

REPORT

2004 AMENDMENTS TO THE CIVIL DISCOVERY STANDARDS RELATING TO ELECTRONIC DISCOVERY

Purpose and Scope of the Amendments

Electronic discovery injects difficult, expensive and contentious issues into many otherwise routine disputes. In 1999, the American Bar Association adopted CIVIL DISCOVERY STANDARDS to serve as guidelines to assist the parties, counsel and the court in civil discovery. The CIVIL DISCOVERY STANDARDS included provisions addressing preservation duties and cost shifting in relation to electronic discovery. Those standards have been cited in some of the most celebrated decisions in the area. *See, e.g., Zubulake v. UBS Warburg*, 216 F.R.D. 280, 283 n.30 (S.D.N.Y. 2003).

The 2004 amendments update the CIVIL DISCOVERY STANDARDS insofar as they relate to electronic discovery. Like the existing CIVIL DISCOVERY STANDARDS, the 2004 amendments are not intended to restate the law or replace existing court rules. Rather, they are designed to supplement existing rules and address practical aspects of the electronic discovery process that are not addressed by the rules. These amendments focus primarily on discovery requests and responses, discovery conferences (initial conferences and meet-and-confers), and on privilege problems.

With respect to discovery and discovery conferences, the 2004 amendments provide counsel with checklists and best practices to assist counsel in identifying types and locations of electronic data that should be considered (i) for effective discovery and (ii) to avoid spoliation problems. The nettlesome issues of cost allocation and motions to compel/resist production are also addressed, with a long list of factors furnished for the assistance of counsel and the court.

A series of best practices with respect to privilege issues are set forth, with three primary alternatives designed to avoid or minimize invasion of the attorney-client privilege and work product protection. Suggestions as to procedure are provided for the consideration of court and counsel.

Public Dissemination and Circulation for Comment

The 2004 amendments to the CIVIL DISCOVERY STANDARDS were circulated for public comment to all state bar associations; all ABA entities; major local bar associations; to hundreds of state and federal judges across the country; and to the Civil Procedure Committee of the American College of Trial Lawyers.

The 2004 amendments were also the subject of an open forum at the at the mid-year meeting of the House of Delegates in San Antonio in February of 2004.

These amendments were posted for public comment on the website of the Section of Litigation, at

<http://www.abanet.org/litigation/taskforces/electronic/home.html>.

In addition, 2004 amendments to the CIVIL DISCOVERY STANDARDS were posted for comment on the website of the American Association of Law Schools' Civil Procedure Section.

Numerous articles calling the attention of Bench and Bar to the 2004 amendments were also written, including articles in:

- (1) *The National Law Journal* (November 24, 2003, at p. 30);
- (2) *U.S. Law Week* (December 9, 2003, at p. 2326);
- (3) *BNA Expert Evidence Report* (December 22, 2003, at p. 597);
- (4) *BNA Employment Discrimination Reporter* (December 10, 2003, at p. 670);
- (5) *Digital Discovery & e-Evidence* (Pike & Fischer) (January 2004 at p. 1);
- (6) *Litigation News* (March 2004 at p. 1).

Each of these articles either reprinted the 2004 amendments or provided the website address at which they could be accessed.

In addition, the Chair of the Section of Litigation discussed the 2004 amendments in her column in the December 2003 Litigation Update sent by email to members of the Section.

Numerous comments were received from these various sources, and many were incorporated in the final version of the amendments.

Conclusion

The 2004 amendments to the CIVIL DISCOVERY STANDARDS are premised on, and further advance, existing ABA policies, including the Association's core value of promoting improvements in the system of justice generally and the jury trial in particular. These amendments provide needed guidance for both bench and bar. They explicitly reflect that they neither limit judicial discretion nor attempt to supersede governing law. The 2004 amendments to the CIVIL DISCOVERY STANDARDS stand in the highest traditions of the Association in the service of the courts, both state and federal, and the civil jury system.

Respectfully submitted,

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Chair
Section of Litigation