-party) (15%); and
- Answers to refusals based on privilege (12%).

The disposition of motions was reported in 74% of completed forms. Based on those, orders were made as follows:

- As asked (41%);
- Partially granted (31%);
- Adjourned (25%); and
- Refused (5%).

Cost awards were reported in only 32% of completed forms. Where reported, the following awards were made:

- Partial indemnity (11%);
- Substantial indemnity (less than 1%);
- Partial indemnity in combination with other cost award (less than 1%); and
- Other i.e. unspecified (20%)

### Case Specific Questionnaire Results

The case specific questionnaire also looked at motion activity. Results indicated that approximately 30% of cases in which discovery occurred had general motions activity and close to half of these (or 14%) had discovery-related motions, broken down as follows:

- 10% had only 1 motion;
- 3% had 2 motions;
- 1% had 3 motions; and
- less than 1% had 4 or 5 motions.

While Toronto had no greater proportion of general motion activity than other centres, discovery-related motion activity was higher in Toronto (15%) compared to Ottawa (10%), Thunder Bay (11%) and London (9%). The following chart breaks down discovery-related motion activity in each location by type of order sought:

**Discovery-related Motions by Type of Order Sought**

| Order relating to | Ottawa | Toronto | Thunder Bay | London | Total |
|---|---|---|---|---|---|
| Undertakings | 43% | 72% | 53% | 20% | 68% |
| Documentary discovery | 79% | 33% | 67% | 50% | 37% |
| Refusals/questions under advisement | 37% | 32% | 7% | 30% | 31% |
| Oral/written discovery | 35% | 15% | 20% | 10% | 16% |
| Cross-examination on affidavit of documents | 10% | 3% | n/a | n/a | 3% |

Outside Toronto,[349] orders relating to documentary discovery were sought most often. In Toronto, the most frequently sought orders related to undertakings, followed by documentary discovery.

Based on Toronto results,[350] the most frequently sought documentary discovery orders were to compel disclosure or production of documents and to produce an affidavit of documents. The most frequently sought oral/written discovery order was to compel answers to undertakings for information held by the party examined.[351]

**Findings from Consultation Meetings and Submissions**

In its submission, the Ontario Trial Lawyers Association rejected the notion that there are excessive discovery-related motions:

> There is no truth to the myth that court motion lists are full as a result of the discovery process and its abuse by Counsel. This myth has become pervasive because of judicial dislike for presiding over discovery squabbles. Most judges do not wish to be drawn into this type of battle and only want to be involved when it is clear that both sides have reached an impasse on a substantive issue. This reluctance of some judges should not be grounds to create new rules for Counsel. There is a relatively narrow group of cases in which discovery abuse occurs, but Counsel generally are competent and cooperative. Where problems do occur, what is needed is a Court that invites and welcomes the determination of these disputes quickly and with a strong judicial hand.

There was a general consensus at consultations that unreasonable behaviour on the part of lawyers and non-compliance with the rules often result in unnecessary discovery-related motions, and that the imposition of more serious sanctions for breach of discovery obligations would lead to greater compliance and fewer motions. It was also suggested that lack of preparation for discovery leads to more discovery disputes and related motions. Discovery-related motion activity was considered by those consulted to be more problematic in Toronto than elsewhere. Lower motion activity in smaller centres was primarily attributed to the local legal culture and collegial relations within the profession. Case management masters agreed that discovery disputes occur more regularly in large centres where counsel are not familiar with each other. They also suggested that disputes are more likely to arise in contract/commercial, personal injury and product liability cases, as well as those with confidentiality issues such as intellectual property, wrongful dismissal and fiduciary duty.

A concern that was shared by many lawyers is the delay in obtaining access to judicial intervention. As pointed out by the Advocates' Society in its submission:

> It is very important to provide quick and efficient access to a judge or master to resolve discovery-related disputes. It is the inevitable delay until enforcement of an obligation

[349] Statistics from London, Ottawa and Thunder Bay should be read with the caveat that the sample of cases from which they were drawn was small.
[350] The Toronto sample was larger than the other locations, permitting a detailed breakdown of orders.
[351] Note: There were far fewer orders pertaining to orders based on privilege.

> that gives the unreasonable lawyer and/or client the comfort and encouragement to continue to be unreasonable. Knowledge of quick access to a judge or master to resolve a refusal or dispute about relevance has the positive effect of forcing counsel to be reasonable and to resolve their differences without going to court. This has certainly been the experience of Ottawa counsel under the Case Management regime.

In Toronto and Ottawa case managed proceedings, discovery-related issues are dealt with at case conferences. Approximately 40% of respondents to the case specific questionnaire indicated that discovery issues were dealt with at a case conference. Close to 60% of those case conferences involved multiple discovery issues. The vast majority of respondents (96% in Ottawa and 89% in Toronto) were "satisfied with this method of dealing with the issues."

With respect to the cost of motions, lawyers in northern Ontario noted during consultations that the requirement to bring a motion in the county of the responding party's solicitor significantly adds to the costs of motions, especially when the opposing counsel is in Toronto.

## 16. ENFORCEMENT OF DISCOVERY OBLIGATIONS

There was a general perception that members of the judiciary seem reluctant to take an active role in the resolution of discovery disputes or in the enforcement of discovery obligations. A recurring theme throughout the consultation process was the need for tougher and more consistent sanctions. Many lawyers expressed concern that judges and masters neither treat discovery abuses seriously enough nor make adequate use of available sanctions. The Task Force was told that breaches of the discovery rules cannot be discouraged if the consequences of non-compliance are insignificant.

These views are consistent with the Task Force's statistical findings. Out of 26 possible reform options canvassed in the case specific questionnaire and the consultation paper, those involving sanctions were ranked relatively high with respect to their potential for improving the discovery process:

- Stricter enforcement of sanctions by judiciary: This reform ranked third overall in responses to the case specific questionnaires, with 45% support overall.[352] It ranked first in responses to the consultation survey, with 79% support.
- Tougher cost sanctions for unnecessary discovery-related motions: In the case specific questionnaires, this reform ranked fifth overall, with 42.5% support overall.[353] It ranked fifth in the consultation survey, with 75% support.
- Serious sanctions for untimely, excessive or disorderly production of documents: This reform ranked seventh overall in the case specific questionnaire, with 39% support overall[354]. It ranked seventh in the consultation survey, with 71% support.

[352] Ranking by location: Ottawa – 1st; Toronto – 2nd; London – 5th; Thunder Bay 7th.
[353] Ranking by location: Toronto – 5th; Ottawa and Thunder Bay – 6th; London – 11th.
[354] Ranking by location: Toronto 6th; Thunder Bay 9th; Ottawa and London – 10th.

- Immediate contempt order for failing to comply with orders: This ranked much lower – 16th in Toronto, Ottawa and Thunder Bay and 25th in London, with 23% support overall. It ranked 16th in the consultation survey, with 40% support.

On the other hand, sanctions should not be rigidly applied so as to discourage parties from proceeding with legitimate disputes, as noted in one submission:

> Having argued for more consistent rulings and meaningful costs awards, it must be remembered that there are occasions where bona fide disputes arise in the context of discoveries, which can only be resolved by the court. It would not be a step forward if two counsel who were both acting in the best of faith… could not get a ruling from the court without the loser being exposed to something tantamount to a penal sanction. The idea is to weed out the nonsense, not discourage anyone from ever litigating anything and any arbitrary rule which intruded on the court's discretion to distinguish between the two types of cases would be a barrier to justice.355

Beyond enforcement of discovery obligations, many members of the bar urge greater judicial oversight of the litigation process – not to provide individual case management, but rather to provide direction in cases where needed to ensure consistency and predictability.

## 17. LEGAL CULTURE

As noted earlier, legal culture was thought to be an important factor in the conduct of discovery. There was a general consensus that lawyers in smaller communities or specialty bars tend to be more collegial – not only because their paths frequently cross, but because they are well known to the presiding judiciary. However, it was recognized that there are both cooperative lawyers and obstreperous lawyers throughout the province.

While lawyers consulted did not tend to identify incompetence or unprofessional conduct as a major concern, they did acknowledge a deficiency in the area of civility. Many agreed that a "change in attitude" with respect to discovery would have a positive impact on the integrity of the process. There was significant support for initiatives directed toward this goal, such as encouraging widespread awareness and adoption of civility principles[356] through lawyer training, mentoring and continuing legal education programs.

With respect to junior lawyers, it was generally agreed that the profession does not provide adequate mentoring or support in the area of discovery. The Advocates' Society noted in its submission that "[p]articularly in Toronto, discoveries are relegated to younger members of our bar who either conduct them on their own with no guidance and/or with a seeming lack of knowledge about the rules and how to use them."

[355] Submission of Sean Dewart, dated May 7, 2002.
[356] See the Advocates' Society *Principles of Civility*.

# PART VI: REFORM OPTIONS AND RECOMMENDATIONS

## 1. INTRODUCTION

As noted in the Introduction to the Report, the mandate of the Task Force was to consider all aspects of discovery in Ontario and develop options for a more efficient process.

The approaches to reform canvassed in this part of the Report are informed by the findings related to the current discovery process, discussed in Part V, as well as a consideration of discovery processes in other jurisdictions, described in Part III.

### Guiding Principles

The Task Force established the following "guiding principles" to provide a framework within which to assess reform options:

- Reforms should promote access to justice for both represented and unrepresented litigants by reducing unnecessary delay and cost associated with discovery.
- Reforms should encourage parties to engage in discovery planning and to resolve discovery issues cooperatively, with timely recourse to the court where intervention is warranted (for example in complex or problem cases).
- Reforms should apply fairly in all parts of the province and be feasible in both case managed and non-case managed proceedings. Province-wide predictability with respect to procedures is important.
- Reforms should promote timely and cost-effective disclosure, production and examination for discovery.
- Reforms should not impose unnecessary procedural steps.
- The discovery process should not be "micro-managed" through the rules.
- Reforms should reduce and streamline discovery-related motions.
- Reforms can only be effective if they have the support of both the bench and bar.
- Rule changes alone cannot improve the discovery process. Issues relating to civility, professionalism and competence must also be addressed through legal education and training.

### Overview of Reform Directions

The findings indicate that while many lawyers are satisfied with the current discovery process, many others consider the costs and delays associated with discovery to be an impediment to access to justice. Several litigants recounted their difficult and costly experiences with discovery.

Discovery problems do not arise in the majority of cases, but are primarily associated with larger, complex cases, or where there is a lack of cooperation between opposing counsel. A common perception is that there are fewer discovery-related difficulties where the bar is collegial, for example in smaller geographical communities or within specialty bars. Another prevalent view is that greater judicial intervention and more consistent enforcement of discovery obligations would go a long way to address problem situations.

While there is no evidence to warrant a fundamental overhaul of Ontario's discovery process, the findings point to the need for a number of significant improvements in order to achieve greater efficiencies. The Task Force is of the view that there is scope for reform on two fronts:

(i) Incorporation of enhanced cost and time saving mechanisms into the Rules of Civil Procedure, including:

- Discovery management mechanisms for case managed and non-case managed proceedings;
- Narrower scope of discovery;
- Enhanced early disclosure and production requirements;
- Default time limit on oral discovery;
- Written questions permitted as a supplement to oral discovery;
- Improved access to discovery of non-parties, corporate representatives and experts;
- New timelines for certain discovery steps (including documentary disclosure, production of expert reports, completion of undertakings and answering refusals);
- Standardized, simplified process for resolving discovery disputes; and
- Enunciation of principles of efficiency and professionalism.

(ii) Development and dissemination of a "best practices" manual containing practical guidelines on the conduct of discovery.

Not all discovery problems can be addressed by more stringent regulation of lawyers or by a detailed code prescribing the discovery process. Many difficulties can be attributed to the "culture of litigation" and the traditional adversarial role of counsel, as well as to the conduct of particular lawyers. In order to instil in the profession a broader acceptance of the value of collaboration in preparing for discovery and an appreciation for cost-effective and efficient ways to conduct discovery, the Task Force recommends the development of a best practices manual on all aspects of the discovery process. Established outside of the rules, best practices will not be enforceable *per se*, but will provide practical guidelines for lawyers on conducting discovery generally, and in specific types of cases. It is also anticipated that best practices will facilitate recognition by the profession and the judiciary of acceptable "norms" for the conduct of discovery.

A detailed discussion of reform options and recommendations follows.

## 2. DISCOVERY MANAGEMENT

### Issue

What, if any, discovery management mechanisms would be beneficial to Ontario's discovery process?

### Current Rules

The discovery rules do not expressly provide for pre-discovery planning by the parties or court management of the discovery process to address matters relating to the scope and timing of documentary production or examinations for discovery, or to allow clients to anticipate the likely cost of the process.[357]

Management of the discovery process, however, is an element of case management under rule 77. For example, plaintiffs are required to file a timetable,[358] defined as a "schedule for the completion of one or more steps required to advance the proceeding."[359] Among other things, the timetable must indicate the timing of delivery of affidavits of documents and provide for the completion of examinations for discovery and any incidental motions at least ten days before the settlement conference. The timetable may be established on the parties' agreement or by court order. If a party fails to comply with a timetable, the case management judge or case management master may amend the timetable, order costs, strike out a party's document, dismiss a party's proceeding or strike a party's defence.[360]

In addition, rule 77.13(3) authorizes a case management judge or case management master to convene a case conference at any time in order to:

(a) identify the issues and note those that are contested and those that are not;
(b) explore methods to resolve the contested issues;
(c) if possible, secure the parties' agreement on a specific schedule of events in the proceeding;
(d) create a timetable for the proceeding; and
(e) review and, if necessary, amend an existing timetable.

While not explicit, this authority extends to the creation of a discovery schedule and the resolution of discovery disputes. As pointed out by the case management masters during consultations, discovery matters are frequently addressed at case conferences.

---

[357] While Ont. Rules, rule 30.03(1) requires parties to deliver an affidavit of documents within ten days after the close of pleadings and rule 30.04(4) requires all documents listed in a party's affidavit of documents to be produced at the examination of the party, there is no express requirement that all relevant documents be produced prior to an examination.

[358] Ont. Rules, rule 77.10(2), (4), (5). Note: This requirement applies in Toronto and Windsor, but not in Ottawa.

[359] Ont. Rules, rule 77.03(1).

[360] Ont. Rules, rule 77.10(7).

Rule 77.09.1 ("Assignment of a Particular Judge") permits the assignment of a judge to individually case manage a proceeding, where warranted by the circumstances of the case, having regard to a number of criteria relating to the complexity, public importance, difficulty and duration of the case.

## Discussion

Discovery management has two key features. The first is discovery planning, whereby counsel (and/or the parties, where unrepresented) meet early in the case to map out the discovery process and reach an understanding on such matters as the scope of discoverable issues and information, the manner of production, the persons to be examined, the mode of examination, the need for expert evidence, and the timetable for disclosure, production and examinations.

The second feature is access to judicial intervention where the parties are unable to reach a consensus on a discovery plan, or where a case otherwise requires court assistance in managing the discovery process.

The Task Force is of the view that the incorporation of discovery management mechanisms into Ontario's discovery process will assist in reducing many of the key problems identified in the review, including late delivery of affidavits of documents, incomplete and untimely production, excessive requests for information and documents, difficulties and delays in scheduling discoveries, improper refusals, delays in fulfilling undertakings, and disagreements as to the scope of discovery.

The findings strongly indicate that encouraging parties to reach a consensus on discovery matters – either on their own or with the court's intervention where necessary – will help to promote cooperation, ensure complete, timely, and orderly production of documents, clarify the scope of discovery and reduce the potential for protracted disputes. While many lawyers already make it a practice to plan how and when production and examinations will occur, many others do not have meaningful discussions with opposing counsel prior to oral discovery. There is significant support for establishing a specific framework to standardize this practice and provide for judicial assistance where necessary.

At the same time, the Task Force recognizes that the majority of cases are relatively straightforward and proceed through the discovery process without difficulties. In keeping with its guiding principles, the Task Force believes that any discovery management scheme must not create additional, unnecessary steps or costs in those cases. The Task Force agrees with participants in the review that court assisted discovery management would be of greatest benefit in complex cases or those in which discovery problems can be anticipated.

### *Discovery Planning*

The Task Force has grappled with the issue of how to incorporate discovery planning into the discovery process without imposing an unnecessary burden on the majority of cases that are routine in nature.

Two broad approaches have been considered:

(i) Make discovery planning a mandatory requirement under the rules; and
(ii) Develop best practices to encourage discovery planning.

A mandatory discovery planning rule would require parties in all cases to engage in pre-discovery discussions and, where appropriate, create a written discovery plan. The rule would establish a fixed timeframe in which the discussions must take place and a checklist of issues that must be addressed. It would also provide for court assistance where parties were unable to agree on the plan. If, during the course of discoveries, a party brought a discovery-related motion, the court would consider what discovery planning efforts were made and whether the motion could have been avoided through pre-discovery discussions.

While no Canadian jurisdictions currently require discovery planning in their rules, a number of common law jurisdictions have adopted mandatory discovery planning, as discussed in Part III of the Report. In the United States, for example, the American Bar Association's Court Delay Reduction Committee (1997) recommended discovery conferences as one of nine "discovery guidelines" that should be incorporated into state and federal rules.[361] The guideline provides that "[n]o discovery should be permitted until counsel for the parties hold a mandatory early discovery conference to resolve disclosure disagreements and develop a binding discovery plan in writing." The U.S. federal jurisdiction and Texas have incorporated this requirement into their rules.

In the U.S. Federal Court,[362] parties in all cases must hold a discovery conference and attempt in good faith to agree on a proposed discovery plan that addresses:

- the time and form for completing early disclosures required under the rules;
- the subjects on which discovery may be needed;
- when discovery should be completed;
- whether discovery should be conducted in phases or limited to certain issues; and
- what other limitations should be imposed upon the discovery process.

The proposed plan is then reviewed at a judicial scheduling conference, and the court may make various orders including limiting the time to complete discoveries and related motions.

In Texas, every case must be governed by a discovery control plan.[363] There are three "levels" of plan (depending on the monetary value and complexity of the case). Level 1 (for cases of $50,000 or less) and Level 2 (geared to non-complex cases over $50,000) establish standard timeframes for the completion of discovery, time limits on oral discovery and limits on the number of

[361] Court Delay Reduction Committee of the National Conference of State Trial Judges of the Judicial Division of the American Bar Association, *Discovery Guidelines Reducing Cost and Delay* (Spring 1997) The Judges' Journal, p.9. Other guidelines include: no discovery motions until counsel meet and confer to resolve discovery dispute; counsel to control unnecessary expense and delay; and court to impose appropriate sanctions where party fails to comply with disclosure obligations.
[362] U.S. Fed. Rules, rule 26(f); rule 16(b).
[363] Tex. Rules, rule 190.1.

interrogatories.[364] Level 3 provides for court-managed discovery and a tailored discovery plan in complex cases or in any case at the request of a party or on the court's initiative.[365]

The effectiveness of mandatory discovery plans in the U.S. federal jurisdiction has been the subject of empirical research. In one study,[366] the efficacy of discovery management policies was analyzed to determine their impact on reducing lawyer hours and time to disposition of proceedings. The study concluded that the requirement for a "discovery/case management plan" helped to reduce time to disposition and was especially beneficial in large monetary claims, complex cases and cases experiencing a high degree of discovery-related difficulties.[367]

While the findings suggest that there is qualified support for mandatory discovery planning in Ontario, a number of concerns have been raised in relation to this option, which the Task Force finds persuasive. First, there is a strong view that discovery plans are needed only in problem or complex cases. It is felt that the requirement to enter into a discovery plan would be seen as an unnecessary and costly step for most cases – and that the detailed prescription of the discovery planning process would add unwarranted complexity into the rules. Second, it is felt that such a requirement would be difficult to enforce. Third, there is a general consensus that unless accompanied by a cultural shift towards greater cooperation, many lawyers may consider mandatory discovery planning a meaningless exercise. Anecdotal comments by a number of lawyers concerning their experiences with the mandatory settlement discussion under simplified procedure rule 76.07[368] suggest that mandatory discovery discussions might be taken lightly or even ignored by some counsel. Finally, the Task Force has concerns that mandating a court review of all plans would be an unwarranted demand on judicial resources.

Recognizing that lawyers cannot be forced to engage in meaningful discovery planning simply through rule changes, the Task Force favours the inclusion of discovery planning guidelines in a best practices manual. The manual will be discussed in detail in Part VI, Section 16.

A number of professional organizations in other jurisdictions have adopted codes or guidelines that are intended to inform parties, lawyers and the court about practical aspects of the discovery process, including discovery planning. For example, the American Bar Association has produced a list of civil discovery standards, intended to assist the parties, counsel, and the court in civil discovery. The standards are not a restatement of the law, but instead seek "to address practical aspects of the discovery process that may not be covered by the rules."[369] The American College of Trial Lawyers' Code of Pre-Trial Conduct provides some direction to lawyers on discovery

---

[364] Tex. Rules, rules 190.2 and 190.3, respectively, prescribe the Level 1 and Level 2 discovery control plans. Once selected by the plaintiff, the limits prescribed in these rules become the discovery control plan, unless a party brings a motion for an individualized discovery control plan (level 3) under rule 190.4**.**

[365] Tex. Rules, rule 190.4.

[366] J. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data* (Washington D.C.: RAND, 1998) [hereinafter RAND study].

[367] RAND study, *ibid.* at 68 – 69.

[368] Ont. Rules, rule 76.07(1) provides that "Within 60 days after the close of pleadings, the solicitors for the parties shall consider the possibility of settlement of any or all issues in the action either by way of a meeting or by telephone call."

[369] American Bar Association, *Civil Discovery Standards* (August 1999), http://www.abanet.org/litigation/taskforces/civil.pdf.

practices and scheduling.[370] In Canada, the Law Society of British Columbia has issued a detailed Practice Checklist Manual on general litigation procedure, which includes guidelines on planning and conducting discovery.[371]

Much support has been expressed to the Task Force for the idea that counsel (or parties, where unrepresented) be encouraged – rather than mandated – to communicate in advance of discoveries with the objective of discussing the most expeditious and cost-effective means to complete the discovery process, having regard to the nature and complexity of the proceedings, the number of documents and potential witnesses involved, and the ease and expense of retrieving discoverable information.

