Developed by the National Conference of State Trial Judges of the Judicial Division of the American Bar Association

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Introduction

Much good work has been accomplished in the area of controlling discovery in an effort to reduce expense and delay in civil litigation. Beginning in the 1980s, members of the legal community became concerned about the growing expense and delay in civil cases and sought solutions to the problem. In the early 1990s, in response to the outcry from the general public and the business community, all three branches of the federal government became involved in the debate, and each made recommendations for reform. The first major result of these recommendations was the Civil Justice Reform Act of 1990, which required all federal district courts to develop civil case management plans and ten district courts to adopt certain recommended guidelines and principles in their differentiated case management plans.

In 1991, the President's Council on Competitiveness issued a report entitled “Agenda for Civil Justice Reform in America” that analyzed problems with civil discovery and recommended changes in the Federal Rules of Civil Procedure to prevent discovery abuse. The report stated that, “over 80 percent of the time and cost of a typical lawsuit involves pre-trial examination of facts through discovery.” The same year, the Judicial Conference of the United States began its examination of discovery problems in civil cases. Through its committees, the Judicial Conference proposed several amendments to the discovery provisions of the Federal Rules of Civil Procedure, which were transmitted to Congress and became effective in December 1993. Federal Rule 26(a) contains the most significant amendments, which provide for initial disclosure of core information, mandatory pre-discovery meetings of counsel, and court authority to impose numerical limits on specific forms of discovery.

Individual federal courts responded by developing plans such as the “Rocket Docket” in the Eastern District of Virginia, which became known for drastically reducing delay through active judicial management of civil dockets and strict enforcement of rules to control the discovery process. The RAND Corporation and the Federal Judicial Center have undertaken major studies on the effect of the discovery reform in the federal courts initiated by the Civil Justice Reform Act of 1990. These studies demonstrate that the various civil procedure reforms to control discovery, although not perfect, have achieved the intended result of lowering litigation costs and delay without compromising fairness.

On the state level, Arizona led the way in 1992 by making major changes to its rules of civil procedure that included automatic mandatory disclosure, presumptive numerical limits on various forms of discovery, limits on the number of expert witnesses, and arbitration. Alaska and Illinois also joined the discovery reform movement. In 1996, Alaska adopted civil discovery rules similar to Federal Rule 26(a), and Illinois amended its rules to incorporate changes in the discovery process analogous to the Discovery Guidelines for State Courts that were subsequently adopted by the American Bar Association (see below).

The American Bar Association (ABA) has taken steps in anticipation of discovery reform. In 1992, the ABA adopted Standards of Judicial Administration, Section 2.50 of which require trial courts to control the pace of litigation, reduce delay, and maintain current dockets.

In 1994, the Delay Reduction Committee of the National Conference of State Trial Judges of the ABA Judicial Division commenced work on Discovery Guidelines for State Courts (Guidelines). The goal of the committee was to survey all discovery reform programs and proposals nationwide in an effort to compile an up-to-date set of guidelines for controlling discovery in order to reduce expense and delay in civil litigation. The Guidelines were intended to assist state courts and state rulemaking bodies. A preliminary draft of the Guidelines was circulated to all entities within the ABA for comment and evaluation. The chair of the ABA Judicial Division appointed a special ad hoc committee to review the comments and revise the draft
Guidelines accordingly. The resulting final Guidelines were the product of painstaking draftsmanship and careful consideration of all viewpoints within the ABA. The Guidelines were approved by the National Conference of State Trial Judges and the ABA Judicial Division at the 1997 ABA Midyear Meeting and by the ABA House of Delegates at the 1998 ABA Annual Meeting.

Clearly, these dramatic reforms in the rules of discovery signal a fundamental shift of policy in civil litigation no less profound than the transition from code pleading to notice pleading and discovery when the Federal Rules of Civil Procedure were first adopted.

Those courts that have not taken steps to modernize their rules of discovery in order to reduce cost and delay should consider that it is in their best interests to do so. Decades of experience teach us that injustice is frequently the result of discovery abuse. It is now time to address the much needed reforms for mandatory disclosure and control of discovery in order to curb abuses and respond to the rising chorus from all sides demanding reduction of expense and delay in our civil courts.
Discovery Guidelines for State Courts
with Commentary

1. Each party to an action shall make initial disclosure of discoverable information relevant to its claims and defenses asserted in the action except on order of the court for good cause shown.

Commentary: In jurisdictions adopting simultaneous disclosure, the parties should make disclosures with respect to the disputed facts alleged with particularity in the pleadings. In jurisdictions adopting sequential disclosure, the particularity prerequisite will be provided by the opposing party's previous written disclosures rather than the pleadings. Without waiting for a discovery request or court order, attorneys for all parties should disclose within specified time periods the following information: (1) the legal theory underlying each claim or defense; (2) the names and addresses of persons likely to have discoverable information; (3) identification by category and location of documents and tangible items relevant to the disputed facts stated with particularity; (4) itemization of damages; (5) agreements, written or otherwise; (6) insurance policies or cover sheets.

Subject to ruling by the court, a party need not disclose information subject to a claim or objection (1) based on privilege or work product; (2) that the disclosure sought is unreasonably cumulative or duplicative; (3) that the information is obtainable from another source that is more convenient, less burdensome, or less expensive; or (4) that the burden or expense of disclosure outweights its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of issues at stake in the litigation, and the importance of the disclosure in resolving the issues. Exceptions to disclosure in appropriate cases should be available on motion of a party. All counsel should have a continuing duty to disclose new information and documents and to supplement or correct information previously disclosed.

2. No formal discovery request 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.

Commentary: This guideline requires counsel to take the initiative in making disclosure, resolving disclosure disputes, and developing a discovery plan in writing for submission to the court before initiating costly and time-consuming discovery requests. The conference should be held within a court-specified time in order to facilitate full disclosure by all parties as mandated. Disagreement over certain elements of a discovery plan should not prevent discovery from proceeding on those elements as to which there is no disagreement. This guideline will save the time of court and counsel and obviate the need for many discovery hearings; it will effectuate the mandatory disclosure guideline. The court always retains authority to order discovery in emergency matters.

3. Discovery should be limited unless the court, on motion of a party, permits expanded discovery in an appropriate case.
Commentary: This guideline seeks to avoid the "one-size-fits-all" fallacy. All unlimited jurisdiction cases would start out in the same primary category with limited discovery after counsel for the parties satisfy the initial disclosure and discovery conference requirements. In this limited discovery category, each party would be restricted to a specific number of depositions with limitation as to duration, except with a judge's permission or by agreement of the parties. Similarly, interrogatories would be restricted in number, including subpart. The number of expert witnesses called by each party would likewise be limited. It is anticipated that the identification of documents under guideline number 1 will significantly reduce the need for exploratory requests for production. The majority of cases should not require expanded discovery. All discovery must be completed within a standard period of time. Upon completion of discovery, counsel would be required to certify the case ready for pretrial and trial assignment, except where a date has previously been established or another system exists to assure a prompt trial date.

The secondary category of expanded discovery would be reserved for a relatively small number of cases as designated by the court on motion of a party. When so designated, the court may permit specific expanded discovery after holding a court-supervised discovery conference.

4. The court shall promptly schedule a supervised discovery conference at which counsel shall submit a reasonable and comprehensive discovery plan, subject to court approval, which shall designate the time, place, and the most cost effective manner of discovery; the dates for exchange of expected trial witnesses; the dates and sequence for disclosure of experts and written reports containing their opinions; and the deadline for completion of all discovery. The court shall also schedule the dates for pretrial conference and trial.

Commentary: This guideline permits the court to tailor discovery to the specific requirements of the case. Development of a discovery plan with discovery completion and trial dates is essential.

A supervised discovery conference enables the court to control discovery expense and delay. For example, the judge may order out-of-state witnesses or experts to be deposed in-state, thus avoiding the time and expense required for travel of counsel. Similarly, the court may permit telephone depositions or direct the use of videotaped depositions.

5. The court should not entertain discovery motions until counsel have met and conferred in a good faith effort to resolve discovery disputes and movant has filed a detailed certificate of compliance.

Commentary: This guideline requires counsel to make a reasonable and good faith effort to meet and confer in order to improve communication and resolve discovery disputes before utilizing the time-honored but wasteful practice of litigating such issues. The supporting certificate must state specific acts of counsel to effectuate the standard.
6. The court must actively control the discovery process and should not hesitate to impose sanctions when appropriate.

Commentary: Studies and surveys of counsel have revealed that a major discovery problem is the perception that judges are unwilling to resolve discovery disputes and are reluctant to impose meaningful sanctions for discovery abuse. (See "Attorneys' Views of Civil Discovery," Susan Keilitz, Roger Hanson, and Richard Semiatin, The Judges' Journal, Vol. 32, No. 2, Spring 1993.) Abuse can only be prevented if judges are willing to become involved. If the court ignores abuse, opposing counsel are encouraged to "fight fire with fire."

Judges should adopt efficient techniques for expeditious determination of discovery snags such as telephone conferences with the court during depositions and otherwise, and fast transmission of motions, briefs, and other documents by fax.

7. Counsel should at all times seek to control unnecessary expenses and delay.

Commentary: Counsel have a duty to realistically evaluate a case on a continuing basis to assure that the cost of litigation is not disproportionate to the significance of the controversy. A substantial criticism of today's practice is excessive cost. Controlling costs is a responsibility that can only be addressed by the lawyers handling the litigation. Moreover, the expense of litigating should not be artificially driven up to defeat the ends of justice by placing an action unnecessarily beyond the reach of a litigant.

8. When a party fails to comply with its disclosure obligations, the court has a duty to impose sanctions when appropriate.

Commentary: In determining appropriate sanctions, the court should consider all the circumstances including any resulting expense, whether the failure to disclose was inadvertent or intentional, or constituted unfair surprise. Such sanctions could include imposition of costs, special instructions to the jury regarding the failure to disclose, excluding evidence, or precluding a party from contesting a designated issue.

9. The court should encourage counsel at all times to use alternative dispute resolution mechanisms to resolve all substantive issues in civil litigation.

Commentary: This guideline recognizes that resolution of the underlying dispute is always the court's prime objective from the inception of the case.