

SUMMARY OF RECOMMENDATIONS

Discovery Management

- [1] Develop best practices for discovery planning, with a standard checklist of items to be addressed.
- [2] Establish a new rule permitting case conferences to be convened in non-case managed locations, at the request of any party or on the court's initiative.
- [3] Establish a new discovery rule permitting any party to seek a case conference for the purpose of resolving issues related to discovery planning and establishing a discovery plan.
- [4] In rule 77.13(3), provide express authority for the court to require or create a discovery plan at a case conference.
- [5] Establish a new discovery rule providing for individualized management of the discovery process in "appropriate" cases, based on the criteria listed in rule 77.09.1(5) (Assignment of Particular Judge).
- [6] Expand the criteria in rule 77.09.1(5) to include "nature of parties and whether they are represented."
- [7] Authorize the court to designate a proceeding for individualized discovery management on the parties' consent, on the motion of any party, or on the court's initiative in "appropriate" cases, based on the criteria listed in rule 77.09. 1(5).
- [8] Incorporate case management mechanisms from rule 77 into the new discovery management rule, including case conferences (with express authority for the court to require or create a discovery plan at a case conference, assignment of a particular judge, and any case management powers needed to give effect to the rule).

Scope of Discovery

- [9] Narrow the scope of discovery. Replace the current "semblance of relevance" standard to a standard of "relevance" by modifying the phrase "relating to" any matter in issue in an action in rules 30.02(1), 30.03 and 31.06(1) with "relevant to" any matter in issue in an action.

Documentary Disclosure and Production

- [10] Amend rule 30.03(1) to require parties to exchange affidavits of documents within 45 days after the close of pleadings, subject to the parties' agreement otherwise or a court order.
- [11] Amend rule 30 to require production of documents referred to in pleadings at the time pleadings are served, unless they have been produced previously.
- [12] Add a new schedule to the affidavit of documents listing documents in the possession of non-parties that will be relied on by parties.

- [13] Develop best practices for standard early documentary disclosure and production for specific case types.
- [14] Replace Forms 30A and 30B with new standard forms for the schedules to the affidavits of documents, to include the following fields of information:
- Date
 - Document type (e.g. letter, memo, contract, etc.)
 - Author
 - Recipient
 - Title of document or other description
 - Production number/page range
 - Identification of attachments, if any
 - Basis of privilege claimed
- [15] Develop best practices for the manner of disclosure and productions.

Production of Documents in the Possession of Non-Parties

- [16] Modify the test for production from non-parties in rule 30.10(1) by deleting the requirement to demonstrate that it would be “unfair to require the moving party to proceed to trial without having discovery of the document”. Authorize the court to order production from non-parties where the document is relevant to a material issue in the action (*as the rule currently provides*) and where the court is satisfied that the document is not privileged and that its production would not be injurious to the public interest (*new requirement*).

Discovery of Electronic Documents

- [17] Amend rules 30.01 and 31.01 to include in the definition of document “data created and stored in electronic form.”
- [18] Amend rule 4.01(4) of the Law Society’s Rules of Professional Conduct to include the discovery of electronic documents in documentary disclosure, in appropriate cases.
- [19] Develop best practices with respect to retention of electronic records and the scope, cost and manner of electronic documentary production.
- [20] Following a period of monitoring the impact of best practices, review and revise the rules relating to documentary production.
- [21] Participate in processes to establish national standards for electronic discovery.

Oral Discovery

- [22] Amend rule 31 to provide that, subject to the parties’ agreement otherwise or a court order, a party will have up to a maximum of one day to examine each party adverse in interest.
- [23] Develop best practices with respect to deemed authenticity of documents.

- [24] Civil Rules Committee to consider a review of the provisions relating to deemed authenticity of documents.
- [25] Retain the right to cross-examine at oral examination for discovery.
- [26] Do not introduce amendments to the rules at this time with respect to video recording of oral examinations for discovery.
- [27] Develop best practices for the conduct of oral discovery.

Written Discovery

- [28] Amend rule 31.02(1) to allow both oral and written discovery on parties' consent, or by court order, provided that there will not be duplication and that discovery will be conducted in a cost-effective manner.
- [29] Include a sanction in rule 35.05 to address the situation where written discovery (whether consented to or ordered by the court in addition to oral discovery) proves to be duplicative or is not conducted in a cost-effective manner.
- [30] Develop best practices for the use of written questions and answers.
- [31] Amend rule 35.02 to extend the time for responding to written questions from 15 days to 45 days, subject to agreement of the parties otherwise or court order.
- [32] Amend rule 35.04(1), to extend the time for serving a further list of written questions to 15 days, while retaining the current 15 days for responding to an examining party's further list of questions.

Examination of Corporate Representatives and Partners

- [33] Where an action is brought by or against a corporation or a partnership in its firm name, amend rules 31.03(2), (3) and (4) to permit the examination of more than one corporate representative or partner with personal knowledge of relevant information, on the parties' consent, or by court order.

