

## **PART III: CROSS-JURISDICTIONAL COMPARISON OF DISCOVERY PROCESS**

The purpose of Part III is to compare key similarities and differences in the discovery processes of Ontario and other Canadian, American and Commonwealth jurisdictions. Part VI of the Report examines some of these processes more closely as part of the analysis of potential reform options.

### **1. CANADA**

With some exceptions, discovery procedures in most Canadian jurisdictions share the following features:

- an automatic duty to disclose documents;
- examination for discovery by either oral or written questions, but not both;
- primary reliance on oral examination;
- restrictions on the pre-trial examination of non-parties including experts; and
- pre-trial disclosure of expert reports.

#### **Documentary Discovery**

##### *Scope*

Like Ontario, the majority of Canadian jurisdictions impose a broad obligation to disclose and produce documents in a party's possession, power or control "relating to any matter in issue"<sup>125</sup> or "relating to any/every matter in question."<sup>126</sup> Three jurisdictions have narrowed this obligation. In the Federal Court, for example, parties must disclose all "relevant" documents.<sup>127</sup> A document is relevant "if the party intends to rely on it or if the document tends to adversely affect the party's case or to support another party's case."<sup>128</sup> In Alberta, a party must disclose records in its possession, custody or power that are "relevant and material,"<sup>129</sup> as defined in the Rules of Court.<sup>130</sup> In Quebec, a party is only required to disclose exhibits it intends to rely on at a hearing.<sup>131</sup>

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<sup>125</sup> Ont. Rules, rule 30.02(1), (2); New Brunswick, Rules of Court [hereinafter "N.B. Rules"], rule 31.02; Northwest Territories, The Supreme Court Rules [hereinafter "N.W.T. Rules"], rule 219; Prince Edward Island, Civil Procedure Rules [hereinafter "P.E.I. Rules"], rule 30.02; Manitoba, Court of Queen's Bench Rules [hereinafter "Man. Rules"], rule 30.01, 30.03 (Parties must disclose "all relevant documents"; however, a "relevant" document is defined as "one which relates to any matter in issue in an action".)

<sup>126</sup> British Columbia, Rules of Court [hereinafter "B.C. Rules"], rule 26; Newfoundland, Rules of the Supreme Court, 1986 [hereinafter "Nfld. Rules"], rule 32.01; Nova Scotia, Civil Procedure Rules [hereinafter "N.S. Rules"], rule 20.01; Saskatchewan, Rules of Court [hereinafter "Sask. Rules"], rule 212; [Yukon – B.C. Rules apply].

<sup>127</sup> Federal Court Rules, 1998 [hereinafter "Fed. Ct. Rules"], rule 223(2).

<sup>128</sup> Fed. Ct. Rules, rule 222(2).

<sup>129</sup> Alberta, Alberta Rules of Court [hereinafter "Alta. Rules"], rule 187.1.

<sup>130</sup> Alta. Rules, rule 186.1, which reads: "For the purpose of this part, a question or record is relevant and material only if the answer to the question, or if the record, could reasonably be expected

***Timing and Process***

Most Canadian jurisdictions impose an automatic duty to produce an “affidavit of documents” or “affidavit of records” within a prescribed time period.<sup>132</sup> Generally, the affidavit must list documents with a description of those a party does not object to producing, those that are privileged, and those that are no longer in that party’s possession or control. In British Columbia and New Brunswick, this obligation does not arise until a party serves a demand or notice for discovery of documents.<sup>133</sup>

In Ontario, there is no express restriction on the court’s ability to extend the time for exchanging affidavits of documents. In Alberta, by contrast, the affidavit must be served and filed 90 days after service of the statement of defence, and the court’s general authority to enlarge or abridge a time period does not apply.<sup>134</sup> The court may grant an order permitting late filing of an affidavit of records only if it is satisfied that the case is complex, the volume of documents requires an extension of time, or other sufficient reason exists.<sup>135</sup>

Other approaches include the automatic duty to produce copies of documents with the affidavit in Prince Edward Island,<sup>136</sup> and the requirement in Quebec that an affidavit (or notice) of documents be delivered with pleadings.<sup>137</sup> In Newfoundland and Nova Scotia, a party must attach to the list of documents a true copy of any non-privileged document in its possession, custody or control.<sup>138</sup> In several jurisdictions, any document listed in an affidavit is deemed to be authentic, unless the receiving party serves notice disputing its authenticity.<sup>139</sup>

In Alberta “very long trial actions,” the case management judge may establish a mechanism for production or description “when the number, nature or location of the records makes production or description in the normal course unduly expensive or cumbersome.”<sup>140</sup> Another feature of

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- (a) to significantly help determine one or more of the issues raised in the pleadings, or
  - (a) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.”

<sup>131</sup> Art. 331.1 *Code of Civil Procedure of Quebec*, R.S.Q. c. C-25 [hereinafter “C.C.P.”]. Note, however, that the examination on discovery provisions provide that certain persons may be summoned “to give communication and allow a copy to be made of any document relating to the issues”. See Arts. 397, 398 C.C.P.

<sup>132</sup> Alta. Rules, rule 187 (generally 90 days after service of the first statement of defence); Man. Rules, rule 30 (10 days after close of pleadings); Nfld. Rules, rule 32.01 (10 days after close of pleadings); N.W.T. Rules, rule 221 (30 days after close of pleadings); N.S. Rules, rule 20.01 (60 days after close of pleadings); P.E.I. Rules, rule 30 (10 days after close of pleadings); Sask. Rules, rule 212 (10 days after statement of defence is filed); Fed. Ct. Rules, rule 223 (30 days after close of pleadings).

<sup>133</sup> B.C. Rules, rule 26(1); N.B. Rules, rule 31.03.

<sup>134</sup> Alta. Rules, rules 187(2), (4), 548.

<sup>135</sup> Alta. Rules, rule 188.1. Note, however, that some commentators have suggested that rule 549 (which provides that the time for delivering or filing any pleading or other document may be enlarged on consent without application to the court) may be used to extend deadlines contained in the rules. See Eric Macklin, Q.C. & Alan Macleod, Q.C., *New Discovery Rules* (Law Society of Alberta, December 14, 1999).

[http://www.lawsocietyalberta.com/whats\\_new/new\\_dec14\\_discovery.asp](http://www.lawsocietyalberta.com/whats_new/new_dec14_discovery.asp).

<sup>136</sup> P.E.I. Rules, rule 30.03(4).

<sup>137</sup> Art. 331.1 C.C.P.

<sup>138</sup> Nfld. Rules, rule 32.01(4); N.S. Rules, rule 20.01(4).

<sup>139</sup> Alta. Rules, rule 192; Nfld. Rules, rule 32.04; N.W.T. Rules, rule 228; N.S. Rules, rule 20.03(1).

<sup>140</sup> Alta. Rules, rule 189.1.

Alberta's rules to encourage timely production is the provision that a party may not conduct an examination for discovery until it has filed and served an affidavit of records, unless the court orders otherwise.<sup>141</sup>

### ***Documentary Production from Non-Parties***

Like Ontario, all Canadian jurisdictions require a court order to compel the production of a document from a person who is not a party to a proceeding.<sup>142</sup>

## **Examination for Discovery**

### ***Scope***

With the exception of Alberta and the Federal Court, the scope of examination for discovery in other Canadian jurisdictions is broad. Persons being examined must answer all proper questions “relating to any matter in issue in the action,”<sup>143</sup> “relating to a matter in question,”<sup>144</sup> “regarding any matter that is relevant to the subject matter of the proceeding,”<sup>145</sup> “relating to the issues between the parties” or “touching the matters in issue in the action.”<sup>146</sup> In Alberta, there is a duty to answer only “relevant and material questions”<sup>147</sup> and in the Federal Court, a duty to answer questions “relevant to any unadmitted allegation of fact in a pleading.”<sup>148</sup>

### ***Method of Examination***

Five Canadian jurisdictions, including Ontario, permit a party to examine an opposing party by either oral examination or written questions, but not both, unless leave of the court is obtained.<sup>149</sup> British Columbia, Manitoba, Nova Scotia and Newfoundland have no such restrictions.<sup>150</sup> Saskatchewan does not provide for written examinations<sup>151</sup> and Alberta permits written examinations only by court order.<sup>152</sup>

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<sup>141</sup> Alta. Rules, rule 189.

