



INSTITUTE *for the* ADVANCEMENT  
*of the* AMERICAN LEGAL SYSTEM



**WRITTEN STATEMENT  
Of**

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**on “The Costs and Burdens of Civil Discovery”  
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**Before the  
Subcommittee on the Constitution  
Committee on the Judiciary  
United States House of Representatives**

# DISCOVERY: The Scope of the Problem, and Role of Rules

## I. Overview

Chairman Franks and Ranking Member Nadler. My name is Rebecca Love Kourlis. I am a former Colorado Supreme Court justice and trial judge, and currently the Executive Director of IAALS, the Institute for the Advancement of the American Legal System at the University of Denver. IAALS is a national, independent and non-partisan research center that develops research, convenes stakeholders and proposes solutions for problems associated with the civil justice system in the United States. IAALS has undertaken significant research on the costs, delays and gamesmanship that plague the civil litigation process, and it is from that research that this statement derives. Thank you for convening these hearings and for inviting my testimony.

## II. Summary

- In 1938, the Federal Rules of Civil Procedure were launched: the drafters' intent was to ensure that litigants could get into court easily at the front end, and then gain access to information from the other side that would allow them to go to trial without fear of being ambushed. The initial model for discovery was to provide litigants with a panoply of different tools that they could use to obtain information, with no thought that in every case every litigant would use every tool.
- The overarching commitment of the rules from the onset has been to a “just, speedy and inexpensive” system. However, recent national studies confirm that discovery has become a punishingly expensive process for both plaintiffs and defendants alike, and is frequently not proportional to the dispute at issue.
- The advent of the electronic age, with the profusion of electronic data, has created new challenges for the discovery model, and has ‘upped the ante’ significantly for parties to many lawsuits. It has highlighted and accelerated the need for change.
- There is a growing consensus that change is required. The system cannot continue to function as it has. Over 77 percent of attorneys (over 90 percent for general counsel) surveyed nationwide<sup>1</sup> agree that the system has become too expensive. Electronic discovery (“e-discovery”) costs are part of the problem, and they can dwarf even attorneys’ fees, particularly in a business case. Three out of four attorneys<sup>2</sup> believe that discovery costs, as a share of total litigation costs, have increased disproportionately due to the advent of e-discovery. Over 80 percent of respondents to nationwide surveys of attorneys and general counsel indicated that costs drive cases to settle for reasons unrelated to the merits.<sup>3</sup>

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<sup>1</sup> As part of the American College of Trial Lawyers (“ACTL”) survey, American Bar Association (“ABA”) Section of Litigation survey, National Employment Lawyers Association (“NELA”) survey and Civil Litigation Survey of Chief Legal Officers and General Counsel belonging to the Association of Corporate Counsel (“general counsel survey”).

<sup>2</sup> In the ACTL and ABA surveys.

<sup>3</sup> ACTL Fellows: 83 percent; ABA Litigation: 83 percent; general counsel: 81 percent.

- The costs of discovery are impacting access to the courts. Surveys of attorneys suggest that for an attorney to take a case, at least \$100,000 must be at issue—otherwise it is not cost-effective.<sup>4</sup> A small business owner with a defaulted payment on delivery of goods may simply be out of luck because the costs of litigation would leave him with a judgment that has cost more to obtain than the amount of the original debt. Again, this is a problem that negatively impacts both defendants and plaintiffs.
- There are differing opinions as to the solutions to these problems. Generally, the proposals fall into three categories: suggestions for rules changes (both pinpoint and systemic); suggestions for enhanced management of cases by judges to control costs and delay and keep the case on track; and suggestions for cooperation among attorneys to defuse the ‘Rambo-esque’ style of litigation that runs up both tempers and tabs. The ultimate answer is quite likely a combination of all three.
- It is IAALS’ view that rules changes must comprise part of the solution. The Federal Rules of Civil Procedure create the bounds within which judges manage cases and within which attorneys shape their decisions and actions. Rules play a fundamental role in controlling over-processing of cases and the current rules scheme is not living up to this role. Preservation is an example of the need for rules reform—but certainly not the only example.
- The responsibility for rules rests with the federal courts. Congress has authorized the federal judiciary to prescribe the rules of practice, procedure and evidence for the federal courts, subject to the ultimate legislative right of the Congress to reject, modify or defer any of the rules. The authority and procedures for promulgating rules are set forth in the Rules Enabling Act.<sup>5</sup> The federal judiciary undertakes that responsibility through the Judicial Conference of the United States, which oversees the operation of the general rules of practice and procedure.<sup>6</sup> As part of this continuing obligation, the Judicial Conference is authorized to recommend amendments and additions to the rules to promote:
  - simplicity in procedure,
  - fairness in administration,
  - the just determination of litigation, and
  - the elimination of unjustifiable expense and delay.
- The Judicial Conference acts through the Committee on Rules of Practice and Procedure, commonly referred to as the “Standing Committee.”<sup>7</sup> There are five advisory committees that make recommendations to the Standing Committee, one of which is the Civil Rules Advisory Committee. Standing Committee recommendations go to the Judicial Conference, which recommends changes to the Supreme Court, which in turn promulgates rules amendments with which it agrees, subject to a layover period to allow Congress to take whatever action it wishes.

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<sup>4</sup> This was the most commonly cited threshold in the ACTL, ABA and NELA surveys.

<sup>5</sup> 28 U.S.C. §§2071-2077 (2011).

<sup>6</sup> 28 U.S.C. §331 (2011).

<sup>7</sup> 28 U.S.C. §2073(b).

- The Standing Committee and the Civil Rules Advisory Committee have acknowledged the problems associated with the costs of discovery and are evaluating solutions. In fact, the 2010 Civil Litigation Conference at Duke University School of Law with its express focus on exploring the current costs of civil litigation, particularly discovery, and discussing possible solutions was an unprecedented step toward building the momentum necessary for systemic change. Subsequent conferences, such as the Mini-Conference on Preservation and Sanctions, and Civil Rules Advisory Committee meetings have continued to focus on possible rules changes designed to address those problems.
- One of the issues hampering the movement toward rules changes is disagreement about the scope and magnitude of the problem.<sup>8</sup> The Standing Committee and the Civil Rules Advisory Committee are collecting information and input that will enable them to make decisions about fundamental changes to the rules.<sup>9</sup> However, with respect to preservation—the specific focus of this hearing—significant empirical data already support the need for a preservation rule.<sup>10</sup>
- The Standing Committee is the appropriate forum for the discussion, both the immediate and the long-term discussion, but it is a discussion in which all of us have a legitimate and significant stake—as this hearing demonstrates.

### III. Background on the Federal Rules of Civil Procedure

At the turn of the twentieth century, American civil procedure was confusing at best, chaotic at worst. An attorney practicing in one state had to learn the procedural rules for state actions in equity, federal actions in equity, and federal and state actions at law.<sup>11</sup> In many states, procedure was further complicated by the formalistic requirements of the Field Code<sup>12</sup> under which parties were

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<sup>8</sup> The Federal Judicial Center undertook a closed-case study, which concluded that the costs of discovery were really not as much of a concern as predicted. However, the study did not separate out the cases in which discovery did not occur at all—either because of early resolution, or as a cost-avoidance measure. And, as Professor William Hubbard demonstrates, litigation costs “are highly skewed, with a long tail in which a small number of highly complex and burdensome cases account for a large share of the total costs.” *The Costs and Burdens of Civil Discovery: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 7 (2011) (statement of William H.J. Hubbard, Assistant Professor of Law, Univ. of Chi. Law Sch.).

<sup>9</sup> There are various pilot projects underway across the country that are testing possible solutions to some of the broader discovery and civil litigation problems. Data are being collected from those projects by the National Center for State Courts, the Federal Judicial Center and IAALS.

<sup>10</sup> See 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 12-14 (rev. Apr. 15, 2009), reprinted in 268 F.R.D. 407, 420-422 (rev. Apr. 15, 2009). The *Final Report* is attached at the end of this written statement. See also CIVIL JUSTICE REFORM GROUP, LAWYERS FOR CIVIL JUSTICE & U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, LITIGATION COST SURVEY OF MAJOR COMPANIES (2010) (submitted for presentation to the Committee on Rules of Practice and Procedure at the 2010 Conference on Civil Litigation); U.S. COURTS, DALLAS CONFERENCE ON PRESERVATION/SANCTIONS (9/9/11), <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/DallasMiniConfSept2011.aspx> (last visited Nov. 14, 2011).

<sup>11</sup> Thomas O. Main, *Reconsidering Procedural Conformity Statutes*, 35 W. ST. U. L. REV. 75, 89-94 (2007).

<sup>12</sup> Pleading of the facts constituting the cause of action, complicated joinder of parties and extremely limited discovery. See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in*

required, in order to plead a cause of action, to set out specific facts supporting each element of a cause of action at the outset. The rigidity of the pleading requirements prompted widespread concern that meritorious claims were being dismissed on the basis of procedural technicalities. These concerns and the complexity of the state and federal civil procedure scheme in general, led to increased demand for simple, uniform rules of federal civil procedure. The Rules Enabling Act of 1934 paved the way for this development by empowering the Supreme Court to promulgate general rules of procedure, thereby streamlining the rulemaking process.<sup>13</sup> An Advisory Committee appointed by the Supreme Court spent 18 months drafting the Federal Rules of Civil Procedure (“FRCP”) which went into effect on September 16, 1938.

The gist of the new procedural scheme was relatively straightforward: the plaintiff would initiate the case with a short and plain statement sufficient to put the defendant on notice of the nature of the claim and the parties would engage in discovery to collect information relevant to the claims before trial and thus avoid any surprises once trial began. The new rules, therefore, did away with the rigid pleading requirements of the Field Code by fashioning “a system in which initial access to the courthouse would be virtually guaranteed.”<sup>14</sup> Under the FRCP, the defendant would have opportunities to test the nature of the plaintiff’s claims before trial, either at the pleading stage (Rule 12) or at the summary judgment stage (Rule 56). If disputed issues of material fact remained, the case would proceed to trial for resolution.

The FRCP were by most measures a good fit for the civil litigation climate of the 1940s and 1950s. Transcontinental travel was a rare luxury and most cases were handled exclusively by local counsel. Discovery was necessarily limited because computers, copy machines and email were not yet a part of daily life. And major categories of substantive litigation, such as class actions, mass tort litigation and civil rights litigation had not yet appeared in any significant volume. Under these conditions, and especially in comparison to the complicated system that preceded it, the new procedural scheme was largely embraced by the legal community and during this period many states incorporated the FRCP, in whole or in part, into their own procedural codes.

#### IV. Modern Challenges

Many of the problems with the FRCP today have been tied to discovery and as early as 1968, studies were being undertaken to explore the relationship between discovery practices and cost increases in civil litigation.<sup>15</sup> The process exploded in the 1970s when the volume of available information and

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*Historical Perspective*, 135 U. PA. L. REV. 909, 939-40 (1987); see also Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 332, 328-33 (1988). Twenty-seven states copied the Field Code. Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 696 (1998).