The Task Force therefore recommends, as part of a best practices manual, the development of discovery planning best practices to address a number of matters, including:

- a timetable for the exchange of sworn affidavits of documents and production of documents, prior to examination for discovery;
- consideration as to whether any of the examination for discovery will be conducted by written questions and answers, and timing of the delivery of the written questions and answers;
- proposed dates for and expected duration of oral examinations;
- identification of the substantive issues expected to be canvassed during oral examinations;
- identification of the need for expert reports;
- identification of and agreement on the persons to be examined;
- proposed timetable for fulfilling undertakings and dates for any examinations arising from those undertakings; and
- estimated dates for setting the matter down for pre-trial and trial.

**Recommendation:**

- ❑ **Develop best practices for discovery planning, with a standard checklist of items to be addressed.**

### *Court Assisted Discovery Planning*

While voluntary discovery planning as a best practice is adequate in most cases, those in which parties are unable to agree on a discovery plan would benefit from limited intervention to address a specific problem arising from a lack of cooperation among parties or their counsel, or disagreement on a particular discovery issue. Court intervention would also be helpful in cases involving unrepresented litigants, who may be inexperienced with the discovery process and lack an understanding of disclosure requirements, the scope of relevance and appropriate conduct as prescribed by professional conduct rules.

---

[370] American College of Trial Lawyers, *Code of Pre-trial Conduct* (May 2003), http://www.actl.com/PDFs/CodeOfPretrialConduct.pdf.

[371] See, e.g., Law Society of British Columbia, *Practice Checklist Manual: General Litigation Procedure*, http://www.lawsociety.bc.ca/library/checklist/docs/e-2.doc; in particular, see section 6.13.

In these situations, access to the court is needed to assist the parties in discovery planning. Given that motions can be time-consuming and costly, the Task Force is in favour of establishing a less formal mechanism for this purpose. As noted above, case conferences are available under case management rule 77.13 in Toronto, Ottawa and Windsor to permit rulings without the necessity of a motion. The Task Force has heard from case management masters and counsel alike that case conferences are routinely used with great success to resolve discovery planning and other discovery issues, even though not expressly provided for in rule 77.13. However, no parallel mechanism is available in the rest of the province.[372]

There is much support for the introduction of case conferences on a province-wide basis to assist with discovery planning and the resolution of discovery disputes. (See Part VI, Section 13 for a detailed discussion of discovery disputes.) The Task Force recommends that case conferences be made available throughout the province, and that rule 77.13 be amended to expressly include discovery plans as one of the matters the court may deal with at a case conference.

**Recommendations:**

- **Establish a new rule permitting case conferences to be convened in non-case managed locations, at the request of any party or on the court's initiative.**
- **Establish a new discovery rule permitting any party to seek a case conference for the purpose of resolving issues related to discovery planning and establishing a discovery plan.**
- **In rule 77.13(3), provide express authority for the court to require or create a discovery plan at a case conference.**

***Individualized Discovery Management in Appropriate Cases***

As noted above, complex or otherwise difficult cases would reap the greatest benefit from court assistance in managing the discovery process. While the framework for discovery management exists in case managed courts, there is no analogous provision elsewhere. The Task Force recommends the introduction of a new discovery rule for cases not covered by rule 77, granting the court authority to manage the discovery process in appropriate cases on its own initiative or at the request of the parties. In determining whether a case is appropriate for discovery management, the Task Force recommends that the rule incorporate the criteria set out in rule 77.09.1(5) (which are used by the court to determine whether a particular judge should be assigned to manage a proceeding):

(a) the purpose of case management;
(b) the complexity of the issues of fact or law;
(c) the importance to the public of the issues of fact or law;
(d) the number of parties or prospective parties;

[372] It should be noted that case conferences are available under the *Family Law Rules* to address discovery issues; see, *Ontario Family Law Rules,* O.Reg. 114/99, as amended, rule 17(4) and (8) [hereinafter "Ont. Family Rules"].

(e) the number of proceedings involving the same or similar parties or causes of action;
(f) the amount of intervention by the case management judge that the proceeding is likely to require;
(g) the time required for discovery, if applicable, and for preparation for trial or hearing;
(h) the number of expert witnesses and other witnesses;
(i) the time required for the trial or hearing; and
(j) any other factors that the judge considers relevant or that are raised by a party.

The Task Force recommends that these criteria be expanded to permit the court to consider "the nature of the parties and whether they are represented" in recognition of the fact that there are many unrepresented parties before the courts and that cases involving unrepresented parties often require greater judicial involvement.

A discovery management rule, combined with the ability to resolve discovery issues at case conferences and the explicit authority to require or create discovery plans as recommended above, will provide the court with the tools to intervene where necessary and respond to the specific needs of a case.

It is further recommended that any other case management powers given to judges under rule 77 (including the assignment of a particular judge under rule 77.09.1(5) and the general powers under rule 77.11 to "make orders, impose terms and give directions and award costs as necessary" to carry out the purpose of the rule) be included in the new discovery management rule.

**Recommendations:**

- **Establish a new discovery rule providing for individualized management of the discovery process in "appropriate" cases, based on the criteria listed in rule 77.09.1(5) (Assignment of a Particular Judge)**
- **Expand the criteria in rule 77.09.1(5) to include "nature of parties and whether they are represented."**
- **Authorize the court to designate a proceeding for individualized discovery management on the parties' consent, on the motion of any party, or on the court's initiative in "appropriate" cases, based on the criteria listed in rule 77.09.1(5).**
- **Incorporate case management mechanisms from rule 77 into the new discovery management rule, including case conferences (with express authority for the court to require or create a discovery plan at a case conference, assignment of a particular judge, and any case management powers needed to give effect to the rule).**

## 3. SCOPE OF DISCOVERY

### Issue

Should the current scope of discovery be narrowed?

### Current rules

The scope of discovery is currently very broad. Rule 30.02(1) provides that "[e]very document relating to any matter in issue in an action" must be disclosed, and rule 31.06 (1) requires persons being examined to answer" any proper question relating to any matter in issue in the action," subject to privilege claims. Rule 30.03, which prescribes the requirements for affidavits of documents, mirrors this language.

In applying rule 30.02, courts have imposed extensive and far-reaching disclosure and production obligations. The test of relevance for purposes of discovery has been held to be much broader than that at trial; the test is not based on whether documents would be admissible at trial, but on whether they have a "semblance of relevance" to the issues disclosed in the proceedings.[373] The relevance of a document is to be determined by reference to the breadth and content of the pleadings.[374] It is the role of the trial judge to make the ultimate ruling on relevance.[375]

With respect to examination for discovery under rule 31.06, courts have held that a question is relevant and should be answered if it has a semblance of relevance to the matters in issue as set out in the pleadings.[376] A proper question can be judged by whether it leads to a line of inquiry that would uncover admissible evidence.[377]

It is noted that other provisions in the rules that deal with discoverable matters adopt the term "relevant." Rule 30.05 provides that the disclosure or production of a document is not to be taken "as an admission of its relevance." Where a court is satisfied "that any relevant document" has been omitted from an affidavit of documents, the court may inspect a document "for the purpose of determining its relevance."[378] With respect to documents in the possession, power or

---

[373] *Bensuro Holdings Inc. v. Avenor Inc.* (2000), 186 D.L.R. (4th) 182 (S.C.J.); *Brandolino v. Canhas* (1995), 82 O.A.C. 123 (Div. Ct.); *Toronto Board of Education Staff Credit Union Ltd. v. Skinner* (1984), 46 C.P.C. 292 (Ont. H.C.).

[374] *Hopps-King Estate v. Miller* (1998), 29 C.P.C. (4th) 23 (Gen. Div.)(hospital ordered to produce personnel files of doctors where plaintiff pleaded that hospital failed to have competent staff on hand); *Morgan Guaranty Trust Co. of New York v. Outerbridge* (1987), 23 C.P.C. (2d) 127 (Ont. Master), affirmed (1988), 23 C.P.C. (2d) 127n (Ont. Master) – defendant in computerized banking case where overpayment was an issue asked for production of the plaintiff bank's documents on the operation of the computer system. These were very general documents, which were only relevant on a theory, but there was no evidence to support the theory, and the theory was not even argued in the pleadings. The documents were not to be produced.

[375] *Toronto Board of Education*, *supra*, note 373.

[376] *Kay v. Posluns* (1989), 71 O.R. (2d) 238 (H.C.).

[377] *Air Canada v. McDonnell Douglas Corp.* (1995), 22. O.R. (3d) 140 (Master), affd 22 O.R. (3d) 382 (Gen. Div.).

[378] Ont., rule 30.06. See also rule 30.10, which sets out the court's power to examine a document from a non-party to determine whether it is relevant, and to order production of a document "relevant to a material issue in the action." Rule 31.10 sets out the court's power to grant leave to examine a non-party where there is reason to believe such person has "information relevant to a material issue in the action."

control of a party's subsidiary and affiliated companies, the court may order that "all relevant documents" held by such companies be disclosed.[379] And finally, a lawyer must explain to his or her client "what kinds of documents are relevant to the allegations made in the pleading."[380]

## Discussion

The findings are mixed regarding the usefulness and desirability of narrowing the scope of discovery. In surveys conducted by the Task Force, there was a roughly equal split between respondents who thought a narrower test of relevance would have a positive impact and those who thought it would have a negative impact. A third group felt that a narrower test would have no impact at all.

Those in favour of limiting the scope of discovery have noted that the "semblance of relevance" test contributes to excessive document production, lengthy oral examinations and discovery abuse, all of which can make the process prohibitively expensive. It is also questioned whether the expansive scope of discovery is consistent with the general principle of access to justice, which, as expressed in rule 1.04(1) calls for "the just, most expeditious and least expensive determination of every civil proceeding on its merits." Opponents have expressed concern that key evidence might not be obtained before trial, thereby preventing parties from knowing "the case to be met" and reducing the prospects of settlement. It is also argued that a new, narrower test will generate more disagreements, motions activity and judicial interpretations of the new test.

The Task Force is of the view that a new test is required to balance the need for sufficient disclosure with concerns about the excessive burden created by overly expansive discovery obligations. Other jurisdictions were canvassed for potential options in this regard. In describing the scope of oral and documentary discovery, most prescribe a duty to provide information that is "relevant" to the "claim or defence" or to the "subject matter of the case."[381] Some use the term "relating to" or "touching" the "matters in issue" or "matters in question."[382]

A number of jurisdictions have made efforts to narrow the scope of discovery. For example, Alberta recently adopted the test of "relevant and material" in order to exclude discoverable information of only "tertiary relevance."[383] Canada's Federal Court rules make an attempt to define relevance: "a document is relevant if the party intends to rely on it or if the document tends to adversely affect the party's case or to support another party's case."[384] A similar approach is taken in the United Kingdom and Australia, where a party must disclose documents

---

[379] Ont., rule 30.02(4)

[380] Ont., rule 30.03(4).

[381] U.S. Fed., rule 26(b); Tex., rule 192.3; Cal., § 2017; Ariz., rule 26(b); Man., rule 30.01(1)(c), 31.06(1); PEI, rule 30.02(1), 31.06; N.B., rule 31.02(1), 32.06(1); N.S., rule 20.01(1), 18.01(1).

[382] B.C., rule 26(1), 27(22); Nfld., rule 32.01(1), 30.08(1); N.W.T., rule 219, 251(1); Que, rule 397; Sask., rule 212(1), 222.

[383] Alberta Rules of Court Project, *supra* note 152 at 38-39. It is noteworthy that the Discovery and Evidence Committee of the Alberta Rules of Court Project recommends that the narrower "material and relevant" test be retained for both document discovery and examination for discovery, noting that it is "the most effective way of minimizing pre-trial cost and delay while still permitting sufficient disclosure of evidence prior to trial, at 40.

[384] Can. Fed., rule 222(2).

on which it relies, those which adversely affect its own case, adversely affect another party's case, or supports another party's case.[385] The U.S. federal discovery rules previously required parties to disclose material that was relevant to "the subject matter in the proceeding," but the rule has since been modified to require disclosure of material relevant to the "claims and defenses" of the parties.[386]

The Task Force recommends narrowing the scope of discovery by replacing the phrase "**relating** to any matter in issue in an action" in rules 30.02(1), 30.03 and 31.06(1) with "**relevant** to any matter in issue in an action." While the Task Force has no illusions that this reform will resolve the matter of scope, it will provide a clear signal to the legal profession that restraint is to be used in the discovery process. In combination with other recommendations in this Report, this change will strengthen the objective that discovery be conducted with due regard to cost and efficiency. A narrower test will also help to curb discovery abuse and eliminate areas of inquiry that could not reasonably be considered relevant, even though they currently survive a "semblance of relevance" test. A new test will not impede the parties' ability to obtain the information, but will oblige them to focus on information that is truly necessary. As part of the discovery planning process, counsel will be required to work out (on their own or with the court's assistance) what information is relevant.

In making this recommendation, the Task Force fully expects that there will be a continuing debate over the proper scope of discovery, and additional judicial interpretations of "relevant." Some would argue that narrowing the scope will exacerbate disputes about what is "relevant," and transform the system back to a fact-pleading system whereby parties include overly detailed facts and unduly expanded issues to preserve the breadth of discovery. However, as with its other recommendations, the Task Force is hopeful that the legal profession, with judicial support, will develop guidelines that anticipate in advance the scope of discovery and avoid disputes over relevance. Moreover, it is hoped that lawyers will adapt to the narrower test and incorporate principles of cost efficiency and expedience into their practice.

**Recommendation:**

- **Narrow the scope of discovery. Replace the current "semblance of relevance" standard to a standard of "relevance" by modifying the phrase "relating to" any matter in issue in an action in rules 30.02(1), 30.03 and 31.06(1) with "relevant to" any matter in issue in an action.**

[385] U.K. Rules, rule 31.6; Aus (Fed), Order 15, rule 2.

[386] U.S. Fed. Rules, rule 26(a)(1)(B); see also Thomas D. Rowe Jr., "A Square Peg in a Round Hole? The 2000 Limitation on the Scope of Federal Civil Discovery" (Fall, 2001) 69 Tenn. L. Rev. 13 at 14.

## 4. ADEQUACY AND TIMING OF DOCUMENTARY DISCLOSURE AND PRODUCTION

### Issue

What reforms would improve the adequacy and timeliness of disclosure and production?

### Current Rules

A party is required, within ten days after the close of pleadings, to serve on all other parties an affidavit of documents which discloses all documents relating to any matter in issue in the action "that are or have been in the party's possession, control or power."[387] In separate schedules, the affidavit must list and describe documents:

(a) that are in the party's possession, control or power and that the party does not object to producing;
(b) that are or were in the party's possession, control or power and for which the party claims privilege, and the grounds for the claim; and
(c) that were formerly in the party's possession, control or power, but are no longer in the party's possession, control or power, whether or not privilege is claimed for them, together with a statement of when and how the party lost possession or control of or power over them and their present location.[388]

In simplified procedure actions under rule 76, parties are also required to provide a list in the affidavit stating the names and addresses of persons "who might reasonably be expected to have knowledge of matters in issue in the action."[389]

In the affidavit, a party's lawyer is required to certify that he or she has explained to the deponent the necessity of making full disclosure of all relevant documents, and what kinds of documents are likely to be relevant to the allegations made in the pleadings.[390]

Once relevant documents are disclosed in an affidavit of documents, a party may request that they be produced for inspection, unless privilege is claimed.[391] However, in simplified procedure actions, a party is required to serve on every other party a copy of the documents referred to in Schedule A, without being requested.[392]

While there is no express requirement that all documents be produced prior to an examination for discovery, the rules imply that all relevant documents will be disclosed early and prior to an

[387] Ont. Rules, rule 30.03(1).
[388] Ont. Rules, rule 30.03(2).
[389] Ont. Rules, rule 76.03(2).
[390] Ont. Rules, rule 30.03(4).
[391] Ont. Rules, rule 30.02(2).
[392] Ont. Rules, rule 76.03(1)(b).

examination,[393] and produced before or at the examination.[394] Where a person admits that he or she has a relevant document that is not privileged, it must be produced at the examination, or within two days after the examination.[395]

Pursuant to the regulated affidavit of document forms (30A and 30B), the disclosing party must number each document consecutively, and set out "the nature and date of the document and other particulars sufficient to identify it," however, the discovery rules do not specifically prescribe the format or organization of the affidavit.

## Discussion

Some of the most significant problems reported to the Task Force relate to documentary discovery. The findings indicate that the prevalence of incomplete, untimely, disorderly and excessive disclosure and production often lead to increased costs, delays and disputes in the discovery process. In addition, incomplete and untimely disclosure and production of relevant documents often result in a time-consuming, costly and inefficient "two-stage" discovery process whereby further relevant documents are identified at the examination for discovery, necessitating a second round of examinations on those documents subsequently produced. On the other hand, where document production is fulsome and reliable, oral discovery tends to be shortened.

While many of these problems can be addressed by the discovery management mechanisms recommended above, there is also a need for refinements to the documentary discovery rule and the adoption of specific best practices for documentary discovery.

### *Timeframe for Exchange of Affidavit of Documents*

The Task Force is of the view that the current timeframe for completing and serving an affidavit of documents is an unrealistic standard that cannot be met in many cases. The findings indicate that parties rarely comply with the requirement to serve an affidavit of documents within ten days after the close of pleadings. Certain case types, the nature of the parties, or the circumstances of particular cases can make compliance difficult or impossible. For example, in personal injury matters or where parties are large institutions such as hospitals and government agencies, it often takes many weeks or months for relevant documents to be identified, located and retrieved. In cases involving voluminous documents, including electronic documents and e-mails, the vetting and selection of relevant documents is extremely time-consuming.

In considering how to address this issue, the Task Force is mindful of the need to ensure consistency with other timelines fixed in the rules (in particular, the requirement under case

[393] Ont. Rules, rule 30.03(1) requires an affidavit of documents to be served within 10 days after the close of pleadings. Also, rule 31.04(1) and (2) states that a party can only serve a notice of examination or written questions after first serving an affidavit of documents, unless the parties agree otherwise.

[394] Ont. Rules, rule 30.04(4) requires that a party produce at an examination for discovery all documents listed in a party's affidavit of documents that are not privileged, including all documents previously produced. Also, rule 34.10(2) requires the person being examined to bring to the examination all relevant documents that are not privileged.

[395] Ont. Rules, rule 34.10(4).

management to hold a mediation session within 90 or 150 days after the first defence is filed, and a settlement conference within 150 or 240 days after the first defence is filed).[396] It is also important that any new time standard be compatible with discovery management, whereby parties are expected to establish their own customized timetables for disclosure and production. For example, if parties opt for staged production of documents where certain documents are critical for effective discovery and others are less immediately relevant, the rules must provide this flexibility. On the other hand, where the parties are not inclined to customize their disclosure and production timetables, then the rule must provide for a "default" standard. Another important consideration is that the standard be a reasonable one that the judiciary will be prepared to enforce.

Most Canadian jurisdictions require the exchange of affidavits of documents within 10, 30 or 60 days after the close of pleadings, while Alberta's timeframe is 90 days after the statement of defence is filed.

In order to balance the need for a more generous time period for completing disclosure, the constraints of other fixed timelines in the rules and the importance of flexibility, the Task Force recommends that the time for exchanging affidavits of documents be increased to 45 days from the close of pleadings, subject to any other agreement the parties may make or a court order providing for a different timeline. The 10-day rule has been honoured more in the breach than in the observance. It is hoped that a 45-day rule will be adequate in the majority of cases, and if not, an alternate time period may be agreed upon by the parties or, where required, ordered by the court.

**Recommendation:**

- **Amend rule 30.03 (1) to require parties to exchange affidavits of documents within 45 days after the close of pleadings, subject to the parties' agreement otherwise or a court order.**

***Early Production of Key Documents***

The findings highlight the tension between the requirement under rules for early disclosure, contrasted with the adversarial tendency to limit disclosure to that which is helpful to the disclosing party's case. The Task Force believes it would be beneficial if, at a minimum, the key documents and information were produced as early as possible. The Task Force has considered several proposals in this connection, including a requirement to produce certain Schedule A documents with the pleadings or with the affidavit of documents, and alternatively, a requirement to produce with the pleadings all documents referred to therein.

Under the discovery rules in Prince Edward Island, parties are required to attach non-privileged documents to the affidavit of documents, unless another party has already produced or agreed to

[396] Ont. Rules, rule 24.1.09(1) and (3), rule 77.14(1).

produce a copy.[397] Similarly, Newfoundland's rules require copies of documents to be attached to the list of documents, unless the court orders otherwise.[398]

U.S. Federal Court rule 26[399] requires "initial disclosure" (unless otherwise ordered by the court and subject to rights of privilege) of: names, addresses and phone numbers of potential witnesses; names of potential experts; copies or descriptions of key documents and information; computation of damages with supporting documents and materials, including materials bearing on the nature and extent of injuries suffered; and any relevant insurance agreement. Arizona has a similar requirement.[400] According to assessments of rule 26, early disclosure has been successful in reducing the duration of discovery and the number of discovery disputes, and in improving the prospects of settlement.[401] On the other hand, there are significant concerns about the upfront costs for clients in obtaining documents and increased lawyer work hours.[402]

Mandatory production of all Schedule A documents with the affidavit of documents or with the pleadings would have the advantages of eliminating the need to request documents and speeding up the production process. Production at the time of pleadings could have the added benefit of facilitating more responsive defences and replies, thereby reducing the need to amend pleadings. The Task Force has been advised that the amendment of pleadings late in the litigation process results in significant costs and delay arising from re-attendances at examinations for discovery and further productions.[403]

However, there is little support for this approach, and its advantages are clearly outweighed by its disadvantages. First, it is inconsistent with the objective of discovery planning, which allows the parties to establish their own timetable for production. In many cases, it may not be feasible to complete the time-consuming process of retrieving, labelling and copying all Schedule A documents at such an early stage. In addition, automatic production may result in the duplication of documents already in the possession of opposing parties, thereby resulting in wasted effort and expense.

The Task Force notes that a balance must be struck between the level of production required early in a case to permit discovery, which entails moderate costs easily estimated, and the full production needed for trial, with the associated larger costs. Since less than five percent of actions end up at trial, fulsome production may add unwarranted costs. There are cases, however, where the resolution prior to trial can only be accomplished with full production.