Examination of Non-Parties

- [34] Modify the test for examining non-parties in rule 31.10(2) by deleting the requirement to demonstrate that it would be "unfair to require the moving party to proceed to trial without having the opportunity of examining the person".
- [35] Develop best practices to encourage parties to reach agreements on obtaining information from a non-party, subject to the non-party's consent or a court order.

Discovery of Expert Evidence

- [36] Modify rule 53.03 so that the 90/60/30 day time limits are calculated from the date of the pre-trial conference (or, in rule 77 cases, the settlement conference), subject to:
- a court order; or
 - the parties' agreement otherwise, provided that it is possible to have a meaningful pre-trial or settlement conference.
- [37] Develop best practices to encourage judicial management of the timing of delivery of expert reports under rule 53.03(4) to facilitate a meaningful pre-trial or settlement conference.
- [38] Amend rule 53.03 to provide that an expert who has been retained to give opinion evidence may be examined for discovery on the parties' and the expert's consent or by direction of the court on notice to the expert,
- subject to a consideration of factors including cost, time, and the expert's availability;
 - provided that the examination is restricted to the expert's qualifications, area of expertise and the findings and opinions set out in the expert's report; and
 - provided that the party wishing to examine the expert is responsible for paying any reasonable fees, estimated in advance, associated with the expert's attendance at oral discovery and with the preparation of responses to written questions.
- [39] Amend rule 48.04(2) to permit the examination of an expert on the consent of the parties and the expert without leave of the court, notwithstanding that an action has been set down for trial.
- [40] Develop best practices for the use of experts and expert reports.
- [41] Monitor the impact of recommendations and other initiatives on concerns regarding the proliferation of experts in civil litigation.

Undertakings and Refusals

- [42] Monitor refusals motions based on relevance to determine whether the proposal to preclude objections on the basis of relevance ought to be reconsidered.
- [43] Amend rule 31 to require parties to answer undertakings and refusals within 45 days of their being given, subject to the parties' agreement otherwise or a court order.
- [44] Amend rule 31 to provide that any question taken under advisement is deemed to be a refusal if not answered within 45 days of being asked.
- [45] Develop best practices for the appropriate use of undertakings and for the prompt listing and exchange of undertakings, refusals and requests for information from non-parties.

- [46] Introduce an undertakings and refusals chart as a regulated form under a new discovery rule for use in motions relating to unanswered undertakings and refusals.
- [47] Require parties to collaborate in the preparation of the chart and to file the chart, along with the pleadings, prior to the hearing of an undertaking or refusals motion.

Discovery Disputes

- [48] Establish a province-wide simplified process for resolving discovery disputes, to include the following features:
 - simplified discovery motions form (based on Form 77C);
 - no requirement to file a formal motion record or supporting materials (except for the undertakings and refusals chart recommended above);
 - motions to be heard in person, by teleconference and in writing, where appropriate and subject to the court's discretion; and
 - access to case conferences at the request of any party or on the court's initiative.
- [49] As a pre-requisite to bringing a motion or requesting a case conference, require parties to demonstrate that they have communicated in an attempt to resolve the discovery dispute.
- [50] Include a presumptive order for costs on the higher scale where a party is successful, unless the court orders otherwise.

Enforcement of Discovery Obligations

- [51] While the Rules of Civil Procedure provide an adequate range of sanctions to address discovery abuse, the imposition of meaningful and predictable consequences would help to deter unjustified breaches of discovery obligations.

Principles of Efficiency and Professionalism

- [52] Incorporate into rule 1.04 language from rule 77.02 to provide that “the rules shall be construed so as to reduce unnecessary cost and delay in civil litigation, facilitate early and fair settlements and bring proceedings expeditiously to a just determination while allowing sufficient time for the conduct of the proceeding.”
- [53] Incorporate the wording of rule 4.01(4) and (7) of the Rules of Professional Conduct into a new discovery rule.

Best Practices Manual

- [54] Develop a best practices manual to address the proper conduct of discovery, including discovery planning, documentary discovery, written and oral examination for discovery, undertakings and refusals, motions, discovery of expert evidence, unrepresented litigants and other related matters.
- [55] Form a steering committee to oversee the development and implementation of the best practices manual, reporting to the Attorney General and the Chief Justice of the Superior Court and comprised of the following members:
- Judicial representative as Chair
 - Discovery Task Force members
 - 1 representative of each of the Law Society, Advocates' Society, Ontario Bar Association, County and District Law Presidents' Association, Ontario Trial Lawyers' Association and Metropolitan Toronto Lawyers' Association
 - 2 judicial representatives (1 from Toronto and 1 from outside Toronto)
 - 1 representative of the Court Services Division, Ministry of the Attorney General
 - 1 representative of the Civil Rules Committee Secretariat
- [56] Mandate the Law Society to coordinate the production and dissemination of the best practices manual and to develop complementary bar education and training programs.

Other

- [57] Review rules 26.01 and 53.08 to address prejudice caused by untimely amendments of pleadings, disclosure of information or delivery of documents.