

## PART V: TASK FORCE FINDINGS

### 1. INTRODUCTION

This part of the Report discusses the findings regarding the current discovery process, including the key objectives, benefits and problems with discovery, as well as the perceived impact of potential reforms. Findings are based on responses to the case specific questionnaire and consultation paper, and feedback from submissions, focus groups and consultation meetings.

Overall, the Task Force has found that while many lawyers are satisfied with Ontario's discovery process, many others consider the costs and delays associated with discovery to be an impediment to access to justice.

Discovery-related problems do not arise in the majority of cases, but primarily in larger, "complex" cases, or where there is a lack of cooperation between opposing counsel. Local culture also plays a key role. A common perception is that there are fewer discovery-related difficulties where the bar is collegial, for example in smaller geographical communities or within specialty bars. Another prevalent view is that greater judicial intervention and more consistent enforcement of discovery obligations would go a long way to address problem situations. The following comments reflect views expressed most frequently to the Task Force:

At the end of the day, the expectation is most lawyers have some grumblings with the present system: tinkering rather than wholesale changes are warranted and would be of benefit to civil litigators.<sup>317</sup>

Problems usually relate to the behaviour of particular lawyers and not to the discovery process itself.<sup>318</sup>

The Task Force received several submissions from litigants, some of whom recounted their difficult and costly experiences with the discovery process. As noted by one litigant:

My husband and I have spent 12 years trying to get to court and finally gave up. It was a dreadful experience impacting our health and our lives. We were discovered until we gave up. The discovery we were submitted to was atrocious. We did not get to discoveries until 1999. Our... issue happened in 1990. I do not understand why it took so long. The questions were asked in open-ended fashion – therefore the answer was every file that ever existed.... They then asked the same question in a different format. There were 9 days of discoveries over 4 years and they wanted more. The cost of the discoveries I am sure exceeded what we were asking for [in] damages. The lawyers were very aggressive at times... I believe a system that allows this kind of treatment is wrong!<sup>319</sup>

<sup>317</sup> Submission of County & District Law Presidents' Association, dated June 17, 2002.

<sup>318</sup> Comment made during Essex Bar Association consultation meeting, June 19, 2002.

<sup>319</sup> Submission dated October 7, 2002.

## 2. KEY OBJECTIVES AND BENEFITS OF THE DISCOVERY PROCESS

In its consultation paper, the Task Force asked respondents to identify the key objectives of discovery from a list of 18 choices. The most frequently identified objectives were:

- To enable parties to assess strengths and weaknesses of each side’s case prior to trial (99%);
- To obtain admissions (97%);
- To narrow issues for trial (96%);
- To assess credibility of person being examined as a witness (93%);
- To facilitate settlement (94%);
- To identify new documents that may affect outcome (90%);
- To get a recorded version of the witness’ memory prior to trial, which may be used to impeach opponent or expert witness (87%);
- To strengthen the case in specific ways (84%); and
- To dispense with the time and expense of proof at trial (82%).

Feedback provided during consultations suggests that discoveries often permit other lines of inquiry to open up, revealing new issues in the litigation. In addition, once oral discoveries are scheduled, counsel must set aside time for preparation, turn their minds to the case and assess its strengths and weaknesses, which permits them to frankly and intelligently discuss settlement options. The sooner discoveries take place, the sooner the parties are able to meaningfully discuss settlement, which lowers costs for clients. However, use of the discovery process as a “fishing expedition” or a “weapon” to slow down cases (e.g. by producing boxes of irrelevant documents or delaying production of relevant documents) was not considered a legitimate objective by those consulted.

Respondents to the case specific questionnaire were asked to consider a list of 12 potential benefits of discovery and to indicate the extent to which any of these were realized in their case. The two top benefits (realized in 80% to 90% of cases in all four sites) were:<sup>320</sup>

- Strengthened the case in specific ways; and
- Obtained better understanding of the parties.

## 3. PERCEIVED DISCOVERY PROBLEMS AND IMPACT OF POTENTIAL REFORMS

A total of 26 potential problems were canvassed in the case specific questionnaire. For cases in which discovery had commenced, respondents were asked to indicate whether or not each problem was present, and if so, whether the problem had a significant impact on increasing (1) the cost of discovery (i.e. by 20% or more) to litigants or (2) the number of delays or disputes in the discovery process. In a majority of cases, most of the listed problems were not present. In fact, the top four problems were present in only 18% to 28% of all cases. The next nine problems were present in 6% to 10% of cases in at least one court location. The remaining problems were present in less than 10% of cases.

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<sup>320</sup> See Appendix L for detailed results.

Similarly, a series of 27 reform options were explored in relation to cases in which discovery had taken place. Respondents were asked to indicate whether each reform would have had a positive, negative or no impact on their specific case. The seven reforms that received the greatest support were endorsed as having a positive impact by at least 40% of respondents in two or more court locations. The next eight were endorsed by at least 30% of respondents. The six reforms with the least support were considered to have a negative impact by at least 40% of respondents. Responses to the others were not as clearly divided between positive, negative or no impact.

The same problems and reforms were canvassed in the consultation paper. Respondents were asked to provide their views in general, and not in relation to specific cases. The results were used to gauge whether general perceptions about the discovery process were consistent with the findings in the case specific questionnaires. The ranking of problems and reforms followed a similar pattern to that in the case specific questionnaire, although overall percentages were higher in the consultation paper. Key problems and reforms identified by respondents to the surveys are summarized below:<sup>321</sup>

<b>Key Discovery Problems</b>	<b>Key Reform Options</b>
<ul style="list-style-type: none"> <li>• Insufficient or incomplete disclosure/production</li> <li>• Untimely disclosure/production</li> <li>• Disorderly disclosure/production</li> <li>• Excessive disclosure/production; production of irrelevant documents</li> <li>• Untimely production of expert reports</li> <li>• Excessive requests for information and documents</li> <li>• Vague requests for information and documents</li> <li>• Disclosure only after motion to compel</li> <li>• Difficulty/delay in scheduling examinations</li> <li>• Cost of oral discovery disproportionate to value of claim</li> <li>• Contentious relationship among clients</li> <li>• Inappropriate attitude/behaviour of other parties</li> <li>• Improper refusals based on relevance</li> </ul>	<ul style="list-style-type: none"> <li>• Standard disclosure protocols for certain case types</li> <li>• Guidelines for orderly production of documents</li> <li>• Mandatory production of Schedule A documents with pleadings</li> <li>• Mandatory early disclosure of certain aspects of claim with pleadings</li> <li>• Greater specificity in Schedule B about basis of privilege</li> <li>• Serious sanctions for untimely, excessive or disorderly production of documents</li> <li>• Discovery plan</li> <li>• Access to immediate rulings on oral discovery disputes</li> <li>• Deem questions taken under advisement to be refusals if not answered within fixed time</li> <li>• Time limits and sanctions on completing undertakings</li> <li>• Have parties prepare list of undertakings and refusals at end of oral discovery</li> <li>• Tougher cost sanctions for unnecessary discovery-related motions</li> <li>• Stricter enforcement of sanctions by judiciary</li> </ul>

<sup>321</sup> See Appendix M for detailed results.

#### 4. COSTS OF DISCOVERY

The literature on discovery and anecdotal information from clients reveal a great dissatisfaction with the costs of discovery. Task Force members heard about numerous scenarios in which individual or small business litigants were forced to abandon claims or accept less than adequate settlements as a result of excessive discovery costs. The Task Force therefore wished to elicit data from respondents to the case specific questionnaire that might shed some light on the actual costs of discovery and whether those costs influenced clients' decisions in the proceedings.

The results discussed in this section must be read with the caveat that virtually no clients responded directly to the case specific questionnaires. Secondly, it should be noted that the results do not, for the most part, reflect costs after the introduction of the costs grid, which came into effect on January 1, 2002.