---

[397] PEI Rules, rule 30.03(4).
[398] Nfld. Rules, rule 32.01.
[399] U.S. Fed. R. Civ. P., rule 26(a).
[400] Ariz..R. Civ. P., rule 26; See discussion in Part III of the Report.
[401] See Carl Tobias, "Discovery Reform Redux" (1999) 31, Conn. Law Rev. 1433 [hereinafter C. Tobias, *Discovery Reform Redux*] at 1436, citing to T.E. Willging *et al*., *Discovery and Disclosure Practice, Problems, and Proposals for Change: A Case-based National Survey of Counsel in Closed Federal Civil Cases* (Federal Judicial Center: 1997) at 535.
[402] C. Tobias, *Discovery Reform Redux*, *ibid*. at 1437, citing to RAND study, *supra*.
[403] Note: Ont. Rules, rule 26.01 which states that the court *shall* grant leave to amend pleadings at any stage of an action, unless prejudice would result that could not be compensated for by costs or an adjournment.

The Task Force therefore recommends a less onerous option, which is to require parties to produce with the pleadings documents referred to therein, unless they have been produced previously. This approach, which will achieve some of the benefits described above, is widely supported, and many lawyers have indicated that it is their standard practice in any event.

**Recommendation:**

- **Amend rule 30 to require production of documents referred to in pleadings at the time pleadings are served, unless they have been produced previously.**

### *Early Disclosure/Production of Documents in the Possession of Non-Parties*

The obligation to disclose documents under rule 30.03 includes only documents that are or have been in the party's possession, control or power.[404] By contrast, the rules in the Federal Court[405] and New Brunswick[406] require the disclosure of relevant documents the party believes to be in the possession, power or control of a non-party. In Newfoundland, a party must disclose documents of which it has knowledge at the time of pleadings that relate to every matter in question in the proceeding.[407] Alberta requires a party to disclose all relevant and material documents in the affidavit of records; once disclosed, the deponent must specify which documents are or have been in the party's possession, control or power.[408] In the U.S. jurisdictions with an automatic duty to disclose documents, the duty may be limited to those documents in the possession of a party,[409] or may be broad to include any relevant document that a party believes may be relevant to the subject matter of the action.[410]

In order to support the objective of fulsome early disclosure, the Task Force recommends that parties be required to identify documents in the possession of non-parties that will be relied upon by parties.

**Recommendation:**

- **Add a new schedule to the affidavit of documents listing documents in the possession of non-parties that will be relied on by parties.**

### *Standard Early Production in Specific Case Types*

The findings indicate that in certain case types (including personal injury, medical malpractice, commercial, wrongful dismissal, and construction cases, among others) there are standard documents and information that can and should be routinely produced early in the litigation

[404] For similar obligations in other Canadian jurisdictions, see, B.C. Rules, rule 26(1); Man. Rules, rule 30.03(1); N.S. Rules, rule 20.01(1); N.W.T. Rules, rule 219; P.E.I. Rules, rule 30.02(1); Sask. Rules, rule 212(1).
[405] Can. Fed. Rules, rule 223(2)(a)(4).
[406] N.B. Rules, rule 31.02(1).
[407] Nwfld. Rules, rule 32.01(1).
[408] Alta. Rules, rule 187.1(2).
[409] See, *e.g.,* U.S. Fed. R. Civ. P., rule 26(a)(1).
[410] See, *e.g.,* Ariz. R. Civ. P., rule 26.1(a).

process. Significant support has been expressed to the Task Force for developing guidelines for the production of standard documents in these types of cases.

There is precedent for the imposition of standard production requirements under the *Ontario Family Law Rules*. Under rule 13, where an application, answer or notice of motion contains a claim for support, property or exclusive possession of the matrimonial home, parties must produce with their filings financial statements and copies of income tax returns and notices of assessment for the preceding three taxation years.[411]

A number of jurisdictions have implemented case specific production requirements. In Arizona, for example, a special rule for medical malpractice cases requires the parties, soon after the close of pleadings, to exchange copies of all available medical records relevant to the subject matter of the action.[412] This rule was introduced following a review of medical malpractice procedure, conducted by a committee appointed by the Arizona Supreme Court.

California, with the assistance of an advisory committee, developed official form interrogatories and requests for admissions for certain case types, including personal injury, property damage and breach of contract.[413] These interrogatories standardize questions that are regularly asked in common case types; however, their use is not mandatory.

The United Kingdom has implemented case specific protocols in six areas: clinical disputes; personal injury; defamation; construction and engineering; professional negligence; and judicial review. The protocols prescribe, among other things, types of documents that must be exchanged (e.g. surgery records, accident reports, maintenance records, copies of policies, list of potential experts), and procedures for obtaining certain documents. In the event of non-compliance, the court may impose sanctions.[414] It has been suggested that the protocols significantly increase upfront costs for clients.[415] Moreover, anecdotal reports suggest that the front-ending of costs discourages some lawyers from accepting certain cases on a "conditional" fee basis, impeding access to justice for some litigants.[416]

Given these concerns and the Task Force's reluctance to add complex requirements to the discovery rules, it is recommended that guidelines for early standard documentary disclosure and production be developed as part of the best practices manual. The Task Force notes that counsel who are experienced in handling specific types of cases (e.g. personal injury, construction) can

---

[411] See Ont. Family Rules, rule 13. Other standard production requirements for family law matters are provided in: Ont. Rules, rule 69.14 and rule 70.04; *Family Law Act*, s. 8; Child Support Guidelines, s. 21 and s. 25.

[412] Arizona Rules, rule 26.2; see also State Bar Committee Notes to rule 26.2 of *Arizona Rules of Court Annotated* (2003) (Lexis-Nexis). Parties may, in lieu of serving copies of medical records, inquire what documents the opposing party wishes to have produced. Arizona Rules, rule 26.2(1)(3).

[413] Cal. Code Civ. P. § 2030(c)(1), 2033.5.

[414] See, e.g., U.K. Rules, Pre-Action Protocol for the Resolution of Clinical Disputes, s. 1.13, http://www.lcd.gov.uk/civil/procrules_fin/contents/protocols/prot_rcd.htm.

[415] See M. Bramley & A Gouge, *The Civil Justice Reforms One Year On: Freshfields Assess Their Progress* (London: Butterworths, 2000) at 10, which identifies some additional steps and costs parties must meet before issuing a proceeding, including early identification of documents, identification of key factual evidence (witnesses), and early engagement of experts.

[416] Interview with Lawrence West, Q.C., July 22, 2003.

readily identify those documents that are essential to resolving a case. A number of bar organizations and specialists have expressed their willingness to provide their expertise in this connection.

**Recommendation:**

- **Develop best practices for standard early documentary disclosure and production for specific case types.**

***Manner of Disclosure and Production***

As noted earlier, the rules do not prescribe in detail the format of the affidavit of documents or establish standards for the orderly production of materials. Rule 30.03 sets out the four categories of documents that must be listed in separate schedules to the affidavit of documents, and Forms 30A and 30B prescribe what information is required in describing the listed documents. Courts have held that each document must be given a number and must be described by including the type of document, date, sender, receiver, and the grounds for which any claim of privilege is made.[417]

Nonetheless, it has been reported to the Task Force that many lawyers routinely provide unsworn or incomplete affidavits, inadequate identification and descriptions of documents, and insufficient explanations as to the grounds for privilege claimed. The findings indicate that the discovery process would benefit greatly from more specificity and standardization in the rules as to the organization and content of the schedules to the affidavit of documents. There is widespread support for the establishment of a standard form prescribing the information to be provided in the schedules to the affidavit, including: date; type of document; author; recipient; title of document or other description; production number; attachments, if any; and basis of privilege, if claimed. Such standardization, it is felt, will facilitate document identification, particularly through electronic searches.

In addition, many participants in the review favour the development of best practices to provide guidance to lawyers and the unrepresented in preparing for disclosure. Such practices would include: providing clients with detailed explanations of disclosure requirements; ensuring that clients' documents are properly organized before preparing the affidavit; clearly identifying and itemizing documents; avoiding the practice of "bundling" of documents unless it is appropriate to do so; not asserting privilege as a means of avoiding production of relevant documents; and organizing affidavits in a consistent manner (e.g. chronologically or by issue).

To ensure consistency across the province and reduce the amount of needless time and expense arising from inadequate disclosure, the Task Force recommends the adoption of a template similar to that proposed at **Appendix N,** and the development of best practices for disclosure.

---

[417] See Ont. Rules, rule 30.03(2); *Solid Waste Reclamation Inc. v. Philip Enterprises Inc.* (1992), 2 O.R. (3d) 481 (Gen. Div.) (proper identification of document requires each document be given a unique number); *Waxman v. Waxman* (1990), 42 C.P.C. (2d) 296 (Master) (affidavit must set out for each document a description including its type, the sender and receiver of the document, its date and the grounds for which any claim of privilege is made).

With respect to the production of documents, the Task Force anticipates that discovery management will, to a great extent, address many of the problems relating to the timing and manner of production. However, the Task Force also recommends the development of best practices to encourage lawyers to consult with opposing parties about the most efficient and least costly manner of production, including consideration of joint books of production, scanning of documents into electronic format, and the use of litigation support software to aid in the cataloguing of documents.

**Recommendations:**

- **Replace Forms 30A and 30B with new standard forms for the schedules to the affidavits of documents, to include the following fields of information:**
  - **Date**
  - **Document type (e.g. letter, memo, contract, etc.)**
  - **Author**
  - **Recipient**
  - **Title of document or other description**
  - **Production number/page range**
  - **Identification of attachments, if any**
  - **Basis of privilege claimed**
- **Develop best practices for the manner of disclosure and productions.**

## 5. PRODUCTION OF DOCUMENTS IN THE POSSESSION OF NON-PARTIES

### Issue

Would enhanced access to documents in the possession of non-parties reduce cost and delay in the discovery process?

### Current Rules

Pursuant to rule 30.10(1), the court may compel a non-party to produce a document only where the court is satisfied that the document is relevant to a material issue in the action and that it would be unfair to require the party seeking production to proceed to trial without discovery of the document.

### Discussion

The findings reveal that the need to obtain documents from non-parties is a factor that can lead to increased costs, delays or discovery disputes, particularly in negligence, medical malpractice, personal injury and motor vehicle cases. The requirement to demonstrate unfairness at trial is seen as an onerous one that makes it difficult to obtain an order compelling production from a non-party. Obtaining production from non-parties through undertakings also generates disputes as to whether best efforts were made by the producing party to obtain these documents.

To address these concerns, the Task Force has considered two possible approaches:

(i) Introduce a right to permit parties to obtain production from non-parties, without first obtaining a court order; and
(ii) Modify the current test for production.

While there is some support for eliminating the need for a court order, there are a number of reasons for rejecting this option. Groups representing hospitals, physicians and government agencies have noted that it is extremely expensive and time-consuming to produce hospital records, full physician reports, and government documents. In addition, all government documents produced must first be vetted to protect public interest immunity (Crown privilege), solicitor-client privilege, and possibly personal information protected under the *Freedom of Information and Protection of Privacy Act*.[418]

The Task Force is also concerned about the potential for this option to increase opportunities for discovery abuse, in the form of "fishing expeditions." Another consideration is that the problem of non-party production tends to be more prevalent in specific case types rather than in all cases. Moreover, the Task Force is of the view that introduction of discovery planning will facilitate greater co-operation among counsel in obtaining non-party documents. Finally, the Task Force is influenced by the fact that all other Canadian jurisdictions require a court order for production.

[418] *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended.

In considering whether and how to modify the current test in Ontario, the Task Force notes that the test differs throughout the country. In the Northwest Territories, a moving party need only show that the document is relevant to a material issue in the action.[419] Nova Scotia, Saskatchewan and Alberta require the moving party to show that the non-party might be compelled to produce the relevant document at trial.[420] In Nova Scotia there is an additional requirement that such an order "shall not be made unless the court is of the opinion that the order is necessary for disposing fairly of the proceeding or for saving costs and is not injurious to the public interest."[421]

No other jurisdiction requires the moving party to establish that it would be unfair to proceed to trial without the document. This requirement appears to be inconsistent with the fact that the majority of cases settle without a trial. Enhanced access to documents in the possession of non-parties would likely improve the prospects of settlement.

In an effort to balance these considerations with the need to protect privilege, privacy and other public interest concerns, the Task Force recommends eliminating the requirement for the moving party to show unfairness, while retaining the requirement to show relevance. In addition, it is recommended that the rule authorize the court to refuse to order production where it is of the opinion that the document is privileged or that its disclosure would be injurious to the public interest. It is hoped that the development of best practices in specific case types will result in routine requests and consent orders for documents in the possession of non-parties. Over time, with the acceptance by parties and non-parties of standard early disclosure and production guidelines, the need for orders may be eliminated.

**Recommendation:**

- **Modify the test for production from non-parties in rule 30.10(1) by deleting the requirement to demonstrate that it would be "unfair to require the moving party to proceed to trial without having discovery of the document." Authorize the court to order production from non-parties where the document is relevant to a material issue in the action (*as the rule currently provides*) and where the court is satisfied that the document is not privileged and that its production would not be injurious to the public interest (*new requirement*).**

[419] N.W.T. Rules, rule 231(1).
[420] N.S. Rules, rule 20.06(2); Sask. Rules, rule 236; Alta. Rules, rule 209
[421] N.S. Rules, rule 20.06(3).

## 6. DISCOVERY OF ELECTRONIC DOCUMENTS

### Issue

What steps can be taken to promote the effective use of technology in the discovery process?

### Current Rules

The rules define documents broadly to include electronic documents. Pursuant to rule 1.03(1), " 'document' includes data and information in electronic form; 'electronic' includes created, recorded, transmitted or stored in digital form or in other intangible form by electronic, magnetic or optical means or by any other means that has capabilities for creation, recording, transmission or storage similar to those means, and 'electronically' has a corresponding meaning."[422] For the purposes of discovery, a document is defined in rules 30 and 31 to include "data and information recorded or stored by means of any device."[423]

The rules, however, go no further in defining the scope and manner of electronic document production. Parameters around the production of electronic documents are largely found in case law, as exemplified in the following rulings:

- The court may order electronic production of documents, even though hard copy production has occurred.[424]
- Where a party requests production of e-documents, the responding party may edit out privileged material. Reasonable costs of searching and producing are to be paid by the party requesting production.[425]
- Where electronic production of documents is a less expensive manner of production than hard copy production, the court may order electronic production (e.g. $15,000 as opposed to $250,000). Authority for such an order is found in the rule that provides for "the just, speedy and inexpensive determination of every proceeding on its merits."[426]
- Where there are voluminous productions, the producing party will be required to develop a unique number identifier for each document that is compatible with computer retrieval systems, or other system that will allow for cost-effective document retrieval.[427]
- Where a party has prepared, for its own use, an electronic searchable database of documents, there may be an obligation to provide access to the database.[428]

---

[422] O. Reg 427/01, filed November 22, 2002. Prior to this date, "document" for the purposes of documentary discovery was only defined in rule 30.01(1)(a), and no definition for "electronic" existed.
[423] Ont. Rules, rule 30.01(1)(a); rule 31.01.
[424] *Reichmann v. Toronto Life Publishing Co. (No. 2)* (1988), 30 C.P.C. (2d) 280 (Ont. H.C.),
[425] *Bank of Montreal v. 3D Properties Inc.*, [1993] S.J. No. 279 (Q.B.) (QL).
[426] *British Columbia Building Corp. v. T & N, plc*, [1995] B.C.J. No. 620 (B.C.S.C.) (QL).
[427] *Solid Waste Reclamation Inc., et al. v. Philip Enterprises Inc., et al.* (1991), 2 O.R. (3d) 481, [1991] O.J. No. 213 (Gen. Div.) (QL); *Mirra v. Toronto Dominion Bank*, [2002] O.J. No. 1483 (Ont. Master) (QL).
[428] *Wilson v. Servier*, [2002] O.J. No. 3723 (S.C.J.).

In prescribing a lawyer's obligation to ensure full disclosure, rule 30.03(4) requires a lawyer to certify that he or she has explained to clients "the necessity of making full disclosure of all documents relating to any matter in issue in the action." There is no express requirement to explain that the scope of discovery includes electronic documents; nor does rule 4.01(4) of the Rules of Professional Conduct, which instructs lawyers to ensure their clients make full documentary disclosure, make any reference to electronic documents.[429]

## Discussion

Electronic discovery is a significant issue in a number of large and complex cases, and in time, will become a significant in many other types of cases.[430]

Notwithstanding the growing sources of electronic documents, the findings indicate that a large majority of lawyers have yet to fully recognize the impact of technology on the discovery process. The overall orientation of the profession towards print, combined with the absence of clear guidelines or rules on the scope and manner of electronic production, has meant that many lawyers remain unfamiliar with the obligation to produce electronic documents and with the technology available to retrieve, exchange and produce documents in a cost-effective and time saving manner. Retention of records, particularly electronic records, in the face of erasure policies or allegations of spoliation is an emerging issue.

In its report, the Canadian Bar Association's Systems of Civil Justice Task Force identified electronic document production as an issue and stated that reform depends largely on access to document imaging and management.[431] The report of the Civil Justice Review also commented on "the explosion of information sources and available data as a result of the growth in technology [which] has led to an enormous increase in the material available for discovery purposes."[432] Neither report, however, made specific recommendations in regard to electronic discovery. Since these reports, management of electronic documents has become a growing business.[433]

The Task Force is of the view that the breadth of emerging issues in relation to electronic discovery, the profession's limited knowledge of this area and the importance of developing consistent policies and procedures for electronic discovery suggest the need for accurate definition of the scope of electronic discovery, proactive steps to encourage greater use of

[429] Law Society of Upper Canada, Rules of Professional Conduct, rule 4.01(4). See discussion and footnote in Section 14 for full text of the rule.

[430] For example, it is expected that much of what is currently gathered in health records will eventually be in electronic form. Interview with David Pattenden, CEO, Ontario Medical Association.

[431] Canadian Bar Association, *Report of the Canadian Bar Association: Task Force on Systems of Civil Justice* (Ottawa: Canadian Bar Association, 1996) at 43.

[432] Ontario Civil Justice Review, *Civil Justice Review: First Report* (Toronto: Ontario Civil Justice Review, 1995) at 237.

[433] The *LegalTech* conference in Toronto on November 22, 2002 was a forum for the presentation of all aspects of e-documentation, including its use in court. Several suppliers of various electronic document management and image scanning services attended to provide assistance and advise lawyers of their services.

technology in the civil litigation process, including best practices, and a coordinated approach (both provincially and nationally) to the establishment of standards for electronic discovery.

### *Defining the Scope of Electronic Discovery*[434]

Despite the existing definitions of "document" and "electronic" in the rules, the considerable scope of electronic discovery is not widely understood within the legal profession. "Meta-data," "residual," "replicant" and "archival" data are potentially relevant and helpful sources of information that are largely unfamiliar to lawyers and many of their clients.

More tangible sources of electronic documents include magnetic storage devices such as floppy disks, CDs and DVDs. Less familiar sources, as described below, encompass information stored on hard drives and back-up tapes, which can be converted to files and saved onto floppy disks or CDs:

- Meta-data includes electronic information that is attached to the files created by users. For example, most word processing software records the user's name, as well as the dates and times of document revisions. E-mail software records not only the dates and times e-mails are created, but also the names of the originator and all recipients. Although meta-data may be hidden from users, it is generally readily available. Digital files created by users, along with attached meta-data, are often referred to as "active data." Active data includes any documents created by word processors, spreadsheets, e-mail or any files created by the operating system.
- Residual data is information that remains stored on the computer even after a file has been deleted. The computer does not instantly "wipe clean" the space in which the file was stored, but merely "tags" it as re-usable space. The deleted data does not become truly unavailable until this space is re-used. Since computers use up all available space before using re-usable space, deleted files are often retrievable for a considerable period of time.
- Replicant data is created when a software program, such as a word processor, makes periodic back-up files of an open file (e.g. at five minute intervals) to facilitate retrieval of the document where there is a computer malfunction. Each time the program creates a new back-up file, the previous back-up file is deleted, or tagged for reuse. Accordingly, the retrieval of residual data can provide a very clear picture of the progression of changes made to a document.
- Archival data, also created to minimize the loss of electronic data, is data that is reproduced in a wholesale manner from a user's hard disk onto back-up "tapes." Most institutions and businesses save a copy of their entire system onto back-up tapes daily, and retain them indefinitely. Similar in form to magnetic audiocassette tapes, computer back-up tapes store huge amounts of data. However, searching for and retrieving

[434] Susan Wortzman, a partner at Lerners LLP and member of the Task Force, has extensive knowledge of electronic discovery issues. Much of the research cited in this section is from Ms. Wortzman and her recent paper on this issue, *Electronic Discovery: A Silent Case Killer*, prepared for the LegalTech Conference (November 14, 2002).

> specific files is often cumbersome and time-consuming. The restoration of a complete set of back-up tapes can be prohibitively expensive, depending on the technology used and the institution's archival policies.[435]

With the exception of Alberta, no Canadian jurisdiction specifically prescribes the scope or manner of electronic document production. Most Canadian rules assume parties are dealing with paper documents. In Alberta, however, a party may request that any "computer generated document" received by another party be provided in electronic format. Upon receipt of such a request, the producing party must provide the document in electronic format, or if not readily available electronically, in ASCII format.[436] The requesting party is responsible for disbursements relating to production and delivery of the document.[437] However, this rule contemplates that paper production will always occur first, and does not prescribe mechanisms for scanning and exchanging non-computer generated documents. In a recent consultation paper, the Alberta Rules of Court Project has concluded that rule changes are not needed to address the production of electronic documents, given the broad definition of "record" in Alberta's rules.[438]

In California, the court may make an order permitting technology to be used for discoveries in complex and other cases.[439] The order will prescribe procedures for using technology, which may include the exchange of pleadings and documents in electronic format.[440] Before the court can make such an order, the parties must agree, or the court must find that any prescribed procedures:

- promote cost-effective and efficient discovery or discovery-related motions;
- do not impose or require undue expenditures of time or money;
- do not create an undue economic burden or hardship on any person;
- promote open competition among vendors and service providers in order to facilitate the highest quality service at the lowest reasonable cost to the litigants; and
- do not require parties or counsel to purchase exceptional or unnecessary services, hardware, or software.[441]

Lawyers must appreciate the broad scope of electronic documents in order to be aware of an opposing party's obligations to produce in order to properly represent their client's interests. Absent a clear understanding of the full range of electronic information sources, parties cannot properly discharge their duty to preserve and disclose electronic documents, nor can lawyers fulfil their professional obligation to inform clients of this duty. Given the professional obligation of a "competent lawyer" to adapt to "changing professional requirements, standards, techniques and

---

[435] Submission from Martin Felsky, Commonwealth Legal Inc., to the Task Force, dated March 31, 2003, citing *Rowe Entertainment Inc. v. The William Morris Agency, Inc*. 205 F.R.D. 421 (S.D.N.Y. 2002).

[436] ASCII stands for American Standard Code for Information Interchange, and is a form of data that can be readily understood by the vast majority of computers throughout the world.

[437] Alta. Rules, rule 5.11.

[438] Alberta Rules of Court Project, *supra* note 152 at 23-24.

[439] Cal. Code Civ. P. § 2017(e)(1).

[440] Cal. Code Civ. P. § 2017(e)(3). Note that "technology" is defined in § 2017(e)(6) broadly to include telephone, e-mail, CD-ROM, internet web sites, electronic documents, electronic document depositories, internet depositions and storage, videoconferencing, and other electronic communication that may be used.

[441] Cal. Code Civ. P. § 2017(e)(2).

practices,"[442] lawyers should be expected to incorporate a basic understanding of electronic information into their knowledge base. Now that Ontario courts have recognized the independent tort of spoliation (for failure to preserve electronic information), it is even more critical that lawyers advise their clients of the need to preserve this type of data.[443]

In order to foster a greater understanding of the scope of electronic discovery, the Task Force recommends that, at a minimum, the definition of "document" in rules 30 and 31 be amended to refer specifically to "data created and stored in electronic form," so it is consistent with the definition in rule 1.03. It is also recommended that rule 4.01(4) of the Rules of Professional Conduct, which sets out a lawyer's discovery obligations, be amended so that it expressly refers to electronic documents in a manner consistent with the definition in the Rules of Civil Procedure.

The Task Force recognizes that in expanding the professional obligation to include electronic documents, there is a danger that lawyers may feel compelled to demand production or advise their clients to produce the full range of electronic data in every case, in order to avoid the risk of being accused of professional irresponsibility. Given the costs associated with the disclosure of certain types of electronic information, it is not cost-effective to seek or offer their production in all cases. Therefore, the cost versus the benefits associated with extending the definition may have to be considered in individual cases.[444] It is anticipated that the development of best practices with the input of the profession will provide guidance to lawyers and clients.

The Task Force cautions the drafters of such an amendment to include the discovery of electronic documents as part of the lawyer's obligation in appropriate cases only, and in keeping with best practices, as discussed below.

**Recommendations:**

- **Amend rules 30.01 and 31.01 to include in the definition of document "data created and stored in electronic form."**
- **Amend rule 4.01(4) of the Law Society's Rules of Professional Conduct to include the discovery of electronic documents in documentary discovery, in appropriate cases.**

***Best Practices for Electronic Discovery***

Technology offers improved methods of retrieving, exchanging and producing documents. Electronic production can result in significant savings of cost and time compared to paper production. For example, electronically created documents can be converted from one digital form into another at minimal cost. Volumes of hard copy documents can be scanned onto CDs at less expense than photocopying them, especially in multi-party litigation and when parties share

[442] Law Society of Upper Canada, Rules of Professional Conduct, rule 2.01(k).
[443] *Spasic Estate v. Imperial Tobacco Ltd*. (2000), 49 O.R. (3d) 699 (C.A.) (leave to appeal denied).
[444] For example, the factors considered by the court in California when making orders for the use of technology in discovery, referenced above, may serve as a useful guide for Ontario court's to consider when determining whether to order disclosure and production of all forms of electronic documents.

the cost. With the assistance of software tools, electronic documents are also much easier to search than paper.

In order to maximize the benefits of electronic discovery, both the court and the profession need guidance with respect to such issues as: what circumstances call for electronic production as opposed to paper production; how the cost of production should be fairly allocated; how to ensure that electronically produced documents are compatible with courtroom technology to facilitate production at trial; how to provide for the redaction of privileged and irrelevant material in electronic form; and how to ensure appropriate retention of electronic records.

Ontario's rules were designed for the production of paper documents. Although "document" is broadly defined, the rules assume the parties are dealing with hard copies, photocopies and printed affidavits. The rules do not address the mechanics for producing scanned images or documents, even when such documents are originally in this format.[445] Similarly, the Law Society's Practice Management Guidelines do not consider the use of technology in large document cases to be mandatory,[446] in spite of the potential cost savings.

A number of jurisdictions have developed practice directions or guidelines to assist with electronic document production. For example, a working group of the Sedona Conference in the United States produced a best practices guide for electronic document production in March of 2003.[447] Conceived with input from experienced practitioners and technology experts, the guide contains a set of principles with commentary to assist the practitioner with electronic document discovery, including the following:

- Electronic data and documents are potentially discoverable under federal and state rules of procedure, and organizations must therefore properly preserve electronic data and documents that can reasonably be anticipated to be relevant to litigation.
- When balancing the cost, burden, and need for electronic data and documents, courts and parties should apply the balancing standard embodied in federal and state rules of procedure, which requires considering the technological feasibility and realistic costs of preserving, retrieving, producing and reviewing electronic data, as well as the nature of the litigation and the amount in controversy.
- Parties should confer early in the discovery process regarding the preservation and production of electronic data and documents and, when these matters are at issue in the litigation, attempt if possible, to reach agreement concerning the scope of each party's rights and responsibilities.
- The primary source of electronic data and documents for production should be active data and information purposely stored in a manner that anticipates future business use

[445] Submission to the Task Force by Martin Felsky, Commonwealth Legal Inc., dated March 31, 2003.
[446] *Ibid.*, citing the Law Society of Upper Canada, *Practice Management Guidelines*, Technology. www.lsuc.on.ca/services/pmg_tech.jsp.
[447] The Sedona Conference, *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* (March 2003) http://www.thesedonaconference.org/publications_html.

and permits efficient searching and retrieval, and resort to disaster recovery backup tapes and other sources of data and documents requires the requesting party to demonstrate need and relevance that outweigh the cost, burden, and disruption of retrieving and processing the data from such sources.

- A responding party should follow reasonable procedures to protect privileges and objections to production of electronic data and documents.

Another example of guidelines respecting the use of electronic information in civil litigation is found in a practice note issued by the Chief Justice of the Federal Court of Australia.[448] Some key components of the note are summarized below:

- Parties are encouraged to consider the use of technology from the commencement of proceedings and an agreed protocol for the exchange of electronic data during discovery.
- Parties are further encouraged, where appropriate, to:
    - use electronic data to create lists of discoverable documents;
    - undertake discovery by exchanging electronic data created in accordance with an agreed protocol; and
    - exchange electronic versions of documents such as pleadings and statements.
- Where there are more than 500 documents between the parties, they are encouraged to agree, before commencement of discovery, upon a protocol for exchanging documents and indexes in electronic format.
- Any agreed protocol should include the exchange of court documents and discovery lists in electronic format, and an appropriate medium for the exchange of electronic documents.
- Checklists are provided to help define the information technology protocols, and the fields of data parties should consider using when collecting electronic data.
- Where a party serves a court document, the recipient may ask that a copy of the document be provided in electronic format, and the court expects parties to accede to requests for copies of electronic documents.
- Parties are expected to consider ways to manage the discovery process more efficiently through the use of information technology, and to make reasonable attempts to agree on the format for producing electronic documents and/or images of documents. Such agreements will be better informed if the parties have identified the scope of discovery and the categories of documents likely to be discoverable.

[448] Practice note of Chief Justice M.E.J. Black, Federal Court of Australia, dated April 20, 2000. For complete text of the note, refer to refer to http://www.fedcourt.gov.au/pracproc/practice_notes_cj17.htm.

The Task Force recommends that best practices be developed to facilitate the effective use of technology in the discovery process. Following the implementation of best practices and a period of monitoring their impact, it is recommended that the Civil Rules Committee review and revise the rules relating to documentary production.

**Recommendations:**

- **Develop best practices with respect to retention of electronic records and the scope, cost and manner of electronic documentary production.**
- **Following a period of monitoring the impact of best practices, review and revise the rules relating to documentary production.**

***Provincial and National Standards***

Commercial and class action proceedings often involve issues that cross provincial and national borders. The cost and timeliness of production of electronic data and the format for its filing and presentation in court is an issue that should be dealt with on a collaborative basis in all Canadian jurisdictions.

It is important that standardized practices be consistent with available technology in Ontario's courts and other Canadian courts. Some work in this regard is already underway. The Canadian Judicial Council[449] and the Canadian Forum on Civil Justice, among others, are currently examining national standards for litigation document production. The Task Force recommends that Ontario participate in processes to establish national standards for electronic document production.

**Recommendation:**

- **Participate in processes to establish national standards for electronic discovery.**

[449] Submission to the Task Force by Martin Felsky, Commonwealth Legal Inc., dated March 31, 2003.

## 7. ORAL DISCOVERY

### Issue

How can oral discovery be made more efficient and cost-effective?

### Current Rules

A party may examine a party adverse in interest by way of oral examination or written questions and answers, but not both, unless leave of the court is granted. Where more than one party is entitled to examine a person, it must be by oral examination, unless all the parties entitled to examine the person agree otherwise.[450]

Oral examination is initiated by service of a notice of examination.[451] A party may examine any other party adverse in interest only once, except with leave.[452] The term "once" is not restricted to a fixed period of time, and the practice among lawyers is to adjourn an examination that is not completed at the end of a day for continuation on a later date. The party who first serves a notice of examination has the right to complete examinations being examined by another party.[453] The examination must take place in the county where the person to be examined resides, unless the court orders otherwise or all parties agree to hold the examination elsewhere.[454] A person who objects to being examined at the designated time or place or by the person assigned to conduct the examination may bring a motion to show that the time, place or person is unsuitable for the proper conduct of the examination.[455]

The person being examined must answer any proper question relating to any matter in issue, and no objection may be made to a question on the ground that it constitutes cross-examination, unless the question is directed solely to the credibility of the witness.[456]

The rules do not establish limits on the amount of time that may be spent at oral examinations for discovery. In Toronto and Windsor case managed actions, the plaintiff must file a timetable, agreed to by the parties or established by the court at a case conference, fixing the date for completion of examinations for discovery.[457] In actions governed by the simplified procedure, parties are not permitted to conduct examinations for discovery.[458]

---

[450] Ont. Rules, rule 31.02(1).
[451] Ont. Rules, rule 34.04.
[452] Ont. Rules, rule 31.03(1).
[453] Ont. Rules, rule 31.04(3).
[454] Ont. Rules, rule 34.03
[455] Ont. Rules, rule 34.02(2).
[456] Ont. Rules, rule 31.06.
[457] Ont. Rules, rule 77.10 (2), (3), (5). The timetabling requirement does not apply in Ottawa.
[458] Ont. Rules, rule 76.04.

## Discussion

The findings indicate that scheduling difficulties, delays in completing examinations, inadequate preparation for oral discovery, prolonged examinations and improper refusals based on relevance are some of the key problems associated with oral discovery. There are also concerns that the cost of oral discovery is sometimes disproportionate to the value of the claim.

In deliberating on how best to address these issues, the Task Force has considered a number of options, which are reviewed in detail below:

(i) Restrict or eliminate the right to oral discovery;
(ii) Eliminate the right to cross-examination;
(iii) Restrict the time for oral discovery;
(iv) Modify the venue provisions;
(v) Use discovery planning and management mechanisms; and
(vi) Develop best practices for the conduct of oral discovery.

Other options considered by the Task Force include permitting written discovery as a supplement to oral discovery (discussed in Part VI, Section 8) and eliminating refusals except on the grounds of solicitor-client privilege (discussed in Part VI, Section 12).

### *Right to Oral Discovery*

As mentioned previously, reliance on oral discovery is primarily a North American phenomenon that does not exist in other common law jurisdictions.[459] Several authorities have identified oral discovery as the most costly step in litigation, and the one that contributes most to delay.[460] The Civil Justice Review noted that while most members of the bench and bar view oral examinations to be a critical component in the conduct of litigation, "concerns have been raised that it has become too time-consuming and costly to continue without new controls."[461]

Steps have been taken in Ontario and other Canadian jurisdictions to restrict access to oral examinations in certain types of proceedings. For example, in cases governed by Ontario's Family Law Rules, no party may be "questioned" or examined for discovery unless an order of the court is first obtained.[462] This "gate keeping" rule was designed to address concerns over the high cost of discovery. It was based on the rationale that when parties are collaborative and make full documentary disclosure, there is little need for oral discovery, and that written questions are the most efficient and cost-effective means of obtaining any additional information required.

---

[459] See Part III of the Report.

[460] See, E.D.D. Tavender, Q.C. & G.L. Tarnowsky, "Reform of the Discovery Process" in Canadian Bar Association, *Issues Papers: Background Study to the Systems of Civil Justice Task Force Interim Report*, (Ottawa: Canadian Bar Association, 1996) at 1, in which the authors state "the discovery process is an aspect of the civil justice system frequently criticized as being a major contributor to the costs and delays in the system."; G.D. Cudmore, *Choate on Discovery, 2d ed.,* loose leaf (Toronto: Carswell, 1993) at 1-12; T.E. Willging *et al*., "Discovery and Disclosure Practice, Problems and Proposals for Change: A Case-based National Survey of Counsel in Closed Federal Civil Cases" (Federal Judicial Center: 1997).

[461] Ontario Civil Justice Review, *Civil Justice Review: Supplemental and Final Report* (Toronto: Ontario Civil Justice Review, 1996) at 130.

[462] Ont. Family Rules, rule 20(5).

Case conferences and settlement conferences provide counsel with an opportunity to meet parties and assess their demeanor. [463]

In addition, oral discovery has been eliminated for cases of lower monetary value in Ontario (simplified procedure cases under rule 76), as well as in Quebec, Saskatchewan and the Federal Court in order to streamline the litigation process.[464] During this review, one legal association has proposed that the monetary limit of rule 76 be increased from $50,000 to $100,000 in order to eliminate the costs of oral discovery for a broader range of cases.[465] However, much contrary opinion has been expressed by lawyers who feel that oral discovery, even in smaller cases, is desirable. The Task Force suggests that any expansion of the application of rule 76 continue to be carefully monitored by the Simplified Procedure Subcommittee of the Civil Rules Committee's in its ongoing review of that rule.[466]

As noted above, common law systems in the United Kingdom, Australia, and New Zealand have operated effectively without reliance on an oral examination process, using documentary and written discovery only.[467] Interestingly, there is no groundswell in these jurisdictions to include oral discovery in their rules of procedure.[468]

There are a number of compelling arguments to support the elimination of oral discovery and its replacement with exclusive written discovery.[469] For example, written examinations require counsel to carefully review the facts of a case in order to prepare questions. The Task Force has heard frequent complaints about oral discoveries being conducted without adequate preparation, which can result in unnecessarily prolonged examinations. Written answers can be clearer, more succinct and more informative than oral answers. Oral answers can be evasive, leading to repetition of questions. Time constraints at oral examinations may necessitate adjournments to permit counsel to prepare follow up questions. The use of written questions and answers may eliminate scheduling difficulties and costs associated with attendance at oral discoveries. Finally,

---

[463] This rule was based on a similar rule that had been in place in the former Provincial Division (now Ontario Court of Justice) for over 20 years. See, Family Law Rules Committee, *Consultation Draft of Family Law Rules and Forms* (November 12, 1996) at 30.

[464] See, e.g. Ontario Rules, rule 76 (cases under $50,000); Que. Code, s. 396.1 (cases under $25,000); Sask. Rules, rule 484 (actions under $50,000, unless leave obtained); Fed. Rules, rule 296 (cases under $50,000; maximum of 50 written questions permitted).

[465] Submission to the Task Force of the Metropolitan Toronto Lawyers' Association, dated September 19, 2002.

[466] Rule 76 was originally evaluated by the Simplified Procedures Subcommittee, which recommended in its report in October 2000 that the monetary limit of the rule be increased from $25,000 to $50,000. See, Simplified Procedure Evaluation Subcommittee of the Civil Rules Committee, John Callaghan (Chair), *Simplified Procedure Subcommittee Evaluation Report* (October 2000). This increase came into force on January 1, 2002 pursuant to O. Reg. 284/02.

[467] It is also worthy of note that oral examination has never been a component of the discovery process in European civil law jurisdictions.

[468] However, each of these countries has recently revised their rules to address documentary production problems similar to those encountered by this Task Force. As in Ontario, the litigation culture of lawyers in specific locations has a significant impact on the effective resolution of cases.

[469] See P. Schindler, "The Advantages and Disadvantages of Written Examinations for Discovery" (Aug. 1989) 10 Advocates' Q. 404.

written examinations reduce opportunities for harassment and intimidation of persons being examined.

There are also distinct disadvantages to a system that relies exclusively on written questions and answers. One such concern is that answers may be contrived or finessed by counsel, and may not accurately reflect the facts.[470] Written examinations do not permit counsel to assess whether or not a person is telling the truth and how a person will "perform" as a witness at trial. Since few cases proceed to trial, the value of oral discovery as a mechanism to assess potential witnesses may be somewhat overstated. On the other hand, such an assessment may influence the recommendations counsel make to their clients regarding settlement. Other problems with written questions include the potential for delay where counsel for the examined party objects to questions. Written questions and answers can also be cumbersome, costly and time consuming, especially in complicated proceedings.

Whatever its true value, the majority of lawyers consulted view oral examinations as an indispensable discovery mechanism. Of all the discovery reform options canvassed by the Task Force, the elimination or restriction of access to oral examinations has been the most vehemently opposed by participants in the review. The Task Force has concluded that the imposition of restrictions at this time is not only unwarranted by the findings, but would be met with significant opposition by the litigation bar. With the implementation of other controls, the Task Force is of the view that many of the problems relating to oral discovery can be adequately addressed.

### *Scheduling and Location of Examinations*

The findings indicate that scheduling oral examinations and delays in completing examinations are problematic, particularly in cases with multiple parties or lawyers, or where lawyers' heavy caseloads necessitate the postponement of discoveries for lengthy periods.

Like Ontario, most Canadian jurisdictions do not prescribe detailed scheduling requirements in their rules. However, in Alberta, the court may impose terms with respect to, *inter alia*, location and scheduling where, "the expense, delay…or difficulty in complying fully [with the discovery rules] would be grossly disproportionate to the likely benefit."[471] Recent changes to Quebec's Code of Civil Procedure require parties to negotiate an agreement on the number, length and other conditions of examinations before the filing of the defence.[472] The agreement must be filed with the court and is binding on the parties.[473]

By contrast, Texas is an example of a jurisdiction in which the rules prescribe a fixed timeframe within which discovery must be completed.[474] The Task Force has concerns about establishing fixed time provisions in Ontario, given the importance of flexibility to respond to the specific circumstances of individual cases.

---

[470] *Ibid.* at 416.
[471] Alta. Rules, rule 216.1(1)(b).
[472] Que. Code, rule 151.1.
[473] Que. Code, rule 151.2.
[474] See discussion of the Texas discovery rules in Part III of the Report.

A related matter is the location of examinations. According to the findings, it is not unusual for lawyers or parties to be located in different counties. During consultations, scenarios have been described in which the majority of lawyers were located outside the county where the examined party resided, resulting in excessive lawyers' fees and expenses related to travel. It has been suggested that convenience and cost efficiency should be express considerations under rule 34.03.

With the implementation of discovery planning and management mechanisms, the Task Force does not see the need for amendments to the current provisions with respect to scheduling and location of oral discoveries. These arrangements are more appropriately left to counsel, and if they are unable to agree, the assistance of the court can be obtained.

***Duration of Oral Examinations***

The statistical findings indicate that the total number of days spent in oral examinations (both as the examining lawyer and as the representative of the party being examined) range on average from one to two days. In 25% of cases studied, lawyers spent three days or more in oral examinations, and in 5% of the cases, up to 14 days. Anecdotal information outside the survey results reveal a small percentage of cases with weeks of oral discovery.

Feedback from consultations and submissions indicates that many lawyers are concerned about unduly lengthy oral discoveries and the associated cost and delay. Factors seen as contributing to the prolongation of oral examinations include lack of preparation or experience, irrelevant or repetitious questions, or in some cases, lawyers' billing targets.

The Canadian Bar Association's Task Force on Systems of Civil Justice recommended that each jurisdiction amend its rules to limit the time available for discovery, and the Civil Justice Review also proposed time limits as a potential reform option.[475]

Time limits have been imposed in British Columbia's Fast Track Litigation Rule, designed for actions that require trials of two days or less. Under that rule, an examination for discovery must not exceed two hours except with the consent of the parties or by court order.[476] In the U.S. Federal Court and Arizona state courts, depositions in all cases are subject to time limits of seven and four hours respectively, which can be altered by agreement or by court order.[477] In both jurisdictions, the court has the authority to impose sanctions if it finds conduct that has frustrated the fair examination of a deponent. The scheme in Texas includes time limits on oral depositions based on the discovery control plan selected. In cases involving less than $50,000 (Level 1), each party is permitted six hours of oral deposition, which they may agree to extend to a maximum of ten hours per party.[478] In cases over $50,000 (Level 2), each side may have no more than 50 hours

[475] Ontario Civil Justice Review, *Civil Justice Review: Supplemental and Final Report* (Toronto: Ontario Civil Justice Review, 1996) at 131; Canadian Bar Association, *Report of the Canadian Bar Association: Task Force on Systems of Civil Justice* (Ottawa: Canadian Bar Association, 1996) at 43; E.D.D. Tavender, Q.C. & G.L. Tarnowsky, "Reform of the Discovery Process" in Canadian Bar Association, *Issues Papers: Background Study to the Systems of Civil Justice Task Force Interim Report*, (Ottawa: Canadian Bar Association, 1996) at 8.

[476] B.C. Rules, rule 66 (13) and (14).

[477] U.S. Fed. Rules, rule 30(d)(2); Ariz. Rules, rule 30(d).

[478] Tex. Rules, rule 190.2(c)(2).

in oral deposition to examine the opposing side, unless a court order is obtained.[479] In cases with individualized discovery control plans (Level 3), the court sets the duration of oral depositions as part of the discovery plan.[480]

The findings suggest that one day of oral examination per party adverse in interest should be sufficient in most cases. Many lawyers consulted have acknowledged that time limits are beneficial, in that they force counsel to consider how much time is realistically needed, to prepare adequately for oral discoveries, and to remain focused on relevant matters. Others have expressed concerns about the inflexibility and arbitrariness of fixed time limits. The Task Force believes that this concern can be addressed by adopting the approach in British Columbia, the U.S. Federal Court and Arizona, whereby a prescribed "default" time limit can be modified by the parties on consent or by a court order.