<sup>13</sup> In 1911, Thomas Shelton, the Chairman of the ABA Committee on Uniform Judicial Procedure, and Henry Clayton, Chair of the House Judiciary Committee, made an initial attempt to pass the bill. Although unsuccessful, proponents (including then-Chief Justice William Howard Taft) launched a successful redrafting effort in 1923 and a version similar to this 1923 draft became the Rules Enabling Act of 1934. See Jay Tidmarsh, *Pound’s Century and Ours*, 81 NOTRE DAME L. REV. 513, 513 (2006); Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1045-73, 1097 (1982).

<sup>14</sup> Rebecca Love Kourlis et al., *Reinvigorating Pleadings*, 87 DENV. U. L. REV. 245, 245 (Winter 2010).

<sup>15</sup> See WILLIAM A. GLASER, *PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM* (1968) (presenting the findings of the Columbia Law School’s Project for Effective Justice).

the scope of permitted discovery both expanded simultaneously and, in at least some cases, this convergence led to skyrocketing costs, over-discovery and discovery abuse.

The first proposed solution was greater judicial case management<sup>16</sup> and amendments to the FRCP in the 1980s and early 1990s provided for increased judicial control over discovery practices.<sup>17</sup> Beginning in the early 1990s and through to 2000, amendments to the FRCP included limits on the methods and scope of discovery<sup>18</sup> and provided for the front-loaded exchange of information through initial disclosures.<sup>19</sup>

Technological developments of the past decade, while making our lives more efficient in many respects, have exacerbated the problems of cost and delay in the discovery process. The parabolic growth of electronically stored information (“ESI”) generated by e-mails, text messages, instant messages, voice mails, websites, call logs, word processing documents and digital photos has exponentially increased the amount of information that must be unearthed in the discovery process during the course of a lawsuit. The FRCP were amended in 2006 to respond to some of the issues generated by ESI but problems remain.

The history of rules amendments since 1970, therefore, is largely a history of trying to put the discovery genie back in the bottle, first by increasing judicial control over case management, then by limiting the methods of available discovery, then by mandating disclosures at the outset of the case and most recently, by addressing issues specific to the discovery of ESI. In fact, the discovery rules have been amended more frequently than any others,<sup>20</sup> yet widespread concerns and complaints persist.

## V. The Data

These concerns have come to a head in recent years and rule makers, practitioners and academics alike have turned their attention to a comprehensive assessment of the state of the civil justice system, involving significant empirical research to pinpoint problems and examine solutions. In May 2010, at the request of the Standing Committee, the Civil Rules Advisory Committee held a two-day conference at the Duke University School of Law “designed as a disciplined identification of litigation problems and exploration of the most promising opportunities to improve federal civil

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<sup>16</sup> Calls for increased judicial management began in earnest with a series of Federal Judicial Center studies in the late 1970s that found that the use of court management techniques could help keep discovery under control and decrease time to resolution for a case. STEVEN FLANDERS ET AL., *CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS* (1977); PAUL R. CONNOLLY ET AL., *JUDICIAL CONTROLS AND THE CIVIL LITIGATION PROCESS: DISCOVERY* (1978).

<sup>17</sup> FED. R. CIV. P. 26(f) cmt. background (1980); FED. R. CIV. P. 16 cmt. background (1983); FED. R. CIV. P. 16 cmt. background (1993).

<sup>18</sup> FED. R. CIV. P. 30 cmt. background (1993); FED. R. CIV. P. 33 cmt. background (1993); FED. R. CIV. P. 26 cmt. background (2000).

<sup>19</sup> In 1993, provisions requiring parties to disclose certain information relevant to the case without waiting for a discovery request were introduced in optional format. These provisions were made mandatory in 2000. FED. R. CIV. P. 26 cmt. background (2000).

<sup>20</sup> Report from the Judicial Conference Advisory Committee on Civil Rules and the Committee on Rules of Practice and Procedure to the Chief Justice of the United States on the 2010 Conference on Civil Litigation 1 (2010) [hereinafter Report to the Chief Justice on the 2010 Conference].

litigation.”<sup>21</sup> Submissions to the 2010 Conference on Civil Litigation (also referred to as the Duke Conference) included numerous white papers issued by national organizations, groups and prominent lawyers and an unprecedented amount of empirical studies and data. For example, in 2008, the Joint Project of the American College of Trial Lawyers (“ACTL”) Task Force on Discovery<sup>22</sup> and IAALS surveyed attorney Fellows of the ACTL. To expand the pool of views and gather comparative data, IAALS supported the Federal Judicial Center’s (“FJC”) administration of similar surveys of members of the American Bar Association (“ABA”) Section of Litigation and members of the National Employment Lawyers Association (“NELA”).<sup>23</sup> IAALS partnered with Northwestern University School of Law’s Searle Center on Law, Regulation, and Economic Growth (“Searle Center”) to gain the judicial perspective by administering a survey to state and federal judges, and IAALS surveyed general counsel to capture the company/litigant experience. The FJC conducted a closed-case study of federal civil cases that terminated in the last quarter of 2008 and the Searle Center administered a survey of Fortune 200 companies regarding litigation costs.

This list is not exhaustive and indeed has expanded. The Duke Conference highlighted priority areas, among which were preservation and spoliation of electronically stored information.<sup>24</sup> In pursuit of further discussion on preservation and sanctions, the Discovery Subcommittee of the Civil Rules Advisory Committee held a mini-conference on preservation and sanctions (also referred to as the Dallas Conference). In advance of the mini-conference, the FJC studied motions for sanctions based upon spoliation of evidence in civil cases and RAND Corporation’s Institute for Civil Justice reported preliminary results of research into costs associated with pretrial discovery of ESI. Numerous comments were submitted, many of which suggested proposed rules. Empirical work continues, building on the studies prepared for the Duke and Dallas Conferences.

From the empirical studies and data already developed, broad themes have emerged, many of which are troubling. According to an IAALS analysis, together, the ACTL Fellows, ABA Section of Litigation, NELA member and state and trial judge surveys “suggest a plausible theory: cost inefficiencies in the civil justice process reduce court access, delay contributes to unnecessary cost, and discovery procedure is a key factor with respect to both cost and delay.”<sup>25</sup>

With respect to cost, the ACTL, ABA and NELA surveys asked respondents to evaluate whether “[l]itigation is too expensive” (i.e., relative to what it ought to cost) and more than three out of four attorneys in every group expressed agreement with this statement.<sup>26</sup> Ninety-seven percent of general counsel surveyed agreed that the system is too expensive, with 78 percent of respondents expressing strong agreement.<sup>27</sup> Agreement with this statement tended to become stronger as the geographic scope of the respondent company increased, from 92 percent for local companies to 98 percent for multinational companies.<sup>28</sup> Over 80 percent of respondents to both the ABA and NELA surveys

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<sup>21</sup> *Id.*

<sup>22</sup> Now the Task Force on Discovery and Civil Justice.

<sup>23</sup> Report to the Chief Justice on the 2010 Conference, *supra* note 20, at 2.

<sup>24</sup> *Id.* at 12.

<sup>25</sup> CORINA GERETY, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, EXCESS & ACCESS: CONSENSUS ON THE AMERICAN CIVIL JUSTICE LANDSCAPE 2 (2011).

<sup>26</sup> ACTL Fellows: 85 percent; ABA Litigation: 81 percent; NELA Members: 77 percent.

<sup>27</sup> INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, CIVIL LITIGATION SURVEY OF CHIEF LEGAL OFFICERS AND GENERAL COUNSEL BELONGING TO THE ASSOCIATION OF CORPORATE COUNSEL 17-18 (2010).

<sup>28</sup> *Id.* at 18.

indicated that litigation costs are not proportional to the value of a small case (i.e., small amount in dispute). The ACTL and general counsel surveys did not distinguish between small and large cases, but in both surveys majorities<sup>29</sup> indicated agreement that litigation costs are not proportional to case value. A majority of respondents to the general counsel survey reported that the cost of pretrial litigation for a typical company has increased, as has the total yearly cost of pretrial litigation.<sup>30</sup>

The discovery process plays a key role in generating cost and delay. The FRCP's structure does not always promote early identification of issues, which often leads to a lack of focus in discovery. Further, the discovery rules provide for virtually unlimited discovery, unless and until the court says otherwise, which occurs far less frequently than one would hope. At least 70 percent of respondents to the ACTL, ABA and NELA surveys expressed agreement with the statement that “[d]iscovery is too expensive,”<sup>31</sup> demonstrating a widespread belief that discovery is more costly than it needs to be. Respondents to the FJC closed-case study were asked to rate how “the costs of discovery to your side in the named case compare to your client’s stakes.”<sup>32</sup> A majority of respondents indicated costs were “just the right amount” in relation to the stakes and in a sizeable minority of cases (23 percent for plaintiffs and 27 percent for defendants) attorney respondents deemed discovery costs too high in relation to the stakes.<sup>33</sup> The FJC study concluded that litigation “costs appear to be proportionate to the monetary stakes” for most cases within the federal system<sup>34</sup>—to which we should be asking whether success in most cases is good enough.

With respect to delay, the ACTL, ABA and NELA surveys asked respondents to identify one “primary cause of delay in the litigation process” and in all three surveys, attorneys identified the “time required to complete discovery” as the primary cause, over any other single cause.<sup>35</sup> Respondents to the IAALS/Searle Center survey of state and federal trial court judges asked a slightly different question, but with a generally consistent result. Judges were permitted to select multiple causes of “significant” delay, and requested to rank the causes selected on a scale from one (most significant) to five (least significant). Over 80 percent of trial judges identified the time required to complete discovery as a significant cause of delay<sup>36</sup> and this cause ranked the highest in significance.<sup>37</sup>

When asked to provide “the percentage of total expenses and time spent ... in connection with discovery (including discovery motions and other discovery related disputes)” in “typical cases that do not go to trial,” the aggregate responses in the ACTL, ABA and NELA surveys were nearly identical. Half of respondents reported that discovery consumes at least 70 percent of expenditures in cases that are not tried; on average, respondents reported that two-thirds of expenditures are

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<sup>29</sup> Sixty-nine percent and 88 percent; respectively.

<sup>30</sup> IAALS, CIVIL LITIGATION SURVEY OF CHIEF LEGAL OFFICERS AND GENERAL COUNSEL, *supra* note 27, at 16.

<sup>31</sup> ACTL Fellows: 87 percent; ABA Litigation: 82 percent; NELA Members: 70 percent.

<sup>32</sup> EMERY G. LEE III AND THOMAS EL WILLGING, FEDERAL JUDICIAL CENTER, NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 97 (Oct. 2009). Certainly, this rating will be affected by respondents’ subjective judgments, views, beliefs, and attitudes.

<sup>33</sup> *Id.* 27-28, 97.

<sup>34</sup> Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 768 (2010).

<sup>35</sup> ACTL Fellows: 55 percent; ABA Litigation: 48 percent; NELA Members: 35 percent.

<sup>36</sup> State Judges: 82 percent; Federal Judges: 84 percent.

<sup>37</sup> State Judges: 1.8 average rank; Federal Judges: 1.7 average rank.

discovery related.<sup>38</sup> The ABA and NELA surveys went further and requested an assessment of total time and expenses that *should* be incurred in connection with discovery in such cases. Responses were again similar, and identified an appropriate level of discovery expenditures lower than the current level reported.<sup>39</sup> The consistency among these groups shows that attorneys believe there is room for improvement with respect to the time and cost required to complete discovery.