Respondents were asked to estimate their billings and the proportion that related to discovery.<sup>322</sup> The typical (or median) amount "billed or to be billed" for "legal work done on the case to date" was similar for Ottawa, Toronto and Thunder Bay – between \$10,001 and \$16,000 in all three locations – compared to a median of \$5,001 to \$10,000 in London. About 8% of respondents in Ottawa, Toronto and Thunder Bay indicated that they had billed over \$50,000, compared with 2% of respondents in London. Details are shown in the chart below.

**Cost of Legal Work on Case to Date**

<b>Amount billed to client for legal work done on case to date</b>	<b>Ottawa</b>	<b>Toronto</b>	<b>Thunder Bay</b>	<b>London</b>	<b>All locations combined</b>
less than \$5,000	16.9%	20.5%	17.8%	28.1%	20.5%
\$5,001 to \$10,000	21.4%	25.9%	27.1%	34.4%	26.1%
\$10,000 to \$16,000	33.1%	27.2%	25.4%	24.2%	27.5%
\$16,001 to \$31,000	17.6%	13.7%	12.7%	10.2%	13.8%
\$31,001 to \$50,000	3.5%	4.6%	9.3%	.8%	4.5%
\$50,001 to \$75,000	6.1%	4.2%	2.5%	.8%	4.1%
over \$75,000	1.5%	3.9%	5.1%	1.6%	3.5%

Subject to variations from one site to another, the overall percentage of billings associated with discovery activities (including motions) was approximately: 25% or less of total billings to date in 32% of cases; 26% to 50% of total billings to date in 44% of cases; and over 50% of total billings to date in 23% of cases. Discovery costs comprised a much smaller percentage of total billings in Thunder Bay than in the other three court locations. Details are shown in the following chart.

<sup>322</sup> Note: These included legal fees for cases that had not yet been disposed (i.e. with only partial legal fees set to date). The numbers thus likely understate the total legal fees that were billed for disposed cases.

**Cost of Discovery as % of Total Billed to Client to Date**

<b>Discovery costs as % of total billed to client to date</b>	<b>Ottawa</b>	<b>Toronto</b>	<b>Thunder Bay</b>	<b>London</b>	<b>All locations combined</b>
over 0 to 10%	5.3%	5.8%	8.3%	10.0%	6.2%
over 10% to 15%	6.4%	3.0%	14.7%	3.6%	4.1%
over 15% to 20%	11.1%	11.8%	8.3%	4.5%	11.0%
over 20% to 25%	13.1%	9.7%	24.8%	7.3%	10.9%
over 25% to 30%	10.2%	9.9%	13.8%	10.9%	10.2%
over 30% to 35%	4.5%	7.0%	2.8%	7.3%	6.5%
over 35% to 50%	17.1%	29.4%	16.5%	33.6%	27.7%
over 50% to 65%	14.6%	7.6%	4.6%	10.9%	8.3%
over 65% to 80%	16.6%	12.6%	3.7%	8.2%	12.1%
over 80%	1.1%	3.2%	2.8%	3.6%	3.0%

When asked to rank the costs associated with each type of discovery conducted in their case, respondents in all locations ranked oral discovery costs as the highest proportion of total discovery costs and documentary discovery costs as the second highest. Written discovery ranked third in Ottawa and fourth in all other locations. Responding to undertakings ranked fourth in Ottawa and third in all other locations.

One of the most important questions relating to costs was whether, “[o]n the whole, the cost of discovery was too high, too low, or about right relative to your client’s stake in this case.” The Task Force acknowledges that this question would have been answered very differently by litigants, who may be unfamiliar with the costs of litigation, than by lawyers, who can anticipate large discovery costs.

As expected, a strong majority of respondents in all locations (about 80% overall) indicated that costs were about right. On the other hand, a notable minority of respondents – 20% in Ottawa and 19% in Toronto – indicated that costs were relatively too high compared to their clients’ stake in the case.<sup>323</sup>

It is significant that 25% of respondents indicated that the cost of discovery led their client to pursue an alternative course of action. Two percent of respondents said that their client discontinued or abandoned the claim or defence, 8% settled on less satisfactory terms than would have been achieved had the client continued with the litigation, and 18% took “other” action, including “attempt to resolve case” and “plaintiff out of business.”

However, the Ontario Trial Lawyers Association,<sup>324</sup> whose membership is composed primarily of plaintiffs’ personal injury counsel, submitted that the cost of discovery is not generally a problem for plaintiffs and that many cases settle with no or limited discovery. Moreover,

[p]laintiffs’ lawyers in ordinary cases have learned how to manage time and expense. We have had to do so because our clients will not pay for scorched earth tactics. It is

<sup>323</sup> 10% of Thunder Bay respondents and 12% of London respondents indicated that the cost of discovery was relatively too high.

<sup>324</sup> Submission of the Ontario Trial Lawyers Association, dated January 24, 2003.

the very rare Plaintiff's lawyer who can attract a case that will justify an investment in litigation as full-scale warfare, characterized by lengthy discovery, discovery motions, stonewalling and other roadblocks to settlement or trial. No Plaintiff's lawyer is going to put more time and expense into a case than the case can possibly recoup for him or her. ...

The changing dynamics of the defence bar, with many more in-house counsel and detailed cost control by insurers of outside defence counsel has resulted in less aggressive and time extended discovery.

## **5. SCOPE OF DISCOVERY**

While most lawyers surveyed did not consider the current scope of discovery (i.e. “semblance of relevance” test) to be overly broad, some support was expressed in consultations and submissions for narrowing the scope.

In the case specific questionnaire, fewer than 10% of respondents identified the scope of discovery as a problem, ranking it in the bottom 13 out of 26 potential problems. Similarly, most respondents to the consultation paper ranked this problem in the bottom 13, although 35% considered the scope of discovery to be too broad.

On the other hand, a number of groups and individuals proposed that the scope of discovery be narrowed, noting that the “semblance of relevance” standard gives rise to unduly long and costly oral discoveries, which can lead parties to settle their disputes simply to avoid discovery. This was seen as particularly troublesome where parties have unequal financial resources. It was suggested that a narrower scope would be consistent with the objective of improving access to justice.

It was also pointed out to the Task Force that some lawyers abuse the “semblance of relevance” test by seeking productions and asking questions that are of marginal relevance, and that others go as far as harassment by repeating questions that are clearly irrelevant. A narrower test of relevance, it was observed, would help to curb this type of conduct.

Those opposed to restricting the scope of discovery indicated that, in the interest of adequate disclosure, it would be preferable for the scope to be too broad than too narrow. There was concern about limiting avenues of inquiry early in the proceedings, when these might prove to be relevant later on. As stated in the Ontario Bar Association's submission, “by restricting the scope of disclosure, key evidence may not be obtained before the trial.”<sup>325</sup>

Concern was also expressed that a new, narrower test might lead to more disagreements, motions activity and judicial interpretation, as well as more expansive pleadings. In its submission, The Advocates' Society pointed out that changing the definition of relevance “will not, in and of itself, result in improvement and could actually lead to increased motions and increased debate about

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<sup>325</sup> Submission of the Ontario Bar Association, dated September 12, 2002.

what, for example, is directly relevant to a substantive issue.”<sup>326</sup> Similarly, the Ontario Bar Association noted in its submission:

Changing the rules with respect to required disclosure, i.e., relevance, may not be workable. Lawyers may not be able to agree on what evidence is clearly relevant. Semblance of relevancy is a more workable definition.

## **6. ADEQUACY AND TIMING OF DOCUMENTARY DISCLOSURE/PRODUCTION**

Problems related to documentary discovery were among the most significant reported to the Task Force. The highest ranked problems, identified by at least 20% of respondents to the case specific questionnaire, were:

- 1<sup>st</sup> Insufficient or incomplete disclosure/production (27% overall); and
- 2<sup>nd</sup> Untimely disclosure/production; withholding material information until late in the process (20% overall).

Other documentary discovery problems identified in 10% or more of responses in at least one court location, include, in order of ranking:

- 6<sup>th</sup> Disorderly disclosure/production (12% - Ottawa; 16% - Toronto);
- 7<sup>th</sup> Excessive requests for information and documents (13% - Toronto);
- 9<sup>th</sup> Disclosure only after motion to compel (11% - Toronto);
- 10<sup>th</sup> Excessive disclosure/production/production of irrelevant documents (10% - Toronto); and
- 11<sup>th</sup> Vague requests for information and documents (10% - Thunder Bay).