The Task Force therefore recommends that rule 31 be amended to set a default limit on oral discovery of one day per party adverse in interest, unless otherwise agreed to by the parties or ordered by the court. The one-day timeframe reflects the general consensus that most examinations of a party can be completed in that time. The provision for a default time limit will provide parties with the flexibility, in planning for discovery, to agree on a longer period as needed. If they are unable to agree, they may seek the court's assistance in establishing an appropriate time frame.

**Recommendation:**

- **Amend rule 31 to provide that, subject to the parties' agreement otherwise or a court order, a party will have up to a maximum of one day to examine each party adverse in interest.**

***Deemed Admission of Authenticity***

Rule 30.05 provides that the production of a document is not an admission of its relevance, but does not address the matter of its authenticity. Under rule 51.02, a party must serve a notice to admit documents in order to trigger the deemed admission of authenticity. "Authenticity" is defined under rule 51.01 as:

(a) a document that is said to be an original was printed, written, signed or executed as it purports to have been,
(b) a document that is said to be a copy is a true copy of the original, and
(c) where the document is a copy of a letter, telegram or telecommunication, the original was sent as it purports to have been sent and received by the person to whom it is addressed.

According to the findings, much time is wasted at discoveries simply confirming that copies of produced documents are authentic. There is support for a mechanism that could minimize this time.

[479] Tex. Rules, rule 190.3(b)(2).
[480] Tex. Rules, rule 190.4(b).

Most Canadian rules include a notice to admit procedure,[481] and a similar approach is followed in the U.S. federal jurisdiction.[482] In Alberta, Newfoundland, Northwest Territories, and Nova Scotia, the rules provide that a party in receipt of an affidavit of documents (and in Alberta, the producing party) is deemed to admit the authenticity of any document listed therein, unless the recipient disputes its authenticity by serving a notice on the producing party, denies authenticity in the pleadings, or the court orders differently. The prescribed time for serving notice ranges from ten days from service or receipt of the affidavit of documents in Newfoundland and Nova Scotia to 30 days in Alberta and the Northwest Territories.[483]

The Alberta Rules of Court Project, while noting the benefits of its deemed admission of authenticity rule in dispensing with proof at trial and ensuring that reliable records are provided at examinations for discovery, has concerns about its application.[484] One concern is the absence of a definition of "authenticity" in the Alberta provision.[485] Another is that the deemed admission period runs from the service of the affidavit of records, whereas in practice, copies of disclosed records tend not to be provided until after the 30-day period. This creates the potential that significant admissions may be deemed to be made before counsel has actually received documents in the affidavit of records.[486] Electronic documents are especially problematic because of the ease with which they can be altered, making it difficult or impossible to assess their authenticity from a description in the affidavit of documents. Similarly, it may be difficult to determine whether emails (including attachments) have been received by the intended recipient.[487]

In view of these concerns, the Task Force does not recommend changes to the rules at this time. The request to admit process provided for in rule 51.02 is under-utilized in practice and where used, is only employed shortly before trial. The Task Force recommends that best practices be developed to encourage parties to enter their own arrangements with respect to deemed authenticity. The Civil Rules Committee may wish to review this issue in the future.

**Recommendations:**

- **Develop best practices with respect to deemed authenticity of documents.**
- **Civil Rules Committee to consider a review of the provisions relating to deemed authenticity of documents.**

---

[481] See B.C. Rules, rule 31(1); Man. Rules, rule 51.02; Sask. Rules, rule 242; P.E.I. Rules, rule 51.02; N.B. Rules, rule 31.10; N.S. Rules, rule 21.02; Nfld. Rules, rule 33.02.

[482] U.S. Fed. R. Civ. P., rule 36.

[483] Alta. Rules, rule 192(1); Nfld. Rules, rule 32.04; N.W.T. Rules, rule 228; N.S. Rules, rule 20.03.

[484] Alberta Rules of Court Project, *Discovery and Evidence Issues: Commission Evidence, Admissions, Peirringer Agreements and Innovative Procedures, Consultation Memorandum No. 12.7* (Edmonton: Alberta Law Reform Institute, July 2003) at 24.

[485] Courts have held that deemed authenticity only goes to the authenticity of the document itself and to the fact that it was sent or received, but does not apply to the truth of its contents. *Murphy Oil Co. Ltd. v. The Predator Corporation Ltd*. (2002) 316 A.R. 1, 2002 ABQB 408 at para 32, as cited *ibid*. at 25.

[486] *Ibid.* at 25.

[487] *Ibid*. at 27.

### *Cross-Examination*

The right to cross-examine at oral discovery was introduced as part of the 1985 amendments to the rules. One objective was to enhance the examining party's ability to gain admissions at discovery in order to facilitate, among other things, the obtaining of summary judgment.

The rules in most Canadian jurisdictions are similar to those in Ontario;[488] however, some are silent as to whether objections may be made to questions asked by way of cross-examination.[489] By contrast, British Columbia's rules state that an examination for discovery "shall be in the nature of a cross-examination."[490] In the American jurisdictions canvassed, depositions may occur by way of both examination and cross-examination of a witness.[491]

Anecdotally, the Task Force has heard that unnecessarily aggressive or uncivil cross-examinations – when they occur – tend to be a product of local legal culture, inexperienced counsel or the attitude or posturing of individual lawyers. On the whole, however, the statistical findings suggest that abusive examination is not a problem in over 95% of cases.

The Task Force does not recommend eliminating the right to cross-examine. In some cases, cross-examination can be essential to obtain information or admissions that may bring the action to an early resolution. Even if cross-examination were eliminated, the Task Force doubts this would significantly curtail the behaviour of lawyers who have a propensity for acting in an aggressive or abusive manner. In any event, the rules currently permit a party who is being subjected to abusive cross-examination to adjourn the examination, move for directions with respect to its continuation, and seek costs.[492]

**Recommendation:**

- **Retain the right to cross-examine at oral examination for discovery.**

### *Video Recording of Oral Discovery*

The Task Force canvassed the possibility of mandating the video recording of oral discoveries as one means of deterring uncivil conduct at oral examinations. Although the rules permit examinations to be recorded by videotape or other similar means on the parties' consent or by order of the court,[493] video is rarely used in Ontario for this purpose. The findings indicated that most lawyers are uncomfortable with recording discoveries on video, and have concerns about access to and the cost of video technology, the accuracy of transcripts (particularly when several people speak at once), as well as the need for recording standards to ensure that the videotape is a fair representation of the parties' demeanour.

---

[488] Man. Rules, rule 31.06(1); N.B. Rules, rule 32.06(1); N.W.T. Rules, rule 251(1); P.E.I. Rules, rule 31.06(1); Fed. Rules, rule 242(2)

[489] Alta; Nfld.; N.S.; Que.; Sask.

[490] B.C. Rules, rule 27(21).

[491] U.S. Fed. Rules, rule 30(c); Tex. Rules, rule 199.5(b); N.Y. Rules, rule 3113(c); Cal. Code, § 2025(1); Ariz. Rules, rule 30(c).

[492] Ont. Rules, rule 34.14(1) and (2).

[493] Ont. Rules, rule 34.19(1).

In many American jurisdictions, depositions may be videotaped at the option of the examining party.[494] No Canadian jurisdictions require examinations to be videotaped, although many permit them to be videotaped as a means of recording the testimony given.[495]

The Task Force makes no recommendations at this time, but suggests that the Civil Rules Committee consider the capacity of video technology to enhance the discovery process. The Task Force also notes that video recordings (even where discovery evidence is transcribed by other means) may be useful in providing early responses to undertakings or dealing with refusals, and should be encouraged.

**Recommendation:**

- **Do not introduce amendments to the rules at this time with respect to video recording of oral examinations for discovery.**

***Discovery Planning and Best Practices for Oral Discovery***

The Task Force anticipates that as part of discovery planning, parties will take steps to agree on the timing, duration and location of examinations, and to explore ways to maximize the efficiency and effectiveness of oral discovery. This might include a consideration of the use of agreed statements of fact, requests to admit and demands for particulars to better clarify issues prior to oral discoveries. The Task Force also recommends that best practices be developed on the proper conduct of oral discovery, including such matters as preparation for examinations, proper questions, undertakings and refusals.

**Recommendation:**

- **Develop best practices for the conduct of oral discovery.**

[494] See, e.g. U.S. Fed. Rules, rule 30(b)(2); Tex. Rules, rule 199.1(c); Cal. Rules, rule 2025(d)(5); Ariz. Rules, rule 30(b)(4).
[495] See, e.g., Man. Rules, rule 34.18; Nfld. Rules, rule 30.06; N.S. Rules, rule 18.07.

## 8. WRITTEN DISCOVERY

### Issue:

Can written questions and answers be used more effectively as a discovery mechanism?

### Current Rules:

In developing the 1985 rules, it was felt that permitting both written and oral discovery would encourage abuse of the process by duplication of questions and the resulting additional costs. As noted above, an examining party has the option of conducting an examination for discovery by written questions and answers, or by oral examination, but cannot subject the person being examined to both forms of discovery without leave of the court.[496] Where more than one party is entitled to examine a person, it must be by way of oral examination.[497]

An examining party may opt for written examination by serving a list of questions on the person to be examined and all other parties.[498] The answers, along with the reason for any objections,[499] are to be contained in an affidavit and served on all parties within 15 days of receipt of the questions.[500] If the examining party is not satisfied with an answer or where an answer suggests a new line of questioning, the examining party may serve a further list of questions within ten days of receiving the answers. These questions must also be answered within 15 days of service.[501]

Where a party fails to answer any written question or provides an insufficient or evasive answer, rules 35.04(2) to (4) empower the court to order the person to be examined orally, strike out all or part of the person's evidence, dismiss the party's action or strike the party's defence, or make such other order as is just. Rule 35.05 permits the court, on motion by a party, to terminate the written examination or limit its scope.

### Discussion

As noted above, few lawyers use written discovery as an alternative to oral discovery and none view it to be an appropriate means of obtaining admissions. However, the findings suggest that examination by written questions and answers is a valuable and cost-effective means of obtaining early disclosure of certain types of documents and information, which can be examined on at oral discovery. Written discovery is particularly useful in cases relying heavily on documentary evidence, and can be an effective means of reducing the number of undertakings on oral discovery and the need for follow up discovery on responses to undertakings.

---

[496] Ont. Rules, rule 31.02(1).
[497] Ont. Rules, rule 31.02(2)
[498] Ont. Rules, rule 35.01.
[499] Ont. Rules, rule 35.03
[500] Ont. Rules, rule 35.02
[501] Ont. Rules, rule 35.04(1)

In Alberta, the Working Committee on Discovery and Evidence of the Alberta Law Reform Institute (ALRI) has recommended the introduction of written interrogatories into the rules, noting their utility in the following circumstances:

- for follow up questions to answers to undertakings;
- where questions on discovery deal with technical matters that must be compiled from various sources;
- where a corporate officer adopts evidence or information from other employees;
- prior to discovery, to obtain basic information about key employees and documents;
- where it is inconvenient to have the witness attend or the witness resides far away;
- where it is likely that only a few questions are necessary and are not objectionable; and
- to preserve evidence prior to trial.[502]

The ALRI observed that written questions and answers are not helpful where it is important to observe the party being examined or where the questions are general and narrative in nature.

### *Written Discovery in Conjunction with Oral Discovery*

The Task Force is of the view that written discovery should be encouraged where it may abbreviate the length of oral examinations. The current rule, which requires a party to choose between written and oral discovery, is one factor that can prolong oral discovery. Several options have been considered to promote the use of written discovery as a supplement to oral discovery:

(i) Require the exchange of "will-say" statements;
(ii) Require written discovery as a pre-requisite to oral discovery;
(iii) Introduce "standard form interrogatories;" and
(iv) Permit parties to opt for both forms of discovery.

The mandatory exchange of will-say statements early in the litigation is one option for supplementing oral discovery. In simplified procedure cases in the East Region, a judicial practice direction requires parties to file a summary of witnesses' evidence at the pre-trial conference.[503] Lawyers who conduct litigation in that region consider this to be a practical alternative to oral examinations, which are prohibited under rule 76.[504]

Some regulatory tribunals, such as the National Energy Board and the Ontario Energy Board, use a form of written interrogatory called an "information request." Similar to will-say statements, which provide information to support pleadings, the information request enables parties to obtain elaboration of conclusions set out in their filed positions, and is particularly useful for the elaboration of technical data.[505]

However, no Canadian jurisdiction requires the exchange of will-say statements in conjunction with oral discovery as part of the civil litigation process.

---

[502] Alberta Rules of Court Project, *supra* note 152 at 56-57.
[503] Practice Direction, Hon. J. Douglas Cunningham, Regional Senior Justice (East Region), December 31, 2001.
[504] Submission to the Task Force of the Frontenac Law Association, dated September 13, 2002.
[505] Interview with Ottawa practitioner, P.C.P. Thomson, June 2003.

In the U.S., Arizona requires parties to exchange the names and addresses of witnesses they intend to call at trial, and a brief description of their expected testimony within 40 days of the close of pleadings. In Texas, parties must, if requested, disclose "any discoverable witness statements" that may have been taken within the prescribed discovery period. In the United Kingdom, the court will order a party to serve on other parties any witness statements of the oral evidence on which the party intends to rely at trial. If a party has served a witness statement and wishes to rely on the witness' evidence at trial, the party must call the witness to give oral evidence, but the statement stands as the witness' evidence in chief.[506] Reports indicate that this has shortened trial time.[507] The mandatory exchange of will-say statements is a common feature of international commercial arbitrations. Commercial arbitration specialists consulted during the review consider this a valuable means of defining issues and the need for experts.

The key concern with this option, and the reason for its rejection, is its potential for increasing the upfront costs of discovery.

Another option is to require parties to complete written discovery before commencing oral examinations, with the objective of obtaining disclosure of key information prior to oral discovery. Based on feedback from consultations, the Task Force is of the view that mandating two types of discovery could lead to increased costs, duplication in the areas of inquiry, and possible abuse by wealthy litigants seeking to wear down opposing parties.

A further option is the use of standard form interrogatories, such as those developed by the California Judicial Council[508] for use in a number of case types, including personal injury, property damage, wrongful death, breach of contract and family. Under this approach, commonly asked questions for each case type are captured in standard interrogatories that must be answered. It is noted that no Canadian jurisdictions have introduced interrogatories into their civil procedure.

In rejecting this approach, those consulted have expressed concerns that standard interrogatories may result in standard (or meaningless) answers. As noted earlier, a criticism of written interrogatories is that they tend to be lawyer-drafted questions that may be complicated and convoluted, requiring lawyer-drafted answers that may be evasive and obtuse. As such, interrogatories can prove costly and time-consuming to draft and to answer. By contrast, requests for information (for example, to establish the existence of additional documentation or to explain a technical position or give particulars) have proven to be worthwhile and effective, not only in jurisdictions where mandated, but in Ontario.

The Task Force therefore recommends a fourth option, whereby parties may agree to have both oral and written discovery (in addition to the existing provision, which requires a court order). Through discovery planning, parties can select the most suitable mode or modes of examination for their case. In doing so, they would be expected to factor in cost, convenience and efficiency considerations, and would be required to ensure that the two forms of discovery are conducted in a cost-effective manner, without duplication.

---

[506] U.K. Rules, rule 32.4 and rule 32.5(1),(2).
[507] Interview with U.K. practitioner Lawrence West, Q.C., July 22, 2003.
[508] Discussed in Part III of the Report.

Where parties cannot agree, any party may request the court to order both forms of discovery, so long as the court is satisfied that (a) examined parties will not be subjected to duplicative questions and (b) discovery will be conducted cost-effectively. To ensure compliance with these conditions, it is recommended that a provision be added authorizing the court on a party's request to impose sanctions where the second examination duplicates questions previously asked, or the examination is not being conducted cost-effectively.

The Task Force recommends the development of best practices to support this reform. It is anticipated that best practices will lead to a consensus on when to use written discovery and how to craft questions and answers. As standard requests and responses that now occur between many competent practitioners become routine, it is hoped that the need for court orders will diminish.

**Recommendations:**

- **Amend rule 31.02(1) to allow both oral and written discovery on parties' consent, or by court order, provided that there will not be duplication and that discovery will be conducted in a cost-effective manner.**
- **Include a sanction in rule 35.05 to address the situation where written discovery (whether consented to or ordered by the court in addition to oral discovery) proves to be duplicative or is not conducted in a cost-effective manner.**
- **Develop best practices for the use of written questions and answers.**

### *Time for Responding to Written Questions*

The Task Force recommends amending rule 35.02 to extend the timeframe for responding to written questions from 15 days to 45 days from receipt of the questions. It is also recommended that the timeframe in rule 35.04(1) for serving an examining party's "further list of questions" be extended from 10 to 15 days after receipt of answers (with no change to the current 15-day period for responding to the further list of questions). The objective of this proposal is to provide a more reasonable period for parties to respond to written questions, thereby reducing the potential for motions to compel responses.

**Recommendations:**

- **Amend rule 35.02 to extend the time for responding to written questions from 15 days to 45 days, subject to agreement of the parties otherwise or court order.**
- **Amend rule 35.04(1), to extend the time for serving a further list of written questions to 15 days, while retaining the current 15 days for responding to an examining party's further list of questions.**

## 9. EXAMINATION OF CORPORATE REPRESENTATIVES AND PARTNERS

### Issue

Should the discovery rules provide enhanced access to examination for discovery of corporate representatives and partners?

### Current Rules

A party may examine any officer, director or employee on behalf of the corporation, but where any one of them has been examined, the examining party is not entitled to examine other officers, directors, or employees without leave of the court.[509] The rule does not include any reference to the examination of former officers, directors or employees.

Where an action is brought by or against a partnership in the firm name, each person who was or is alleged to have been a partner may be examined.[510]

### Discussion

***Corporate representatives***

According to the findings, Ontario's current restriction on the examination of corporate parties to one representative (unless leave is granted) may contribute to unnecessary expense and delay in the discovery process where the chosen representative has inadequate knowledge of all the facts in issue, or where several corporate representatives have personal knowledge of key facts relevant to the litigation.

The rules in several other Canadian jurisdictions are more liberal in this regard. For example, Newfoundland and Nova Scotia allow a party to examine "any person." Parties in Alberta may, as of right, examine one or more officers of a corporation.[511] In the Northwest Territories, more than one officer may be examined with leave of the court, or where the parties agree.[512]

In the United States, besides granting the right to examine any person, most jurisdictions canvassed require the issuance of a notice of examination or subpeona to a party that is a corporation, partnership, association, or government agency.[513] The notice must describe with reasonable particularity the matters on which the examination is requested, to enable the organization to designate one or more individuals who are best equipped to testify on those matters. The requirement for advance disclosure of issues to be pursued at an examination minimizes the potential of having uninformed representatives in attendance.

The Task Force is of the view that Ontario's current rule increases the risk of examining corporate representatives with inadequate knowledge, which may result in undertakings and a

[509] Ont. Rules, rule 31.03(2) and (3).
[510] Ont. Rules, rule 31.03(4).
[511] Alta. Rules, rule 200(1)(b).
[512] N.W.T. Rules, rule 238.
[513] See, U.S. Fed. Rules, rule 30(b)(6); Tex. Rules, rule 176.6; Cal. Rules, rule 2020(c); Ariz. Rules, rule 30(b)(6).

further round of questions. It is not uncommon for several individuals within a corporation to have direct knowledge of different issues that might arise in an action, and obtaining their testimony first-hand may result in cost savings.

At the same time, the Task Force is cognizant of the potential for abuse or unintentional misuse of expanded rights of discovery, and does not propose unlimited rights to examine corporate representatives. Rather, and in keeping with other recommendations in this Report, the Task Force is of the view that parties should be encouraged to come to their own agreement in selecting the appropriate representative(s) as part of their discovery planning efforts. As noted earlier, this will require parties to have frank discussions about matters expected to be addressed at examinations and ways to minimize cost, time and inconvenience for all concerned (including, for example the potential for supplementing oral examinations with written questions and answers).

It is therefore recommended that rule 31.03(2) and (3) be amended to permit parties to consent to the examination of more than one corporate representative with personal knowledge of relevant information, while retaining the court's authority to make such an order where parties are unable to agree.

The Task Force also recommends that rule 31.03(4) regarding the examination of partners be modified so as to be consistent with that for corporate representatives. Where an action is brought by or against a partnership in the firm name, parties would be permitted to consent to the examination of more than one partner with relevant information, and the court would have the authority to make such an order where parties cannot agree. This change will not diminish a party's right to examine each partner in a partnership where the action is brought by or against the partners individually.

**Recommendation:**

- **Where an action is brought by or against a corporation or a partnership in its firm name, amend rules 31.03(2), (3) and (4) to permit the examination of more than one corporate representative or partner with personal knowledge of relevant information, on the parties' consent, or by court order.**

***Former Officers, Directors and Employees***

The Task Force notes the difficulties that can arise for parties in situations where former officers, directors or employees (who may not be parties to an action) possess the best knowledge of the matters in issue. Given the importance of protecting the interests of non-parties, the Task Force believes that such individuals must be treated in the same manner as any other non-party, as discussed in the following section.

## 10. EXAMINATION OF NON-PARTIES

### Issue

Should the discovery rules provide enhanced access to examination for discovery of non-parties?

### Current Rules

Non-parties may be examined only with leave of the court.[514] The court shall not grant an order unless it is satisfied that:

(a) The moving party has been unable to obtain the information from other persons whom the moving party is entitled to examine for discovery, or from the person he or she seeks to examine;
(b) It would be unfair to require the moving party to proceed to trial without having the opportunity of examining the person; and
(c) The examination will not,
    i. unduly delay the commencement of the trial of the action;
    ii. entail unreasonable expense for other parties, or
    iii. result in unfairness to the person the moving party seeks to examine.[515]

### Discussion

The current test for leave to examine non-parties is onerous, like the corresponding test for production from non-parties. Obtaining information from non-parties usually occurs through undertakings by the examined party, which can lead to further rounds of examination and undertakings, and disputes as to whether the examined party has exercised best efforts to obtain answers from the non-party.

A few submissions to the Task Force have proposed reforms to permit the examination of non-parties, including experts, as of right, or based on a lower threshold for leave. The Task Force has considered the desirability of building into the rules greater flexibility to examine non-parties.

All American jurisdictions canvassed permit the oral examination of non-parties as of right (although some restrict the number of non-parties that may be examined).[516] Newfoundland and Nova Scotia permit the examination of "any person,"[517] subject to the court's discretion to limit the number of examinations where they are unnecessary, improper or vexatious.

Leave of the court is required to examine non-parties in all other Canadian jurisdictions, but the threshold for obtaining leave varies. For example, in British Columbia, an application to examine a non-party must be accompanied by an affidavit stating "that the proposed witness has refused or neglected upon request by the applicant to give a responsive statement, either orally or in

[514] Ont. Rules, rule 31.10(1).
[515] Ont. Rules, rule 31.10(2).
[516] U.S. Fed., rule30(a)(1); Tex. Rules, rule 199.1; N.Y. Rules, rule 3106; Cal. Rules, rule 2025(a); Ariz. Rules, rule 30(a).
[517] Nfld. Rules, rule 30.01(1); N.S. Rules, rule 18.01(1)

writing, relating to the witness' knowledge of the matters in question, or that the witness has given conflicting statements."[518]

In Prince Edward Island, the test for granting leave includes a requirement that the moving party file a certificate stating that the examination "is not made in bad faith or is not calculated to annoy, embarrass or oppress the person sought to be examined."[519] In Quebec, the court may permit the examination of "any other person" on such conditions as the court may determine.[520]

While it is true that Ontario's test for leave to examine a non-party is onerous, the Task Force supports the policy rationale behind it. Unrestricted entitlement to examine non-parties could lead to discovery abuse, increased costs, unfairness to non-parties and more motion activity by non-parties who object to being examined.

However, the Task Force recommends that the test for examining a non-party be modified so as to be consistent with the test for documentary production from non-parties recommended in Part VI, Section 5. This entails deleting the requirement to show it would be unfair to the moving party to proceed to trial without having the opportunity to examine the person. The Task Force is confident that such a change will not compromise fairness to non-parties, given the express requirement in rule 31.10(2) to demonstrate that the examination will not result in unfairness to the person the moving party seeks to examine.

It is also recommended that best practices be developed to encourage parties to reach agreements on obtaining information from non-parties, for example through the combined use of written and oral examinations (with the approval of the non-party or with leave of the court). In certain cases, for example, it may be more cost-effective for parties to directly seek written answers to questions solely within the knowledge of non-parties, than to go through the process of putting questions to the examined party at the oral examination, preparing a list of undertakings, and forwarding them to the non-party.

**Recommendations:**

- **Modify the test for examining non-parties in rule 31.10(2) by deleting the requirement to demonstrate that it would be "unfair to require the moving party to proceed to trial without having the opportunity of examining the person."**
- **Develop best practices to encourage parties to reach agreements on obtaining information from a non-party, subject to the non-party's consent or a court order.**

[518] B.C. Rules, rule 28(3)(c).
[519] PEI Rules, rule 31.10(2).
[520] Que. Rules, rule 397, 398.

## 11. DISCOVERY OF EXPERT EVIDENCE

### Issue

Where experts are retained for the purpose of providing opinion evidence, how can the cost and delay associated with the discovery of such evidence be addressed?

### Current Rules

The pre-trial disclosure of expert findings, opinions, and conclusions is limited under the current rules to the disclosure of expert reports. Rule 53.03 requires a party who intends to call an expert witness to serve opposing parties with a copy of the expert's report not less than 90 days before the trial.[521] A party who intends to call an expert to testify in response must serve a responding expert report not less than 60 days before trial.[522] Any supplementary report must be served not less than 30 days before trial.[523] These timelines may be extended or abridged by the judge or case management master at the pre-trial or any conference under rule 77, or by the court on motion.[524]

Rule 50.05, which governs pre-trial conferences, provides that "[a]ll documents intended to be used at the hearing that may be of assistance in achieving the purposes of a pre-trial conference, such as medical reports and reports of experts, shall be made available to the pre-trial conference judge or officer." In case managed proceedings, rule 77.14(4) requires the delivery of a settlement conference brief, containing all material necessary for the settlement conference, including relevant portions of experts' reports and other evidence that may be adduced at trial.

The rules do not provide for the pre-trial examination of an expert. Experts engaged by a party in preparation of contemplated or pending litigation are excluded as a class of non-parties who might otherwise be ordered to attend an examination for discovery.[525] During an examination of an opposing party, a party is permitted to ask questions on experts' findings and opinions; however, a party being examined need not disclose the findings, opinions and conclusions of an expert engaged by the party where (1) they were obtained in preparation for litigation, and (2) the expert will not be called as a witness at trial.[526]

In specified circumstances where an expert will not be available for trial, a party may examine an expert before trial, with leave of the court or on consent of the parties, but only after the expert's report has been served.[527]

Section 12 of the Ontario *Evidence Act* also governs the use of expert evidence, limiting the number of experts that may be called to three, unless leave of the court is obtained.[528] Case law has held that this section should be interpreted to mean three experts per side, per case.[529]

---

[521] Ont. Rules, rule 53.03(1).
[522] Ont. Rules, rule 53.03(2).
[523] Ont. Rules, rule 53.03(3).
[524] Ont. Rules, rule 53.03(4).
[525] Ont. Rules, rule 31.10(1).
[526] Ont. Rules, rule 31.06(3).
[527] Ont. Rules, rule 36.01(3).

## Discussion

Issues relating to the discovery of expert evidence highlight the tension between the underlying premise of the rules – that early disclosure will promote early resolution – and the adversarial practice of some lawyers to gain advantage by strategic, delayed disclosure.

The findings indicate that the timing of pre-trial disclosure of expert and medical reports, and the prohibition on the examination for discovery of experts are key problems. In a small number of complex cases, difficulties are caused by the limited disclosure requirements with respect to the factual basis of experts' findings, opinions and conclusions. The proliferation of expert reports is also an ongoing challenge.

### *Scope of Disclosure Requirements Related to Expert Evidence*

Prior to the current rules, the evidence of an expert was led at trial on the basis of facts assumed by the expert from evidence given or hypothetically to be given to the court. The lack of information available to the opposing side about the expert's anticipated evidence was often an "ambush" and could produce a miscarriage of justice.

The present disclosure requirements were intended to address this concern. However, some practitioners continue to adopt a "trial by ambush" approach; others simply are not sufficiently prepared at the time of their client's oral discovery to know what experts may be retained, much less what their findings, opinions and conclusions will be. It is common for experts to be retained only after oral discovery, and to be asked to comment on the discovery transcript.

There are those who argue that neither the factual base relied on by a retained expert nor the expert's findings, opinions and conclusions should be part of the discovery process until a report on which a party decides to rely at trial is received. This approach runs counter to the intention of rule 31.06 to promote disclosure and the continuing disclosure obligation under rule 31.09(1).

However, the Task Force does not recommend reform in this area at this time. Best practices for early disclosure and production in specific case types of cases (recommended in Part VI, Section 16), together with the reforms proposed below, can be expected to go some distance to advance meaningful disclosure of expert evidence.

### *Timing of Disclosure of Expert Reports*

According to the findings, a significant proportion of lawyers are concerned about the untimely production of expert reports. The judiciary frequently grants extensions of time to accommodate late service of expert reports. Since time must be granted for the filing of responding reports, trial dates often have to be rescheduled. This is especially problematic in regions with long trial lists and can result in significant delays in the final resolution of a case.

What is important for parties to know, and is contemplated by rule 36.01(3), is the substance of the opinions of experts whose evidence is to be given at trial, along with the factual basis for

[528] *Evidence Act*, RSO 1990, c. E.23, s. 12.
[529] *Bank of America Canada v. Mutual Trust Co.* (1998), 39 O.R. (3d) 134 (Gen. Div. [Commercial List]).

these opinions. The delivery of an expert report then provides more detailed reasons for the opinion. It has been suggested that the obligation to disclose expert findings, opinions and conclusions at oral discovery ought to be given a liberal construction.[530] However, the intent of disclosure is often thwarted by postponing the determination as to whether the expert will be called at trial until parties are forced to deliver the expert's report under rule 53.03. The Task Force has heard that in the context of rules that permit and require disclosure of expert evidence, it does not make sense to allow one side to obtain an adversarial advantage by depriving the other of findings, opinions and conclusions on a timely basis and as part of the discovery process.

The importance of early disclosure is well known in the criminal context.[531] The provision in rule 53.08 that mandates a trial judge to admit a late-delivered expert report unless costs are not an adequate remedy is recognition of the disclosure principle in the civil context.[532]

Many lawyers make it a practice to send the other side a copy of an expert report as soon as it is received, whether or not a decision has been made to call the expert at trial. Others, as noted above, avoid disclosure by taking the position that they will deliver expert reports only as required by the rules. This position may deprive the other side of examining the facts from the opponent that are known by the opponent's counsel to be crucial to "preliminary" findings, opinions and conclusions of a proposed expert.

In its 1996 *Report of the Task Force on Systems of Civil Justice*, the Canadian Bar Association recommended that the rules in each Canadian jurisdiction be amended to require early disclosure of expert reports, and to provide for the exchange of expert critique reports in a timely fashion before trial.[533] Several Canadian jurisdictions prescribe a fixed time before trial for serving expert reports,[534] while others prescribe service "as soon as practicable" and in any event, before trial scheduling or setting the matter down for trial.[535] Manitoba requires the expert report to be included in the pre-trial brief,[536] and Saskatchewan requires service not less than ten days before the pre-trial conference.[537] Under Quebec's case management regime, parties must file an agreed timetable for the delivery of expert reports.[538] In most American jurisdictions, parties may specify

---

[530] See, e.g. G. Watson and C. Perkins, eds., *Holmestead and Watson*, *Ontario Civil Procedure* vol. 3 (Toronto: Carswell, 1993), at 31-100.

[531] See, e.g. *R. v. Stinchcombe* [1991] 3 S.C.R. 326; see also the *Criminal Code*, R.S.C. 1985, C-46, s. 657.3, which requires each party who intends to produce an expert's report as evidence to give to the other party, before the proceedings, a copy of an affidavit setting out the qualifications of the expert along with the report.

[532] Ont. Rules, rule 53.08(1) provides: "If evidence is admissible only with leave of the trial judge under a provision listed in subrule (2), leave **shall** be granted on such terms as are just and with an adjournment if necessary, unless to do so will cause prejudice to the opposite party or will cause undue delay in the conduct of the trial." [emphasis added]

[533] *supra*, note 18 at 44.

[534] Alta. Rules, rule 218.1 (120 days before trial); B.C. Rules, rule 40A(3) (60 days before the expert testifies); Nfld. Rules, rule 46.07 (10 days before trial); N.W.T. Rules, rule 279 (90 days before trial);

[535] N.B. Rules, rule 52.01(1) (no later than the motions day on which the trial date is fixed); N.S. Rules, rule 31.08(1) (within 30 days of filing the notice of trial); PEI Rules, rule 53.03(1) (within 30 days of filing the notice of trial); Can. Fed. Rules, rule 279 (within 60 days before trial).

[536] Man. Rules, rule 53.03(1).

[537] Sask. Rules, rule 284C(2) (not less than 10 days before the pre-trial conference).

[538] Que. Rules, rule 151.1

the timing of delivery of expert reports in a discovery plan, but default time periods prescribe that they be served before trial.[539]

The Task Force questions the efficacy of the "90/60/30-day rule," which anchors the time for serving expert reports to the trial. Access to expert reports in advance of the pre-trial conference (or the settlement conference in case managed proceedings under rule 77) would be extremely beneficial in promoting meaningful settlement discussions. The Task Force recommends changing rule 53.03 and calculating the 90/60/30-day limit from the pre-trial/settlement conference, subject to the court's authority to order otherwise. It is also recommended that the court be encouraged through best practices to make more frequent resort to its powers under rule 53.03(4) to promote timely delivery of expert reports and disclosure of information on which such reports are based.[540]

This proposal, which has been favourably received by those consulted, is consistent with the requirement under rule 50.05 to deliver documents that may be useful at the pre-trial conference, including expert and medical reports, and the corresponding requirement under rule 77.14(4) to deliver a settlement conference brief containing all material necessary for the settlement conference, including relevant portions of experts' reports.

In some instances, however, the time required or cost associated with preparation of expert reports may preclude parties from serving them within this timeframe. In such cases, parties may need additional time or, alternatively, may prefer to exchange draft opinions outlining the expected testimony of an expert; where cost is a significant factor, they may wish to jointly appoint an expert to share the cost of the expert's report. The Task Force recommends that the rule afford parties the flexibility to make arrangements as part of their discovery plan to suit the circumstances of their case, so long as they have provided for sufficient disclosure to have a productive pre-trial or settlement conference.

**Recommendations:**

- **Modify rule 53.03 so that the 90/60/30 day time limits are calculated from the date of the pre-trial conference (or, in rule 77 cases, the settlement conference), subject to:**
  - **a court order; or**
  - **the parties' agreement otherwise, provided that it is possible to have a meaningful pre-trial or settlement conference.**
- **Develop best practices to encourage judicial management of the timing of delivery of expert reports under rule 53.03(4) to facilitate a meaningful pre-trial or settlement conference.**

[539] U.S. Fed. Rules, rule 26(a)(2)(C) (according to court order or parties agreement, but in any event, 90 days before trial); Tex. Rules, rule 195.2 (within 30 days after a request is served, or within a fixed time before the end of the discovery period); Cal. Rules, 2034(b) (70 days before the trial date).

[540] Recent case law, such as *Braddock v. Oakville-Trafalgar Memorial Hospital* (2000), 1 C.P.C. (5th) 346 states: "In order to reduce unnecessary costs and delay and to facilitate early and fair settlement the Court may order that expert reports be produced earlier than required under rule 53.03."

***Examination for Discovery of Experts***

There are cases in which the pre-trial examination of an expert to test his or her opinions and assumptions is the most efficient way for a party to evaluate the strengths and weaknesses of its case before incurring the expense of trial.

Like Ontario, most Canadian jurisdictions permit the examination for discovery of experts only in restricted circumstances.[541] In Alberta, Newfoundland, Northwest Territories, and Nova Scotia, a party may move for an order to cross-examine court-appointed experts only.[542] Nova Scotia also permits pre-trial examination of an opposing party's expert without leave, as long as the expert has been paid a reasonable fee for his or her attendance at the examination.[543] In Alberta long trial actions and the Federal Court, where an expert will be called as a witness at trial, the court may grant leave for the pre-trial examination of the expert on the contents of his or her report.[544]

American jurisdictions permit the pre-trial examination of experts without leave where the expert has delivered a report or has been designated as a witness.[545] In the United Kingdom, a party may serve written questions on the expert only for the purpose of clarifying the report within 28 days of its receipt. In all other cases, leave of the court is required.[546] Leave of the court is required to cross-examine an expert in New Zealand and the Australian federal jurisdiction.[547]

The Task Force recognizes that unrestricted access to experts during the discovery process raises the spectre of additional costs, delays and unwarranted intrusion into experts' time. However, where parties agree (or the court concludes) that the pre-trial examination of an expert is necessary to test the expert's opinion, assess the merits of his or her positions, narrow the issues in dispute, facilitate settlement or avoid surprise at trial, it is recommended that the rules provide the flexibility to allow such an examination, so long as it is restricted to the expert's qualifications, area of expertise and the findings and opinions in the report.

The Task Force recommends that factors such as cost, time and availability of experts be included as criteria to be considered in determining whether and how to examine an expert. For example, where the use of written questions and answers is the least costly and intrusive method, parties might conduct their examination in that manner. It is also recommended that the party wishing to examine the expert be responsible for paying any reasonable fees, estimated in advance, associated with the expert's attendance at oral discovery or with the preparation of responses to written questions.

The Task Force notes that in situations where an action has been set down for trial, rule 48.04 prevents any party who has set down the action or consented to it being placed on the trial list

[541] Ont. Rules, rule 36.01 permits the taking of evidence of an expert before trial, in certain situations, in order to have the expert's testimony tendered at trial (e.g., where the expert will not be available to testify at trial.
[542] Alta. Rules, rule 218(6); Nfld. Rules, rule 35.03; N.W.T. Rules, rule 278(8); N.S. Rules, rule 23.03.
[543] N.S. Rules, rule 31.08(2)
[544] Can Fed. Rules, rule 280(3); Alta. Rules, rule 218.8(1).
[545] U.S.Fed. Rules, rule 26(b)(4)(A); Ariz. Rules, rule 26(4)(A); Tex. Rules, rule 195.3(a); N.Y. Rules, rule 3101(d)1; Cal. Rules, rule 2034(i).
[546] U.K. Rules, rule 35.6.
[547] N.Z. Rules, rule 328; Aus (Fed) Rules, Order 34, Rule 4.

from initiating or continuing any form of discovery (or any motion) without the court's leave. The Task Force recommends that rule 48.04 be amended to permit the examination of an expert without leave, notwithstanding that the action has been set down for trial.

While there is no easy solution to problems associated with the use of experts, the discovery and settlement conference processes cannot be meaningful and complete unless the parties know the nature and extent of the expert evidence they may face at trial, and the cost associated with that evidence. Only with that information can a party responding to an expert's report determine what expert evidence might be required. Failure to provide this information may well add to the costs by necessitating a delay or adjournment of a trial.

**Recommendations:**

- **Amend rule 53.03 to provide that an expert who has been retained to give opinion evidence may be examined for discovery on the parties' and the expert's consent or by direction of the court on notice to the expert,**
  - **subject to a consideration of factors including cost, time, and the expert's availability;**
  - **provided that the examination is restricted to the expert's qualifications, area of expertise and the findings and opinions set out in the expert's report; and**
  - **provided that the party wishing to examine the expert is responsible for paying any reasonable fees, estimated in advance, associated with the expert's attendance at oral discovery and with the preparation of responses to written questions.**
- **Amend rule 48.04(2) to permit the examination of an expert *on the consent of the parties and the expert* without leave of the court, notwithstanding that an action has been set down for trial.**

### *Best Practices for Experts*

The Task Force recommends the development of best practices in the following areas to assist parties and counsel in the discovery planning process and to encourage a cooperative approach to the discovery of expert evidence:[548]

[548] The thoughtful and comprehensive reasons of the Court of Appeal for Alberta in *N.M. v. Public Trustee (Alberta) as Administrator Ad Litem for Roy Drew, Deceased* (released July 25, 2003) exemplify the need for a cooperative approach. At issue was whether a plaintiff who had agreed to allow defense counsel to interview the treating physician could insist on the right of plaintiff's counsel to attend the interview. The reasons of both the majority (who upheld the condition) and the dissent (who would have removed it) recognized the challenging issues of confidentiality and privilege confronted by a treating doctor when faced with such requests, even where the patient agrees. The court recognized the role of the Law Society and the professional conduct rules in providing guidance. The decision highlights the difficulty of drafting rules that will apply to all cases without encouraging even more motion activity than presently exists. It is hoped that with a co-operative effort of bar, bench and professional societies, guidelines can be developed that will reduce the need for more specific rules and consequent motions.

- appropriate use of experts (including, for example, the use of joint experts);
- organization of expert reports;
- content of expert reports, which should at a minimum include:
    - the expert's name, address and current curriculum vitae;
    - a detailed description of the expert's area of expertise;
    - a list of questions that the expert will answer in the report;
    - a description of research conducted by the expert to be able to answer the questions;
    - a description of the factual assumptions on which the opinion is based;
    - a list of documents relied upon by the expert in formulating the opinion; and
    - answers to or opinions on each of the questions and the reasons for each;
- considerations in determining how to facilitate early disclosure of expert reports (including for example, the provision of report summaries); and
- considerations in determining whether and how to conduct a pre-trial examination of an expert (including, for example, the use of written questions and answers or oral examination).

**Recommendation:**

- ❑ **Develop best practices for the use of experts and expert reports.**

***Proliferation of Experts***

While the number of experts permitted to testify at trial and the length of their reports were not specifically referred to in the Task Force's mandate, the findings reveal that the proliferation of experts has a significant impact on discovery and the litigation process as a whole. As the number of experts increases, so does the number of expert reports that are subject to disclosure. Many lawyers are concerned with the cost and additional trial time associated with the increasing use of experts. Trial judges also report this as a concern, particularly as it tends to increase the length of jury trials.

Section 12 of the *Evidence Act*, which provides that not more than three (expert) witnesses may be called on either side without leave of the trial judge or other presiding officer is often not observed, and has resulted in an increase rather than a limit on the number of experts. Despite the decisions in Ontario that confirm the limit of three,[549] the number of experts appearing in certain types of cases continues to grow. In 1996, the Canadian Bar Association reported that experts are being used more frequently in litigation, which results in increased cost and delay.[550]

Although experts are very helpful in appropriate cases, lawyers have a tendency to engage too many experts. Trial judges are often reluctant to refuse leave to call more than three experts where the parties have already incurred the expense and served expert reports. As observed by the Canadian Bar Association in its 1996 report, "judges do not appear to be using a consistent

[549] *Bank of America v. Mutual Trust Co.* (1998), 39 O.R. (3d) 134 (Gen Div.*); Toronto-Dominion Bank v. E. Goldberger Holdings* (1999), 43 C.P.C. (4th) 275 (S.C.J. [Commerical List]).

[550] Canadian Bar Association, *Report of the Canadian Bar Association: Task Force on Systems of Civil Justice* (Ottawa: Canadian Bar Association, 1996) at 44.

approach to curtail the scope of opinion evidence offered in complex cases."[551] In many cases, particularly in the personal injury and motor vehicle fields, counsel consent to additional experts on the basis that cross-examination may aid their case.