With respect to e-discovery, Fulbright & Jaworski L.L.P. reports that this issue emerged in 2005 as “the most troublesome new litigation challenge,” cited by approximately one of every five respondents to the *Litigation Trends Survey*.<sup>40</sup> Respondents to the general counsel survey reporting an increase in pretrial litigation costs for the typical case most commonly cited discovery in general—e-discovery in particular—as the basis for this trend.<sup>41</sup> In Fulbright & Jaworski L.L.P.’s 2007 *Litigation Trends Survey*, more than 60 percent of U.S. and U.K. companies reported little change following the December 2006 e-discovery amendments; in fact, 27 percent of respondents thought the changes had “made the situation more difficult to deal with in federal litigation” and this sentiment was even stronger in mid-sized (31 percent) and larger (35 percent) companies.<sup>42</sup> In 2010, when asked to evaluate whether “the U.S. Rules of Civil Procedure Should Be Modified In Some Way to Limit Electronic Discovery in Civil Actions,” 79 percent of all U.S. company respondents to the *Litigation Trends Survey* answered “yes.”<sup>43</sup> With respect to sanctions, a majority of respondents to the general counsel survey disagreed that “motions for sanctions are a useful tool in responding to e-discovery abuse” although a majority did agree that “the threat of sanctions is a significant consideration in my company’s e-discovery decisions.”<sup>44</sup>

The cumulative effects of increasing cost and delay, and disproportionate discovery processes resulting in both, have had devastating consequences on the public’s ability to access the civil justice system, and further threaten to undermine the public’s confidence in the system. Attorney respondents to the ACTL, ABA and NELA surveys indicated that the cost-benefit analysis affects whether some parties can commence and maintain a civil action. Over 80 percent of attorneys in every group answered “yes” to the following question: “In general, does your firm turn away cases when it is not cost-effective to handle them?”<sup>45</sup> In all three surveys, \$100,000 was the most commonly cited monetary threshold for not taking a case.

Survey results also suggest that some cases are settling primarily because of cost concerns. More than 80 percent of respondents to the ACTL, ABA and general counsel surveys and a majority of respondents to the NELA survey indicated that costs drive cases to settle for reasons unrelated to the merits.<sup>46</sup> These feelings were strongly held by those representing primarily defendants, although majorities of those representing primarily plaintiffs or representing both equally also indicated a direct causation between cost and settlement. In the FJC survey, 58 percent of defense lawyers and

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<sup>38</sup> ACTL Fellows: 70 percent median, 67 percent average; ABA Litigation: 70 percent median, 66 percent average; NELA Members: 70 percent median, 66 percent average.

<sup>39</sup> ABA Litigation: 50 percent median, 50 percent average; NELA Members: 50 percent median; 53 percent average.

<sup>40</sup> FULBRIGHT & JAWORSKI L.L.P., E-DISCOVERY FINDINGS FROM THE 2005-2010 FULBRIGHT & JAWORSKI L.L.P. LITIGATION TRENDS SURVEYS 3 (2010).

<sup>41</sup> IAALS, CIVIL LITIGATION SURVEY OF CHIEF LEGAL OFFICERS AND GENERAL COUNSEL, *supra* note 27, at 16.

<sup>42</sup> Notably, U.K. companies were more positive about the changes than their U.S. counterparts. FULBRIGHT & JAWORSKI, *supra* note 40, at 7, 78-79, 117.

<sup>43</sup> *Id.* at 213.

<sup>44</sup> IAALS, CIVIL LITIGATION SURVEY OF CHIEF LEGAL OFFICERS AND GENERAL COUNSEL, *supra* note 27, at 34.

<sup>45</sup> ACTL Fellows: 81 percent; ABA Litigation: 82 percent; NELA Members: 88 percent.

<sup>46</sup> ACTL Fellows: 83 percent; ABA Litigation: 83 percent; general counsel: 81 percent. NELA Members: 59 percent.

those representing both parties equally agreed that “[t]he cost of litigating in federal court, including the cost of discovery, has caused at least one of my clients to settle a case that they would not have settled but for that cost.”<sup>47</sup> Those representing primarily plaintiffs were split, with 39 percent agreeing and 38 percent disagreeing.<sup>48</sup>

## VI. Modern Solutions

In short, the various surveys suggest that the FRCP are not meeting the promise of Rule One: “These rules ... should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.” Efforts to bring the rules—both the FRCP and state analogs—back in line with Rule One’s goals are increasing. In 2009, the *Final Report on the Joint Project of the ACTL Task Force on Discovery and IAALS* set forth 29 Proposed Principles that the two organizations suggested “will ultimately result in a civil justice system that better serves the needs of its users.”<sup>49</sup> Since their release, these Principles have been the subject of extensive discussions on rules-based changes and select Principles have been implemented in various forms in state courts across the nation where rules changes are being evaluated and measured.

The importance of rules and rules-based solutions cannot be understated. In a perfect world, judges, attorneys and the rules would all interact in a way that would ensure the maximum level of cooperation, fairness, efficiency and cost-effectiveness: the rules would be simple to understand, cost-effective and easy to follow, attorneys would be cooperative, professional and consistently follow the rules, and judges would consistently apply and enforce the rules in a way that ensures the just, speedy and inexpensive determination of the dispute. However, the civil justice system is not operating in such a manner and the rules play a primary role in both creating the problems and defining the solutions.

Too many attorneys believe they should—or must—take advantage of the full range of procedures available to them under the rules, and the FRCP do little to dissuade them from this view. The problem is especially acute with respect to the discovery rules. In fact, respondents to the ACTL, ABA and NELEA surveys, and IAALS/Searle Center survey of state and federal trial court judges, generally hold attorneys more responsible for discovery inefficiencies than the litigants themselves. Overall, not more than one in ten respondents agreed with the statement that “[litigants], not attorneys, drive excessive discovery.”<sup>50</sup> In too many cases, discovery has become an end in itself and the process does little, if anything, to promote the just, speedy and inexpensive determination of actions.

## VII. Conclusion

Active and effective case management by judges and attorney professionalism and civility play a large role in this process, to be sure; however, judges cannot be forced to practice active case

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<sup>47</sup> LEE AND WILLGING, NATIONAL, CASE-BASED CIVIL RULES SURVEY, *supra* note 32, at 72-73.

<sup>48</sup> *Id.*

<sup>49</sup> FINAL REPORT, *supra* note 10, at 1.

<sup>50</sup> ACTL Fellows: 11 percent; ABA Litigation: 11 percent; NELEA Members: 6 percent; State Judges: 7 percent; Federal Judges: 7 percent.

management and attorneys cannot be forced to cooperate and/or act in a civil manner. At the end of the day, it is the rules that provide the structure within which judges and attorneys operate and it is the rules that create the expectations to which the players in the civil justice system are held. In order to avoid the expenditure of unnecessary time and money, either the rules—particularly those relating to discovery and providing judicial discretion to limit discovery—need to be much more strictly enforced or the rules need to be rewritten to achieve the same result. After decades of calls for increased case management, numerous rounds of rules amendments authorizing judges to play a greater role in the discovery process and arguably little progress to-date in reigning in discovery costs, relying solely on case management or cooperation to bring the process back in line with the needs of the users no longer seems a viable option.

The goal of rules in general is predictability and consistency. The specific goal of the FRCP is a just, speedy and inexpensive system. The FRCP neither create predictability and consistency nor serve justice, efficiency and cost-effectiveness. Accordingly, they must be changed: both with respect to e-discovery and preservation, and also more broadly—to serve all litigants and potential litigants.



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UNIVERSITY OF DENVER

# 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

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The Institute for the Advancement of the American Legal System (IAALS) at the University of Denver was the brainchild of the University's Chancellor Emeritus Daniel Ritchie, Denver attorney and Bar leader John Moye and United States District Court Judge Richard Matsch. IAALS Executive Director Rebecca Love Kourlis is also a founding member and previously served for almost twenty years as a Colorado Supreme Court Justice and trial court judge.

IAALS staff is comprised of an experienced and dedicated group of men and women who have achieved recognition in their former roles as judges, lawyers, academics and journalists. It is a national non-partisan organization dedicated to improving the process and culture of the civil justice system. IAALS provides principled leadership, conducts comprehensive and objective research, and develops innovative and practical solutions. IAALS' mission is to participate in the achievement of a transparent, fair and cost-effective civil justice system that is accountable to and trusted by those it serves.

In the civil justice reform area, IAALS is studying the relationship between existing Rules of Civil Procedure and cost and delay in the civil justice system. To this end, it has examined alternative approaches in place in other countries and even in the United States in certain jurisdictions.

The Institute benefits from gifts donated to the University for the use of IAALS. None of those gifts have conditions or requirements, other than accounting and fiduciary responsibility.

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**JOINT PROJECT  
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**FINAL REPORT<sup>1</sup>**

The American College of Trial Lawyers Task Force on Discovery (“Task Force”) and the Institute for the Advancement of the American Legal System (“IAALS”) at the University of Denver have, beginning in mid-2007, engaged in a joint project to examine the role of discovery in perceived problems in the United States civil justice system and to make recommendations for reform, if appropriate. The project was conceived as an outgrowth of increasing concerns that problems in the civil justice system, especially those relating to discovery, have resulted in unacceptable delays and prohibitive expense. Although originally intended to focus primarily on discovery, the mandate of the project was broadened to examine other parts of the civil justice system that relate to and have a potential impact on discovery. The goal of the project is to provide Proposed Principles that will ultimately result in a civil justice system that better serves the needs of its users.

**THE PROCESS**

The participants have held seven two-day meetings and participated in additional lengthy conference calls over the past 18 months. They began by studying the history of the Federal Rules of Civil Procedure, past attempts at reforms, prior cost studies, academic literature commenting on and proposing changes to the rules and media coverage about the cost of litigation.

The first goal of the project was to determine whether a problem really exists and, if so, to determine its dimensions. As a starting point, therefore, the Task Force and IAALS worked with an outside consultant to design and conduct a survey of the Fellows of the American College of Trial Lawyers (“ACTL”) to create a database from which to work. IAALS contracted with Mathematica Policy Research, Inc. to manage the survey and bore its full cost. Mathematica then compiled the results of the survey and issued an 87-page report.

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<sup>1</sup> Accepted and approved by the Board of Regents of the American College of Trial Lawyers on February 25, 2009.

The survey was administered over a four-week period beginning April 23, 2008. It was sent to the 3,812 Fellows of the ACTL, excluding judicial, emeritus and Canadian Fellows, who could be reached electronically. Of those, 1,494 responded. Responses of 112 not currently engaged in civil litigation were not considered. The response rate was a remarkably high 42 percent.

On average, the respondents had practiced law for 38 years. Twenty-four percent represent plaintiffs exclusively, 31 percent represent defendants exclusively and 44 percent represent both, but primarily defendants. About 40 percent of the respondents litigate complex commercial disputes, but fewer than 20 percent litigate primarily in federal court (although nearly a third split their time equally between federal and state courts). Although there were some exceptions, such as with respect to summary judgment, for the most part there was no substantial difference between the responses of those who represent primarily plaintiffs and those who represent primarily defendants, at least with respect to differences relating to the action recommended in this report.