As noted earlier, respondents were also asked whether each problem they identified had a significant impact on costs, delay or the number of discovery-related disputes; a majority of respondents stated that they did.

In the consultation paper, documentary discovery problems were ranked as follows:

- 1<sup>st</sup> Insufficient or incomplete disclosure/production (71%);
- 2<sup>nd</sup> Untimely disclosure/production and withholding material information until late in the process (64%);
- 3<sup>rd</sup> Excessive requests for information and documents (61%);
- 5<sup>th</sup> Disorderly disclosure/production (48%); and
- 6<sup>th</sup> Disclosure only after motion to compel (47%).

### **Incomplete and Untimely Disclosure/Production**

Feedback provided to the Task Force during consultations and in written submissions supported these statistical findings. There was widespread concurrence that the prevalence of untimely, unsworn and incomplete affidavits of documents is a serious problem. As stated by the Advocates’ Society in its submission:

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<sup>326</sup> Submission of the Advocates’ Society, dated October 9, 2002.

[U]ntimely and incomplete disclosure...strike at the heart of discovery's key purposes. Without complete and timely disclosure of relevant information, discovery is thwarted....

The Task Force was told that incomplete, untimely disclosure and productions frequently leads to a further round of productions and examinations. Much needless time is wasted ensuring complete disclosure, or in giving undertakings to provide documents that should have been disclosed prior to the commencement of oral discoveries. According to the Advocates' Society:<sup>327</sup>

We have come to experience what essentially is a two-stage discovery process, which is caused by initial incomplete production. This results in the first discovery appointment being used to request information, followed by receipt of the information (many times after contested motions and many times information is not complete or truly responsive), after which a second attendance is required to conduct the true discovery. An enforceable and efficient mechanism that allows a party to request and receive relevant documents after receipt of an affidavit of documents and prior to the initial discovery date should be available.

This concern was echoed in the submission of the Metropolitan Toronto Lawyers Association:<sup>328</sup>

Detailed requests for further documents are made at the time of the examination for discovery, which usually leads to substantial further production of documents necessitating a further round of examinations for discovery to address the new productions. The effect of this practice is to delay the proceedings and to increase the costs associated with litigation.

A frequently cited problem was the absence of adequate descriptions of documents in schedules to the affidavits of documents. The Task Force heard that Schedule A documents are often bundled together in groups rather than individually itemized, and details of Schedule B privileged documents are not provided.

It was suggested during consultations that prompt production of documents is easier for certain case types (e.g. commercial cases), than for others (e.g. personal injury). Moreover, there are often delays in obtaining documents from large institutional parties such as hospitals and government agencies. In addition, the broad definition of "document," coupled with the proliferation of electronic document sources such as e-mail, make it more difficult for parties to provide a complete and timely affidavit of documents.

As shown in the following chart, respondents to the case specific questionnaire indicated that sworn affidavits were exchanged in approximately three quarters of cases, with two exceptions: affidavits of documents were exchanged in 98% of Ottawa undisposed cases, and in 84% of London disposed cases.

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<sup>327</sup> Submission of the Advocates' Society, dated October 9, 2002.

<sup>328</sup> Submission of the Metropolitan Toronto Lawyers Association, dated September 19, 2002.

**Cases with Documentary Discovery:  
Whether Clients' Affidavit of Documents was Delivered**

Was client's affidavit of documents delivered?		Not Disposed	Disposed	Unspecified*	Total
Ottawa	Yes	98.2%	76.5%	47.6%	79.1%
	No	1.8%	23.5%	52.4%	20.9%
Toronto	Yes	75.6%	78.8%	65.5%	76.0%
	No	24.4%	23.2%	34.5%	24.0%
Thunder Bay	Yes	71.0%	78.9%	50.0%	74.8%
	No	29.0%	21.1%	50.0%	25.2%
London	Yes	76.2%	84.3%	100.0%	81.1%
	No	22.2%	15.7%		18.3%

\*Respondent did not indicate disposition of case.

Approximately one quarter of cases where discovery had commenced were disposed (often through settlement) without an exchange of sworn affidavits of documents. Of those that were not disposed, affidavits of documents were not exchanged in 24% of Toronto cases, 29% of Thunder Bay cases and 22% of London cases, even though these cases were commenced in 1999 or 2000. By contrast, there were only 2% of undisposed cases in Ottawa in which affidavits of documents were not exchanged.

### Volume of documents

Given anecdotal information about the proliferation of documents in civil proceedings, the Task Force was interested in quantifying the volume of documents exchanged in the cases sampled. In framing a question for the case specific questionnaire, the Task Force was aware of the time consuming efforts that would be required for counsel to count the number of pages produced in each case, and decided instead to ask respondents to indicate the number of documents referenced in their affidavits of documents. In any event, a fairly high percentage of respondents did not answer this question. The results shown in the chart below, are, therefore, of somewhat limited utility.

### Volume of Documents by Court Location

	Ottawa	Toronto	Thunder Bay	London
50% or more respondents indicated that their affidavits referenced a minimum of:	56 documents	35 documents	40 documents	27 documents
25% or more respondents indicated that their affidavits referenced a minimum of:	200 documents	60 documents	74 documents	66 documents
5% or more respondents indicated that their affidavits referenced a minimum of:	500 documents	500 documents	260 documents	200 documents

The case specific questionnaire also asked whether the presence of a large volume of discoverable documents was a factor in the case, and whether it had an impact on cost and delay. A significant minority of respondents noted the presence of this factor in their case (42% in Ottawa, 40% in

Thunder Bay, 26% in Toronto and 17% in London) and its impact on cost and/or delay (49% in Toronto, 33% in Ottawa, 26% in Thunder Bay and 25% in London).

In consultations and submissions, the Task Force heard that there is a much larger volume of discoverable documents today than ten years ago. This problem can be exacerbated in cases where one of the parties is a large institution or in “document heavy” cases, such as construction matters. Excessive document requests or productions are sometimes attributed to inexperienced lawyers, who are concerned about “leaving any stone unturned.”

Almost all of those consulted urged that steps be taken to improve compliance with the rules. As noted earlier, there was substantial support for reforms designed to address problems relating to documentary discovery, including stricter enforcement of the rules by the judiciary, serious cost sanctions, guidelines for orderly production of documents and standard disclosure protocols for certain case types. These were supported by between 35% and 45% of respondents to the case specific questionnaire, and by at least 70% of respondents to the consultation paper.

Other reform proposals made during consultations include:

- Prescribe a longer, more realistic timeframe for exchanging affidavits of documents;
- Require parties at a minimum to produce documents referred to in the pleadings;
- Establish standard formats for Schedules A, B and C;
- Discovery planning by parties to clarify the scope of discoverable documents and information, as well as the timing for production especially in cases with a large volume of documents;
- Prohibit parties from commencing examination for discovery until all relevant documents are produced; and
- Mandatory disclosure of certain aspects of the claim with pleadings, such as a list of witnesses or the calculation of damages.

These reform proposals will be discussed in greater detail in Part VI of the Report.

## **7. PRODUCTION OF DOCUMENTS IN THE POSSESSION OF NON-PARTIES**

Respondents to the case specific questionnaire were asked whether the need to obtain records in the possession of a non-party was a factor in their case, and if so, whether it had a significant impact on increasing costs (by 20% or more), delay or the number of disputes. Over a third of respondents identified this factor as being present, and at least one third of those indicated that it had an impact on increasing costs, delays or the number of disputes. This factor was more prevalent for medical malpractice cases in Ottawa, personal injury cases in Toronto, motor vehicle cases in Toronto and Thunder Bay, and negligence cases in Thunder Bay.

During consultations, the Task Force heard that obtaining information from non-parties through undertakings can increase cost and delay, and that many disputes are based on whether the other side has exercised best efforts in obtaining non-party documents. Frequently, “two-stage” oral discovery arises from the late production of hospital and medical records. Similar problems occur in commercial cases where relevant documents are in the hands of third parties. Lawyers

representing hospitals, physicians, and government agencies expressed concern about the costly and time-consuming efforts required to produce documents, noting that plaintiffs often have easier access to records than doctors and hospitals.

