

**REPORT FROM THE TASK FORCE ON DISCOVERY AND CIVIL JUSTICE  
OF THE  
AMERICAN COLLEGE OF TRIAL LAWYERS  
AND THE  
INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM  
TO THE  
2010 CIVIL LITIGATION CONFERENCE  
DUKE UNIVERSITY SCHOOL OF LAW**

In March 2009 the Task Force on Discovery<sup>1</sup> of the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System published a Final Report of their joint project relating to discovery and the American civil justice system. That report was approved and adopted by the Board of Regents of the College.

The Task Force and the Institute concluded their Final Report as follows:

“We hope that this joint report will inspire substantive discussion among practicing lawyers, the judiciary, the academy, legislators and, most importantly, clients and the public.”

That has certainly occurred. In this report to the 2010 Civil Litigation Conference, we briefly describe the current status of our joint project and we clarify one of the Principles articulated in our Final Report that has been the subject of some negative commentary.

The Task Force was originally charged by the College to work with the Institute in order to examine the role of discovery in the civil justice system (both federal and state) and to make recommendations for making the system more efficient and less

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<sup>1</sup> The Task Force has been renamed the “Task Force on Discovery and Civil Justice” to reflect the fact that its mandate goes beyond discovery and concerns aspects of the civil justice system that affect discovery, such as case management.

expensive. The Final Report of the Task Force and the Institute sets forth 29 “Principles” for improvements that could be applied to both state and federal civil justice systems and that the Task Force and the Institute hoped would “be made the subject of public comment, discussion, debate and refinement.” In crafting those Principles, the Task Force and the Institute took note of the responses from 1,490 Fellows of the College to a written survey relating to their perceptions of the civil justice system.<sup>2</sup> Among other things, respondents to our survey had the following perceptions:

- 81% thought the civil justice system was too expensive;
- 69% thought the civil justice system took too long;
- 68% thought expenses inhibit the filing of cases;
- 65% thought the Federal Rules of Civil Procedure were *not* conducive to the goal of Rule 1;
- 71% thought discovery was being used as a tool to force settlement;
- 87% thought e-discovery increases expenses;<sup>3</sup> and

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<sup>2</sup> The same survey, with very few changes, has been administered to the members of the ABA Section of Litigation, the results of which are the subject of a separate report to this Conference. The survey was also administered to the members of the National Employment Lawyers Association. According to the Federal Judicial Center, there were some differences in the results of the surveys but many areas of general agreement in the responses. For example, there was broad agreement that the time necessary to complete discovery was the primary cause of delay in the litigation process and that early intervention by judges helps to limit discovery. See Emery G. Lee III and Thomas E. Willging, *Attorney Satisfaction with the Federal Rules of Civil Procedure* (March 2010), pp. 8, 11.

<sup>3</sup> A recent paper submitted to this Conference by the Center for Constitutional Litigation PC, a Washington D.C. law firm that describes itself as “unabashedly represent[ing] the interests of plaintiffs,” states that “underlying the [Task Force’s] study

- 63% thought e-discovery was being abused.

The Principles set forth in the Final Report, some of which were controversial, were designed to address those perceptions. They were the result of many hours of intense discussion and compromise among the members of the Task Force and the Institute and were meant “to work in tandem with one another and should be evaluated in their entirety.”

Following publication of the Final Report, several judges approached the Task Force and the Institute and indicated a desire to test the Principles in practice through pilot projects in their jurisdictions. In order to accommodate those desires, the Task Force and the Institute drafted a set of rules called “Pilot Project Rules” that could be used to govern such pilot projects. Those rules and an accompanying Civil Case Flow Management Guideline prepared by the Institute were published together in late 2009 in a document called “A Roadmap for Reform.” The Pilot Project Rules were intended to be only one possible manifestation of how the Principles could be used in practice. Those

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is an assumption that is demonstrably incorrect: that discovery costs are out of control.” Center for Constitutional Litigation PC, *Nineteenth Century Rules for Twenty-First Century Courts?* (March 2010), pp. 2, 3. In support of that assertion, the Center cites a 2009 study by Emery G. Lee III and Thomas E. Willging of the Federal Judicial Center, *National Case-Based Civil Rules Survey, Preliminary Report to the Federal Judicial Conference Advisory Committee on Civil Rules* (Oct. 2009) at 2. However, in a follow-up report in 2010, which the Center does not cite, the same authors reported on the results of a multivariate analysis of the same data. They concluded that, all else equal, plaintiffs who only requested electronic discovery had 37% higher costs and those who both requested and produced electronic discovery had 48% higher costs. For each dispute over electronic information, the plaintiff had 10% higher costs. Similar results were reported for defense attorneys. Emery G. Lee III and Thomas E. Willging, *Litigation Costs in Civil Cases: Multivariate Analysis* (March 2010), pp. 5, 7.