<sup>142</sup> Ont. Rules, rule 30.10; Alta. Rules, rule 209, 216.1; B.C. Rules, rule 26(11); Man. Rules, rule 30.10(1); N.B. Rules, rule 31.11(1); Nfld. Rules, rule 32.07(2); N.W.T. Rules, rule 231; N.S. Rules, 20.06(2); P.E.I. Rules, rule 30.10; Art. 402 C.C.P.; Sask. Rules, rule 236; [Yukon – B.C. Rules apply]; Fed. Ct. Rules, rule 233.

<sup>143</sup> Ont. Rules, rule 31.06; Man. Rules, rule 31.06; N.B. Rules, rule 32; N.W.T. Rules, rule 251; P.E.I. Rules, rule 31.

<sup>144</sup> B.C. Rules, rule 27(22); [Yukon – B.C. Rules apply].

<sup>145</sup> Nfld Rules, rule 30.08; N.S. Rules, rule 18.01.

<sup>146</sup> Arts. 397, 398 C.C.P.; Sask. Rules, rule 222.

<sup>147</sup> Alta. Rules, rule 200(1.2).

<sup>148</sup> Fed. Ct. Rules, rule 240.

<sup>149</sup> Ont. Rules, rule 31.02(1). [Note: Where more than one party is entitled to examine a person, the examination shall be an oral examination, unless the parties agree otherwise, pursuant to rule 31.02(2)]; N.B. Rules, rule 32.04; N.W.T. Rules, rule 236; P.E.I. Rules, rule 31.02; Fed. Ct. Rules, rule 234.

<sup>150</sup> B.C. Rules, rules 27(1),(2), 29(1); Man. Rules, rule 31.02; N.S. Rules, rules 18.01, 19.01; Nfld. Rules, rules 30.01, 31.01.

<sup>151</sup> The rules do, however, provide that witnesses may give evidence by means of interrogatories in certain circumstances. The rules also provide for the use of written questions in family law proceedings. See Sask. Rules, e.g. rules 284, 310, 605(4).

<sup>152</sup> Alta. Rules, rule 216.1(2). Note, however, that Alberta's streamlined procedure rules allow a party to elect that an examination for discovery be by written interrogatories only. See Alta. Rules, rule 662(5). Note also that a

### ***Examination of Non-Parties***

Most Canadian jurisdictions do not permit the examination of non-parties without leave of the court.<sup>153</sup> Only Newfoundland<sup>154</sup> and Nova Scotia<sup>155</sup> permit non-parties to be examined without a court order, subject to the court's discretion to limit unnecessary or vexatious examinations.

### ***Examination of Corporate Parties***

The majority of Canadian jurisdictions permit a party to examine only one officer, director or employee of a corporate party, except with leave.<sup>156</sup> By contrast, Alberta does not restrict the number of corporate officers who may be examined,<sup>157</sup> and as stated above, Newfoundland and Nova Scotia permit any person to be examined.

## **Expert Evidence**

### ***Expert Reports***

Like Ontario, most Canadian jurisdictions require an expert report to set out the expert's name, address and qualifications, as well as the substance of the proposed testimony.<sup>158</sup> Several also require a description of the grounds, factual assumptions, or disclosure of documents on which the opinion is based.<sup>159</sup>

Most jurisdictions prescribe fixed time periods for the delivery of expert reports. These are summarized in **Appendix J**. Some jurisdictions require expert reports to be delivered within a specified time before or by pre-trial.<sup>160</sup> Others, including Ontario, require delivery within a specified time before trial. By contrast, New Brunswick requires that expert reports be served "as soon as practicable" but no later than the trial scheduling date.<sup>161</sup> Under Quebec's case management regime, parties must file an agreed timetable for delivering expert reports. If they are unable to agree, the court may fix a timetable.

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Working Committee of Alberta's Discovery and Evidence Committee has proposed that written interrogatories be permitted as an alternative to oral discovery. See Alberta Rules of Court Project, *Document Discovery and Examination for Discovery, Consultation Memorandum No. 12.2* (Edmonton: Alberta Law Reform Institute, October 2002) at 58.

<sup>153</sup> Ont. Rules, rule 31.10(1); Alta. Rules, rules 200, 201, 202; B.C. Rules, rule 28(1); Man. Rules, 31.10(1); N.B. Rules, rule 32.10(1); N.W.T. Rules, rule 270(1); P.E.I. Rules, rule 31.10(1); Arts. 397, 398 C.C.P.; Sask. Rules, rule 222A(1); Fed. Ct. Rules, rule 238(1)

<sup>154</sup> Nfld. Rules, rule 30.01(1), (2).

<sup>155</sup> N.S. Rules, rule 18.01(1), (2).

<sup>156</sup> Ont. Rules, rule 31.03(2), (3); B.C. Rules, rule 27(4), (5); Man. Rules, rule 31.03(2),(3); N.B. Rules, rule 32.02(2); N.W.T. Rules, rule 238(1),(2); P.E.I. Rules, rule 31.03(2), (3); Arts. 397, 398 C.C.P.; Sask. Rules, 223; Fed. Ct. Rules, rule 235, 237(1), (3).

<sup>157</sup> Alta. Rules, rule 200(1).

<sup>158</sup> Ont. Rule, rule 53.03(1); Alta. Rules, rule 218.1(1); BC Rules, rule 40A(5); Man. Rules, rule 53.03(1); N.B. Rules, rule 52.01(1); N.W.T. Rules, rule 279; N.S. Rules, rule 31.08(1); PEI Rules, rule 53.03(1); Sask. Rules, rule 284D(1); Yukon, same as B.C.

<sup>159</sup> B.C. Rules, rule 40A(5); N.W.T. Rules, rule 279(1); N.S. Rules, rule 31.08(1); PEI Rules, rule 53.03(1).

<sup>160</sup> Man. Rules, rule 50.01(3), 53.03(1); Sask. Rules, rule 284D(1).

<sup>161</sup> N.B. Rules, rule 52.01(1).

### ***Number of Expert Witnesses***

Most jurisdictions limit the number of experts that may testify at trial. Ontario and five other jurisdictions, permit each party to call up to three experts, unless the court grants leave to call more.<sup>162</sup> In other jurisdictions, parties are restricted to five experts per side.<sup>163</sup> In Newfoundland and Nova Scotia, the court may limit the number of experts (including medical experts) to be called at a trial.<sup>164</sup> The rules in Newfoundland, Nova Scotia and New Brunswick prescribe that where the court has appointed an expert, each party may call only one expert (except with leave to call more) to respond to evidence of the court-appointed expert.<sup>165</sup> Alberta permits one expert per subject per party if the case is designated as a “very long trial action.”<sup>166</sup>

### ***Pre-Trial Examination of Experts***

In the four jurisdictions that permit an expert to be examined before trial, leave is required.<sup>167</sup> In the four jurisdictions that provide for court-appointed experts, parties may seek leave to cross-examine on the expert’s findings before trial.<sup>168</sup> Ontario is one of three jurisdictions that expressly prohibits the examination of an expert retained by another party in anticipation of litigation.<sup>169</sup> The remaining jurisdictions do not refer to the examination of an expert prior to trial.

