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Civil Discovery Standards

Civil Discovery Standards Seek to Improve Pretrial Practice

Technology issues prompt novel thinking

BY SUSAN J. BECKER
LITIGATION NEWS ASSOCIATE EDITOR

You are 30 minutes into the deposition of your opponent's expert. Opposing counsel has just lodged his 17th long-winded objection—this time to your question about the expert's graduate education. At this rate, the deposition will take at least three times the eight-hour limit the court has set for expert depositions.

Which one of these options will you pursue:

- Adjourn the deposition and file extensive motion papers. Ask for relief ranging from reimbursement of your expenses for the failed deposition to disbarment of opposing counsel.
- Start screaming at opposing counsel (off the record, of course) to try to modify his inappropriate behavior.
- Seek judicial intervention by telephone during the deposition.

If you chose the first or second option, you are not alone. Indeed, the popularity of these two responses among attorneys confronted with discovery disputes has inspired the Section of Litigation Discovery Task Force to create Civil Discovery Standards. The Task Force recently circulated the Standards for comment. (For the record, the Standards favor the third option.)

"The idea of creating these Standards came about in two ways," says Lorna G. Schofield, New York City, Co-Chair of the Discovery Standards Task Force. "The Section had already produced Civil Trial Practice Standards, which were perceived as useful and were well received by lawyers and the courts. Then, Judge James G. Carr, Toledo, OH (N.D. Ohio), suggested that we should have something similar for discovery matters, to help the parties and the courts deal with things that are not covered directly in the rules."

One of the many challenges the Discovery Standards Task Force faced was creating guidelines equally applicable to state and federal court proceedings, Schofield says. The Standards involving technology issues were also difficult due to the newness and ubiquitous nature of modern technology.

"If you have billions of electronic files, do you have to produce every one?"

"The section on technology is not very long, but it is an important step forward," Schofield says. "The world is changing so fast, and people are stumped by a lot of the issues technology raises. For example, if you have billions of files stored electronically, do you have to produce every one of them? How should companies be advised regarding their record-retention policies? And what about inadvertent disclosure of documents? All of these issues have arisen before, but they take on another level of complexity when technology is involved."

The Discovery Standards Task Force consists of state and federal judges, a law professor, and plaintiffs' and defense attorneys from around the country. The Task Force adapted the Proposed Standards from a wide variety of state and federal rules of procedure, local rules of court, and other sources.

"This document is by no means intended to be mandatory," says Dennis P. Rawlinson, Portland, OR, Co-Chair

Highlights of Civil Discovery Standards

BY SUSAN J. BECKER
LITIGATION NEWS ASSOCIATE EDITOR

The Civil Discovery Standards drafted by the Section of Litigation's Discovery Standards Task Force propose the following guidelines for managing pretrial matters.

Discovery Conferences and Plans. Attorneys should work cooperatively to develop a case management plan detailing the timelines and other specifics of discovery, including: voluntary and informal discovery of documents; agreements as to the number, identity, location and length of fact witness depositions; the exchange of reports of, and deposition arrangements for, expert witnesses; issues relating to discovery of third-parties; and methods for asserting privilege claims and resolving disputes relating to privilege.

The judge assigned to the case should hold a scheduling conference shortly after the case is filed and, working with the parties, issue a case management order.

Resolving Discovery Disputes. When discovery disputes arise, counsel must confer in good faith before seeking judicial intervention. The judge should, to the extent practicable, use telephone conferences and other informal methods to resolve discovery disputes as soon as possible, rather than requiring extensive briefs.

Sanctions. When a party fails to comply with discovery obligations, a presumption arises that sanctions should be imposed, but the recalcitrant party will not be sanctioned if she can demonstrate good cause for failure to comply.

Propounding Interrogatories. Interrogatories should be concise, focused, objective, and unambiguous. Courts should consider working with advisory panels and bar organizations to develop form interrogatories that are presumed to meet these standards.

Preservation of Evidence. Upon learning that litigation is probable or has been commenced, litigation counsel should inform his clients of their duty to preserve potentially relevant documents and the consequences of failing to do so. This duty extends to information in electronic media, including word-processing documents, spread sheets, databases, and electronic mail.

Responding to Interrogatories and Document Requests. Parties should provide complete answers to interrogatories and document requests; specific objections should be detailed and matched to specific requests. If voluminous documents are to be produced, counsel should confer on the most efficient method of production. Unless otherwise specified, a request for documents includes information stored in electronic media.

Counsel has a duty to prepare individuals designated to testify on behalf of an entity to provide meaningful information about the specified areas.

Deposition Scheduling and Disputes. Depositions should be scheduled after consultation with those involved regarding a convenient time and place. Pertinent documents should be produced prior to the deposition. If an objection to the date or place of a deposition is made within three business days of the receipt of notice of the deposition, the deposition should ordinarily be stayed until the parties agree or the court sets a date or location for the deposition.

Unless otherwise prescribed by a rule or local convention, a plaintiff presumptively may be deposed where the suit was brought; a defendant presumptively may be deposed where the defendant resides or has a principal place of business; and the deposition of a nonparty witness presumptively will be taken where he works. The court may consider, either by local rule or case-specific order, whether to limit the length of a deposition or class of depositions (e.g., parties, fact witnesses, expert witnesses).

Deposition Attendance. Live depositions should not be considered public proceedings to the same extent as trials. Accordingly, attendance should be limited to the parties and one close family member, if the deponent requests, a designated representative of an entity, the attorneys and their legal assistants, and any expert retained by a party.

Depositions: Objections and Conferences. Objections during depositions should be presented in a short form, such as "leading," "argumentative," or "form." The deponent's attorney cannot confer with the deponent and cannot take a recess while a question is pending except to determine whether a privilege should be asserted.

Depositions: Designation of Organizational Witness. In responding to a notice of deposition to an entity, the entity's counsel should make a diligent effort to identify the individual best suited to testify, and may in certain cir-

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of the Discovery Standards Task Force. "It is intended just as a guide, but as a very helpful guide when people are struggling with discovery issues. The Standards also contain citations to authority which might be helpful in resolving difficult situations."

The Standards help bridge the gaps in existing rules and procedures, Rawlinson adds. These Standards provide the courts and litigants with the collective wisdom from others who have already faced some of these unusual situations," Rawlinson says. "Building on these suggestions, the Standards offer creative ways of handling these matters."

Each standard is intended (i) to eliminate unnecessary effort and expense, (ii) to restrict the opportunities for misusing the discovery process, both offensively and defensively, and (iii) where possible, to encourage a cooperative rather than adversarial approach to discovery.

> *"The Standards also contain citations to authority, which might be helpful in resolving difficult situations."*

In the Preface to the 70-page draft of the Civil Discovery Standards states. (See "Highlights" article, page 4, for some of the specific Standards proposed to achieve these goals).

The draft Standards have been circulated for comment to Section leaders, all constituent groups in the ABA, and hundreds of state and local bar associations, Schofield says. Comments were also gathered during an open forum at the Section's Annual Meeting in Dallas.

The Discovery Standards Task Force will consider all public comments and then plans to present a final draft of the Standards for approval during the ABA's Annual Meeting in August, Schofield says. Once approved, the Standards would be widely circulated to courts and lawyers throughout the country. ❑

cumstances need to designate more than one individual. Counsel presenting several individuals must specify in advance the areas that each individual is qualified to address. Counsel also has a duty to prepare the designated individuals to be able to provide meaningful information about the areas specified in the deposition notice.

Experts: Disclosure. Expert witnesses should be disclosed at least 90 days prior to the trial date. The plaintiff should usually disclose its experts first. The defendant should have at least 20 days following the plaintiff's disclosure to disclose its experts.

Experts' Reports. Both retained experts and employee experts of a party should be required to provide a written report to opposing counsel. In addition to the expert's qualifications and compensation received, the report should include a complete statement of the opinion the expert will offer, along with the data or information on which the expert is relying, and any exhibits to be used as a summary or in support of the opinion. The report should not disclose any communications that reveal the attorney's mental impressions, opinions, or trial strategy.

> *A party does not ordinarily have a duty to restore electronic information deleted or discarded in the ordinary course of business.*

Electronic Information: Preserving and Producing. Unless the requesting party demonstrates substantial need, a party does not ordinarily have a duty to restore electronic information that was deleted or discarded in the normal course of business but may not have been completely erased from the computer's memory.

A party may ask for electronically stored information in electronic format, hard copy, or both. The party may also seek ancillary materials, such as information that indicates whether electronic mail was actually sent and opened by recipients and whether the information was edited.

In resolving a discovery dispute regarding electronically stored materials, the court should consider a number of factors, including the burden and expense of the discovery, the requesting party's need for it, the breadth of the request, and the resources of each party. In a complex case the court may consider hiring a technology consultant to help with discovery disputes. The discovering party generally should bear any special expenses incurred in producing requested electronic information. ❑

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