The overuse of experts in medical malpractice cases and the associated costs has been noted in recent articles.[552]

Like Ontario, several Canadian jurisdictions permit parties to call a maximum of three experts, unless leave of the court is obtained.[553] Saskatchewan permits each party to call five experts.[554] Nova Scotia and Newfoundland set no maximum, leaving it to the court to limit the number of expert witnesses that may be called.[555] In jurisdictions that authorize the court to appoint an expert, the rules generally permit each party to call one expert to respond to the report of the court-appointed expert.[556]

Reforms in some jurisdictions have focused on limiting experts and shortening their court appearance by fostering common agreement and using their reports as evidence-in-chief. In Arizona, for example, each "side" is entitled to one expert per issue, unless the court orders otherwise. If multiple parties on one side cannot agree on an expert, the court will designate an "independent expert."[557]

In the United Kingdom, no party may call an expert or put in evidence an expert's report without the court's permission. The court also has the power to direct that a single joint expert, selected from a list agreed upon by the parties, give evidence where two or more parties wish to submit expert evidence on a particular issue.[558] In cases where permission is granted for more than one expert to give evidence on a matter, the court may direct that a discussion take place between experts for the purpose of identifying the issues in the proceeding and, where possible, reaching agreement on the issues.[559] Early commentary on these reforms suggests that the use of single joint experts appears to have worked well, and has contributed to a less adversarial culture, earlier settlement, and lower costs.[560]

A variety of suggestions have been made to the Task Force to address the overuse of experts including: a requirement that parties obtain leave to call an expert; provision for court-appointed or joint independent experts; and increased judicial enforcement of existing restrictions on the number of experts.

---

[551] *Ibid*.

[552] Rino Stradiotta, QC "Hospital Viewpoint" (Address to the Canadian Medical Protective Association Tort Reform Conference, 5 November 1998) at 19; Margaret Ross, "Scope of Tort Reform" (Address to the Canadian Medical Protective Association Tort Reform Conference, 5 November 1998) at 30.

[553] N.W.T. *Evidence Act*, s. 9; *Manitoba Evidence Act*, s. 25; New Brunswick, *Evidence Act*, s. 23.

[554] Saskatchewan, *Evidence Act*, s. 48.

[555] N.S. Rules, rule 31.06; Nfld. Rules, rule 46.05.

[556] See, e.g., Nfld. Rules, rule 35.05; N.S. Rules, rule 23.05.

[557] Ariz. Rules, rule 26(D).

[558] U.K. Rules, rule 35.4; 35.7.

[559] U.K. Rules, rule 35.12.

[560] *Civil Justice Reform Evaluation, Emerging Findings*, March 2001, cited in B.C. Justice Review Task Force, Exploring Fundamental Change: A Compendium of Potential Justice System Reforms (July 2002) at 27 to 29.

As this issue does not fall squarely within the mandate of the current review, the Task Force makes no recommendations for reform at this time. It is, however, recommended that a review be undertaken to address concerns regarding the proliferation of experts.

**Recommendation:**

- **Monitor the impact of recommendations and other initiatives on concerns regarding the proliferation of experts in civil litigation.**

## 12. UNDERTAKINGS AND REFUSALS

### Issue

How can undertakings and refusals be dealt with in a more efficient manner?

### Current Rules

The rules limit the types of objections, or refusals, that may be made at an examination for discovery. Under rule 31.06(1), the examined party may not object to a proper question that relates to a matter in issue on the grounds that the information sought is evidence, or that the question constitutes cross-examination (unless the question is directed solely to the credibility of the witness, or the information sought is privileged).

Rule 34.12(1) requires a party who objects to a question to briefly state the reason for the objection. Objections are usually based on the grounds that a question is irrelevant to the matters in issue, or that it seeks privileged information. Notwithstanding an objection, the examined party may choose to answer a question, without conceding admissibility or relevance. A ruling on the objection must be obtained before the answer is used as evidence at a hearing.[561]

Frequently, parties do not have immediate access to the requested information and undertake to obtain the answer or to exercise best efforts to do so. The rules do not prescribe timelines within which undertakings or refusals are to be answered, but provide that a party who fails to answer an undertaking or refusal within 60 days before trial may not rely on that information at trial, except with leave of the trial judge.[562] The Rules of Professional Conduct impose an obligation on lawyers to "strictly and scrupulously carry out an undertaking given to the tribunal or to another lawyer in the course of litigation."[563]

### Discussion

Unreasonable delays or lack of diligence in answering undertakings and improper refusals on the basis of relevance, along with the associated motions, have been identified as principal causes of unnecessary cost and delay in the discovery process. Moreover, undertakings and refusals motions can be very time-consuming, often resulting in days of hearings.

---

[561] Ont. Rules, rule 34.12(2).
[562] Ont. Rules, rule 31.07(1) and (2).
[563] Law Society of Upper Canada, Rules of Professional Conduct, rule 4.01(7).

### *Refusal of Questions Based on Relevance*

There are a variety of reasons for refusals based on relevance. For example, it may be that the witness is not properly prepared, or that counsel for the witness is not familiar with the issues as seen from the other side. Alternatively, counsel may wish to delay or avoid a damaging response and to have further time for reflection.

In an effort to address the proliferation of refusals motions, the Advocates' Society, in 2000, recommended removing the right to refuse questions at an examination for discovery, except on the basis of privilege. An examined party who did not think a question was relevant would be required to answer the question, and an objection would be recorded. The trial judge would then determine the relevance of the question. This proposal was based on a procedure used in the U.S. federal jurisdiction.[564] The Civil Rules Committee rejected this proposed reform on the basis that it provided an opportunity for examining parties to abuse the examination by asking endless questions of marginal or no relevance, simply to wear down their opponents. In its submission to the Task Force of September 18, 2002, the Advocates' Society withdrew this proposal.

The Task Force is of the view that the process set out in rule 34.12(2), which permits a party who objects to a question to answer it without conceding admissibility or relevance, is vastly underutilized and should be used to greater effect. It is recommended that at the conclusion of a refusals motion, the court, in determining costs, consider whether the process prescribed by rule 34.12(2) was sought or offered.

It is anticipated that the development of best practices for specific case types will, over time, provide guidance with respect to relevance in individual cases. The Task Force recommends that refusals motions based on relevance be monitored to determine whether the recommendations in this Report are sufficient to reduce problems in this area, and if not, whether the proposal to preclude objections based on relevance ought to be reconsidered.

**Recommendation**

- **Monitor refusals motions based on relevance to determine whether the proposal to preclude objections on the basis of relevance ought to be reconsidered.**

### *Timelines for Answering Undertakings and Refusals*

The findings indicate that examined parties frequently ignore undertakings (and sometimes refusals that are not maintained) or delay responses as long as possible, particularly where the responses do not assist their position. However, on the requesting side, the information may be vital to a position that would resolve the case. Other difficulties arise from lack of clarity about precisely what is sought, what counsel has undertaken, and who is responsible for fulfilling the undertaking. Many lawyers carelessly undertake to provide responses on behalf of their clients without careful inquiry as to the feasibility or timeliness of fulfilling such undertakings. These factors result in delay and increased cost.

[564] U.S. Fed. Rules, rule 30(c).

To respond to delays associated with answering undertakings and refusals (where the refusal is not maintained), the Task Force has considered the option of imposing a duty to answer within a fixed period of time after they are given.

In the Northwest Territories, a party must answer undertakings in a "timely manner."[565] In Saskatchewan, anyone who fails to answer an undertaking "within a reasonable time" is deemed guilty of contempt of court.[566] However, none of the jurisdictions canvassed imposed express timelines within which answers to undertakings must be provided.

The Task Force has concerns about the practical impact of the current timeframe for answering undertakings and refusals, which is calculated in relation to the trial ("60 days before the trial begins"), when in reality so few cases proceed to trial. It appears to have little effect on promoting timely answers. A more concrete and measurable time standard is one that is calculated from the time the question was asked.

However, the Task Force recognizes that a fixed timeframe will inevitably lead to additional motion activity, and prefers a flexible time standard that could be modified by agreement of the parties to respond to the particular needs of their case. In determining a reasonable timeframe, consideration must be given to such factors as the time needed to obtain documents and other information from non-parties and to prepare transcripts from oral discoveries (which can take several weeks). The Task Force recommends that the current requirement be replaced with a default time period of 45 days for answers to undertakings and refusals (where not maintained) from the date they were given, subject to any other timeframe agreed to by the parties as part of their early discovery planning. Where parties are unable to agree, they may obtain a court order.

**Recommendation:**

- **Amend rule 31 to require parties to answer undertakings and refusals within 45 days of their being given, subject to the parties' agreement otherwise or a court order.**

### *Timelines for Answering Questions Taken under Advisement*

Lawyers frequently take questions "under advisement," a response that is neither a refusal nor an undertaking. The rules require questions to be answered or refused, but do not provide for a party to take questions under advisement. In order to eliminate this ambiguity, the Task Force recommends that rule 31 be amended to provide that any question taken under advisement is deemed to be a refusal if not answered within 45 days.

**Recommendation:**

- **Amend rule 31 to provide that any question taken under advisement is deemed to be a refusal if not answered within 45 days of being asked.**

[565] N.W.T. Rules, rule 261.
[566] Sask. Rules, rule 231.

***Best Practices***

In spite of the professional obligation to scrupulously carry out undertakings, the findings reveal concerns about lawyers who do not fully comprehend the purpose of undertakings or who give undertakings that are not within their power to carry out. The Task Force is of the view that the development of best practices will provide needed guidance in this regard.

Concerns have also been expressed about counsel waiting until transcripts have been produced before taking steps to fulfill undertakings or to request information from non-parties. It is suggested that counsel should as a general rule exchange a list of undertakings, refusals and requests for information from non-parties within a week after oral examination.

Given the delays and costs that can be associated with transcript preparation, there are numerous alternatives for listing undertakings and refusals in a timely manner. For example, many lawyers make a handwritten or dictated list of undertakings and refusals during the course of the examination in order to create an immediate record. As a matter of practice, many lawyers write to opposing counsel shortly after the examination, listing all undertakings and refusals that were given. Some case management masters have made orders endorsing similar procedures so that cases are not delayed pending transcript production. The Task Force recommends that efficient practices such as these be incorporated into best practices.

**Recommendation:**

- ❑ **Develop best practices for the appropriate use of undertakings and for the prompt listing and exchange of undertakings, refusals and requests for information from non-parties.**

***Undertakings and Refusals Motions***[567]

The Task Force has heard that much valuable preparation time for both counsel and the court is wasted when responses to undertakings and refusals are made only on the "eve" or day of a motion to compel responses.

In an effort to reduce the amount of time spent preparing for and presiding over undertakings and refusals motions, judges and case management masters in Toronto have introduced an undertakings and refusals chart over the past several years, which is to be completed with the following information:

- the issue that is the subject of the undertaking or refusal, and its connection to the pleadings or affidavit;
- the question number and page reference on the transcript where the question appears;
- the precise question asked; and
- the answer given or the basis of the refusal.

[567] A broader discussion of discovery-related motions is found in Part VI, Section 13.

Each undertaking or refusal is grouped beside the issue to which it relates. Moving parties are encouraged to provide a copy of the chart in electronic format for the assistance of the responding party, and parties are encouraged to co-operate in preparing the chart jointly if appropriate. Once received, the responding party must complete a column in the chart that explains the basis for each refusal or answer provided. The final column is reserved for the court's disposition with respect to each undertaking or refusal. The chart that appears below forms part of an advisory notice to the profession issued by R.S.J. Blair for Toronto region on August 29, 2002. The notice requires undertakings and refusals motions to be made in accordance with the chart and the associated direction.[568]

| **REFUSALS** | | | | | |
|---|---|---|---|---|---|
| **Refusals to answer questions on the examination of _____, dated _____.** | | | | | |
| Issue & relationship to pleadings or affidavit | Question No. | Page No. | Specific question | Answer or precise basis for refusal | Disposition by the Court |
| 1. | | | | | |
| | | | | | |
| 2. | | | | | |
| | | | | | |

| **UNDERTAKINGS** | | | | | |
|---|---|---|---|---|---|
| **Outstanding undertakings given on the examination of _____, dated _____.** | | | | | |
| Issue & relationship to pleadings or affidavit | Question No. | Page No. | Specific undertaking | Date answered or precise reason for not doing so | Disposition by the Court |
| 1. | | | | | |
| | | | | | |
| 2. | | | | | |
| | | | | | |

According to the Toronto case management masters, the chart is extremely helpful in reducing the duration of motions and in encouraging settlement of contentious issues. Once counsel focus on why they need or think they are entitled to an answer, many questions are withdrawn. Similarly, when responding counsel consider the relevance of a question that is adjacent to the related pleading as set out in the chart, many questions are answered. A number of Toronto counsel have concurred that a requirement to put one's position in "black and white" has a sobering effect.

The case management masters have also noted that grouping questions by issue saves considerable time. Once the relevance of a particular issue has been determined, refusals can be disposed of on a group-by-group basis. Filing a copy of the pleadings with the chart and other motion material is very useful in helping determine the relevance of a question asked and whether it was properly refused. The chart has been so successful that, even prior to the advisory notice, most case management masters in Toronto made it a mandatory pre-requisite to the hearing of undertakings and refusals motions. The Task Force recommends that a standard chart, based on

[568] The direction requires parties to engage in good faith efforts to resolve outstanding refusals or undertakings and to narrow the issues to be argued. Parties are also expected to collaborate in the preparation of materials to permit the motion to proceed efficiently.

the above precedent, be adopted for province-wide use in the resolution of disputes related to undertakings and refusals.

**Recommendations:**

- **Introduce an undertakings and refusals chart as a regulated form under a new discovery rule for use in motions relating to unanswered undertakings and refusals.**
- **Require parties to collaborate in the preparation of the chart and to file the chart, along with the pleadings, prior to the hearing of an undertaking or refusals motion.**

The Task Force has also considered the feasibility of requiring undertakings and refusals motions to be disposed of in writing as a means of eliminating the time associated with appearances. However, case management masters have advised that such a requirement would not improve efficiency for either counsel or the court. The preparation of written submissions would be extremely costly and onerous for counsel. The review of written submissions and supporting materials would be time-consuming for the court. The case management masters have indicated that it is generally more expedient to hear oral submissions. For these reasons, the Task Force has rejected this option.

## 13. DISCOVERY DISPUTES

### Issue

How can the volume of discovery disputes and the associated cost and delay be minimized?

### Current Rules

Discovery-related disputes are resolved through general motions procedures and, in case managed proceedings, through the additional mechanism of case conferences. There are no specialized provisions for discovery disputes. Motions are usually made by notice of motion, unless the nature of the motion or the circumstances makes notice unnecessary.[569] Depending on the relief sought, a motion may be heard by a judge, master, or registrar.[570] Motions made on notice must be heard in the county where the respondent resides or where the respondent's solicitor is located,[571] and leave is required to have a motion heard elsewhere.

A motion may be set down for hearing any day on which a judge or master is scheduled to hear motions or on days prescribed by local practice directions. A special hearing date must be obtained where counsel anticipate a motion to be longer than two hours.[572] Provision is also

[569] Ont. Rules, rule 37.01.
[570] Ont. Rules, rule 37.02; rule 76.05; rule 77.12.
[571] Ont. Rules, rule 37.03(2)
[572] Ont. Rules, rule 37.05(2).

made for urgent motions to be heard any day on which a judge or master is scheduled to hear motions. [573]

Where issues of fact and law are not complex, the moving party may propose that the motion be heard in writing, in which case the motion must be made on 14 days notice and the moving party must file a motion record, draft order and factum.[574] Motions may also be heard by video or teleconference.[575] In a complicated proceeding, the court may direct all motions to be heard by a particular judge.[576]

The procedure for motions has been streamlined for simplified procedure and case managed proceedings. For example, parties use special abbreviated motion forms and are not required to file supporting material or a motion record.[577] In addition, simplified procedure and case managed motions are heard where the proceeding was commenced.[578] Materials may be submitted by fax in addition to the other means.[579]

## Discussion

Timely access to the court for prompt resolution of discovery disputes is critical to the success of the discovery process. The findings indicated that delay in gaining access to judicial intervention is a concern across the province. The problem is particularly acute in Toronto, where counsel can expect to wait for weeks and even months to have a discovery-related matter addressed by the court.

The current motions process – as prescribed by the rules and modified by a proliferation of local practices – is perceived as a cumbersome and inefficient method of resolving discovery issues. Particular problems in respect of undertakings and refusals motions are discussed in the previous section.

In exploring ways to improve the current process, the Task Force has taken several factors into account. First, limitations on judicial resources preclude access to "real time" rulings during or immediately after oral examination.[580] Second, in keeping with the principles of discovery planning, parties must be encouraged to attempt to resolve their disputes before seeking the court's assistance. There is precedent in other jurisdictions for requiring counsel, as a pre-requisite to bringing a motion, to confer in an attempt to resolve discovery disputes.[581] Finally, a

[573] Ont. Rules, rule 37.05.
[574] Ont. Rules, rule 37.12.1.
[575] Ont. Rules, rule 1.08(1).
[576] Ont. Rules, rule 37.15.
[577] Ont. Rules, rule 76.05; rule 77.12.
[578] Ont. Rules, rule 76.05(2); rule 77.01(5).
[579] Ont. Rules, rule 76.05(3); rule 77.12(2.1).
[580] It is interesting to note that California has a process for "contracting out" discovery disputes to specially appointed masters. Cal.Code of Civ. P., § 639 (a) (5)
[581] See, e.g., American Bar Association's Court Delay Reduction Committee, *supra* note 361, which recommended as one of nine discovery guidelines that the court not entertain discovery motions until counsel certify that they have met and made good faith efforts to resolve discovery disputes. This requirement has been incorporated into U.S. Federal Court and Arizona rules. U.S. Fed. R. Civ. P., rule 37(A)(2)(a); Ariz. R. Civ. P., 37(a)(2)(C).

timely, streamlined, consistent process is needed to promote efficient resolution of discovery disputes.

Case management rule 77 offers mechanisms for resolving discovery disputes that satisfy most of the above criteria. As discussed earlier, the Task Force recommends incorporating case conferences into a new discovery management rule, along with other case management tools, to enable the court to intervene in discovery disputes at the request of any party or on the court's own initiative.

The Task Force recommends adding a provision that prescribes a streamlined motions procedure for discovery disputes, based on that found in rule 77, whereby parties would use a simplified form and would not be required to file supporting material or a motion record. It is recommended that the provision expressly authorize motions to take place in person, by teleconference and in writing where appropriate, subject to the court's discretion.

It is also recommended that parties be required, as a pre-requisite to bringing a motion or requesting a case conference, to demonstrate that they have made efforts to resolve the dispute before seeking the court's intervention. The delay necessitated by discovery-related motions is in many cases entirely avoidable, particularly where the parties are (or should be) aware in advance of the likely outcome of such motions. The Task Force recommends that there be a presumption of costs to the successful party on the higher scale unless the court orders otherwise. The objective of this provision is to strengthen parties' incentive to resolve disputes on their own and discourage unnecessary motions.

**Recommendations:**

- **Establish a province-wide simplified process for resolving discovery disputes, to include the following features:**
  - **simplified discovery motions form (based on Form 77C);**
  - **no requirement to file a formal motion record or supporting materials (except for the undertakings and refusals chart recommended above);**
  - **motions to be heard in person, by teleconference and in writing, where appropriate and subject to the court's discretion; and**
  - **access to case conferences at the request of any party or on the court's initiative.**
- **As a pre-requisite to bringing a motion or requesting a case conference, require parties to demonstrate that they have communicated in an attempt to resolve the discovery dispute.**
- **Include a presumptive order for costs on the higher scale where a party is successful, unless the court orders otherwise.**

## 14. ENFORCEMENT OF DISCOVERY OBLIGATIONS

### Issue

How can discovery obligations be enforced more effectively to reduce non-compliance with and/or abuse of discovery rules?

### Current Rules

The rules provide a range of sanctions and enforcement mechanisms, including a variety of serious penalties.[582] For example, where a party fails to serve an affidavit of documents as prescribed, answer any proper question at an examination, or produce a required document, the court has the power to dismiss an action or strike a defence.[583] Where a party does not comply with an interlocutory order (e.g. to answer undertakings or refusals within a prescribed period of time), the court may dismiss the proceeding, strike out a party's defence, or stay the party's proceeding.[584] Other possible sanctions include orders for re-attendance at an examination, orders to pay costs personally and any costs thrown away, as well as the costs of the continuation of the examination, and any other order as is just.[585]

### Discussion

Lawyers consulted by the Task Force have a strong desire for tougher sanctions with "real teeth" for unjustified breaches of the discovery rules, and greater predictability in the enforcement of discovery obligations by the judiciary. The Task Force has heard that discovery abuse can only be deterred by clear and meaningful consequences, and that uneven enforcement of the rules makes it difficult for lawyers to advise their clients what to expect where breaches occur.

On the other hand, it is recognized that there are valid reasons for judicial restraint in applying sanctions, including rule 1.04, which mandates the court to construe the rules liberally "to secure the just, most expeditious and least expensive determination" of cases on their merits. Overly strict sanctions, such as the rigid imposition of cost penalties, could discourage parties (especially those with limited financial resources) from pursuing legitimate inquiries, thereby impeding access to justice. Moreover, sanctions perceived to be excessive would inevitably lead to an increase in motions and appeals challenging the merits of orders.

Inconsistencies in the application of sanctions can arise where various judges become involved in a case at different stages of the proceeding. Lack of familiarity with the file makes it difficult for a judge to assess what, if any, sanctions are warranted at a particular stage of the litigation.

The Task Force has considered the merits of mandatory sanctions for non-compliance, as well as "presumptive" sanctions. Mandatory penalties would eliminate the court's discretion to modify

[582] The chart at Appendix I outlines key discovery breaches, as well as available sanctions and enforcement powers.
[583] Ont. Rules, rule 30.08(2), 34.15(1), 35.04(4).
[584] Ont. Rules, rule 60.12.
[585] Ont. Rules, rule 34.14(2).

the prescribed sanction. With presumptive penalties, the onus would be on the non-complying party to show why the default penalty should not be imposed. An example of this is the Task Force's recommendation in the previous section to authorize the court to make a presumptive order for costs on the higher scale where a party is successful on a motion.

Very few of the jurisdictions canvassed utilize mandatory or presumptive sanctions. The sanctions available in most American jurisdictions are similar to those in Ontario. California is one of the few jurisdictions that defines "discovery misuse" and prescribes mandatory and presumptive sanctions. The court may, upon a finding of discovery misuse, impose one of five types of sanctions. Where a monetary sanction is authorized under the rules, the court "shall" impose the sanction unless there was substantial justification for the conduct.