Rules were not meant to supplant the Principles. We do not expect that any of the pilot projects will adopt the Pilot Project Rules in their entirety; we anticipate that they will be modified to take into account local customs and usage. We also expect that the results of the pilot projects will be evaluated and analyzed when the projects are completed.

Many of the papers that have been submitted to the 2010 Civil Litigation Conference refer to and comment on our Final Report and Pilot Project Rules and the comments are generally favorable.<sup>4</sup> We look forward to a lively discussion about them.

There has been some criticism directed at one of the Principles in particular, the one that relates to fact-based pleading. That criticism appears to conflate the term “fact-based pleading” as used in our Principle with the requirements contained in the Supreme Court decisions in *Twombly* and *Iqbal*. Our Principle reads as follows:

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

In light of the criticism, we believe that some clarification of our Principle is in order and would be helpful.

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<sup>4</sup> For example, Elizabeth J. Cabraser, a San Francisco lawyer who “has represented plaintiffs in complex civil litigation, mass torts, and class actions in the federal and state courts since 1978” (Cabraser, *Uncovering Discovery* (2010), n.\*) wrote:

“Holistically, the *Final Report* program seems balanced, with a potential to improve the quality, and reduce the cost, of civil litigation. It is the product of extensive study, thoughtful reflection, discussion and compromise among those with opposing viewpoints, and it reflects the practicality gained through the litigation experience of seasoned practitioners on both sides of the ‘v’.” (*Id.* at p. 55.)

First, we did not intend to create an additional pleadings hurdle or to foreclose access to the courts. The commentary to our Pilot Project Rule 2.1<sup>5</sup> does a better job of making that intention explicit than our Final Report did:

“PPR 2.1 is not intended to resuscitate the technicalities associated with common-law pleading or foreclose access to the courts. . . .

“If a pleading party cannot through due diligence obtain facts necessary to support one or more elements of the claim, the party may plead such facts on information and belief, again with as much detail as possible.”

The overall goal of our Principles is faster resolution of cases with less expense. One way to achieve that, we suggest, is early disclosure of material facts.

Second, our discussions for reform in general and about that Principle in particular began before *Twombly* and *Iqbal* were decided. Those cases did not influence our recommendation. Indeed, the fact-based pleading to which we refer is different from what those cases require. Our Principle does not address the issue of plausibility. We merely would require that all known material facts be disclosed. We all agreed on the proposition that early disclosure of known facts that will support claims and affirmative defenses is preferred, whether those facts appear in the initial pleadings, early exchanges

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<sup>5</sup> PPR Rule 2.1 reads as follows:

“The party that bears the burden of proof with respect to any claim or affirmative defense must plead with particularity all material facts that are known to that party that support that claim or affirmative defense and each remedy sought, including any known monetary damages. A material fact is one that is essential to the claim or defense and without which it could not be supported. As to facts that are pleaded on information and belief, the pleading party must set forth in detail the basis for the information and belief.

between counsel or discussions with the court. The purpose of doing so is to inform and shape discovery obligations, especially in the digital age.<sup>6</sup> Some members of our Task Force come from states, such as Illinois,<sup>7</sup> where fact-based pleading has been “the way business is done” for years and it was only natural that our Final Report placed the requirement for disclosure of known material facts that support claims or affirmative defenses in a pleading. Requiring disclosure in complaints and answers is obviously one method—perhaps the best method—for such early disclosure, but it is only one way. Others could easily be devised to help inform and shape discovery obligations. It is the result, not the means, that was important to the Task Force, so long as the disclosure comes early and will not cause delay.

Third, our Pilot Project Rules do not require fact-based pleading in the *Twombly/Iqbal* sense. Our Principle is being read by some as an endorsement of those opinions and, in particular, is seen as creating an additional pleadings hurdle for plaintiffs that does not exist under notice pleading. That was not our intention. Although our Principle is drafted in terms of pleadings, our intention was to require the pleading party to disclose early in the case all of the material facts known to that party to establish its claims and affirmative defenses. