

Client Bulletin

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Discovery Reform in the United States: Is it Really at Hand?

The American College of Trial Lawyers (ACTL), composed of distinguished counsel who represent both plaintiffs and defendants in the civil and criminal justice system¹, recently joined with the Institute for the Advancement of The American Legal System (IAALS), a group of former judges, academics and journalists at the University of Denver, in offering recommendations for the overhaul of U.S. civil discovery rules.

The recommendations, contained in a Final Report² issued this month, are drawn from the results of a survey sent to members of ACTL who, on average, have practiced law for more than thirty-five years.

The Report's stark conclusion, based on the ACTL survey results, is that while the U.S. judicial system is not broken, it has been substantially damaged and is in serious need of repair.

The most significant recommendation contained in the Final Report is for substantial restrictions on pretrial discovery, including electronic discovery, in civil litigation. The current state of discovery in the U.S. can only be described as a system that has run amuck and, to quote one of the survey respondents, the discovery rules are a "morass" While it is not likely that the recommendations contained in the Final Report will be immediately adopted, they do provide important food for thought for those who are interested in genuine reform of the judicial system.

The principal problem in civil litigation is a lack of focus in discovery. Discovery rules have been liberalized since the Federal Rules of Civil Procedure (FRCP) were enacted in 1938 and, until 1970, "good cause" was required to conduct "paper discovery", *i.e.* requests for production of categories of documents. An amendment to the FRCP that year, coupled with the widespread use of photocopiers, has led to almost unlimited paper discovery which can overwhelm litigants and counsel while drastically increasing litigation costs. Electronic discovery, which has been an

issue of hot debate over the past decade, has exponentially increased the cost of discovery, leading to battles within battles as to what is discoverable, what is preserved, how can information be preserved and how should information be produced. As matters now stand, there is a presumption in favor of discovery which often results in extensive discovery motion practice as the only possible way to rein in what are at times outrageous discovery demands.

The current rules permit discovery of all documents and information relevant to a claim or defense of any party. The Final Report proposes that party discovery be limited to that which would enable a party to prove or disprove a claim or defense or to impeach a witness. It recommends that proportionality be the guiding principle for determining the scope of discovery. In other words, there is no reason that the full range of discovery options offered by the rules be employed in every case and no justification that more is spent on discovery than a case requires. As a means to achieving this end, the Final Report proposes that shortly after commencement of litigation, each party should produce all reasonably available, non-privileged, non-work product related documents that could be used to support the parties' claims and defenses. After these initial disclosures are made, no other discovery would be permitted absent a showing of "good cause" and a court order to that effect.

In effect, the proposed reforms would reverse the usual order as it currently exists in U.S. litigation. At present, discovery is unlimited unless the court sets a limit by entering a protective order. If the recommendations of the Final Report were adopted, only limited additional discovery directly related to the pleadings would be permitted after the initial disclosures and no other discovery would be allowed absent agreement by the parties or a court order.

The Final Report also addresses the preservation of electronic data and, in particular, the costs involved in preserving electronic data through "litigation holds" which under the current rules

must be issued to insure preservation of potentially discoverable documents as soon as a party is aware that a lawsuit is likely to be commenced. The fundamental problem with electronic discovery is not in its production, but rather in determining what must be preserved and how to preserve it. Should a party fail to preserve relevant electronic information, it becomes embroiled in collateral issues of spoliation of evidence claims, which can subsume the issues in the original underlying litigation. The Report recommends that parties be required to discuss preservation issues promptly after commencement of an action and if no agreement is reached about preservation, the court should make an early order governing electronic discovery.

The proposed principles on preservation of electronic data, to be implemented at the outset of litigation, include:

- (1) the parties must make reasonable and good faith efforts to retain information that is relevant to the threatened or pending litigation;
- (2) a party should not be required to restore deleted or residual electronically stored information including backup tapes;
- (3) sanctions should be imposed only upon a finding that there was an intent to destroy evidence or recklessness; and
- (4) the cost of preserving, collecting and reviewing electronically stored information should generally be borne by the party producing it but the court reserves the right to allocate the expenses of electronic discovery upon application to the court.

The Final Report also recommends that pleadings be based on “fact pleading” rather than “notice pleading” so as to narrow the discovery. The general rule in U.S. litigation is that pleadings are phrased vaguely and broadly, with discovery used as a tool to flesh out the barebones allegations in the complaint. It is not unusual for a practitioner to receive numerous document requests for “all documents relating or referring to . . .”. Were a fact pleading standard to be adopted, plaintiffs would be required to set out in the complaint the exact facts upon which they base their causes of action against the

defendants and defendants would be required to set out as affirmative defenses in their answers the facts which negate the elements of plaintiff’s claims as pleaded. This in turn would narrow the scope of discovery and would promote the overall efficiency of the litigation, including substantial cost savings to the parties.

Other recommendations in the Final Report are for expert depositions be eliminated in most cases, with the parties instead relying on expert reports, that the parties be limited to only one expert per issue, that discovery be stayed pending dispositive motions and that state courts in particular become more involved at the initial stages of litigation in supervising discovery and counsel.

The Final Report constitutes a remarkable effort to modify the *status quo* of civil litigation in the United States. It remains to be seen the extent to which its proposals might be individually adopted by federal and state courts or considered by the Judicial Conference which makes modifications to the Federal Rules of Civil Procedure. At a minimum, however, the proposals contained in the Final Report are a potential welcome sight on the horizon for those defendants who are frequently embroiled in litigation and who are confronted on a daily basis with preservation demands for massive amounts of materials which are not relevant to the issues raised in pending litigation.



If you should have any further questions, or would like further information, please contact:

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² The full title is Final Report on the Joint Project of The American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System, March 11, 2009. A full copy of the Report is available by contacting Michael J. Holland.