## **SURVEY RESULTS**

Three major themes emerged from the Survey:

1. Although the civil justice system is not broken, it is in serious need of repair. In many jurisdictions, today's system takes too long and costs too much. Some deserving cases are not brought because the cost of pursuing them fails a rational cost-benefit test while some other cases of questionable merit and smaller cases are settled rather than tried because it costs too much to litigate them.
2. The existing rules structure does not always lead to early identification of the contested issues to be litigated, which often leads to a lack of focus in discovery. As a result, discovery can cost far too much and can become an end in itself. As one respondent noted: "The discovery rules in particular are impractical in that they promote full discovery as a value above almost everything else." Electronic discovery, in particular, needs a serious overhaul. It was described by one respondent as a "morass." Another respondent stated: "The new rules are a nightmare. The bigger the case the more the abuse and the bigger the nightmare."
3. Judges should have a more active role at the beginning of a case in designing the scope of discovery and the direction and timing of the case all the way to trial. Where abuses occur, judges are perceived not to enforce the rules effectively. According to one Fellow, "Judges need to actively manage each case from the outset to contain costs; nothing else will work."

In short, the survey revealed widely-held opinions that there are serious problems in the civil justice system generally. Judges increasingly must serve as referees in acrimonious discovery disputes, rather than deciding cases on their merits. From the outside, the system is often perceived as cumbersome and inefficient. The emergence of various forms of alternative dispute resolution emphasizes the point.

On September 8, 2008, the Task Force and IAALS published a joint Interim Report, describing the results of the survey in much greater detail. It can be found on the websites of both the American College of Trial Lawyers, [www.actl.com](http://www.actl.com), and IAALS, [www.du.edu/legalinstitute](http://www.du.edu/legalinstitute). That report has since attracted wide attention in the media, the bar and the judiciary.

The results of the survey reflect the fact that circumstances under which civil litigation is conducted have changed dramatically over the past seventy years since the currently prevailing civil procedures were adopted.

The objective of the civil justice system is described in Rule 1 of the Federal Rules of Civil Procedure as “the just, speedy, and inexpensive determination of every action and proceeding.” Too often that objective is now not being met. *Trials, especially jury trials, are vital to fostering the respect of the public in the civil justice system. Trials do not represent a failure of the system. They are the cornerstone of the civil justice system.* Unfortunately, because of expense and delay, both civil bench trials and civil jury trials are disappearing.

### **PROPOSED PRINCIPLES**

Recognizing the need for serious consideration of change in light of the survey results, the Task Force and IAALS continued to study ways of addressing the problems they highlighted. They have had the benefit of participants who practice under various civil procedure systems in the United States and Canada, including both notice pleading and code pleading systems. They have examined in detail civil justice systems in Canada, Australia, New Zealand and Europe, as well as arbitration procedures and criminal procedure and have compared them to our existing civil justice system.<sup>2</sup>

After careful study and many days of deliberation, the Task Force and IAALS have agreed on a proposed set of Principles that would shape solutions to the problems they have identified. The Principles are being released for the purpose of promoting nationwide discussion. These Principles were developed to work in tandem with one another and should be evaluated in their entirety.

### **RECOMMENDED ACTION**

The Task Force and IAALS unanimously recommend that the Proposed Principles set forth in this report, which can be applied to both state and federal civil justice systems, be made the subject of public comment, discussion, debate and refinement. That process should include all the stakeholders with an interest in a viable civil justice system, including state and federal judiciaries, the academy, practitioners, bar organizations, clients and the public at large.

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<sup>2</sup> IAALS’s review of civil procedural reforms in certain foreign jurisdictions and States in the United States is attached as Appendix A.

Some of the Principles may be controversial in some respects. We encourage lively and informed debate among interested parties to achieve the common goal of a fair and, we hope, more efficient, system of justice. We are optimistic that the ensuing dialogue will lead to their future implementation by those responsible for drafting and revising rules of civil practice and procedure in jurisdictions throughout the United States.

## PRINCIPLES

*The Purpose of Procedural Rules: Procedural rules should be designed to achieve the just resolution of every civil action. The concept of just resolution should include procedures proportionate to the nature, scope and magnitude of the case that will produce a reasonably prompt, reasonably efficient, reasonably affordable resolution.*

### 1. GENERAL

- **The “one size fits all” approach of the current federal and most state rules is useful in many cases but rulemakers should have the flexibility to create different sets of rules for certain types of cases so that they can be resolved more expeditiously and efficiently.**

When the Federal Rules of Civil Procedure became effective in 1938 they replaced the common law forms of actions at law and the differing sets of procedures for those actions required by the Conformity Act of 1872 (each district court used the procedures of the state in which it was located) as well as the Equity Rules of 1912, which had governed suits in equity in all of the district courts. The intent was to adopt a single, uniform set of rules that would apply to all cases. Uniform rules made it possible for lawyers to appear in any federal jurisdiction knowing that the same rules would apply in each.

It is time that the rules generally reflect the reality of practice. This Principle supports a single system of civil procedure rules designed for the majority of cases while recognizing that this “one size fits all” approach is not the most effective approach for all types of cases. Over the years, courts have realized this and have informally developed special rules and procedures for certain types of cases. Examples include specific procedures to process patent and medical malpractice cases. Congress also perceived the need for different rules by enacting the Private Securities Litigation Reform Act for securities cases.<sup>3</sup>

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<sup>3</sup> Another example is specific rules that have been developed to process cases of a lower dollar amount, for example Rule 16.1 in Colorado which requires the setting of an early trial date, early, full and detailed disclosure, and presumptively prohibits depositions, interrogatories, document requests or requests for admission in civil actions where the amount in controversy is \$100,000 or less.

The concern that the development of different rules will preclude lawyers from practicing across districts is no longer a reality of present-day practice, as advances in technology allow for almost instant access to local rules and procedures.

We are not suggesting a return to the chaotic and overly-complicated pre-1938 litigation environment, nor are we suggesting differential treatment across districts. This Principle is based on a recognition that the rules should reflect the reality that there are case types that may require different treatment and provide for exceptions where appropriate. Specialized rules should be the exception but they should be permitted.

## 2. PLEADINGS

*The Purpose of Pleadings: Pleadings should notify the opposing party and the court of the factual and legal basis of the pleader's claims or defenses in order to define the issues of fact and law to be adjudicated. They should give the opposing party and the court sufficient information to determine whether the claim or defense is sufficient in law to merit continued litigation. Pleadings should set practical limits on the scope of discovery and trial and should give the court sufficient information to control and supervise the progress of the case to trial or other resolution.*

- **Notice pleading should be replaced by fact-based pleading. Pleadings should set forth with particularity all of the material facts that are known to the pleading party to establish the pleading party's claims or affirmative defenses.**

One of the principal reforms made in the Federal Rules of Civil Procedure was to permit notice pleading. For many years after the federal rules were adopted, there were efforts to require specific, fact-based pleading in certain cases. Some of those efforts were led by certain federal judges, who attempted to make those changes by local rules; however, the Supreme Court resolved the issue in 1957 by holding, in *Conley v. Gibson*, 355 U.S. 45 (1957), that a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. States that adopted the federal-type rules have generally followed suit.

One of the primary criticisms of notice pleading is that it leads to more discovery than is necessary to identify and prepare for a valid legal dispute. In our survey, 61 percent of the respondents said that notice pleading led to more discovery in order to narrow the claims and 64 percent said that fact pleading can narrow the scope of discovery. Forty-eight percent of our respondents said that frivolous claims and defenses are more prevalent than they were five years ago.

Some pleading rules make an exception for pleading fraud and mistake, as to which the pleading party must state "with particularity" the circumstances

constituting fraud or mistake. We believe that a rule with similar specificity requirements should be applied to all cases and throughout all pleadings.

This Principle replaces notice pleading with fact-based pleading. We would require the parties to plead, at least in complaints, counterclaims and affirmative defenses, all material facts that are known to the pleading party to support the elements of a claim for relief or an affirmative defense.

Fact-based pleading must be accompanied by rules for responsive pleading that require a party defending a claim to admit that which should be admitted. Although it is not always possible to understand complex fact situations in detail at an early stage, an answer that generally denies all facts in the complaint simply puts everything at issue and does nothing to identify and eliminate uncontested matters from further litigation. Discovery cannot be framed to address the facts in controversy if the system of pleading fails to identify them.<sup>4</sup>

- **A new summary procedure should be developed by which parties can submit applications for determination of enumerated matters (such as rights that are dependent on the interpretation of a contract) on pleadings and affidavits or other evidentiary materials without triggering an automatic right to discovery or trial or any of the other provisions of the current procedural rules.**

The Task Force recommends that consideration be given the development of alternate procedures for resolution of some disputes where full discovery and a full trial are not required. Contract interpretations, declaratory orders and statutory remedies are examples of matters that can be dealt with efficiently in such a proceeding. In a number of Canadian Provinces, the use of a similar procedure, called an Application, serves this purpose. In Canada, the Notice of Application must set out the precise grounds of relief, the grounds to be argued including reference to rules and statutes and the documentary evidence to be relied on. The contextual facts and documents are contained in an affidavit. The respondents serve and file their responsive pleadings. Depositions may be taken but are limited to what is contained in the affidavits. At or before the oral hearing, the presiding judge can direct a trial of all or part of the application on terms that he or she may direct if satisfied that live testimony is necessary. The time from commencement to completion is most often substantially shorter and less costly than a normal action.

Such an action is similar to but sufficiently different from a declaratory judgment action that it deserves consideration. It is similar to state statutes such as Delaware Corporation Law § 220 (permitting a stockholder to sue to examine the books and records of a corporation). The purpose, obviously, is to streamline the

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<sup>4</sup> Some members of the Task Force believe that the fact-based pleading requirement should be extended to denials that are contained in answers but a majority of the Task Force disagrees.

civil justice system for disputes that do not require the full panoply of procedural devices now found in most systems.

### 3. DISCOVERY

*The Purpose of Discovery: Discovery should enable a party to procure in admissible form through the most efficient, nonredundant, cost-effective method reasonably available, evidence directly relevant to the claims and defenses asserted in the pleadings. Discovery should not be an end in itself; it should be merely a means of facilitating a just, efficient and inexpensive resolution of disputes.*

- **Proportionality should be the most important principle applied to all discovery.**

Discovery is not the purpose of litigation. It is merely a means to an end. If discovery does not promote the just, speedy and inexpensive determination of actions, then it is not fulfilling its purpose.

Unfortunately, many lawyers believe that they should—or must—take advantage of the full range of discovery options offered by the rules. They believe that zealous advocacy (or fear of malpractice claims) demands no less and the current rules certainly do not dissuade them from that view. Such a view, however, is at best a symptom of the problems caused by the current discovery rules and at worst a cause of the problems we face. In either case, we must eliminate that view. It is crippling our civil justice system.

The parties and counsel should attempt in good faith to agree on proportional discovery at the outset of a case but failing agreement, courts should become involved. There simply is no justification for the parties to spend more on discovery than a case requires. Courts should be encouraged, with the help of the parties, to specify what forms of discovery will be permitted in a particular case. Courts should be encouraged to stage discovery to insure that discovery related to potentially dispositive issues is taken first so that those issues can be isolated and timely adjudicated.