### **Special Rules That Impact Discovery**

Like Ontario, several Canadian jurisdictions have established “simplified,” “streamlined,” “fast track” or “fast process” procedures, which may restrict or modify documentary,<sup>170</sup> oral or written<sup>171</sup> discovery requirements.

<sup>162</sup> *Manitoba Evidence Act*, C.C.S.M. c. E150, s. 25; *New Brunswick Evidence Act*, S.N.B. c. E-11, s. 23; *Northwest Territories Evidence Act*, R.S.N.W.T. 1988, c. E-8, s. 9; *Nunavut Evidence Act*, R.S.N.W.T. 1988, c. E-8, s. 9; *Yukon Evidence Act*, R.S.Y. 2002, c. 57, s. 9. Note, however, that legislation in N.B., N.W.T., Nunavut and the Yukon is drafted to suggest a party may call no more than three expert witnesses *on any issue*, rather than on all issues. In contrast, s. 12 of Ontario’s *Evidence Act*, R.S.O. 1990, c. E.23, s. 12 does not include the language “any issue”, suggesting that each side may call a total of 3 experts. Case law has interpreted this section to mean three experts per side, per case. See *Bank of America Canada v. Mutual Trust Co.* (1998), 39 O.R. (3d) 134 (Gen. Div. [Commercial List]).

<sup>163</sup> *The Saskatchewan Evidence Act*, R.S.S. 1978, c. s-18, s. 48; *Canada Evidence Act*, R.S. 1985, c. C-5, s. 7.

<sup>164</sup> Nfld. Rules, rule 46.05; N.S. Rules, rule 31.06.

<sup>165</sup> Nfld. Rules, rule 35.05; N.S. Rules, rule 23.05; N.B. Rules, rule 54.03(8).

<sup>166</sup> Alta. Rules, rule 218.4.

<sup>167</sup> Alta. Rules, rule 218.8(1); N.S. Rules, rule 31.08(2); Que. Code, Art. 397(4), 398(3); Can. (Fed.) Rules, rule 280(3).

<sup>168</sup> Alta. Rules, rule 218(6); N.S. Rules, rule 23.03; N.W.T. Rules, rule 252(8); Nfld. Rules, rule 35.03.

<sup>169</sup> B.C. Rules, rule 28(2); Ont. Rules, rule 31.10(1); Sask. Rules, rule 222A(1).

<sup>170</sup> Some provinces require parties to include a list of potential witnesses with their affidavit of records or documents. See, e.g., Alta. Rules, rule 661(4); Sask. Rules, rule 483(4). Time limits for delivery of affidavit of records or list of documents may also be shortened. See, e.g., Alta Rules, rule 661(1) (30 days after service of statement of defence); N.S. Rules, rule 68.03(1) (Halifax case management fast process) (20 days after close of pleadings).

<sup>171</sup> Examination for discovery is prohibited under Saskatchewan’s simplified procedure rules (r. 296), and under Federal Court simplified action rules (r. 296) is permitted only in writing, and cannot exceed 50 questions. Alberta’s streamlined procedure rules (r. 662(5)) restrict written interrogatories to 1000 words. Under B.C.’s fast track litigation pilot project rule (r. 66(18)), parties need not answer interrogatories, unless a court orders otherwise. Alberta’s rule 662(1) and B.C.’s rule 66(13) & (14) also impose time limits on examinations for discovery.

## Discovery Disputes

Discovery disputes in Ontario are regularly heard by motion<sup>172</sup> or in case managed jurisdictions, by case conference.<sup>173</sup> In case managed and simplified procedure cases, motions may be heard by appearance, telephone or video conference, in writing, or by fax;<sup>174</sup> disputes may also be heard by these methods in other cases where the parties consent and the presiding judge or officer permits it.<sup>175</sup> Case conferences are regularly heard in person or by telephone conference, depending on the scheduling practices of the case management masters.

Other jurisdictions permit motions to be heard by telephone or videoconference, but they require the parties to consent to such a hearing, or to have the court so order, or both.<sup>176</sup> A practice direction in British Columbia permits motions brought in Vancouver to be heard by teleconference only where the judge hearing the motion is sitting outside Vancouver.<sup>177</sup> Prince Edward Island only uncontested motions to be heard by teleconference.<sup>178</sup>

## Sanctions

As noted earlier, the chart at **Appendix I** sets out the range of sanctions and discovery enforcement powers that are currently available to the court in Ontario.

Sanctions of interest in other provinces include a fixed cost penalty payable forthwith in Alberta where a party fails to file an affidavit of records on time.<sup>179</sup> Nova Scotia authorizes the court to impose such penalty as is just where a party does not make reasonable efforts to give full discovery.<sup>180</sup> Several jurisdictions permit contempt orders to issue where a party fails to produce documents as required by the rules, fails to comply with a documentary discovery order, refuses to attend an examination, or refuses to answer proper questions.<sup>181</sup> In Saskatchewan, a person is deemed guilty of contempt where he or she neglects or refuses to attend an examination, to be sworn, to answer any lawful question, or to answer an undertaking within a reasonable time after the examination.<sup>182</sup>

The Discovery and Evidence Committee of the Alberta Rules of Court Project has reviewed Alberta's rule 216.1, which lists 15 remedies the court may order when a party "acts or threatens to act in a manner that is vexatious, evasive, abusive, oppressive, improper or prolix" during the

<sup>172</sup> Ont. Rules, rule 37.01.

<sup>173</sup> Ont. Rules, rule 77.13.

<sup>174</sup> Ont. Rules, rules 76.05(3), 77.12(2.1).

<sup>175</sup> Ont. Rules, rules 1.08(1), 37.12.1.

<sup>176</sup> Alta. Rules, rule 385.1(2) Note: Pursuant to a case management practice note of Sept. 1, 2001, a case management judge may permit parties to attend a case management conference by teleconference; a case management practice note of April 1, 1995, permits contested "applications" to be heard by teleconference; Man. Rules, rule 37.09(1); Nfld. Rules, rule 47A.01; N.B. Rules, rule 37.09; N.S. Rules, rule 37.09(1); N.W.T. Rules, rule 389 (1)

<sup>177</sup> B.C. Notice to the Profession, January 22, 1997.

<sup>178</sup> PEI Practice Note 6, Trial Division – Contested Chambers Practice, para. 6.

<sup>179</sup> Alta. Rules, rule 190.

<sup>180</sup> N.S. Rules, rule 20.09(2).

<sup>181</sup> See, e.g. Nfld. Rules, rule 30.14; N.W.T. Rules, rule 233; N.S. Rules, rules 18.15, 20.09(1).

<sup>182</sup> Sask. Rules, rule 231.

discovery process, or where “the expense, delay, danger or difficulty in complying fully [with discovery obligations] would be grossly disproportionate to the likely benefit.”<sup>183</sup> The Committee considered whether it would be more appropriate to have a general non-compliance rule (such as contempt), but preferred the current rule, which lists specific types of remedies for improper discovery conduct in the discovery process. It was felt that the court might be more comfortable in imposing such forms of relief if they were specifically prescribed.<sup>184</sup>

## 2. UNITED STATES

Discovery procedures in the United States resemble those in Canada in many ways. For example, oral examination is a key element of discovery, as are mechanisms for initial documentary disclosure and written interrogatories. However, distinctly American features include:

- a requirement to disclose documents only on request;
- a general right to conduct both oral discovery and written interrogatories; and
- few restrictions on the pre-trial examination of non-party witnesses.