Several Canadian jurisdictions authorize the court to issue a contempt order for non-compliance with production requirements and refusal to attend an examination or answer a proper question.[586] In Saskatchewan, a person who fails to attend an examination or to answer a "lawful" question or undertakings in a "reasonable" period of time "**shall** be deemed guilty of a contempt of court and proceedings may be taken forthwith to commit him for contempt" [emphasis added].[587] New Brunswick's rules provide that a person who fails to comply with discovery obligations or orders may be apprehended by warrant and brought before the court, detained in custody or released on terms ordered by the court, and ordered to pay costs arising out of his or her refusal or neglect.[588] In the Northwest Territories and Saskatchewan, a solicitor served with a documentary discovery order may be liable for committal or held in contempt where he or she fails "without reasonable excuse" to give notice to his or her client.[589]

Alberta's rules do not give the court a great deal of flexibility to extend the time for filing an affidavit of records[590] and prescribe a significant cost penalty for failure to file the affidavit on time, irrespective of the final outcome.[591] Where a party acts or threatens to act in a "vexatious, evasive, abusive, oppressive, improper or prolix" manner, the court may order, among other things, costs, advance payment of costs, written interrogatories, supervision of further discovery, and schedules or time limits.[592]

Upon careful deliberation, the Task Force does not believe the imposition of mandatory or presumptive sanctions (other than the presumptive costs order recommended earlier) would be a panacea for all of the difficulties associated with discovery. The current rules offer a wide range of sanctions with which to address non-compliance with discovery obligations.

---

[586] Nfld. Rules, rule 30.14; N.W.T. Rules, rule 233; N.S. Rules, rule 18.15, rule 20.09; Sask. Rules, rule 217.
[587] Sask. Rules, rule 231.
[588] N.B. Rules, rule 33.12; the court may issue a warrant where a person fails to attend, answer a proper question, produce a document where required, comply with a costs order where he or she acted improperly at an examination, or fulfill an undertaking.
[589] N.W.T. Rules, rule 233(2); Sask. Rules, rule 221.
[590] Alta. Rules, rule 187(4), rule 188.1, rule 548; See Part III of the Report at p. 30.
[591] Alta. Rules, rule 190.
[592] Alta. Rules, rule 216.1

Lawyers are very interested in greater judicial intervention where discovery problems arise. The Task Force believes that the provisions for court assisted discovery planning, combined with a streamlined process for the resolution of disputes, will enable the judiciary to play a larger role in overseeing the discovery process. This is consistent with the approach taken in family law matters. In addition, the increased cooperation among parties through discovery planning will help to promote compliance with discovery obligations and reduce the number of disputes. Finally, as discussed in the following section, enunciation of the principles of cost and time efficiency and professionalism in the rules should provide additional guidance on the interpretation and application of the discovery rules.

**Recommendation:**

- **While the Rules of Civil Procedure provide an adequate range of sanctions to address discovery abuse, the imposition of meaningful and predictable consequences would help to deter unjustified breaches of discovery obligations.**

## 15. PRINCIPLES OF EFFICIENCY AND PROFESSIONALISM

### Issue

How can the principles of cost and time efficiency and professionalism be more effectively brought to bear on the interpretation and application of the discovery rules?

### Current Rules

Preambles, or principle-based rules, provide a framework within which the rules are to be interpreted and applied. Courts, in interpreting the rules, are expected to look to these purpose-based rules for guidance.[593] They are also meant to serve as a guide for lawyers and unrepresented litigants on the appropriate use of the rules. Rule 1.04 states:

> 1.04 These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

The purpose section in rule 77 sets out the objective of case management:

> 77.02 The purpose of this Rule is to establish a case management system throughout Ontario that reduces unnecessary costs and delay in civil litigation, facilitates early and fair settlements and brings proceedings expeditiously to a just determination while allowing sufficient time for the conduct of the proceeding.

[593] See, e.g., *922230 Ontario Ltd. v. Alarmforce Industries Inc.* (1999), 40 C.P.C. (4th) 373 (Case Mgt. Master).

## Discussion

The findings suggest that the directive in rule 1.04 to "to secure the just, most expeditious and least expensive determination" is not consistently observed in applying the discovery rules. In liberally construing the discovery rules to be as expansive as possible, lawyers and judges may underemphasize the importance of cost and time considerations. This can have the unintended effect of impeding access to justice for many litigants. Recent case law suggests that the court should apply the principle of proportionality in appropriate cases, including the shifting of costs associated where warranted.[594]

The Task Force has heard that the discovery process can be prohibitively expensive for individual or small business litigants. A statistically significant proportion of lawyers consider discovery costs to be disproportionately high. Approximately 20% of respondents to the case specific survey in Ottawa and Toronto stated that discovery costs were relatively too high compared to their clients' stake in the case; 25% said discovery costs led their client to pursue an alternative course of action. Many lawyers also complain about conduct and tactics of counsel that increase the expense and duration of discovery, and the court's reluctance to intervene.

The Task Force is of the view that a stronger directive, or preamble, will help to discourage time-consuming and costly practices. A number of jurisdictions have developed preambles to help govern parties' conduct during the discovery process and to provide courts with a basis for imposing appropriate remedies or sanctions; some of them incorporate the principle of proportionality. Quebec, for example, has recently enacted a more extensive preamble in its Code of Civil Procedure[595], which provides:

> 4.1 Subject to the rules of procedure and the time limits prescribed by this Code, the parties to a proceeding have control of their case and must refrain from acting with the intent of causing prejudice to another person or behaving in an excessive or unreasonable manner, contrary to the requirements of good faith.
>
> 4.2 In any proceeding, the parties must ensure that the proceedings they choose are proportionate, in terms of the costs and time required, to the nature and ultimate purpose of the action or application and to the complexity of the dispute; the same applies to proceedings authorized or ordered by the judge.

U.K.'s civil rules prescribe a detailed "overriding objective" in rule 1.1:

> 1.1 The overriding objective
> (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
> (2) Dealing with a case justly includes, so far as is practicable –
> (a) ensuring that the parties are on an equal footing;

[594] See, e.g., *Business Depot Ltd. v. Genesis Media Inc*. (2000) 48 O.R. (3d) 402 (S.C.J.), where the court ordered the requesting party to pay the costs of searching for and copying documents stored in over 1,000 boxes where the requesting party's counterclaim was tenuous.

[595] Bill 54 – *An Act to reform the Code of Civil Procedure* (in force as of January 1, 2003).

(b) saving expense;
(c) dealing with the case in ways which are proportionate –
  (i) to the amount of money involved;
  (ii) to the importance of the case;
  (iii) the complexity of the issues; and
  (iv) to the financial position of each party;
(d) ensuring that it is dealt with expeditiously and fairly; and
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.[596]

Both the court and the parties have a duty to apply and further the overriding objective.[597] In furtherance of the overriding objective, the court must actively manage cases, which includes encouraging the parties to co-operate, identifying issues at an early stage, fixing timetables and otherwise controlling the progress of the case.[598]

Alberta's rule 216.1, while not a preamble, provides that where "the expense, delay, danger or difficulty in complying fully [with discovery obligations] would be grossly disproportionate to the likely benefit," the court may make various orders to modify the requirements in the rules.

The purpose section of rule 77 expresses principles that the Task Force believes should be brought to bear not only on the discovery process, but the entire litigation process. Broader than rule 1.04, rule 77.02 directly addresses the need to reduce unnecessary cost and delay, to facilitate early and fair settlements and to bring proceedings expeditiously to a just determination. The Task Force recommends replacing the wording in rule 1.04 with that in rule 77.02 in order to provide the court with a very clear rationale for limiting discovery where appropriate.

The Task Force is of the view that the preamble should also signal – to the court and the bar – the level of professionalism that is expected of lawyers in conducting litigation and discovery activities. As noted earlier, rule 4.01(4) of the Rules of Professional Conduct prescribes a lawyer's obligation to explain to his or her client the necessity of making full disclosure and answer questions, to assist the client in making full disclosure, and to refrain from making frivolous requests for productions or information. Rule 4.01(7) requires a lawyer to strictly and scrupulously carry out undertakings.[599] These provisions were introduced in November 2001 to re-enforce a lawyer's obligations under the Rules of Civil Procedure.

---

[596] U.K. Rules, rule 1.1
[597] U.K. Rules, rule 1.2, rule 1.3
[598] U.K. Rules, rule 1.4.
[599] Law Society of Upper Canada, Rules of Professional Conduct, (in effect Nov 1, 2001), rule 4.01:
*Discovery Obligations*
4.01(4) Where the rules of a tribunal require the parties to produce documents or attend on examinations for discovery, a lawyer, when acting as an advocate
  (a) shall explain to his or her client:
    ( ) the necessity of making full disclosure of all documents relating to any matter in issue; and
    ( ) the duty to answer to the best of his or her knowledge, information, and belief, any proper question relating to any issue in the action or made discoverable by the rules of court or the rules of the tribunal;
  (a) shall assist the client in fulfilling his or her obligations to make full disclosure; and

The Task Force recommends that these provisions be directly integrated into the Rules of Civil Procedure, both to reiterate their importance and to enhance their accessibility. In making this recommendation, the Task Force does not seek to empower the court to regulate the conduct of lawyers, but to provide the court with guidance in making determinations with respect to abuse of the discovery rules.

**Recommendations:**

- **Incorporate into rule 1.04 language from rule 77.02 to provide that "the rules shall be construed so as to reduce unnecessary cost and delay in civil litigation, facilitate early and fair settlements and bring proceedings expeditiously to a just determination while allowing sufficient time for the conduct of the proceeding."**
- **Incorporate the wording of rule 4.01(4) and (7) of the Rules of Professional Conduct into a new discovery rule.**

## 16. BEST PRACTICES MANUAL

### Issue

How can the profession be encouraged to adopt best practices in conducting the discovery process?

### Current Rules

A degree of guidance on the proper conduct of discovery is provided to lawyers through practice directions, professional codes and the Law Society's professional conduct rules. However, no comprehensive list of advisable practices for the conduct of discovery currently exists in Ontario. For example, while the professional conduct rules describe a lawyer's discovery obligations, they do not provide specific practical direction as to how those obligations should be carried out.

Practice directions often speak to certain specific or general practices that lawyers should follow. For example, Toronto Regional Senior Justice Blair issued an advisory notice on motion scheduling that states:

> For all motions to compel answers on examination or cross-examination, the parties are expected to engage in good faith efforts to resolve the outstanding refusals or undertakings and to narrow the issues to be argued. Parties are also expected to

---

(a) shall not make frivolous requests for the production of documents or make frivolous demands for information at the examination for discovery.

**…**

*Undertakings*

**4.01 (7)** A lawyer shall strictly and scrupulously carry out an undertaking given to the tribunal or to another lawyer in the course of litigation.

> collaborate in the preparation of materials to permit the motion to proceed efficiently.[600]

The Advocates' Society has developed a civility code, which includes provisions on appropriate conduct at examinations for discovery.[601] Conceived in an effort to address public concerns about lawyers' conduct, the code sets out principles of fairness, candour, cooperation and courtesy that are designed to help litigators foster better relations with opposing counsel, parties and the court. As stated in its preamble, the code is "not intended as a code of professional conduct subject to enforcement by discipline or other sanction but as an educational tool for the encouragement and maintenance of civility in our justice system." The recommendations in the code provide guidance on appropriate behaviour or demeanour, as opposed to specific practices that should be followed.

## Discussion

The Task Force has accumulated an extensive (but by no means exhaustive) list of best practices to be followed in the discovery process. This list has been compiled from a variety of sources, including suggestions by lawyers, members of the judiciary and case management masters who have participated in consultations, as well as guidelines that have been developed in other jurisdictions. These suggestions and guidelines range from the specific (for example, steps to take in planning the discovery process, or how to prepare a client for documentary production) to the general (for example, the importance of cooperation among counsel, or good faith efforts to resolve discovery disputes).

As noted earlier in the Report, not all lawyers routinely follow these practices, with the result that unnecessary costs and delays are added to the discovery process. There is a strong consensus, however, that lawyers should not be "micro-managed" by encoding detailed practice or conduct requirements in the rules. Such requirements would not only bring unnecessary complexity to the rules, but would be difficult to enforce and would inevitably lead to more disputes and related motions.

The Task Force therefore recommends the development of a best practices manual on all aspects of the discovery process, to be used as an educational guide for the profession (and to provide

---

[600] Schedule B to the Advisory Notice, dated August 29, 2002, issued by R.S.J. Blair.

[601] The Advocates' Society, *Principles of Civility for Advocates*. http://www.advsoc.on.ca/civility/principles_tex.htm. The section entitled "Conduct at Examinations for Discovery" provides:

21. Counsel, during examination for discovery, should at all times conduct themselves as if a judge were present. This includes avoiding inappropriate objections to questions, discourteous exchanges among counsel and excessive interruptions to the examination process.
22. Counsel should not ask repetitive or argumentative questions or engage in making excessive or inappropriate self-serving statements during examination for discovery.
23. The witness who is being examined should be treated with appropriate respect and should not be exposed to discourteous comments by opposing counsel or their clients.
24. Counsel should instruct their witnesses as to the appropriate conduct on examination and the requirement for courtesy and civility to opposing counsel and their clients.
25. Counsel should not engage in examinations for discovery that are not necessary to elicit facts or preserve testimony but rather have as their purpose the imposition of a financial burden on the opposite party.

assistance for unrepresented litigants). Best practices are not intended to be enforceable as rules, but to be adopted by the bench and the bar as appropriate conventions or norms for the conduct of discovery. A great deal of enthusiasm for this initiative has been expressed to the Task Force, both by litigation practitioners and the judiciary.

A number of jurisdictions have implemented guidelines that would be instructional in the development of a discovery best practices manual for Ontario. Many of these have been described in earlier sections of the Report. They include, for example, the American Bar Association's 1997 discovery guidelines,[602] and a 1999 publication of the American Bar Association entitled *Civil Discovery Standards*,[603] which expanded upon the 1997 guidelines. These standards are not a restatement of the law, but seek "to address practical aspects of the discovery process that may not be covered by the rules."[604] They are intended to assist parties, counsel and the court by providing guidelines on such matters as: judicial management and party involvement in discovery conferences and plans; methods for resolving discovery disputes; sanctions for failing to comply with discovery obligations; and best practices for depositions, document preservation, organization and production, and preparation of discovery requests and responses. The American College of Trial Lawyers' *Code of Pre-Trial Conduct* also provides some direction to lawyers on discovery activities.[605]

The Arizona-based Sedona Conference has produced a best practices guide for electronic document production[606] and in Australia, the Chief Justice of the Federal Court has issued a practice note containing detailed guidelines for the use of electronic information in civil litigation.[607]

The pre-action protocols in the United Kingdom were designed to facilitate settlement of claims without resort to litigation by encouraging pre-action communication among parties, better and earlier exchange of information, and more comprehensive fact investigation. Although they form part of the rules, the protocols are drafted in language that suggests what parties "should" do, as opposed to what they "shall" do. However, the court may:

> treat the standards set in protocols as the normal reasonable approach to pre-action conduct. If proceedings are issued, it will be for the court to decide whether non-compliance with a protocol should merit adverse consequences. Guidance on the court's likely approach will be given from time to time in practice directions.[608]

---

[602] *Supra*, note 361.
[603] American Bar Association, *Civil Discovery Standards* (August 1999). For further details see http://www.abanet.org/litigation/taskforces/civil.pdf.
[604] *Ibid.* at 1.
[605] *Supra*, note 370.
[606] *Supra*, note 447.
[607] *Supra*, note 448.
[608] U.K. C.P.R., Pre-Action Protocols, Pre-action protocol for personal injury claims. http://www.lcd.gov.uk/civil/procrules_fin/contents/protocols/prot_pic.htm.

In Canada, the Law Society of British Columbia has issued detailed practice checklists to provide guidance on many areas of practice, including discoveries.[609]

The Law Society of Upper Canada has also published checklists, or guidelines, in various areas of law; however, a checklist was never produced for civil litigation. The lessons learned by the Law Society in attempting to develop comprehensive practice guidelines are instructive. As explained to the Task Force by a Law Society representative, the guidelines were seen as unduly expansive (averaging more than 80 pages in length), too restrictive and impossible to implement for sole and small firm practitioners.[610] The Task Force believes that for discovery best practices to be effective, they must be realistic and accessible for all types of practitioners.

### *Development, Dissemination and Maintenance of Manual*

The Task Force is of the view that the development of a best practices manual will require the collaboration of the Law Society, representatives of different segments of the litigation bar, the judiciary, the Civil Rules Committee and courts administration.

Because of the anticipated scope of the manual, it is advisable that a steering committee be established to oversee this initiative, assisted by sub-committees to develop best practices for each of the areas to be covered. Such areas should include (but not necessarily be limited to):

- Discovery planning and scheduling;
- Documentary discovery (timing, format, content, affidavit of documents production, electronic discovery);
- Written discovery (appropriate use of written questions and answers, content of questions and answers);
- Oral examination for discovery (scheduling, preparation, proper questioning, refusals and undertakings);
- Motions (preparation, attempt to resolve disputes, compliance with orders);
- Experts;
- Specific guidelines for certain areas of practice (e.g. wrongful dismissal, motor vehicle, other personal injury, small commercial cases); and
- Unrepresented litigants.

The chart at **Appendix O** contains a preliminary "shopping list" of the types of best practices that might be included in the manual.

As the governing body of the profession, the Law Society is in the best position to coordinate the production and dissemination of the manual, and to develop complementary educational and training programs for the bar. In preliminary discussions, the Law Society has agreed to assume this responsibility.

---

[609] See, e.g., Law Society of British Columbia, *Practice Checklist Manual: Personal Injury Plaintiff's Interview or Examination for Discovery*, http://www.lawsociety.bc.ca/library/checklist/body_checklist_table.html#Litigation.

[610] Memorandum to the Task Force from Diana Miles, Director, Professional Development and Competence, dated July 18, 2003

Task Force members have agreed to serve on the steering committee to supervise the development of best practices, along with other representatives, as recommended below. In order to expedite this initiative, it is recommended that the steering committee hold its initial meeting at the earliest opportunity to formulate a detailed mandate and project plan.

**Recommendations:**

- **Develop a best practices manual to address the proper conduct of discovery, including discovery planning, documentary discovery, written and oral examination for discovery, undertakings and refusals, motions, discovery of expert evidence, unrepresented litigants and other related matters.**
- **Form a steering committee to oversee the development and implementation of the best practices manual, reporting to the Attorney General and the Chief Justice of the Superior Court and comprised of the following members:**
  - **Judicial representative as Chair**
  - **Discovery Task Force members**
  - **1 representative of each of the Law Society, Advocates' Society, Ontario Bar Association, County and District Law Presidents' Association, Ontario Trial Lawyers' Association and Metropolitan Toronto Lawyers' Association**
  - **2 judicial representatives (1 from Toronto and 1 from outside Toronto)**
  - **1 representative of the Court Services Division, Ministry of the Attorney General**
  - **1 representative of the Civil Rules Committee Secretariat**
- **Mandate the Law Society to coordinate the production and dissemination of the best practices manual and to develop complementary bar education and training programs.**

## 17. OTHER MATTERS

### Judicial Management

Some actions take significantly longer to resolve, give rise to more discovery disputes and motions, cause greater expense to parties, and require more judicial intervention than others. These cases present serious challenges. A consistent theme heard by the Task Force is that access to more timely and consistent judicial management in such cases would help shorten the litigation process, minimize the number of discovery disputes, and substantially reduce the cost to parties.

While recognizing that the broader issue of judicial case management (as opposed to management of the discovery process *per se*) goes beyond the scope of its mandate, the Task Force believes it would be valuable to assess the benefits of more active judicial management to assist in the

resolution of discovery disputes and promote early resolution of litigation. It is anticipated that best practices, developed with the co-operation and input of the bar and the judiciary, will reduce unnecessary motions and enable the judiciary to assist where management of a case is warranted.

### Rules 26.01 and 53.08

Rule 26.01, which governs amendments to pleadings, provides that on motion at any stage of an action "the court **shall** grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment" [emphasis added]. Rule 53.08 deals with evidence that is admissible only with leave of the trial judge for a variety of reasons, including failure to disclose a document, refusal to disclose information on discovery, failure to serve an expert's report and failure to disclose a witness. It provides that "leave **shall** be granted on such terms as are just and with an adjournment if necessary, unless to do so will cause prejudice to the opposite party or will cause undue delay in the conduct of the trial" [emphasis added]. Both rules impact on the discovery process because they oblige the court, even at trial, to grant various types of relief unless prejudice cannot be redressed as described above. It is the mandatory aspect of the rule[611] that has a significant impact on the discovery process.

There are strategic and cost consequences for delayed disclosure, including a party's approach to settlement process. While the Task Force does not consider it within its mandate to make specific recommendations for changes to these rules, it is suggested that the Civil Rules Committee consider revisions that would at least presume prejudice to a party who receives late delivery of amendments to pleadings or documents, particularly where relief has not been sought on a more timely basis before trial. Prejudice does result from delay, particularly when it could have been avoided. The Task Force recommends that this issue be studied.

**Recommendation:**

- **Review rules 26.01 and 53.08 to address prejudice caused by untimely amendments of pleadings, disclosure of information or delivery of documents.**

[611] See *Marchand (Litigation Guardian of) v. Public General Hospital of Chatham* (2000), 51 O.R. (3d) 97 (C.A.).

# PART VII: CONCLUSION

The objective of the Task Force has been to study the discovery process and recommend reforms that will promote access to justice by improving the efficiency of the process, without compromising fundamental disclosure principles. It is clear that the views of the profession vary greatly. Many are content with the *status quo*, viewing reforms such as case management and mandatory mediation as unnecessary or unwarranted. Many others welcome changes designed to reduce cost and delay for litigants in the civil justice system.

The Greek philosopher Heraclitus said, over 2500 years ago, "There is nothing permanent except change." As the study of other jurisdictions reveals, improvement in the delivery of civil justice is and will be an ongoing initiative in most common law systems.

A central theme of the Task Force recommendations is that management of the discovery process should, to the extent possible, remain with the parties, with rules operating as a default standard in the absence of consensus. A key to the success of this approach will be recognition by the bar of the value of cooperation in conducting discovery. Equally important is the need for a flexible regulatory scheme that recognizes the unique features and exigencies of different types of cases. A "one size fits all" approach does not allow for the differing timelines and information needs of, for example, personal injury and medical malpractice claims as opposed to wrongful dismissal or commercial cases. At the same time, there is a reasonable expectation that the discovery process will be managed in a predictable and consistent manner throughout the province, whether or not a formal case management scheme is in place.

It is hoped that rule changes recommended in this Report, together with the collaboration of the bench and bar in developing a best practices manual, will contribute to a more cost-effective and efficient discovery process in Ontario.