- **Shortly after the commencement of litigation, each party should produce all reasonably available nonprivileged, non-work product documents and things that may be used to support that party's claims, counterclaims or defenses.**

Only 34 percent of the respondents said that the current initial disclosure rules reduce discovery and only 28 percent said they save the clients money. The initial-disclosure rules need to be revised.

This Principle is similar to Rule 26(a)(1)(ii) of the Federal Rules of Civil Procedure's requirement for initial disclosures but it is slightly broader. Whereas the current Rule permits description of documents by category and location, we

would require production. This Principle is intended to achieve a more meaningful and effective exchange of documents in the early stages of the litigation.

The rationale for this Principle is simple: each party should produce, without delay and without a formal request, documents that are readily available and may be used to support that party's claims, counterclaims or defenses. This Principle, together with fact-based pleadings, ought to facilitate narrowing of the issues and, where appropriate, settlement.

To those charged with applying such a Principle, we suggest that the plaintiff could be required to produce such documents very shortly after the complaint is served and that the defendant, who, unlike the plaintiff, may not be presumed to have prepared for the litigation beforehand, be required to produce such documents within a somewhat longer period of time, say 30 days after the answer is served.

There should be an ongoing duty to supplement this disclosure. A sanction for failure to comply, absent cause or excusable neglect, could be an order precluding use of such evidence at trial.

We also urge specialty bars to develop specific disclosure rules for certain types of cases that could supplement or even replace this Principle.

- **Discovery in general and document discovery in particular should be limited to documents or information that would enable a party to prove or disprove a claim or defense or enable a party to impeach a witness.**

The current rules permit discovery of all documents and information relevant to a claim or defense of any party. As a result, it is not uncommon to see discovery requests that begin with the words "all documents relating or referring to . . .". Such requests are far too broad and are subject to abuse. They should not be permitted.

Especially when combined with notice pleading, discovery is very expensive and time consuming and easily permits substantial abuse. We recommend changing the scope of discovery so as to allow only such limited discovery as will enable a party to prove or disprove a claim or defense or to impeach a witness.

Until 1946, document discovery in the federal system was limited to things "which constitute or contain evidence material to any matter involved in the action" and then only upon motion showing good cause. The scope of discovery was changed for depositions in 1946 to the "subject matter of the action". It was not until 1970 that the requirement for a motion showing good cause was eliminated for document discovery. According to the Advisory Committee Notes, the "good cause" requirement was eliminated "because it has furnished an

uncertain and erratic protection to the parties from whom production [of documents] is sought . . .” The change also was intended to allow the system to operate extrajudicially but the result was to afford virtually no protection at all to those parties. Ironically, the change occurred just as copying machines were becoming widely used and just before the advent of the personal computer.

The “extrajudicial” system has proved to be flawed. Discovery has become broad to the point of being limitless. This Principle would require courts and parties to focus on what is important to fair, expeditious and inexpensive resolution of civil litigation.

- **There should be early disclosure of prospective trial witnesses.**

Identification of prospective witnesses should come early enough to be useful within the designated time limits. We do not take a position on when this disclosure should be made but it should certainly come before discovery is closed and it should be subject to the continuing duty to update. The current federal rule that requires the identification of persons who have information that may be used at trial (Rule 26(a)(1)(A)(i)) probably comes too early in most cases and often leads to responses that are useless.

- **After the initial disclosures are made, only limited additional discovery should be permitted. Once that limited discovery is completed, no more should be allowed absent agreement or a court order, which should be made only upon a showing of good cause and proportionality.**

This is a radical proposal. It is our most significant proposal. It challenges the current practice of broad, open-ended and ever-expanding discovery that was a hallmark of the federal rules as adopted in 1938 and that has become an integral part of our civil justice system. This Principle changes the default. Up to now, the default is that each party may take virtually unlimited discovery unless a court says otherwise. We would reverse the default.

Our discovery system is broken. Fewer than half of the respondents thought that our discovery system works well and 71 percent thought that discovery is used as a tool to force settlement.

The history of discovery-reform efforts further demonstrates the need for radical change. Serious reform efforts began under the mandate of the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, commonly referred to as the Pound Conference. Acting under the conference’s mandate, the American Bar Association’s Section of Litigation created a Special Committee for the Study of Discovery Abuse, which published a report in 1977 recommending numerous specific changes in the rules to correct the abuse identified by the Pound Conference. The recommendations, which included narrowing the subject-matter-of-the-action scope, resulted in substantial

controversy and extensive consideration by the Advisory Committee on Civil Rules and numerous professional groups. In a long process lasting about a quarter of a century, many of the recommendations were eventually adopted in one form or another.

There is substantial opinion that all of those efforts have accomplished little or nothing. Our survey included a request for expressions of agreement or disagreement with a statement that the cumulative effect of the 1976-2007 changes in the discovery rules significantly reduced discovery abuse. Only about one third of the respondents agreed; 44 percent disagreed and an additional 12 percent strongly disagreed.

Efforts to limit discovery must begin with definition of the type of discovery that is permissible, but it is difficult, if not impossible, to write that definition in a way that will satisfy everyone or that will work in all cases. Relevance surely is required and some rules, such as the International Bar Association Rules of Evidence, also require materiality. Whatever the definition, broad, unlimited discovery is now the default notwithstanding that various bar and other groups have complained for years about the burden, expense and abuse of discovery.

This Principle changes the default while still permitting a search, within reason, for the “smoking gun”. Today, the default is that there will be discovery unless it is blocked. *This Principle permits limited discovery proportionately tied to the claims actually at issue, after which there will be no more.* The limited discovery contemplated by this Principle would be in addition to the initial disclosures that the Principles also require. Whereas the initial disclosures would be of documents that may be used to support the producing party’s claims or defenses, the limited discovery described in this Principle would be of documents that support the requesting party’s claims or defenses. This Principle also applies to electronic discovery.

We suggest the following possible areas of limitation for further consideration:

- (1) limitations on scope of discovery (i.e., changes in the definition of relevance);
- (2) limitations on persons from whom discovery can be sought;
- (3) limitations on the types of discovery (e.g., only document discovery, not interrogatories);
- (4) numerical limitations (e.g., only 20 interrogatories or requests for admissions; only 50 hours of deposition time);
- (5) elimination of depositions of experts where their testimony is strictly limited to the contents of their written report;
- (6) limitations on the time available for discovery;

- (7) cost shifting/co-pay rules;
- (8) financial limitations (i.e., limits on the amount of money that can be spent—or that one party can require its opponent to spend—on discovery);  
and
- (9) discovery budgets that are approved by the clients and the court.

For this Principle to work, the contours of the limited discovery we contemplate must be clearly defined. For certain types of cases, it will be possible to develop standards for the discovery defaults. For example, in employment cases, the standard practice is that personnel files are produced and the immediate decisionmaker is deposed. In patent cases, disclosure of the inventor's notebooks and the prosecution history documents might be the norm. The plaintiff and defense bars for certain types of specialized cases should be able to develop appropriate discovery protocols for those cases.

We emphasize that the primary goal is to change the default from unlimited discovery to limited discovery. No matter how the limitations are defined, there should be limitations. Additional discovery beyond the default limits would be allowed only on a showing of good cause and proportionality.

We hasten to note again that this Principle should be read together with the Principles requiring fact-based pleading and that each party forthwith should produce at the beginning of litigation documents that may be used to support that party's claims or defenses. We expect that the limited discovery contemplated by this Principle and the initial-disclosure Principle would be swift, useful and virtually automatic.

We reiterate that there should be a continuing duty to supplement disclosures and discovery responses.

- **All facts are not necessarily subject to discovery.**

This is a corollary of the preceding Principle. We now have a system of discovery in which parties are entitled to discover all facts, without limit, unless and until courts call a halt, which they rarely do. As a result, in the words of one respondent, discovery has become an end in itself and we routinely have "discovery about discovery". Recall that our current rules were created in an era before copying machines, computers and e-mail. Advances in technology are overtaking our rules, to the point that the Advisory Committee Notes to Rule 26(b)(2)(B) of the Federal Rules of Civil Procedure state that "It is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information."

There is, of course, a balance to be established between the burdens of discovery on the one hand and the search for evidence necessary for a just result on the other hand. This Principle is meant to remind courts and litigants that discovery is to be

limited and that the goal of our civil justice system is the “just, speedy, and inexpensive determination of every action and proceeding”.

Discovery planning creates an expectation in the client about the time and the expense required to resolve the case. Additional discovery issues, which may have been avoidable, and their consequent expense may impair the ability of the client to afford or be represented by a lawyer at trial.

- **Courts should consider staying discovery in appropriate cases until after a motion to dismiss is decided.**

Discovery should be a mechanism by which a party discovers evidence to support or defeat a valid claim or defense.<sup>5</sup> It should not be used for the purpose of enabling a party to see whether or not a valid claim exists. If, as we recommend, the complaint must comply with fact-based pleading standards, courts should have the ability to test the legal sufficiency of that complaint in appropriate cases before the parties are allowed to embark on expensive discovery that may never be used.

- **Discovery relating to damages should be treated differently.**

Damages discovery is significantly different from discovery relating to other issues and may call for different discovery procedures relating to timing and content. The party with the burden of proof should, at some point, specifically and separately identify its damage claims and the calculations supporting those claims. Accordingly, the other party’s discovery with respect to damages should be more targeted. Because damages discovery often comes very late in the process, the rules should reflect the reality of the timing of damages discovery.

- **Promptly after litigation is commenced, the parties should discuss the preservation of electronic documents and attempt to reach agreement about preservation. The parties should discuss the manner in which electronic documents are stored and preserved. If the parties cannot agree, the court should make an order governing electronic discovery as soon as possible. That order should specify which electronic information should be preserved and should address the scope of allowable proportional electronic discovery and the allocation of its cost among the parties.**

Electronic information is fundamentally different from other types of discovery in the following respects: it is everywhere, it is often hard to gain access to and it is typically and routinely erased. Under judicial interpretations, once a complaint is served, or perhaps even earlier, the parties have an obligation to preserve all

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<sup>5</sup> We recognize that discovery need not be limited to admissible evidence, but if the discovery does not ultimately lead to evidence that can be used at trial, it serves very little purpose.

material that may prove relevant during a civil action, including electronic information. That is very difficult, if not impossible, to accomplish in an environment in which litigants maintain enormous stores of electronic records. Electronic recordkeeping has led to the retention of information on a scale not contemplated by the framers of the procedural rules, a circumstance complicated by legitimate business practices that involve the periodic erasure of many electronic records.

Often the cost of preservation in response to a “litigation hold” can be enormous, especially for a large business entity.

Under Federal Rule of Civil Procedure 16(b), which was amended in 2006 to include planning for the discovery of electronic information, the initial pretrial conference, if held at all, does not occur until months after service of the complaint. By that time, the obligation to preserve all relevant documents has already been triggered and the cost of preserving electronic documents has already been incurred. This is a problem.