In addition, a number of American jurisdictions have introduced discovery management mechanisms. The objective is to reduce or eliminate discovery-related problems by encouraging parties to reach an understanding (on their own, or with the assistance of the court if needed) early in the litigation process on the parameters of discovery, including:

- scope of discoverable issues and information;
- timetable for disclosure and production;
- production from non-parties;
- manner of production;
- timetable for completing examination for discovery and fulfilling undertakings;
- persons to be examined and duration of examinations; and
- expert evidence needed.

Discovery reform has been the subject of significant scholarly work in the United States. Numerous articles and reports have examined discovery rules and analyzed reform options. Others have looked at the conduct of lawyers and judges in relation to discovery abuse and its impact on civil litigation. These are included in the bibliography at **Appendix G**. Much of this work has resulted in attempts to improve the discovery process. The United States Federal Court, Arizona, California, New York and Texas are some leading jurisdictions where discovery reform is well underway. These are discussed below.

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<sup>183</sup> Alta. Rules, rule 216.1; Alberta Rules of Court Project, *supra* note 152 at 72-74. The remedies include: (a) costs; (b) security for costs; (c) an advance payment against costs; (d) increased or decreased interest entitlement; (e) production of documents; (i) schedules or time limits; (j) written interrogatories; (m) disclosure of the aims of proposed further discovery; and (n) supervision of further discovery by a judge, master or other officer.

<sup>184</sup> Alberta Rules of Court Project, *supra* note 152 at 74.

### (i) Federal Court

The rules relating to discovery are found in Part V of the United States Federal Court Rules of Civil Procedure (rules 26 – 30).<sup>185</sup> These rules underwent significant reform in 1993 and again in 2000.<sup>186</sup> In response to pervasive perceptions that litigation costs too much and takes too long, the U.S. Congress passed the *Civil Justice Reform Act* (“*CJRA*”) in 1990, which required all U.S. District Courts to implement a civil justice expense and delay reduction plan. A major target of the *CJRA* was the discovery process.<sup>187</sup> By 1993, amendments to the Federal Court rules were introduced that:

consisted primarily of new duties to disclose factual information and information about experts, as well as presumptive or potential limits on the amount and type of discovery that could be undertaken. The new rules also took several steps to foster a more cooperative relationship between counsel.<sup>188</sup>

### Scope of Discovery

A key focus of reform was the scope of discovery. Before the 2000 amendments, any material “relevant to the **subject matter** involved in the pending action” [emphasis added] was discoverable. As a result of the reform, discovery material is now defined narrowly as material that is not privileged, and “is relevant to the **claim or defence** of any party” [emphasis added].<sup>189</sup>

### Methods of Discovery

Parties may obtain discovery through documentary disclosure, depositions upon oral examination or written questions, written interrogatories, production of documents or things, and physical and mental examinations.<sup>190</sup> A party may serve on any other party a request to produce any tangible things that constitute matters within the scope of discovery, and which are in the possession of the party upon whom the request is served.<sup>191</sup>

### Mandatory Initial Documentary Disclosure

A significant change in the Federal Court discovery process was the adoption of an automatic duty of initial disclosure.<sup>192</sup> Whereas in the past, a formal discovery request was required to invoke the duty to disclose, parties must now automatically disclose the following information early in the litigation process:

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<sup>185</sup> United States Federal Rules of Civil Procedure [hereinafter, “U.S. Fed. R. Civ. P.”].

<sup>186</sup> See Carl Tobias, “*Congress and the 2000 Federal Civil Rules Amendments*”, 22 *Cardozo Law Review* 75 (2000) for a summary of the history of the amendments.

<sup>187</sup> A.Y. Shields, “*The Civil Justice Reform Act: The Utility of Disclosure as a Reform to the Pretrial Discovery Process*” (1993) 67 *St. John’s L. Rev.* 907 at 907.

<sup>188</sup> P.E. Longan, E.J. Getto & W.T. Hangle, “*Report of the Federal Procedure Committee of the Section of Litigation of the America Bar Association of the Civil Justice Reform Act and the 1993 Discovery Amendments*”.  
[www.abanet.org/litigation/committee/pretrial/longan2.html](http://www.abanet.org/litigation/committee/pretrial/longan2.html).

<sup>189</sup> U.S. Fed.R. Civ. P., rule 26(b)(1).

<sup>190</sup> U.S. Fed.R. Civ. P., rule 26(a)(5).

<sup>191</sup> U.S. Fed.R. Civ. P., rule 34(a).

<sup>192</sup> U.S. Fed. R. Civ. P., rule 26(a)(1).

- names, addresses, and telephone numbers of all potential witnesses;
- description and location of all documents, data and other things in the possession of a party that the disclosing party may use to support its claim or defence;
- computation of any category of damages claimed, with supporting documents and material;
- any relevant insurance agreement; and
- names of potential experts.<sup>193</sup>

These initial disclosures must be made at or within 14 days after the parties' first meeting to discuss a discovery plan (described below).<sup>194</sup>

### **Discovery Planning**

Parties are required to have a meeting (“discovery conference”) to consider the nature and basis of their claims and defences and the possibilities for prompt settlement or resolution of the case. In addition to making the required disclosures, they must develop a proposed discovery plan. The lawyers on record and all unrepresented parties “are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan” and for submitting it to the court within the prescribed timelines.<sup>195</sup>

The discovery conference must occur at least 21 days before a “scheduling conference” (discussed below). The discovery plan must address the parties' views and proposals concerning any deviations from prescribed disclosure requirements, the subjects on which discovery is needed and when it will be completed, any limitations on discovery, and any other orders that the parties believe should be obtained.<sup>196</sup>

Within 14 days after the discovery conference, the parties must submit to the court a discovery plan for review at a scheduling conference. At the scheduling conference, the court may enter an order prescribing the time within which discovery and related motions are to be completed. The court may also include the dates for pre-trial and trial, and make any other necessary order.<sup>197</sup>

### **Written Interrogatories and Oral Depositions**

A party may serve up to 25 written interrogatories on another party. Leave to serve additional interrogatories may be granted in certain circumstances.<sup>198</sup> In addition to written interrogatories, a party may require the oral deposition of any person (including a non-party). Attendance may be compelled by subpoena.<sup>199</sup> A party may also depose any person identified as an expert whose opinions may be presented at trial.<sup>200</sup>

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<sup>193</sup> *Ibid.*

<sup>194</sup> *Ibid.*

<sup>195</sup> U.S. Fed.R. Civ. P., rule 26(f).

<sup>196</sup> U.S. Fed.R. Civ. P., rule 26(f).

<sup>197</sup> U.S. Fed.R. Civ. P., rule 16(b).

<sup>198</sup> U.S. Fed.R. Civ. P., rule 33(a).

<sup>199</sup> U.S. Fed.R. Civ. P., rule 30(a).

<sup>200</sup> U.S. Fed.R. Civ. P., rule 26(4)(A).

## Discovery Disputes

Motions for orders compelling discovery and related sanctions must include a certification that the moving party has in good faith conferred or attempted to confer with the opposing party in an effort to secure the disclosure without court action.<sup>201</sup>

### (ii) Arizona

The discovery process in Arizona is prescribed by the Rules of Civil Procedure for the Superior Courts of Arizona. In 1992, the discovery rules were significantly reformed following a review of the civil discovery process.<sup>202</sup> The amendments placed overall limits on the scope of discovery, required initial disclosure of specified information, limited most depositions to a maximum of four hours, and increased judicial involvement in managing the discovery process.<sup>203</sup>

### Scope of Discovery

The scope of discovery in Arizona is relatively broad. Parties may obtain discovery “regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defence of the party seeking discovery or to the claim or defence of any other party.”<sup>204</sup> The definition of discoverable information provides that “[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”<sup>205</sup> This is similar to the broad “semblance of relevance” test used in Ontario.