The Task Force heard that many lawyers find it difficult to bring a successful motion to compel production from a non-party based on the current onus of proof, which requires the moving party to demonstrate that it would be unfair to proceed to trial without the document.

## 8. DISCOVERY OF ELECTRONIC DOCUMENTS

The burgeoning growth of computer technologies has given rise to challenges in the discovery process, both in terms of the large volume of electronically generated documents and in terms of issues relating to the form, content and cost of documentary productions. On the other hand, technology also presents opportunities in the form of new tools with which to manage the production of documents.

In spite of the extensive business use of computers, the Task Force has found that many lawyers and judges are still unfamiliar with the impact of technology on litigation, as reflected in the discussions at consultation meetings, and in responses to the case specific questionnaires. For example, only 4% of respondents indicated that the discovery of electronic documents was a factor in their case.

Task Force members met with Martin Felsky, a specialist in litigation support document management services and an advisor to the Canadian Judicial Council on litigation document production. Mr. Felsky also prepared a submission to the Task Force, which offered insights as to why the majority of lawyers have been slow to fully appreciate the important role of technology in the litigation process.<sup>329</sup> For one thing, many lawyers historically have been and continue to be very print-oriented. Often, lawyers and their clients are not aware of what electronic documents they have or of their importance. Many do not recognize the need to produce and ask for electronic documents. Mr. Felsky's submission also identified other barriers to the effective use of technology by the legal profession:

For example, though the definition of "document" is very broad in Rule 30, the rest of the rules on document production assume the parties are dealing with photocopies and printed affidavits:

- The rules do not address the mechanics or cost of producing scanned images or databases.
- The rules do not require a party that may have scanned documents to provide scanned images to the opposing side.
- Conversely, the rules do not prevent a party from requiring printed copies even where the other side has imaged all the production documents.

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<sup>329</sup> Submission of Martin Felsky, Commonwealth Legal Inc., dated March 31, 2003.

Many judges and lawyers have little knowledge of the available technology and little incentive to become aware:

- The Law Society of Upper Canada Practice Management Guidelines do not consider the use of technology in large document cases to be mandatory.
- The Rules of Professional Conduct are silent on the issue, though the Law Society commentary suggests that the rules “may” require the use of technology in some cases.
- The profession has not established any guidelines for the use of technology and the sharing of costs to eliminate uncertainty and excessive caution in its use.
- Lawyers have few opportunities and little time to learn about technology or about the strategic importance of document management in the litigation process.

The Task Force has found that there is a need for further review of emerging electronic discovery issues and proactive steps to encourage greater familiarity with technology by the legal profession. This will be discussed in greater detail in Part VI of the Report.

## 9. ORAL DISCOVERY

### Scheduling Difficulties and Delays

Scheduling problems and delays in commencing or completing discoveries were identified as a significant concern. Of the 26 potential problems canvassed in the case specific questionnaire, the problem of scheduling ranked as the third most serious. It was identified by 19% of respondents overall, the majority of whom reported that this problem had an impact on cost and delay in the discovery process.<sup>330</sup>

The time that elapsed between case commencement and the start of oral discovery was also canvassed in the case specific questionnaire. The typical (median) time period was a minimum of 11 months in all four locations.<sup>331</sup> For at least 25% of Toronto and Ottawa cases, a minimum of 17 months passed before the beginning of oral discovery compared with 21 months in Thunder Bay and 19 months in London. In at least 5% of cases, oral discovery did not commence until 25 months had elapsed in all locations.<sup>332</sup>

<sup>330</sup> The scheduling problem was also identified by 36% of respondents to the consultation paper, ranking 13<sup>th</sup>.

<sup>331</sup> Ottawa – 11 months; Toronto - 12 months; Thunder Bay – 13 months; London – 14 months.

<sup>332</sup> Ottawa – 25 months; Toronto – 29 months; Thunder Bay – 30 months; London – 33 months. Note that, given the limited sample size for certain case types, it was difficult to analyze precisely how the time to commencement of oral discovery varied by case type, other than to note that negligence cases generally took longer than other case types to begin discoveries (except in London).

Scheduling was considered to be particularly problematic with multiple parties or lawyers. Some lawyers' busy schedules make it impossible to schedule discoveries until months in the future. Responses to the case specific questionnaire indicated that multiple parties or multiple lawyers were factors in a notable proportion of cases. There were multiple parties in just under half of the cases in Ottawa, Toronto and Thunder Bay, and in about one quarter of London cases. There were multiple lawyers representing different parties in a third of cases in Ottawa, Toronto and Thunder Bay and about 10% of London cases.

As stated by the County and District Law Presidents' Association in its submission:

The greater the number of counsel involved, the greater the delay in the simple task of scheduling examinations for discovery. The parties are entitled to have litigation move forward in a timely manner. Discoveries scheduled, for example, 9 months down the road don't serve that end.

One strategy proposed by some of those consulted is to serve a notice of examination proposing a reasonable date, knowing that opposing counsel are not available. Opposing counsel is then force to attend, and if not, the examining lawyer may obtain a certificate of non-attendance and bring a motion to fix the date for discovery within a reasonable time.

The Task Force heard that two other principal causes of delay in the oral discovery process are the prolonged duration of oral discovery, as discussed below, and the need for re-attendance as a result of motions relating to undertakings and refusals. This issue is discussed in Part V, Section 14 below. In the context of case managed proceedings in Toronto, the case management masters advised the Task Force during consultations that the inability of counsel to complete discoveries within case management timetables is problematic. There was substantial support for the incorporation of discovery planning mechanisms into the discovery process as a means of addressing scheduling and delay problems. Approximately one-third of lawyers surveyed in the case specific questionnaire and one-half of those who responded to the consultation paper agreed that discovery plans would have a positive impact.

### **Location of Examinations**

One factor that can increase the cost of discovery is the time and expense of travel to examinations for discovery. Respondents to the case specific questionnaire reported that it was relatively common for lawyers or parties to be located outside the county where the action was commenced. This was a factor in a third of Ottawa and Thunder Bay cases, and 26% of London cases. In Toronto, lawyers located outside the county was a factor in 12% of cases and parties located outside the county was a factor in 18% of cases.

At consultations, the Task Force was told that in cases where there are multiple lawyers in one location, it may be more economical for the deponent to travel to the county in which the lawyers are located or to a mutually convenient location, rather than have the lawyers incur the time and expense of travelling to where the deponent resides. It can be burdensome for individual litigants to take time away from their job and travel long distances to attend discoveries. For Aboriginal

clients, unfamiliar settings such as an examiner's office can be uncomfortable.<sup>333</sup> Suggestions were made for greater flexibility in Rule 34 regarding the location of examinations. Teleconferencing and videoconferencing are also available as possible alternatives to in-person examinations, although lawyers consulted were generally reluctant to explore these technologies.

### **Duration of Examinations**

Respondents to the case specific questionnaire were asked to provide information on the time taken from the beginning to end of oral discovery. Results varied from one court location to another. The typical (median) time from beginning to end of oral discovery was 5 months in Ottawa, 6 months in Toronto and Thunder Bay, and 13 months in London. In at least 25% of cases, it took one year or more to complete oral discovery in Toronto and Thunder Bay, 19 months or more in London, and 8 months or more in Ottawa.

For cases involving up to four parties, the time between the start and finish of oral discovery appeared to increase as the number of parties being examined increased. However, for cases in all locations involving five or more parties, this impact ceased to be present and the duration did not tend to increase with the number of parties being examined. The reason for this apparent anomaly could not be derived from the data collected.

The typical (median) number of days spent in oral examination in total (both as examining counsel and representing the client being examined) was 2 days in Ottawa, versus 1 day in the other three sites. In at least 25% of cases in Ottawa and Toronto the respondent spent 3 days or more in examinations, and 2 days or more in Thunder Bay and London. In approximately 5% of cases, the total number of days spent in oral examination was 14 or more in Ottawa, 6 or more in Toronto, 7 or more in Thunder Bay, and 3 or more in London.

Respondents were asked to estimate the duration of the longest individual examination. In Ottawa, at least 50% of the individual examinations were over in 1 day or less and at least 75% were over in 1.6 days or less. In Toronto, Thunder Bay and London, at least 75% of the individual examinations were over in 1 day or less. In approximately 5% of cases, the longest individual examinations were at least 6 days in Ottawa, at least 4 days in Toronto and Thunder Bay, and at least 2 days in London. However, fewer than 8% of respondents to the case specific questionnaire identified the length of examinations as a problem,<sup>334</sup> which is somewhat surprising in light of the feedback provided during consultations and in submissions suggesting that unduly long oral discoveries are a concern to many lawyers.

The case specific questionnaire canvassed the number of persons examined at oral discovery.<sup>335</sup> In all locations, the typical or median number of persons examined was two per case. As well,

<sup>333</sup> Submission of Aboriginal Legal Services of Toronto, dated September 11, 2002.

<sup>334</sup> In the consultation paper, the length of examinations was considered a problem by 32% of respondents, ranking 17<sup>th</sup>.

<sup>335</sup> The question asked how many parties and non-parties were examined. Since very few respondents indicated that non-parties were examined, results are based on a total of parties and non-parties.

there was at least a 5% chance in Ottawa, Toronto and Thunder Bay of more than six persons being examined in oral discoveries (five in London).<sup>336</sup>

The following are representative of the concerns raised at consultations and in submissions with respect to the duration of oral discoveries:

- Some counsel unduly prolong discovery. As stated in one submission:<sup>337</sup>

Some counsel plod along with questions that are ponderous, repetitive, boring and arcane. For the most part, we have to sit there and take it but usually we survive and press ahead. This is only an occasional problem in my experience. Most good counsel know what they want; they get it, (or try to), and move on. This is not a problem that requires rule changes.
- Much time is taken in oral discovery to confirm what should already have been done.
- Lack of preparation and understanding on the part of counsel prolong the discovery process.
- Counsel ask too many irrelevant questions.
- Discoveries involving Toronto lawyers (especially from large firms) are usually longer, whereas discoveries in smaller communities, where opposing counsel are familiar with one another, are rarely longer than one day.

Reaction among those consulted to the imposition of time limits on oral discovery was mixed. On one hand, it was generally conceded that time limits would require counsel to better prepare for discoveries and to avoid repetitious and irrelevant questions. Time limits were also seen as helpful in containing the cost of oral discoveries. Many lawyers indicated that most of their cases could be handled fairly if they were provided with one full day of discovery per party. For example, the Metropolitan Toronto Lawyers Association proposed in its submission that each party be limited to six hours of oral discovery, except where extended discovery is needed and agreed to by the parties or ordered by the court.

On the other hand, there were concerns that time limits would be arbitrary, might unduly limit access to important information, or could be difficult to comply with where witnesses need a great deal of time to tell their story. The Advocates' Society opposed time limits based on the value of a claim, on the grounds that the complexity of issues and the time required for oral examinations is not necessarily directly related to the amount at stake.

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<sup>336</sup> Given the small number of responses for certain case types, it was only possible to make a limited analysis of whether the number of persons examined differed by type of case within each court location. In Toronto, the examination of more than two parties was more likely to occur in motor vehicle cases (71%), negligence cases (64%) and personal injury cases (65%). In Ottawa, the examination of more than two parties was more likely to occur in contract commercial cases (67%), compared to motor vehicle cases (46%) and negligence cases (33%).

<sup>337</sup> Submission of D.P. Nolan, dated June 3, 2002.

### **Disproportionate Cost of Oral Discovery**

In the case specific questionnaire, 15% of respondents reported that the cost of discovery was disproportionate to the value of the claim in their case, ranking this as the fifth most serious problem. This concern was echoed at consultations. It was generally agreed that the amount of money at stake in a claim must be considered in determining how much time to spend at discovery. The client must be clearly advised how much the discovery will cost. The Task Force was told that lengthy discoveries are particularly problematic in smaller cases. In addition, attending oral discoveries takes individual litigants away from their jobs and businesses, which has an impact on their livelihood.

### **Inadequate Preparation for Oral Discovery**

Prevalent among those consulted is the perception that opposing counsel often attend unprepared for oral discovery, asking too many irrelevant questions and demanding unnecessary undertakings. Surprisingly, only 5% of respondents to the case specific questionnaire identified this as a problem in their case.<sup>338</sup>

The Task Force also heard during consultations that parties frequently fail to make best efforts to complete documentary production before oral discovery, and that counsel do not regularly conduct any planning with opposing counsel prior to the oral discovery, for example, with a view to ensuring that witnesses have produced all relevant documents and are sufficiently informed to speak to the issues.

These comments were consistent with the results of the case specific questionnaire. For cases in which oral or written discovery took place, respondents were asked whether they had discussed areas of inquiry with opposing counsel before commencing oral discovery. Such discussions occurred in only 20% of Toronto cases, 32% of Ottawa cases and 15% of London cases. However, they did occur in 55% of Thunder Bay cases.

In addition, only a small majority of respondents reported that they had received relevant documents from opposing parties prior to oral discovery. Relevant documents were received in 61% of Toronto cases, 64% of Ottawa cases, 69% of Thunder Bay cases and 52% of London cases. In the remaining cases, relevant documents were not received in advance of oral discovery.

Requests to admit were made in fewer than 10% of cases overall, with minor regional variations.<sup>339</sup> The majority of these requests were made before discovery commenced.

As noted above, there was a general consensus among those consulted believe that the use of discovery planning prior to the commencement of examinations for discovery would be beneficial.

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<sup>338</sup> The problem of “opposing counsel unprepared or incompetent” was identified by 33% of respondents to the consultation paper, ranking 16<sup>th</sup>.

<sup>339</sup> Requests to admit were present in 10% of Toronto cases, in 7 % of Ottawa and Thunder Bay cases and in 6% of London cases.

### **Attitude/Behaviour of Counsel**

Statistically, few respondents to the case specific questionnaire considered uncivil and unprofessional conduct or incompetence on the part of counsel at oral discovery to be problematic. However, participants in consultations noted that aggressive cross-examination can be problematic. This behaviour was sometimes attributed to lawyers acting on their clients' instructions, or to inexperienced counsel (although this was disputed by a number of younger lawyers).

Some lawyers suggested that aggressive behaviour is especially prevalent among Toronto counsel. Others did not view such conduct as the exclusive domain of any particular locale. At one consultation meeting the comment was made that lawyers act in whatever manner they consider to be in the best interest of their clients; this may include aggressive conduct, which can only be curbed by sanctions. Many lawyers indicated that there is a general erosion of civility in the conduct of discoveries. Anecdotal reports from persons examined on discovery cited incivility towards witnesses in a number of cases. This is discussed further in Part V, Section 17 below.

### **Attitude/Behaviour of Parties**

Only a small minority of respondents to the case specific questionnaire and the consultation paper identified the conduct of parties as a problem, except in Ottawa, where 10% of respondents to the case specific questionnaire reported that other parties had an inappropriate attitude or behaviour. On the other hand, the presence of a contentious relationship among clients was identified by 18% of respondents to the case specific questionnaire, ranking fourth overall (although very few indicated that this problem had a significant impact on cost and delay).

## **10. WRITTEN DISCOVERY**

The findings indicate that written discovery is a seldom-used tool. In the cases surveyed, discovery by written questions occurred in only 1% of cases that had discovery, as contrasted with oral discovery, which took place in about three-quarters of cases. Demands for particulars were also used infrequently – in fewer than 4% of disposed cases in which documentary discovery occurred.<sup>340</sup>

While very few lawyers consulted viewed written discovery as an alternative to oral examinations, many saw it as a helpful supplement in cases that rely heavily on documentary evidence, such as financial disputes. The Task Force was told that written discovery is effective and cost-efficient in obtaining disclosure of certain documents or information that can later be examined orally, and where only a limited number of questions are asked. It is also useful where witnesses have difficulty attending in person or are no longer available.

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<sup>340</sup> The only exception was in Ottawa, where respondents reported making demands for particulars in over 50% of undisposed cases. The data showed that demands for particulars were largely made by defendants; however, the relatively small number of responses did not permit an analysis of the reason for this.

During consultations, lawyers who have used written discovery in appropriate cases ascribed a number of benefits to this method of discovery, including the following:

- They result in clear, concise answers that can be used at trial.
- They can be less time consuming and expensive than oral discovery.
- They force parties to review their documents and focus on the issues early on in the case, which expedites the possibility of settlement, thereby minimizing costs.

However, lawyers did not consider written discovery to be a viable method of obtaining admissions for use at trial, since it provides no opportunity to assess the credibility of a witness.

## **11. EXAMINATION OF CORPORATE REPRESENTATIVES AND PARTNERS**

This issue was not directly canvassed in the case specific questionnaire or in the consultation paper, although respondents were asked whether inadequate knowledge of the case by client representatives who attended discovery was a problem. Six percent of respondents to the case specific questionnaire and 28% of respondents to the consultation paper identified this as a problem. However, the Task Force heard at consultations that the current rule, which permits the examining party to examine only one corporate representative (except with leave of the court), can lead to unnecessary cost and delay in the discovery process where the representative in attendance has inadequate knowledge of the facts in issue.

## **12. EXAMINATION OF NON-PARTIES**

The case specific questionnaire focused primarily on the issue of non-party production, and did not canvas the issue of examining non-parties. However, a few submissions suggested that the test for obtaining leave to examine non-parties is too onerous.

As with non-party production, obtaining information from non-parties is largely achieved through undertakings given by the party being examined. The Task Force heard that this can increase cost and delay since the examined party must contact the non-party for answers to those undertakings, which may lead to additional questions and further undertakings. Because a non-party is not required to provide the requested information, even if it may be relevant, disputes often arise as to whether the examined party exercised best efforts to obtain answers from non-parties.

## **13. DISCOVERY OF EXPERT EVIDENCE**

Three key concerns regarding the discovery of expert evidence were articulated to the Task Force. The untimely production of expert reports and the proliferation of expert reports were both seen as factors that increase cost and delay in the discovery process. The unavailability of pre-trial examination of expert was identified as a third problem.

The case specific questionnaire canvassed a number of issues pertaining to the frequency, nature and impact of expert discovery. Slightly more than 50% of Ottawa and Toronto respondents and

slightly less than 50% of Thunder Bay and London respondents indicated that the need for expert evidence was a factor in their case. Between 20% and 30% of those respondents also indicated that it had a significant impact on cost and delay.

Other areas of inquiry included whether there had been production of an expert report, physical or mental medical examination of a party, production of a medical report or document relating to a person to be examined, or production of a medical report of examining health practitioner. Respondents indicated that at least one of these activities occurred in 36% of Toronto cases in which discovery took place, 42% of Ottawa cases, 30% of Thunder Bay cases and 47% of London cases.

While the sample size was too small for certain case types to fully explore the correlation between the production of expert or medical reports and type of case, it was possible to observe that reports tended to be present in the following types of cases:

- Ottawa: over 75% of motor vehicle, personal injury and negligence cases;
- Toronto: 75% of motor vehicle cases, 61% of personal injury cases and 57% of negligence cases;
- Thunder Bay: 43% of motor vehicle cases and 55% of personal injury cases; and
- London: 74% of motor vehicle cases, 67% of personal injury cases and 54% of negligence cases.

Untimely production of experts' reports was identified as a problem by 10% of respondents in London, 7% of respondents in Toronto and Thunder Bay, and 6% in Ottawa, ranking 12<sup>th</sup> out of 26 potential problems.<sup>341</sup> In Ottawa, Toronto and London there was a direct correlation between the likelihood of a case involving expert discovery or medical examinations and the length of time between the start and end of discovery. This relationship was, however, not present for Thunder Bay cases.

During consultations, the Medico-Legal Society of Toronto noted that expert reports are rarely prepared early in a proceeding. Because many lawyers assume experts can easily complete reports within the time prescribed in the rules (90 days before trial), they do not request reports until late in the process, often in the few months preceding trial. As busy professionals, experts may have to prepare reports outside of regular working hours. The experts consulted urged greater lead-time for the preparation of reports. They also advised that it is difficult to provide responding and supplementary reports within the respective 60-day and 30-day periods prescribed by the rules.

When an expert is unable to provide a responding or supplementary report within the times prescribed by the 90/60/30 day rule, the court often finds it necessary to adjourn the date of trial. The Task Force heard that this can result in lengthy delays in the resolution of proceedings, especially in regions with long trial lists. In Toronto, for example, late production of expert reports can lead to postponement of long trials for significant periods of time.

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<sup>341</sup> 46% of respondents to the consultation paper identified this as a problem, ranking it 7<sup>th</sup> out of 26.

The Task Force was also advised that while experts are very helpful, particularly in cases dealing with technical matters, there is an over-reliance on experts in Ontario. The culture of litigation has resulted in an “industry” of competing experts’ on every issue, which unduly increases costs. According to one submission:

As lawyers, we have abdicated our responsibility to make decisions about lawsuits when we retain too many experts. We do this because it our hope that the expert will make the decisions for us. We have rules limiting the number of experts in a case, but they are very rarely enforced. One suggestion...is that the pre-trial conference judge should make binding orders with regard to what expert evidence can be called at trial. Cases involving complex legal or factual issues always result in more costs to litigants, but they should not necessarily result in delays.<sup>342</sup>

It was suggested to the Task Force that some judges contribute to the overuse of experts. The Task Force was told, for example, that in personal injury actions, some judges now permit expert evidence on the calculation of certain loss claims, whereas in the past they would have been satisfied with calculations made by counsel. It was observed that in cases where opposing experts have conflicting opinions, judges sometimes want to hear additional experts rather than make a decision on the basis of the competing opinions.

On the other hand, certain cases by their very nature, such as medical malpractice matters, must rely more extensively on expert evidence than others. In its submission to the Task Force, the Medical Malpractice Coverage Committee (MMCC)<sup>343</sup> pointed out that in medical malpractice litigation, medical experts provide opinions not only on damages, but also on causation and liability. The MMCC expressed concern about the unavailability of pre-trial examination and cross-examination of experts:

The quality and credibility of the opinions offered by experts will often determine the outcome of the litigation. Current discovery practice makes it difficult for the adversaries to test the expertise of their opponent’s expert witnesses. Those experts are likely to be present at trial and this is likely to be the first opportunity for the opposing counsel to confront the expert and to test the opinions proffered.

The necessity for proceeding to trial to deal with this important aspect of controversy acts as a shield for experts, minimizing their accountability. The MMCC has concluded that there may be value in a process that allows parties to conduct pre-trial examination under oath of expert witnesses. This would provide the opportunity for examination and cross-examination of the expert. It would educate each of the parties as to the relative merits and demerits of their positions. It would allow litigants to more accurately value their position in litigation without incurring the great expenses of attending a trial.

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<sup>342</sup> Submission of Paul Iacono, dated May 1, 2002.

<sup>343</sup> Submission of the Medical Malpractice Coverage Committee, dated May 1, 2003. The committee is a joint committee of the Ministry of Health and Long-Term Care, the Ontario Medical Association and the Canadian Medical Protective Association, created to address medical malpractice indemnity issues.