It is desirable for counsel to agree at the outset about electronic-information preservation and many local rules require such cooperation. Absent agreement of counsel, this Principle requires prompt judicial involvement in the identification and preservation of electronic evidence. We call on courts to hold an initial conference promptly after a complaint is served, for the purpose of making an order with respect to the preservation of electronic information. In this regard, we refer to Principle 5 of the Sedona United States *Principles for Electronic Document Production*.<sup>6</sup>

We are aware of cases in which, shortly after a complaint is filed, a motion is made for the preservation of certain electronic documents that otherwise would be destroyed in the ordinary course. *See, e.g., Keir v. Unumprovident Corp.*, No. 02 Civ. 8781, 2003 WL 21997747 (S.D.N.Y. Aug. 22, 2003) (counsel told court that simply preserving all backup tapes from 881 corporate servers “would cost millions of dollars” and court fashioned a very limited preservation order after requiring counsel to confer).

This Principle would mandate electronic-information conferences, both with counsel and the court, absent agreement. Before such a conference, there should

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<sup>6</sup> The Sedona Conference is a nonprofit law and policy think tank based in Sedona, Arizona. It has published principles relating to electronic document production. Sedona Canada was formed in 2006 out of a recognition that electronic discovery was “quickly becoming a factor in all Canadian civil litigation, large and small.” An overview of the Principles developed by Working Group 1 and Working Group 7 (“Sedona Canada”) are in Appendix B. The complete publications of both Working Groups are *The Sedona Principles, Second Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production (The Sedona Conference® Working Group Series, 2007)* and *The Sedona Canada Principles Addressing Electronic Discovery (A Project of The Sedona Conference® Working Group 7, Sedona Canada, January 2008)*, and the full text of each document may be downloaded free of charge for personal use from [www.thesedonaconference.org](http://www.thesedonaconference.org).

be a safe harbor for routine, benign destruction, so long as it is not done deliberately in order to destroy evidence.

The issue here is not the scope of electronic discovery; rather the issue is what must be preserved before the scope of permissible electronic discovery can be determined. It is the preservation of electronic materials at the outset of litigation that engenders expensive retention efforts, made largely to avoid collateral litigation about evidence spoliation. Litigating electronic evidence spoliation issues that bloom after discovery is well underway can impose enormous expense on the parties and can be used tactically to derail a case, drawing the court's attention away from the merits of the underlying dispute. Current rules do not adequately address this issue.

- **Electronic discovery should be limited by proportionality, taking into account the nature and scope of the case, relevance, importance to the court's adjudication, expense and burdens.**

Our respondents told us that electronic discovery is a nightmare and a morass. These Principles require early judicial involvement so that the burden of electronic discovery is limited by principles of proportionality. Although the Advisory Committee on Civil Rules attempted to deal with the issues in new Rule 26(b)(2), many of our respondents thought that the Rule was inadequate. The Rule, in conjunction with the potential for sanctions under rule 37(e), exposes litigants to a series of legal tests that are not self-explanatory and are difficult to execute in the world of modern information technology. The interplay among "undue cost and burden," "reasonably accessible," "routine good faith operation," and "good cause," all of which concepts are found in that rule, presents traps for even the most well-intentioned litigant.

We understand that more than 50 district courts have detailed local rules for electronic discovery. The best of those provisions should be adopted nationwide.

We are well aware that this area of civil procedure continues to develop and we applaud efforts such as new Federal Rule of Evidence 502 seeking to address the critical issue of attorney-client privilege waiver in the production of documents, including electronic records. It remains to be seen, however, whether a nonwaiver rule will reduce expenses or limit the pre-production expense of discovery of electronic information.

- **The obligation to preserve electronically-stored information requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation; however, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant electronically stored information.**

- **Absent a showing of need and relevance, a party should not be required to restore deleted or residual electronically-stored information, including backup tapes.**
- **Sanctions should be imposed for failure to make electronic discovery only upon a showing of intent to destroy evidence or recklessness.**
- **The cost of preserving, collecting and reviewing electronically-stored material should generally be borne by the party producing it but courts should not hesitate to arrive at a different allocation of expenses in appropriate cases.**

The above Principles are taken from the *Sedona Principles for Addressing Electronic Document Production* (June 2007) and the *Sedona Canada Principles Addressing Electronic Discovery* (January 2008). They are meant to provide a framework for developing rules of reasonableness and proportionality. They do not replace or modify the other Principles relating to the limitation of discovery. They are merely supplemental.

By way of explanation, we can do no better than to quote from two Canadian practitioners who have studied the subject extensively and who bring a refreshing viewpoint to the subject:

The proliferation in recent years of guidelines, formal and informal rules, articles, conferences and expert service providers all dealing with e-discovery may, at times, have obscured the reality that e-discovery must be merely a means to an end and not an end unto itself. E-discovery is a tool which, used properly, can assist with the just resolution of many disputes; however, used improperly, e-discovery can frustrate the cost-effective, speedy and just determination of almost every dispute.

E-discovery has had, and it will continue to have, a growing importance in litigation just as technology has a growing importance in society and commerce. It is up to counsel and the judiciary to ensure that e-discovery does not place the courtroom out of the reach of parties seeking a fair adjudication of their disputes.

B. Sells & TJ Adhihetty, *E-discovery, you can't always get what you want*, *International Litigation News*, Sept. 2008, pp. 35-36.

- **In order to contain the expense of electronic discovery and to carry out the Principle of Proportionality, judges should have access to, and attorneys practicing civil litigation should be encouraged to attend, technical workshops where they can obtain a full understanding of the complexity of the electronic storage and retrieval of documents.**

Although electronic discovery is becoming extraordinarily important in civil litigation, it is proving to be enormously expensive and burdensome. The vast majority (75 percent) of our respondents confirmed the fact that electronic discovery has resulted in a disproportionate increase in the expense of discovery and thus an increase in total litigation expense. Electronic discovery, however, is a fact of life that is here to stay. We favor an intensive study to determine how best to cope with discovery of this information in an efficient, cost-effective way to ensure expenses that are proportional to the value of the case.

Unfortunately, the rules as now written do not give courts any guidance about how to deal with electronic discovery. Moreover, 76 percent of the respondents said that courts do not understand the difficulties parties face in providing electronic discovery. Likewise, trial counsel are often uninformed about the technical facets of electronic discovery and are ill-equipped to assist trial courts in dealing with the issues that arise. Some courts have imposed obligations on counsel to ensure that their clients fully comply with electronic discovery requests; litigation about compliance with electronic discovery requests has become commonplace. We express no opinion about the legitimacy or desirability of such orders.

It does appear, however, that some courts do not fully understand the complexity of the technical issues involved and that the enormous scope and practical unworkability of the obligations they impose on trial counsel are often impossible to meet despite extensive (and expensive) good-faith efforts.

At a minimum, courts making decisions about electronic discovery should fully understand the technical aspects of the issues they must decide, including the feasibility and expense involved in complying with orders relating to such discovery. Accordingly, we recommend workshops for judges to provide them with technical knowledge about the issues involved in electronic discovery. We also recommend that trial counsel become educated in such matters. An informed bench and bar will be better prepared to understand and make informed decisions about the relative difficulties and expense involved in electronic discovery. Such education is essential because without it, counsel increasingly will be constrained to rely on third-party providers of electronic-discovery services who include judgments about responsiveness and privilege among the services they provide, a trend we view with alarm.

- **Requests for admissions and contention interrogatories should be limited by the Principle of proportionality. They should be used sparingly, if at all.**

Requests for admission can be abused, particularly when they are used in large numbers to elicit admissions about immaterial or trivial matters. Used properly, they can focus the scope of discovery by eliminating matters that are not at issue, presumably shortening depositions, eliminating substantial searches for documentary proof and shortening the trial. We recommend meaningful limits on the use of this discovery tool to ensure that it is used for its intended purposes. For example, it could be limited to authentication of documents or numerical and statistical calculations.

Even greater abuse seems to arise with the use of contention interrogatories. They often seek to compel an adversary to summarize its legal theories and then itemize evidence in support of those theories. Just as frequently, they draw lengthy objections that they are premature, seek the revelation of work-product and invite attorney-crafted answers so opaque that they do little to advance the efficient resolution of the litigation. This device should be used rarely and narrowly.

#### 4. EXPERTS

- **Experts should be required to furnish a written report setting forth their opinions, and the reasons for them, and their trial testimony should be strictly limited to the contents of their report. Except in extraordinary cases, only one expert witness per party should be permitted for any given issue.**

The federal rules and many state rules require written expert reports and we urge that the requirement should be followed by all courts. The requirement of an expert report from an expert should obviate the need for a deposition in most cases. In fact, some Task Force members believe that it should obviate altogether the need for a deposition of experts.

We also endorse the proposed amendment to Federal Rule of Civil Procedure 26(b)(4)(B) and (C) and recommend comparable state rules that would prohibit discovery of draft expert reports and some communications between experts and counsel.

## 5. DISPOSITIVE MOTIONS

*The Purpose of Dispositive Motions: Dispositive motions before trial identify and dispose of any issues that can be disposed of without unreasonable delay or expense before, or in lieu of, trial.*

Although we do not recommend any Principle relating to summary judgment motions, we report that there was a disparity of views in the Task Force, just as there was a disparity of views among the respondents. For example, nearly 64 percent of respondents who represent primarily plaintiffs said that summary judgment motions were used as a tactical tool rather than in a good-faith effort to narrow issues. By contrast, nearly 69 percent of respondents who represent primarily defendants said that judges decline to grant summary judgment motions even when they are warranted. This subject deserves further careful consideration and discussion.

## 6. JUDICIAL MANAGEMENT

- **A single judicial officer should be assigned to each case at the beginning of a lawsuit and should stay with the case through its termination.**

The survey respondents agreed overwhelmingly (89 percent) that a single judicial officer should oversee the case from beginning to end. Respondents also agreed overwhelmingly (74 percent) that the judge who is going to try the case should handle all pretrial matters.

In many federal districts, the normal practice is to assign each new case to a single judge and that judge is expected to stay with the case from the beginning to the end. Assignment to a single judge is the most efficient method of judicial management. We believe that the principal role of the judge should be to try the case. Judges who are going to try cases are in the best position to make pretrial rulings on evidentiary and discovery matters and dispositive motions.

We are aware that in some state courts, judges are rotated from one docket to another and that in some federal districts, magistrate judges handle discovery matters. We are concerned that such practices deprive the litigants of the consistency and clarity that assignment to a single docket, without rotation, brings to the system of justice.

We are also cognizant of the fact that in some courts, the scarcity of judicial resources will not allow for the assignment of every case to a single judge, but in those cases, we recommend an increase in judicial resources so that this Principle can be consistently followed.

- **Initial pretrial conferences should be held as soon as possible in all cases and subsequent status conferences should be held when necessary, either on the request of a party or on the court's own initiative.**

In most systems, initial pretrial conferences are permissible but not mandatory. This Principle would require such conferences in all cases. Sixty-seven percent of our respondents thought that such conferences inform the court about the issues in the case and 53 percent thought that such conferences identified and, more important, narrowed the issues. More than 20 percent of the respondents reported that such conferences are not regularly held.

Pretrial conferences are a useful vehicle for involving the court at the earliest possible time in the management of the case. They are useful for keeping the judge informed about the progress of the case and allowing the court to guide the work of counsel. We are aware that there are those who believe that judges should not become involved in litigation too early and should allow the parties to control the litigation without judicial supervision. However, we believe that, especially in complex cases, the better procedure is to involve judges early and often.