### Methods of Discovery

Parties may obtain discovery by a variety of methods, including depositions upon oral examination or written questions, written interrogatories, and production of documents or things. The frequency of use of these methods may be limited by court order.<sup>206</sup>

### Mandatory Initial Documentary Disclosure

Arizona, like the U.S. Federal Court, introduced mandatory initial disclosure as part of its discovery reform initiative. Within 40 days after the filing of a defence (or as otherwise agreed by the parties or ordered by the court),<sup>207</sup> each party must disclose in writing to every other party:

- the factual basis of the claim or defence;
- the legal theory upon which the claim or defence is based;

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<sup>201</sup> U.S. Fed.R. Civ. P., rule 37(A)(2)(a).

<sup>202</sup> Arizona’s discovery rule amendments are often referred to as the “Zlaket Rules”. Chief Justice Thomas A. Zlaket, who was a lawyer at the time of the amendments in 1992, headed the commission which examined civil discovery reform. See, “An Interview with Thomas Zlaket”, <http://aja.ncsc.dni.us/courtrv/cr37/cr37-3/CR37-3Zlaket.pdf>.

<sup>203</sup> *Ibid.*

<sup>204</sup> Rules of Civil Procedure for the Superior Courts of Arizona, [hereinafter, “Ariz. R. Civ. P.”], rule 26(b)(1).

<sup>205</sup> *Ibid.*

<sup>206</sup> Ariz. R. Civ. P., rule 26(a).

<sup>207</sup> Ariz. R. Civ. P., rule 26.1(b)(1).

- identification of witnesses expected to testify, along with a fair description of the substance of each witness' expected testimony;
- names and addresses of all persons whom the party believes may have knowledge relevant to the action, and who have given statements;
- names and addresses of experts the party expects to call at trial, limited to one per side per issue, and the substance of their testimony;
- computation of damages and documents in support thereof;
- the existence and general description of relevant documents that the disclosing party plans to use at trial; and
- a list (and a copy) of documents the party believes may be relevant to the subject matter of the action and those which appear reasonably calculated to lead to the discovery of admissible evidence.<sup>208</sup>

### **Medical Malpractice Cases**

Following a study on medical malpractice procedure by a special committee appointed by the Arizona Supreme Court, a new rule was established in 2000 to address the exchange of documents and limits on discovery in such cases.<sup>209</sup> The rule requires parties to exchange all available medical records relevant to the subject matter in the action soon after pleadings are closed and before discoveries occur.<sup>210</sup> Parties are also permitted to exchange certain limited written interrogatories before a comprehensive pre-trial conference (discussed below).

### **Discovery Planning**

The concept of a comprehensive pre-trial conference was introduced for medical malpractice cases,<sup>211</sup> but it is also available for other types of cases on the written request of any party.<sup>212</sup> Within five days of receiving answers or motions from all defendants who have been served, the plaintiff must notify the court so that a comprehensive pre-trial conference can be scheduled. At the conference, the court and the parties will:

- determine a schedule for the discovery to be undertaken (including depositions, documents to be exchanged, and any medical examinations that may be required);
- determine a schedule for the disclosure of standard of care and causation expert witnesses;
- determine the order of and dates for the disclosure of all other expert and non-expert witnesses, as well as limits on the number of expert witnesses;
- determine the number of non-uniform interrogatories;
- resolve any discovery disputes that have been presented; and
- set a date for a mandatory settlement conference and trial date.<sup>213</sup>

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<sup>208</sup> Ariz. R. Civ. P., rule 26.1(a).

<sup>209</sup> See State Bar Committee Notes to Annotated Arizona Rules of Court, rule 26.1 (2003).

<sup>210</sup> Ariz. R. Civ. P., rule 26.2(a)(1) and (2).

<sup>211</sup> Ariz. R. Civ. P., rule 16(c).

<sup>212</sup> Ariz. R. Civ. P., rule 16(b).

<sup>213</sup> Ariz. R. Civ. P., rule 16(c).

## Experts

In all cases, including medical malpractice cases, each side is presumptively entitled to only one independent expert per issue, except upon a showing of good cause. In medical malpractice cases, each party is presumptively entitled to only one standard of care expert.<sup>214</sup>

## Written Interrogatories

A party may serve on any other party up to a maximum of 40 written interrogatories.<sup>215</sup> If a party believes that good cause exists for additional interrogatories, it must consult with the party to be served and attempt to secure a written agreement for additional interrogatories.<sup>216</sup> If no agreement can be reached, leave of the court is required.<sup>217</sup>

## Discovery Disputes

The court will not consider discovery motions unless moving counsel attaches a separate statement certifying that, after personal consultation and good faith efforts, counsel have been unable to satisfactorily resolve the matter.<sup>218</sup> To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.<sup>219</sup>

### (iii) California

The California Code of Civil Procedure<sup>220</sup> sets out the requirements for discovery in California. It incorporates the *Civil Discovery Act of 1986*, the first major revision of discovery procedures in California since 1957.<sup>221</sup> The Act was the product of a multiple-year study by a joint bar and judicial commission, whose mandate included the elimination or reduction of discovery abuses.<sup>222</sup>

## Scope and Methods of Discovery

Discovery covers any matter that is not privileged and is relevant to the subject matter of the case, including inadmissible matters, so long as the request is reasonably calculated to lead to the discovery of admissible evidence.<sup>223</sup>

A variety of discovery mechanisms are available, including depositions upon oral examination or written questions, and written interrogatories.<sup>224</sup> However, the court may limit the scope or

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<sup>214</sup> Ariz. R. Civ. P., rule 26(b)(4)(D).

<sup>215</sup> Ariz. R. Civ. P., rule 33.1(a).

<sup>216</sup> Ariz. R. Civ. P., rule 33.1(b).

<sup>217</sup> Ariz. R. Civ. P., rule 33.1(c).

<sup>218</sup> Ariz. R. Civ. P., rules 26(g); 37(a)(2)(C).

<sup>219</sup> Ariz. R. Civ. P., rule 7.1(c)(2).

<sup>220</sup> Hereinafter, “Cal. Code Civ. P.”

<sup>221</sup> P.E. Bruggman, *Reducing the Costs of Civil Litigation: Discovery Reform* (Public Law Research Institute, 1995) <http://www.uchastings.edu/plri/fal95tex/discov.html>.

<sup>222</sup> P.E. Bruggman, *Reducing the Costs of Civil Litigation: Discovery Reform* (Public Law Research Institute, 1995) <http://www.uchastings.edu/plri/fal95tex/discov.html>.

<sup>223</sup> Cal. Code Civ. P., § 2017(a).

manner of discovery if it determines that the burden, expense, or intrusiveness of that discovery outweighs the likelihood that the information sought will lead to the discovery of admissible evidence, or is duplicative or unnecessary.<sup>225</sup>

### **Discovery Abuse**

Discovery abuse is defined to include:

- persisting in obtaining information that is outside the scope of discovery;
- using a discovery method that does not comply with its specified procedures;
- employing a discovery method that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense;
- failing to respond or submit to an authorized method of discovery;
- making an unmeritorious objection to discovery;
- making an evasive response to discovery;
- disobeying a court order to provide discovery;
- making or opposing, without substantial justification, a motion to compel or to limit discovery; and
- failing to confer with an opposing party or attorney in a good faith attempt to resolve any dispute concerning discovery (where a motion requires the filing of a certificate that good faith efforts were made).<sup>226</sup>

Upon a finding of discovery misuse, five types of sanctions are authorized:

1. Monetary sanctions, which may be imposed on a party, its attorney, or both. Where a monetary sanction is authorized by the Code, the court shall impose the sanction unless there was substantial justification for the conduct.<sup>227</sup>
2. Issue sanctions, which are orders that deem certain facts to be established or prohibit a party from supporting or opposing claims or defences.<sup>228</sup>
3. Evidence sanctions, which are orders that prohibit a party from introducing designated matters in evidence.<sup>229</sup>
4. Terminating sanctions, which are orders that strike pleadings, stay a proceeding, dismiss an action, or render default judgment.<sup>230</sup>
5. Contempt sanctions, which are contempt orders.<sup>231</sup>

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<sup>224</sup> Cal. Code Civ. P., § 2019(a).