## 14. UNDERTAKINGS AND REFUSALS

Undertakings and refusals were reviewed to determine their impact on the length and cost of discovery, and on the volume of discovery disputes and related motions. Respondents to the case specific questionnaire were asked to quantify the number of questions they asked as examining counsel and that their clients were asked by opposing counsel during oral discovery, as well as the number of undertakings and refusals in response to those questions. Respondents were asked to refer to transcripts in order to retrieve such information, or to make reasonable estimates. As shown in the following chart, the typical number of questions asked in each case by respondents as examining counsel was lowest in Ottawa. The typical number of undertakings and refusals given by opposing parties was highest in Toronto.<sup>344</sup>

**Undertakings & Refusals – Respondent as Examining Counsel**

<b>Respondent as examining counsel</b>	<b>Ottawa</b>	<b>Toronto</b>	<b>Thunder Bay</b>	<b>London</b>
Typical (median) number of questions asked (of all parties) by respondents as examining counsel	150	300	250	300
Typical (median) number of undertakings given to respondents by opposing parties	10	14	10	11
Minimum number of undertakings given to respondents by opposing parties in at least 25% of case	20	21	20	20
Typical (median) number of refusals by opposing parties	1	3	0	0
Minimum number of refusals by opposing parties in at least 25% of cases	5	8	1	2

The following chart shows that the typical number of questions put to the clients of respondents by all other parties was highest in Toronto. The typical number of undertakings arising from these questions was the same in Ottawa, Toronto and Thunder Bay and lowest in London. The typical number of refusals was highest in Toronto.<sup>345</sup>

**Undertakings & Refusals – Respondent’s Client as Examined Party**

<b>Respondent’s client as examined party</b>	<b>Ottawa</b>	<b>Toronto</b>	<b>Thunder Bay</b>	<b>London</b>
Typical (median) number of questions put to respondent’s client by all other parties	200	300	200	175
Typical (median) number of undertakings given by respondent’s client	10	10	10	6
Minimum number of undertakings given by respondent’s client in at least 25% of cases	22	20	15	18
Typical (median) number of refusals by respondent’s client	1	2	0	0
Minimum number of refusals by respondent’s client in at least 25% of cases	3	8	1	2

<sup>344</sup> In 25% of cases in all locations, the number of undertakings was a minimum of 20; the minimum number of refusals was 8 in Toronto, 5 in Ottawa, 2 in London, and 1 in Thunder Bay.

<sup>345</sup> In Ottawa, at least 25% of cases had a minimum of 22 undertakings, compared with minimums of 20 in Toronto, 18 in London and 15 in Thunder Bay. In Toronto, at least 25% of cases had a minimum of 8 refusals, compared with 3 in Ottawa.

Further examination after answers to undertakings or refusals were provided occurred in 19% of cases in Toronto and Ottawa, and in approximately 10% of cases in Thunder Bay and London. The correlation between the number of undertakings and the number of discovery motions was as expected – as their number increased, so did the percent of cases with discovery motions.

The extent to which undertakings and refusals contribute to cost and delay in the discovery process was addressed at consultation meetings and in submissions to the Task Force. While some lawyers considered excessive refusals and the failure to answer undertakings as occasional problems, others viewed delays in answering undertakings and improper refusals to be principal causes of unnecessary costs and delays in the discovery process.

The Advocates' Society, in its submission, pointed to unreasonable delays in obtaining answers to undertakings and related motions, as well as improper refusals on the basis of relevance as serious problems. Similarly, the County and District Law Presidents' Association submission stated:

The all too often mindset of letting undertakings sit post-discoveries must be broken. There is no reason why 'substantial compliance' cannot be expected within a set timeframe.

It was suggested to the Task Force that there are fewer refusals when both sides are genuinely interested in reaching a settlement; conversely, there are more unnecessary refusals in cases where parties do not share the objective of reaching a settlement or where a lawsuit is initiated as a business tactic to work financial hardship on the defendant.

The Task Force heard that getting information from non-parties through undertakings increases costs and delays, and that many disputes are based on whether best efforts have been made to obtain information and documents from non-parties. It was suggested that limited written discovery in advance of oral discovery in such situations would not only shorten oral discovery, but also reduce the number of undertakings and related motions. It was also observed that unnecessary delays also occur when counsel wait until transcripts are produced before taking steps to fulfill undertakings or to request information from non-parties. Some lawyers do not fully comprehend the purpose of undertakings or give undertakings that they cannot fulfill.

During consultations, lawyers expressed concern about the amount of time spent in preparing for undertakings and refusals motions and the duration of such motions, noting that they can last several days. In an effort to streamline undertakings and refusals motions, judges and case management masters in Toronto have developed a chart, which counsel are required to complete. Counsel must indicate the issue that is the subject of the undertaking or refusal, the question number and page reference on which the question appears, the precise question asked, and the answer given or the basis of the refusal.<sup>346</sup> Case management masters and lawyers have found the chart to be successful in reducing the number of disputed issues and the time needed to dispose of such motions. The case management masters also suggested that requests to admit and written interrogatories could reduce the frequency of motions.

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<sup>346</sup> The undertakings and refusals chart is discussed in greater detail in Part VI, Section 12.

## 15. DISCOVERY DISPUTES

In light of anecdotal reports about the proliferation of such motions, especially in Toronto, the Task Force has reviewed the volume of discovery disputes and related motions.

Data concerning motions activity was obtained from several sources. A three-month motions study, as described in Part I of the Report, was conducted in six courts to assess the types and volume of discovery-related motions in comparison to other motions. The case specific questionnaire canvassed the types and number of motions in particular cases. Finally, feedback was solicited through the consultation paper, submissions and at consultation meetings.

Both the case specific questionnaire and the consultation paper asked whether “excessive discovery-related motions arising from abuses or lack of cooperation” was a problem. Fewer than 10% of respondents to the case specific questionnaire identified this as a problem, compared with 40% of respondents to the consultation paper (whose responses reflect general perceptions rather than experiences in specific cases). Key issues giving rise to discovery-related motions included inadequate or untimely disclosure/production, failure to complete undertakings, and disagreement regarding responsibility and cost of producing documents.

The data from the motions study did not permit a calculation of the average time spent on discovery-related motions compared to other motions. However, as noted in the previous section, the Task Force was advised that motions on refusals and undertakings often require several days of the court’s time, particularly in Toronto.

### Motions Study Results

A total of 3,660 completed Motions Data Collection Forms were returned to the Task Force.<sup>347</sup> In Toronto, 20% of all motions were discovery-related, compared to Ottawa, for example, where only 2.4% were discovery-related or Peterborough, where 9% were discovery-related.<sup>348</sup>

In describing the types of motions that were brought – that is documentary, oral or written examinations, or cross-examination on an affidavit – it is important to note that 38% of the motions sought two or more of these three types of orders.

Three-quarters of discovery motions were related to documentary discovery. Of these, the most frequent orders sought were:

- To compel disclosure/production (30%); and
- To produce an affidavit of documents (10%).

Two-thirds of discovery motions related to oral and/or written discovery. Of these, the most frequently sought orders were:

- Answers to undertakings (information held by party examined) (51%);

<sup>347</sup> The breakdown was as follows: Toronto – 2,539; Ottawa – 250; London – 106; Peterborough – 44; Brantford – 719; Thunder Bay – 2.

<sup>348</sup> Data limitations did not permit a comparison of the volume of discovery related motions with other motions in the remaining locations.

- Answers to refusals based on relevance (36%);
- To compel attendance or answer written questions (21%);
- Answers to undertakings (information held by non-party) (15%); and
- Answers to refusals based on privilege (12%).

The disposition of motions was reported in 74% of completed forms. Based on those, orders were made as follows:

- As asked (41%);
- Partially granted (31%);
- Adjourned (25%); and
- Refused (5%).

Cost awards were reported in only 32% of completed forms. Where reported, the following awards were made:

- Partial indemnity (11%);
- Substantial indemnity (less than 1%);
- Partial indemnity in combination with other cost award (less than 1%); and
- Other i.e. unspecified (20%)

### Case Specific Questionnaire Results

The case specific questionnaire also looked at motion activity. Results indicated that approximately 30% of cases in which discovery occurred had general motions activity and close to half of these (or 14%) had discovery-related motions, broken down as follows:

- 10% had only 1 motion;
- 3% had 2 motions;
- 1% had 3 motions; and
- less than 1% had 4 or 5 motions.

While Toronto had no greater proportion of general motion activity than other centres, discovery-related motion activity was higher in Toronto (15%) compared to Ottawa (10%), Thunder Bay (11%) and London (9%). The following chart breaks down discovery-related motion activity in each location by type of order sought:

**Discovery-related Motions by Type of Order Sought**

Order relating to	Ottawa	Toronto	Thunder Bay	London	Total
Undertakings	43%	72%	53%	20%	68%
Documentary discovery	79%	33%	67%	50%	37%
Refusals/questions under advisement	37%	32%	7%	30%	31%
Oral/written discovery	35%	15%	20%	10%	16%
Cross-examination on affidavit of documents	10%	3%	n/a	n/a	3%

Outside Toronto,<sup>349</sup> orders relating to documentary discovery were sought most often. In Toronto, the most frequently sought orders related to undertakings, followed by documentary discovery.

Based on Toronto results,<sup>350</sup> the most frequently sought documentary discovery orders were to compel disclosure or production of documents and to produce an affidavit of documents. The most frequently sought oral/written discovery order was to compel answers to undertakings for information held by the party examined.<sup>351</sup>

### **Findings from Consultation Meetings and Submissions**

In its submission, the Ontario Trial Lawyers Association rejected the notion that there are excessive discovery-related motions:

There is no truth to the myth that court motion lists are full as a result of the discovery process and its abuse by Counsel. This myth has become pervasive because of judicial dislike for presiding over discovery squabbles. Most judges do not wish to be drawn into this type of battle and only want to be involved when it is clear that both sides have reached an impasse on a substantive issue. This reluctance of some judges should not be grounds to create new rules for Counsel. There is a relatively narrow group of cases in which discovery abuse occurs, but Counsel generally are competent and cooperative. Where problems do occur, what is needed is a Court that invites and welcomes the determination of these disputes quickly and with a strong judicial hand.

There was a general consensus at consultations that unreasonable behaviour on the part of lawyers and non-compliance with the rules often result in unnecessary discovery-related motions, and that the imposition of more serious sanctions for breach of discovery obligations would lead to greater compliance and fewer motions. It was also suggested that lack of preparation for discovery leads to more discovery disputes and related motions. Discovery-related motion activity was considered by those consulted to be more problematic in Toronto than elsewhere. Lower motion activity in smaller centres was primarily attributed to the local legal culture and collegial relations within the profession. Case management masters agreed that discovery disputes occur more regularly in large centres where counsel are not familiar with each other. They also suggested that disputes are more likely to arise in contract/commercial, personal injury and product liability cases, as well as those with confidentiality issues such as intellectual property, wrongful dismissal and fiduciary duty.

A concern that was shared by many lawyers is the delay in obtaining access to judicial intervention. As pointed out by the Advocates' Society in its submission:

It is very important to provide quick and efficient access to a judge or master to resolve discovery-related disputes. It is the inevitable delay until enforcement of an obligation

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<sup>349</sup> Statistics from London, Ottawa and Thunder Bay should be read with the caveat that the sample of cases from which they were drawn was small.

<sup>350</sup> The Toronto sample was larger than the other locations, permitting a detailed breakdown of orders.

<sup>351</sup> Note: There were far fewer orders pertaining to orders based on privilege.

that gives the unreasonable lawyer and/or client the comfort and encouragement to continue to be unreasonable. Knowledge of quick access to a judge or master to resolve a refusal or dispute about relevance has the positive effect of forcing counsel to be reasonable and to resolve their differences without going to court. This has certainly been the experience of Ottawa counsel under the Case Management regime.

In Toronto and Ottawa case managed proceedings, discovery-related issues are dealt with at case conferences. Approximately 40% of respondents to the case specific questionnaire indicated that discovery issues were dealt with at a case conference. Close to 60% of those case conferences involved multiple discovery issues. The vast majority of respondents (96% in Ottawa and 89% in Toronto) were “satisfied with this method of dealing with the issues.”

With respect to the cost of motions, lawyers in northern Ontario noted during consultations that the requirement to bring a motion in the county of the responding party’s solicitor significantly adds to the costs of motions, especially when the opposing counsel is in Toronto.

## 16. ENFORCEMENT OF DISCOVERY OBLIGATIONS

There was a general perception that members of the judiciary seem reluctant to take an active role in the resolution of discovery disputes or in the enforcement of discovery obligations. A recurring theme throughout the consultation process was the need for tougher and more consistent sanctions. Many lawyers expressed concern that judges and masters neither treat discovery abuses seriously enough nor make adequate use of available sanctions. The Task Force was told that breaches of the discovery rules cannot be discouraged if the consequences of non-compliance are insignificant.

These views are consistent with the Task Force’s statistical findings. Out of 26 possible reform options canvassed in the case specific questionnaire and the consultation paper, those involving sanctions were ranked relatively high with respect to their potential for improving the discovery process:

- Stricter enforcement of sanctions by judiciary: This reform ranked third overall in responses to the case specific questionnaires, with 45% support overall.<sup>352</sup> It ranked first in responses to the consultation survey, with 79% support.
- Tougher cost sanctions for unnecessary discovery-related motions: In the case specific questionnaires, this reform ranked fifth overall, with 42.5% support overall.<sup>353</sup> It ranked fifth in the consultation survey, with 75% support.
- Serious sanctions for untimely, excessive or disorderly production of documents: This reform ranked seventh overall in the case specific questionnaire, with 39% support overall<sup>354</sup>. It ranked seventh in the consultation survey, with 71% support.

<sup>352</sup> Ranking by location: Ottawa – 1<sup>st</sup>, Toronto – 2<sup>nd</sup>, London – 5<sup>th</sup>, Thunder Bay 7<sup>th</sup>.

<sup>353</sup> Ranking by location: Toronto – 5<sup>th</sup>, Ottawa and Thunder Bay – 6<sup>th</sup>, London – 11<sup>th</sup>.

<sup>354</sup> Ranking by location: Toronto 6<sup>th</sup>, Thunder Bay 9<sup>th</sup>, Ottawa and London – 10<sup>th</sup>.

- Immediate contempt order for failing to comply with orders: This ranked much lower – 16<sup>th</sup> in Toronto, Ottawa and Thunder Bay and 25<sup>th</sup> in London, with 23% support overall. It ranked 16<sup>th</sup> in the consultation survey, with 40% support.

On the other hand, sanctions should not be rigidly applied so as to discourage parties from proceeding with legitimate disputes, as noted in one submission:

Having argued for more consistent rulings and meaningful costs awards, it must be remembered that there are occasions where bona fide disputes arise in the context of discoveries, which can only be resolved by the court. It would not be a step forward if two counsel who were both acting in the best of faith... could not get a ruling from the court without the loser being exposed to something tantamount to a penal sanction. The idea is to weed out the nonsense, not discourage anyone from ever litigating anything and any arbitrary rule which intruded on the court's discretion to distinguish between the two types of cases would be a barrier to justice.<sup>355</sup>

Beyond enforcement of discovery obligations, many members of the bar urge greater judicial oversight of the litigation process – not to provide individual case management, but rather to provide direction in cases where needed to ensure consistency and predictability.

## 17. LEGAL CULTURE

As noted earlier, legal culture was thought to be an important factor in the conduct of discovery. There was a general consensus that lawyers in smaller communities or specialty bars tend to be more collegial – not only because their paths frequently cross, but because they are well known to the presiding judiciary. However, it was recognized that there are both cooperative lawyers and obstreperous lawyers throughout the province.

While lawyers consulted did not tend to identify incompetence or unprofessional conduct as a major concern, they did acknowledge a deficiency in the area of civility. Many agreed that a “change in attitude” with respect to discovery would have a positive impact on the integrity of the process. There was significant support for initiatives directed toward this goal, such as encouraging widespread awareness and adoption of civility principles<sup>356</sup> through lawyer training, mentoring and continuing legal education programs.

With respect to junior lawyers, it was generally agreed that the profession does not provide adequate mentoring or support in the area of discovery. The Advocates' Society noted in its submission that “[p]articularly in Toronto, discoveries are relegated to younger members of our bar who either conduct them on their own with no guidance and/or with a seeming lack of knowledge about the rules and how to use them.”

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<sup>355</sup> Submission of Sean Dewart, dated May 7, 2002.

<sup>356</sup> See the Advocates' Society *Principles of Civility*.