Early judicial involvement is important because not all cases are the same and because different types of cases require different case management. Some, such as complex cases, require more; some, such as relatively routine or smaller cases, require less. The goal is the just, cost-effective and expeditious resolution of disputes.

Seventy-four percent of the Fellows in the survey said that early intervention by judges helped to narrow the issues and 66 percent said that it helped to limit discovery. Seventy-one percent said that early and frequent involvement of a judicial officer leads to results that are more satisfactory to the client.

We believe that pretrial conferences should be held early and that in those conferences courts should identify pleading and discovery issues, specify when they should be addressed and resolved, describe the types of limited discovery that will be permitted and set a timetable for completion. We also believe the conferences are important for a speedy and efficient resolution of the litigation because they allow the court to set directions and guidelines early in the case.

- **At the first pretrial conference, the court should set a realistic date for completion of discovery and a realistic trial date and should stick to them, absent extraordinary circumstances.**

There has been a good deal of debate about the benefits of the early setting of a trial date.

In 1990, the Federal Judicial Center asked the Advisory Committee on Civil Rules to consider amending Rule 16 to require the court to set a trial date at the Rule 16 conference. The Advisory Committee chose not to do so “because the docket conditions in some districts would make setting a realistic trial date early in the case unrealistic”. R. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 *Tulane J. of Int’l & Comp. Law* 153, 179 (1999).

A majority of our respondents (60 percent) thought that the trial date should be set early in the case.

There can be significant benefits to setting a trial date early in the case. For example, the sooner a case gets to trial, the more the claims tend to narrow, the more the evidence is streamlined and the more efficient the process becomes. Without a firm trial date, cases tend to drift and discovery takes on a life of its own. In addition, we believe that setting realistic but firm trial dates facilitates the settlement of cases that should be settled, so long as the court is vigilant to ensure that the parties are behaving responsibly. In addition, it will facilitate the trials of cases that should be tried.

In Delaware Chancery Court, for example, where complex, expedited cases such as those relating to hostile takeovers are heard frequently, the parties know that in such cases they will have only a limited time within which to take discovery and get ready for trial. The parties become more efficient and the process can be more focused.

A new IAALS study provides strong empirical support for early setting of trial dates. Based on an examination of nearly 8,000 closed federal civil cases, the IAALS study found that there is a strong positive statistical correlation between the overall time to resolution of the case and the elapsed time between the filing of the case and the court’s setting of a trial date. See Institute for the Advancement of the American Legal System, *Civil Case Processing in the Federal Courts: A Twenty-First Century Analysis* (forthcoming January 2009).

We also believe that the trial date should not be adjourned except under extraordinary circumstances. The IAALS study found that trial dates are routinely adjourned. Over 92 percent of motions to adjourn the trial date were granted and less than 45 percent of cases that actually went to trial did so on the trial date that was first set. The parties have a right to get their case to trial expeditiously and if they know that the trial date will be adjourned, there is no point in setting a trial date in the first place. It is noteworthy that the IAALS study also found that in courts where trial dates are expected to be held firm, the parties seek trial adjournments at a much lower rate and only under truly extraordinary circumstances.

- **Parties should be required to confer early and often about discovery and, especially in complex cases, to make periodic reports of those conferences to the court.**

Discovery conferences work well and should be continued. Over half (59 percent) of our respondents thought that conferences are helpful in managing the discovery process; just over 40 percent of the respondents said that discovery conferences — although they are mandatory in most cases — frequently do not occur.

Cooperation of counsel is critical to the speedy, effective and inexpensive resolution of disputes in our civil justice system. Ninety-seven percent of our respondents said that when all counsel are collaborative and professional, the case costs the client less. Unfortunately, cooperation does not often occur. In fact, it is argued that cooperation is inconsistent with the adversary system. Professor Stephen Landsman has written that the “sharp clash of proofs presented by adversaries in a highly structured forensic setting” is key to the resolution of disputes in a manner that is acceptable to both the parties and society. S. Landsman, ABA Section of Litigation, *Readings on Adversarial Justice: The American Approach to Adjudication*, 2 (1988).

However, Chief Magistrate Judge Paul W. Grimm of the United States District Court for the District of Maryland, referring specifically to Professor Landsman’s comment, responded that

However central the adversary system is to our way of formal dispute resolution, there is nothing inherent in it that precludes cooperation between the parties and their attorneys during the litigation process to achieve orderly and cost effective discovery of the competing facts on which the system depends. *Mancia v. Mayflower Textile Servs. Co. et al.*, Civ. No. 1:08-CV-00273-CCB, Oct. 15, 2008, p. 20.

Involvement of the court is key to effective cooperation and to a productive discovery conference. Even where the parties agree, the court should review the results of the agreement carefully in order to ensure that the results are conducive to a just, speedy and inexpensive resolution of the dispute. Unlike earlier studies and literature, the survey revealed that experienced trial lawyers increasingly see the role of the judge as a “monitor” whose involvement can critically impact the cost and time to resolution of disputes.

- **Courts are encouraged to raise the possibility of mediation or other form of alternative dispute resolution early in appropriate cases. Courts should have the power to order it in appropriate cases at the appropriate time, unless all parties agree otherwise. Mediation of issues (as opposed to the entire case) may also be appropriate.**

This is a controversial principle; however, it recognizes reality.

Over half (55 percent) of the respondents said that alternative dispute resolution was a positive development. A surprisingly high 82 percent said that court-ordered alternative dispute resolution was a positive development and 72 percent said that it led to settlements without trial.

As far as expense was concerned, 52 percent said that alternative dispute resolution decreased the expense for their clients and 66 percent said that it shortened the time to disposition.

Three conclusions could be drawn. First, this could be a reflection of the extent to which alternative dispute resolution has become efficient and effective. Second, it could be a reflection of how slow and inefficient the normal judicial process has become. Third, it could be a reflection of the fact that ADR may afford the parties a mechanism for avoiding costly discovery.

Whatever the reason, we acknowledge the results and therefore recommend that courts be encouraged to raise mediation as a possibility and that they order it in appropriate cases. We note, however, that if these Principles are effective in reducing the cost of discovery, parties may opt more often for judicial trials, as opposed to ADR. That is, at least, our hope.

We also note that under the Alternative Dispute Resolution Act of 1998 (28 USC § 651, et seq.), federal courts have the power to require parties to “consider” alternative dispute resolution or mediation and are required to make at least one such process available to litigants. We are aware that many federal district courts require alternative dispute resolution and that some state courts require mediation or other alternative dispute resolution in all cases. Some courts will not allow discovery or set a trial date until after the parties mediate. While we believe that mediation or some other form of alternative dispute resolution is desirable in many cases, we believe that the parties should have the ability to say “no” in appropriate cases where they all agree. This is already the practice in many courts.

- **The parties and the courts should give greater priority to the resolution of motions that will advance the case more quickly to trial or resolution.**

Judicial delay in deciding motions is a cause — perhaps a major cause — of delay in our civil justice system.<sup>7</sup> We recognize that our judges often are overworked and without adequate resources. Judicial delay in deciding certain motions that would materially advance the litigation has a materially adverse impact on the

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<sup>7</sup> One of our respondents described a case in which it took the court two years to decide a summary judgment motion. Such a delay is unacceptable and greatly increases the cost of litigation.

ultimate resolution of litigation.<sup>8</sup> In this respect, we endorse Section 11.34 of the Manual For Complex Litigation (Fourth) 2004:

It is important to decide [summary judgment] motions promptly; deferring rulings on summary judgment motions until the final pretrial conference defeats their purpose of expediting the disposition of issues.

It would be appropriate to discuss such motions at a Rule 16 conference so that the court could be alerted to the importance of a prompt resolution of such motions, since delay in deciding such motions almost certainly adds to the expense of litigation.

- **All issues to be tried should be identified early.**

There is often a difference between issues set forth in pleadings and issues to be tried. Some courts require early identification of the issues to be tried and in international arbitrations, terms of reference at the beginning of a case often require that all issues to be arbitrated be specifically identified. Under the Manual For Complex Litigation (Fourth), Section 11.3, “The process of identifying, defining, and resolving issues begins at the initial pretrial conference.” We applaud such practices and this Principle would require early identification of the issues in all cases. Such early identification will materially advance the case and limit discovery to what is truly important. It should be carefully done and should not be merely a recapitulation of the pleadings. We leave to others the description of the form that such statement of issues should take.<sup>9</sup>

- **These Principles call for greater involvement by judges. Where judicial resources are in short supply, they should be increased.**

This Principle recognizes the position long favored by the College. Judicial resources are limited and need to be increased.

- **Trial judges should be familiar with trial practice by experience, judicial education or training and more training programs should be made available to judges.**

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<sup>8</sup> At present, the Civil Justice Reform Act and current Judicial Conference policy require each federal district court to report on (1) motions and certain other matters pending for over six months and (2) cases pending for over three years, broken out by judicial officer. These reports are available for a fee only on the PACER Service Center web site. We strongly encourage that CJRA reports be made available at no cost on the United States Courts official web site ([www.uscourts.gov](http://www.uscourts.gov)), as well as on each district court’s individual web site within a reasonable time period after the reports are completed. We also encourage state court systems to provide similar information if they are not already doing so.

<sup>9</sup> Section 11.33 of the Manual For Complex Litigation (Fourth) 2004, identifies six possible actions that can help identify, define and resolve issues.

Knowledge of the trial process is critical for judges responsible for conducting the trial process. We urge that consideration of trial experience should be an important part of the judicial selection process. Judges who have trial or at least significant case management experience are better able to manage their dockets and to move cases efficiently and expeditiously. Nearly 85 percent of our respondents said that only individuals with substantial trial experience should be chosen as judges and 57 percent thought that judges did not like taking cases to trial. Accordingly, we believe that more training programs should be made available so that judges will be able more efficiently to manage cases so that they can be tried effectively and expeditiously.

## NEXT STEPS

There is much more work to be done. We hope that this joint report will inspire substantive discussion among practicing lawyers, the judiciary, the academy, legislators and, most importantly, clients and the public. In the words of Task Force member The Honourable Mr. Justice Colin L. Campbell of the Superior Court of Justice, Toronto, Ontario:

Discovery reform . . . will not be complete until there is a cultural change in the legal profession and its clients. The system simply cannot continue on the basis that every piece of information is relevant in every case, or that the ‘one size fits all’ approach of Rules can accommodate the needs of the variety of cases that come before the Courts.

With financial support provided by IAALS, the members of the Task Force and the IAALS staff have applied their experience to a year-and-a-half-long process in which they collectively invested hundreds of hours in analyzing the apparent problems, studying the history of previous reform attempts and in debating and developing a set of Proposed Principles. The participants believe that these Principles may one day form the bedrock of a reinvigorated civil justice process; a process that may spawn a renewal of public faith in America’s system of justice.

These men and women whose collective knowledge of these issues may be critical to future reform efforts and the organizations they represent, are committed to participating in discussion and activities engendered by the release of this Report.

Our civil justice system is critical to our way of life. In good times or bad, we must all believe that the courts are available to us to enforce rights and resolve disputes – and to do so in a fair and cost-effective way. At present, the system is captive to cost, delay, and in many instances, gamesmanship. As a profession, we must apply our experience, our differing perspectives and our commitment to justice in order to devise meaningful reforms that will reinstate a trustworthy civil justice system in America.

## APPENDIX A

### IAALS REVIEW OF PROCEDURAL REFORMS IN FOREIGN JURISDICTIONS AND IN SOME STATES IN THE UNITED STATES

The Principles set forth in this report were not developed in a vacuum. Many are part of routine civil practice and procedure in a wide variety of civil law and common law jurisdictions around the world. While some have recently been developed in foreign jurisdictions in response to concerns about cost and delay, others have had a long and successful history of minimizing those concerns. The Principles have been developed in recognition of these practices and procedures. We summarize below the application of both the Principles and the march toward comprehensive reform in several foreign and state jurisdictions.

#### **The Nature of Reform in Foreign Jurisdictions**

There is a growing trend in foreign jurisdictions toward fact pleading, limited discovery and active case management. Where recent reforms have been adopted, they have been systemic and sweeping—not nibbles around the edges. Some of the jurisdictions have measured their reforms, and our Principles build on that information as well.

In 1997, England and Wales undertook a complete overhaul of the civil justice system, resulting in a rewrite of the rules of civil procedure. The new rules instituted a number of pre-action protocols, a more detailed pleading requirement, defined limits on disclosure and discovery, strict limits on expert witnesses and a track system in which cases are treated with different procedures depending on complexity and amount in controversy. To ensure the success of the new rules in practice, the English reforms granted courts broad case management powers and encouraged judges to play an active role in the progression of a case.

In 2007, a review of the Scottish civil justice system began with a commitment to considering widespread reform proposals, however radical. In the area of judicial management, Scotland has already been experimenting with the use of a single judicial officer to handle a case from filing to disposition—a practice that users have hailed as increasing consistency and facilitating agreement.

More recently, Spain has made significant reforms to its code of civil procedure that established greater judicial control and limits on the parties' use and presentation of evidence. Germany is presently engaged in a second round of procedural reforms, also employing increased case management powers and a focus on simplifying procedure.

Canada, too, is taking a new look at its civil justice system. Drafts of revised civil procedure rules are currently under consideration in the Canadian provinces of Alberta, British Columbia and Ontario. Alberta's standard of relevance in the context of discovery has already been narrowed and the draft rules in Ontario and British Columbia would do the same. A comprehensive reform proposal was recently released in New Zealand, part of which also proposes to narrow the standard of relevance.

## **Practices and Procedures in Foreign Jurisdictions**

**Specialized Rules.** In recognition of the fact that trans-substantive rules are not necessarily the most effective approach, many foreign jurisdictions have developed specialized rules and procedures to deal with specific types of cases. Special procedures and case management practices for commercial cases have been developed in England and Wales, Scotland, New Zealand, and Toronto, Canada. In Scotland, practices and procedures have also been developed in the area of personal injury litigation.

**Fact-Based Pleading.** Outside of the United States, fact pleading is largely the standard practice. Foreign jurisdictions differ in the level of detail required by the pleadings; however, even in common law countries like Canada, Australia and the United Kingdom, pleadings must at the very least give a summary of the material facts. Many civil law countries have more stringent pleading requirements. For example, Spain requires a complete narrative of the claim's factual background and German complaints must contain a definite statement of the factual subject matter of the claim. French and Dutch pleadings must contain all the relevant facts and Dutch rules further require that plaintiffs articulate anticipated defenses. The Transnational Principles and Rules of Civil Procedure—drafted in part by the American Law Institute—specifically reject notice pleading, opting instead for a fact-based pleading standard that applies to the claim, denials, affirmative defenses, counterclaims and third-party claims.

**Initial Disclosures.** In most foreign countries, the initial disclosure requirements are closely related to the pleading standard. The jurisdictions with the strictest pleading standards also usually require parties to supplement the pleadings with documents or evidence that propose an appropriate means of proof for the factual assertions made in the pleadings. This is the practice in The Netherlands, Spain, Germany, France and Scotland and under the Transnational Principles. In the jurisdictions with more lax fact-pleading standards—generally common law countries—parties are usually not required to supplement the pleadings with documentary evidence; however, initial disclosures must be made at a specified time shortly after the close of the pleadings.

**Discovery.** Unbridled discovery is almost solely a hallmark of the United States civil justice system. Many civil law countries do not have discovery at all as we understand it in the United States, and even foreign common law jurisdictions have defined limits on the practice and tools of discovery. In Australia, New Zealand, England, Wales and Scotland and under the Transnational Principles, depositions are allowed only in limited circumstances or with court approval. Scotland similarly limits interrogatories to specific circumstances, as does Australia with the further restriction that interrogatories must relate to a matter in question. Recent rule changes in Nova Scotia place presumptive limits on depositions where the amount in controversy is under \$100,000 and a draft proposal in Ontario would allow the court to develop a discovery plan in accordance with the principle of proportionality.

The scope of permissible discovery in many jurisdictions is directly tied to the issues set forth in the pleadings. “Relevant documents” in England and Wales are those that obviously support or undermine a case; specifically excluded are documents that may be relevant as background information or serve as “train of enquiry”. Courts in New South Wales, Australia, and the Transnational Principles similarly reject the “train of enquiry” approach. Courts in Queensland

and South Australia employ a “directly relevant” standard under which the fact proved by the document must establish the existence or nonexistence of facts alleged in the pleading. In Queensland, this approach has been recognized as having substantially reduced the expense of discovery.

Related Civil Justice Reforms in the United States. Some state jurisdictions in the United States have also moved, or are moving, in a similar direction. State rules of civil procedure in Oregon, Texas and Arizona—the last of which traditionally modeled state rules on their federal counterparts—show that practices like fact pleading, early initial disclosures and presumptive limits on discovery are not inconsistent with the style of civil justice in the United States. At the federal level, the Private Securities Litigation Reform Act and recent Supreme Court decisions also illustrate the perceived shortcomings of notice pleading in today’s complex litigation environment.

Specialized rules and procedures have also been developed in United States courts for certain case types, including commercial, patent and medical malpractice cases. Some state jurisdictions have simplified procedures for claims under a certain amount in controversy or in which the parties elect a more streamlined process—e.g., Rule 16.1 in Colorado.

# **APPENDIX B**

# The Sedona Principles for Electronic Document Production

## Second Edition

1. Electronically stored information is potentially discoverable under Fed. R. Civ. P. 34 or its state equivalents. Organizations must properly preserve electronically stored information that can reasonably be anticipated to be relevant to litigation.
2. When balancing the cost, burden, and need for electronically stored information, courts and parties should apply the proportionality standard embodied in Fed. R. Civ. P. 26(b)(2)(C) and its state equivalents, which require consideration of the technological feasibility and realistic costs of preserving, retrieving, reviewing, and producing electronically stored information, as well as the nature of the litigation and the amount in controversy.
3. Parties should confer early in discovery regarding the preservation and production of electronically stored information when these matters are at issue in the litigation and seek to agree on the scope of each party's rights and responsibilities.
4. Discovery requests for electronically stored information should be as clear as possible, while responses and objections to discovery should disclose the scope and limits of the production.
5. The obligation to preserve electronically stored information requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation. However, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant electronically stored information.
6. Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.
7. The requesting party has the burden on a motion to compel to show that the responding party's steps to preserve and produce relevant electronically stored information were inadequate.
8. The primary source of electronically stored information for production should be active data and information. Resort to disaster recovery backup tapes and other sources of electronically stored information that are not reasonably accessible requires the requesting party to demonstrate need and relevance that outweigh the costs and burdens of retrieving and processing the electronically stored information from such sources, including the disruption of business and information management activities.
9. Absent a showing of special need and relevance, a responding party should not be required to preserve, review, or produce deleted, shadowed, fragmented, or residual electronically stored information.
10. A responding party should follow reasonable procedures to protect privileges and objections in connection with the production of electronically stored information.
11. A responding party may satisfy its good faith obligation to preserve and produce relevant electronically stored information by using electronic tools and processes, such as data sampling, searching, or the use of selection criteria, to identify data reasonably likely to contain relevant information.
12. Absent party agreement or court order specifying the form or forms of production, production should be made in the form or forms in which the information is ordinarily maintained or in a reasonably usable form, taking into account the need to produce reasonably accessible metadata that will enable the receiving party to have the same ability to access, search, and display the information as the producing party where appropriate or necessary in light of the nature of the information and the needs of the case.
13. Absent a specific objection, party agreement or court order, the reasonable costs of retrieving and reviewing electronically stored information should be borne by the responding party, unless the information sought is not reasonably available to the responding party in the ordinary course of business. If the information sought is not reasonably available to the responding party in the ordinary course of business, then, absent special circumstances, the costs of retrieving and reviewing such electronic information may be shared by or shifted to the requesting party.
14. Sanctions, including spoliation findings, should be considered by the court only if it finds that there was a clear duty to preserve, a culpable failure to preserve and produce relevant electronically stored information, and a reasonable probability that the loss of the evidence has materially prejudiced the adverse party.

# *The Sedona Canada Principles*

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## *Addressing Electronic Discovery*

- Principle 1:** Electronically stored information is discoverable.
- Principle 2:** In any proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account (i) the nature and scope of the litigation, including the importance and complexity of the issues, interest and amounts at stake; (ii) the relevance of the available electronically stored information; (iii) its importance to the court's adjudication in a given case; and (iv) the costs, burden and delay that may be imposed on the parties to deal with electronically stored information.
- Principle 3:** As soon as litigation is reasonably anticipated, parties must consider their obligation to take reasonable and good faith steps to preserve potentially relevant electronically stored information.
- Principle 4:** Counsel and parties should meet and confer as soon as practicable, and on an ongoing basis, regarding the identification, preservation, collection, review and production of electronically stored information.
- Principle 5:** The parties should be prepared to produce relevant electronically stored information that is reasonably accessible in terms of cost and burden.
- Principle 6:** A party should not be required, absent agreement or a court order based on demonstrated need and relevance, to search for or collect deleted or residual electronically stored information.
- Principle 7:** A party may satisfy its obligation to preserve, collect, review and produce electronically stored information in good faith by using electronic tools and processes such as data sampling, searching or by using selection criteria to collect potentially relevant electronically stored information.
- Principle 8:** Parties should agree as early as possible in the litigation process on the format in which electronically stored information will be produced. Parties should also agree on the format, content and organization of information to be exchanged in any required list of documents as part of the discovery process.
- Principle 9:** During the discovery process parties should agree to or, if necessary, seek judicial direction on measures to protect privileges, privacy, trade secrets and other confidential information relating to the production of electronic documents and data.
- Principle 10:** During the discovery process, parties should anticipate and respect the rules of the forum in which the litigation takes place, while appreciating the impact any decisions may have in related actions in other forums.
- Principle 11:** Sanctions should be considered by the court where a party will be materially prejudiced by another party's failure to meet any obligation to preserve, collect, review or produce electronically stored information. The party in default may avoid sanctions if it demonstrates the failure was not intentional or reckless.
- Principle 12:** The reasonable costs of preserving, collecting and reviewing electronically stored information will generally be borne by the party producing it. In limited circumstances, it may be appropriate for the parties to arrive at a different allocation of costs on an interim basis, by either agreement or court order.