<sup>225</sup> Cal. Code Civ. P., § 2017(c), 2019(b).

<sup>226</sup> Cal. Code Civ. P., § 2023(a).

<sup>227</sup> Cal. Code Civ. P., § 2023(b)(1).

<sup>228</sup> Cal. Code Civ. P., § 2023(b)(2).

<sup>229</sup> Cal. Code Civ. P., § 2023(b)(3).

<sup>230</sup> Cal. Code Civ. P., § 2023(b)(4).

<sup>231</sup> Cal. Code Civ. P., § 2023(b)(5).

## Discovery Disputes

The court is required to impose a monetary sanction against any party who unsuccessfully brings or opposes a discovery-related motion, unless it is shown that the party acted with substantial justification.<sup>232</sup> Most discovery motions must be accompanied by a declaration showing a reasonable and good faith attempt at informal resolution of each issue to be addressed at the motion.<sup>233</sup>

## Written and Standard Form Interrogatories

The restricted use of written and standard form interrogatories is an interesting feature of California's rules. The California Judicial Council has prepared a list of standard form interrogatories, divided by case type, that reflect questions commonly asked in specific case types.<sup>234</sup> A party may ask as many standard form interrogatories as are relevant to the subject matter of the pending action, but may only ask a maximum of 35 individually prepared interrogatories, except in prescribed circumstances.<sup>235</sup>

## Depositions

A party may, by oral or written questions, take the deposition of any party to the action and any expert listed on another party's expert witness list.<sup>236</sup> A non-party may be examined by oral or written deposition. While no court order is needed, a court-issued subpoena is required to examine a non-party.<sup>237</sup>

## Discovery Period

Discovery must be completed at least 30 days before the initial trial date, and any motions arising from discovery must be completed at least 15 days before the initial trial date.<sup>238</sup> As of these dates, the discovery period is closed and cannot be extended even if the trial date is postponed, unless a court order is obtained.<sup>239</sup>

### (iv) New York

The New York Civil Practice Law and Rules<sup>240</sup> govern discovery in civil judicial proceedings in New York State, and include the features described below.

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<sup>232</sup> Cal. Code Civ. P., § 2017(c), (d), 2023.

<sup>233</sup> *E.g.*, see Cal. Code Civ. P., § 2030(l).

<sup>234</sup> Cal. Code Civ. P., § 2033.5. The standard form interrogatories and requests for admission of the genuineness of any relevant documents or of the truth of any relevant matters of fact were developed for use in civil actions relating to personal injury, property damage, wrongful death, unlawful detainer, breach of contract, family law, or fraud, and any others the Judicial Council deems appropriate. Use of these standard forms is optional.

<sup>235</sup> Cal. Code Civ. P., § 2030(c)(1) & (2).

<sup>236</sup> Cal. Code Civ. P., § 2025, 2028.

<sup>237</sup> Cal. Code Civ. P., § 2020.

<sup>238</sup> Cal. Code Civ. P., § 2024(a).

<sup>239</sup> Cal. Code Civ. P., § 2024(e).

<sup>240</sup> Hereinafter, "N.Y. Civ. Prac. L. & R."

## **Scope of Discovery**

Discovery covers all matters that are material and necessary in the prosecution or defence of an action, regardless of the burden of proof.<sup>241</sup>

## **Methods of Discovery**

Parties may obtain discovery by various methods, including depositions upon oral examination or written questions, and written interrogatories.<sup>242</sup> Document production is commenced by serving a notice to produce documents. Once served, a party may inspect the documents designated in the notice.<sup>243</sup> Written interrogatories may be served at any time after an action is commenced. A party may not serve interrogatories and orally examine the same party if the action is based on personal injury, injury to property, or wrongful death.<sup>244</sup> A party may take the testimony of any person by deposition upon oral or written questions.<sup>245</sup>

## **Protective Orders**

At any time, the court may make a protective order, on its own initiative or on the motion of any party, limiting the use of any method of disclosure in order to prevent discovery abuse. Such orders shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the court.<sup>246</sup>

## **Discovery Management**

The court has express authority to supervise discovery. On its own initiative, or on a party's motion, the court may appoint a judge or a referee to supervise all or part of the discovery process. The court may select a hearings officer to act as referee, or the parties may agree on a named lawyer. The referee has the powers of the court with respect to supervising discovery, and any orders relating to discovery are binding on the parties. In the case of a lawyer-referee, the parties pay the lawyer's fees as a disbursement. The court may review a referee's order on a party's motion no later than five days after the order is made.<sup>247</sup>

## **Medical and Personal Injury Cases**

There are special rules for dental, podiatric and medical malpractice actions. The chief administrator of the courts must adopt special calendar control rules, including a pre-calendar conference soon after an action has commenced, to encourage settlement, simplify or limit issues, establish a timetable for disclosure, offers, depositions, future conferences, and set a trial date.<sup>248</sup>

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<sup>241</sup> N.Y. Civ. Prac. L. & R., § 3101.

<sup>242</sup> N.Y. Civ. Prac. L. & R., § 3102(a).

<sup>243</sup> N.Y. Civ. Prac. L. & R., § 3120(a).

<sup>244</sup> N.Y. Civ. Prac. L. & R., § 3130(1).

<sup>245</sup> N.Y. Civ. Prac. L. & R., § 3106(a).

<sup>246</sup> N.Y. Civ. Prac. L. & R., § 3103(a).

<sup>247</sup> N.Y. Civ. Prac. L. & R., see § 3104 generally.

<sup>248</sup> N.Y. Civ. Prac. L. & R., § 3406 (b).

Any party may offer to make available for oral examination the expert witnesses it expects to call at trial. If all parties accept the offer, each party must produce its own expert witnesses for examination upon oral deposition.<sup>249</sup> Finally, where a plaintiff is terminally ill as a result of another party's conduct, the court may establish a schedule for the completion of all discovery proceedings within 90 days after the pre-calendar conference.<sup>250</sup>

## (v) Texas

The discovery process in Texas is prescribed in detailed provisions under the Texas Rules of Civil Procedure.<sup>251</sup> The discovery rules were revised in 1999 in order to impose limits on the volume of discovery, curb abuses, reduce cost and delay, modernize and streamline current discovery practice, reorganize and reword several discovery rules.<sup>252</sup>

### Scope of Discovery

The scope of discovery includes any non-privileged matter that is relevant to the subject matter of the case, including inadmissible matters, so long as the request is reasonably calculated to lead to the discovery of admissible evidence.<sup>253</sup> It also extends to discovery of a party's legal contentions and the factual bases for those contentions.<sup>254</sup> Despite the broad scope of discovery, the court has express power to limit discovery where the information sought is unreasonably cumulative, duplicative, or is obtainable from a less burdensome or less expensive source.<sup>255</sup> The court may also limit discovery where the burden of the proposed discovery outweighs its likely benefit.<sup>256</sup>

### Discovery Control Plans

Parties may obtain discovery by various means, including requests for documentary disclosure, depositions upon oral examination or written questions, and written interrogatories. However, each case (and method of discovery) must be governed by a "discovery control plan."<sup>257</sup> There are three levels of discovery control plan, each of which features: (1) a prescribed "discovery period" within which all discovery must be completed; (2) time limits on oral discovery; and (3) limits on the number of written interrogatories. These are summarized below:

#### Level 1<sup>258</sup>

- Used where the suit seeks only monetary relief of \$50,000 or less;
- Discovery period runs from the date the suit is filed to 30 days before the trial date;

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<sup>249</sup> N.Y. Civ. Prac. L. & R., § 3101(d)(1).

<sup>250</sup> N.Y. Civ. Prac. L. & R., § 3407(b).

<sup>251</sup> Texas Rules of Civil Procedure, [hereinafter, "Tex. R. Civ. P."]

<sup>252</sup> Hon. N. Hecht and R. H. Pemberton, *A Guide to the 1999 Texas Discovery Rules Revisions* (Texas Supreme Court: November, 1998) at G-1.

<sup>253</sup> Tex. R. Civ. P., rule 192.3(a).

<sup>254</sup> Tex. R. Civ. P., rule 192.3(j).

<sup>255</sup> Tex. R. Civ. P., rule 192.4(a).

<sup>256</sup> Tex. R. Civ. P., rule 192.4(b).

<sup>257</sup> Tex. R. Civ. P., rule 190.1.

<sup>258</sup> Tex. R. Civ. P., rule 190.2.

- Each party has a maximum of six hours in total to examine and cross-examine all witnesses by oral deposition; and
- Any party may serve up to 25 written interrogatories on any other party.

Level 2<sup>259</sup>

- Basic “default” level governs most cases (applies where the conditions for Level 1 are not satisfied and the court has not entered a tailored Level 3 discovery plan);
- Discovery period is the earlier of (a) the date the suit is filed to 30 days before the trial date or (b) nine months after the first oral deposition or the due date of answers to written questions;
- Each party has a maximum of 50 hours in total to examine and cross-examine all parties, witnesses and experts on the opposing side; and
- Any party may serve up to 25 written interrogatories on any other party.

Level 3<sup>260</sup>

- Court-managed discovery, as requested by a party or ordered by the court;
- Tailored discovery plan is designed for more complex cases that do not easily fit into Levels 1 or 2, although the court may enter a Level 3 plan on the motion of any party or on its own initiative in any type of case; and
- Plan must include a date for trial, or for a conference to fix a trial, and set the discovery period, appropriate time limits on the amount of discovery, and deadlines for joining new parties, amending pleadings, and designating expert witnesses to be established.

### **Requests for Disclosure**

The request for disclosure enables parties to obtain prescribed discoverable information, including the subject matter on which a party's expert will testify and discoverable witness statements. Information subject to disclosure includes the name, address and phone number of witnesses, the amount and calculation of damages, and the legal theories on which a party's claims or defences are based.<sup>261</sup> This procedure is similar to the "initial disclosures" under U.S. Federal Court rules, except that disclosure is only required where it has been requested.<sup>262</sup>

A party may also serve on another party written interrogatories to inquire about any matter within the scope of discovery.<sup>263</sup> The number permitted depends on the discovery level of the case. Oral depositions may also be conducted of “any person or entity.”<sup>264</sup>

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<sup>259</sup> Tex. R. Civ. P., rule 190.3.

<sup>260</sup> Tex. R. Civ. P., rule 190.4.

<sup>261</sup> Tex. R. Civ. P., rule 194.2.

<sup>262</sup> Tex. R. Civ. P., rule 194.1.

<sup>263</sup> Tex. R. Civ. P., rule 197.1.

<sup>264</sup> Tex. R. Civ. P., rule 199.1(a).

## Code of Conduct

Another unique feature of the Texas rules is the discovery code of conduct, which states:

Parties and their attorneys are expected to cooperate and to make any agreements reasonably necessary for the efficient disposition of the case. All discovery motions or requests for hearings relating to discovery must contain a certificate by the party filing the motion or request that a reasonable effort has been made to resolve the dispute without the necessity of court intervention and the effort failed.<sup>265</sup>

### 3. OTHER COMMONWEALTH COUNTRIES

Unlike North American jurisdictions, those described below do not incorporate oral examination as a regular discovery mechanism. As discussed in Part II of the Report, oral discoveries evolved in Ontario to become the primary method of discovery. This evolution did not occur in other commonwealth countries.

#### (i) United Kingdom

In the U.K. the conduct of litigation in the county courts, High Court, and Civil Division of the Court of Appeal is governed by the Civil Procedure Rules.<sup>266</sup> These rules came into force in 1999 after Lord Woolf, in his on *Access to Justice Final Report*, recommended numerous justice system reforms.<sup>267</sup> The rules seek to streamline the civil justice process and to resolve as many cases as possible without resorting to court proceedings. The overriding objective, as prescribed in the rules and which parties and the court are obliged to further, is to have cases dealt with justly, with due regard to:

- ensuring parties are on equal footing;
- saving expense;
- dealing with cases in a manner that is proportionate to the amount of money involved, the complexity of the issues, and the financial position of the parties; and
- ensuring that cases are dealt with expeditiously and fairly within existing court resources.<sup>268</sup>

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<sup>265</sup> Tex. R. Civ. P., rule 191.2.

<sup>266</sup> U.K. Civil Procedure Rules, Statutory Instrument 1998 No. 3132 (L.17), [hereinafter, "U.K. C.P.R."], Part 2, rule 2.1.

<sup>267</sup> Lord Wolf, *Access to Justice, Final Report*, (July 1996: Lord Chancellor's Department, London) <http://www.lcd.gov.uk/civil/rpt-bfg3.htm#top>, [hereinafter, "Lord Woolf Report"].

<sup>268</sup> U.K. C.P.R., Part 1, rules 1.1(2), 1.3, 1.4.

## Scope of Discovery

The Civil Procedure Rules define “standard disclosure,” as the minimum required in any case, unless a court orders further disclosure. Standard disclosure requires a party to disclose:

- (a) the documents on which the party relies;
- (b) the documents which adversely affect the party’s own case, adversely affect another party’s case or support another party’s case; and
- (c) the documents which the party is required to disclose by a relevant practice direction.<sup>269</sup>

## Documentary Discovery

Cases are allocated by the court to a small claims track, a fast track, or a multi-track, based on parties’ responses to a questionnaire.<sup>270</sup> The duty of disclosure varies with each track. There is no automatic obligation to disclose documents.

For small claims track cases, parties are obliged only to provide copies of documents on which they intend to rely at the hearing.<sup>271</sup> For fast track or multi-track cases, the court gives directions on documentary disclosure.<sup>272</sup> Courts usually order “standard disclosure.”

## Duty to Search

Where disclosure is ordered, parties have a positive obligation to conduct a reasonable search for documents, proportionate to the issues involved in the case. Proportionality is determined with regard to the number of documents involved, the nature and complexity of the proceedings, the ease and expense of retrieving any particular document and the significance of any document that is likely to be located during the search.<sup>273</sup>

## Witness Statements

Oral deposition of witnesses at the pre-trial stage is rare, and is only permitted with a court order.<sup>274</sup> Instead, parties are required to exchange witness statements of their respective fact witnesses,<sup>275</sup> and expert evidence is given by written report.<sup>276</sup> A party who is unable to obtain a witness statement may apply for permission to serve a witness summary instead, which summarizes of the evidence that would otherwise be included in a witness statement.<sup>277</sup>

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<sup>269</sup> U.K. C.P.R., rule 31.6.

<sup>270</sup> U.K. C.P.R., rule 26.5(1).

<sup>271</sup> U.K. C.P.R., rule 27.4(1)(a), 27.4(3)(a).

<sup>272</sup> U.K. C.P.R., rule 28.3(1).

<sup>273</sup> U.K. C.P.R., rule 31.7.

<sup>274</sup> U.K. C.P.R., rule 34.8(1).

<sup>275</sup> U.K. C.P.R., rule 32.4.

<sup>276</sup> U.K. C.P.R., rule 35.5.

<sup>277</sup> U.K. C.P.R., rule 32.9.

## Expert Evidence

The rules restrict expert evidence to that which is “reasonably required to resolve the proceedings.”<sup>278</sup> As such, no party may call an expert or put an expert’s report in evidence without the court’s permission.<sup>279</sup> If two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence be given by one expert only.<sup>280</sup> A party may put written questions about an expert’s report to another party’s expert or to a jointly appointed expert.<sup>281</sup>

## Pre-Action Protocols

Pre-action protocols have been introduced under the rules for certain types of cases, setting out codes of sensible practice that parties are expected to follow when faced with the prospect of a lawsuit. The overall aim is to encourage more pre-action contact between the parties, better and earlier exchange of information and a more co-operative approach to dispute resolution, with litigation as a last resort.<sup>282</sup> There are currently protocols in six areas: construction and engineering disputes; defamation; personal injury claims; resolution of clinical disputes; professional negligence; and judicial review.<sup>283</sup>

By way of example, the personal injury pre-action protocol:

- requires plaintiffs to notify opposing parties early of any damages suffered, and to deliver a letter of claim (a precedent is included in the protocol);
- provides defendants with a standard of time (3 months) to respond to any demand;
- encourages early document disclosure (lists of documents likely to be material in a personal injury action are provided); and
- encourages joint selection of experts through a defined procedure (a precedent letter to a medical expert is included in the protocol).

Early evaluation of the pre-action protocols suggests they are working to encourage pre-litigation settlement and to reduce the number of unnecessary actions.<sup>284</sup> Anecdotal however, concerns have been raised about the potential for the protocols to front-end load costs for parties.

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<sup>278</sup> U.K. C.P.R., rule 35.1.

<sup>279</sup> U.K. C.P.R., rule 35.4.

<sup>280</sup> U.K. C.P.R., rule 35.7.

<sup>281</sup> U.K. C.P.R., rule 35.6.

<sup>282</sup> Lord Woolf Report at c.10.

<sup>283</sup> U.K. C.P.R., Pre-Action Protocols.

<sup>284</sup> See, B.C. Justice Review Task Force, *Exploring Fundamental Change: A Compendium of Potential Justice System Reforms* (July 2002). [http://www.bcjusticereview.org/recent\\_announcements/2002/potential\\_reforms\\_07\\_02.pdf](http://www.bcjusticereview.org/recent_announcements/2002/potential_reforms_07_02.pdf). See also, Lord Chancellor’s Department, *Further Findings – A continuing Evaluation of Civil Justice Reforms* (August 2002). <http://www.lcd.gov.uk/civil/reform/ffreform.htm>.

## **(ii) Australia Federal Court**

Discovery in the Federal Court of Australia is set out in the Federal Court Rules.<sup>285</sup>

### **Documentary Discovery and Scope**

Documentary discovery is triggered by a request to “require any other party to give discovery of documents.”<sup>286</sup> Once such a request is received, a party must list the documents on which it relies and those that adversely affect its own case, documents that adversely affect or support another party’s case, and any documents required to be disclosed by a relevant practice direction.<sup>287</sup>

### **Duty to Search**

As in the United Kingdom, parties must conduct a reasonable search for documents, proportionate to the issues involved in the case. The determination of proportionality is based on the same factors as in the United Kingdom.<sup>288</sup>

### **Written Interrogatories**

Oral examinations for discovery are rare.<sup>289</sup> Parties may serve written interrogatories with leave of the court. There is significant judicial support for the use of written interrogatories.<sup>290</sup> The interrogatories may relate to any matter in question between the interrogating party and the party being served.<sup>291</sup>

### **Expert Evidence**

If a question for an expert witness arises in a proceeding, the court may appoint a court expert to inquire into and report on the question.<sup>292</sup> If a court expert has made a report on any question, any party may adduce evidence of one other expert on the same question.<sup>293</sup> Upon application by any party, the court must order cross-examination of the court expert by all parties.<sup>294</sup>

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<sup>285</sup> Australia Federal Court Rules, Statutory Rules 1979 No. 140 as amended made under the *Federal Court of Australia Act 1976*, [hereinafter, “Aus. Fed. Ct. R.”]

<sup>286</sup> Aus. Fed. Ct. R., Order 15, rule 1.

<sup>287</sup> Aus. Fed. Ct. R., Order 15, rule 2(3).

<sup>288</sup> Aus. Fed. Ct. R., Order 15, rule 2(5). Proportionality is determined by the number of documents involved, the nature and complexity of the proceedings, the ease and expense of retrieving any particular document, and the significance of any document that is likely to be located during the search.

<sup>289</sup> Note: Some forms of pre-trial oral discovery are permitted, with leave of the court, to identify a respondent (Aus. Fed. Ct. R., Order 15A, rule 3), or to add a party to an existing action (Aus. Fed. Ct. R., Order 15A, rule 5). The general authority to order an oral examination is found in Aus. Fed. Ct. R., Order 24, rule 1.

<sup>290</sup> S.D. Simpson, D.L. Bailey, E.K. Evans, *Discovery and Interrogatories*, 2 ed. (Melbourne: Butterworths, 1990) at 5.

<sup>291</sup> Aus. Fed. Ct. R., Order 16, rule 1.

<sup>292</sup> Aus. Fed. Ct. R., Order 34, rules 2, 3.

<sup>293</sup> Aus. Fed. Ct. R., Order 34, rule 6.

<sup>294</sup> Aus. Fed. Ct. R., Order 34, rule 4.

### **(iii) New Zealand High Court**

The High Court Rules establish civil discovery procedures in New Zealand's High Court.<sup>295</sup>

#### **Scope of Discovery**

Upon being served with a notice, a party is required to give discovery of the documents that are or have been in its possession relating to any matter in question in the proceeding.<sup>296</sup>

#### **Written Interrogatories**

As in Australia and the U.K., oral examinations for discovery rarely occur. The parties may question each other by way of written interrogatories. After the pleadings between any parties are closed, any party may serve on another party a notice requiring it to answer interrogatories relating to any matter in question between them.<sup>297</sup> The court may, on a party's application, order that an answer to an interrogatory is not required or limit the extent to which an answer is required.<sup>298</sup>

#### **Witness Statements**

Before trial, parties are required to serve on each other statements of the proposed evidence in chief of each witness to be called.<sup>299</sup>

#### **Expert Evidence**

In certain proceedings, if a question for an expert witness arises, the court may appoint an independent expert to inquire into and report on any question of fact or opinion not involving questions of law or construction.<sup>300</sup> Any party may, within a prescribed period after receiving a copy of the report, apply to the court for leave to cross-examine the court expert on the report.<sup>301</sup>

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<sup>295</sup> High Court Rules, S.N.Z. [hereinafter, "N.Z. H. Ct. R."]

<sup>296</sup> N.Z. H. Ct. R.], rule 293.

<sup>297</sup> N.Z. H. Ct. R., rule 278.

<sup>298</sup> N.Z. H. Ct. R., rule 280.

<sup>299</sup> N.Z. H. Ct. R., rule 441B, 441C.

<sup>300</sup> N.Z. H. Ct. R., rule 324.

<sup>301</sup> N.Z. H. Ct. R., rule 328.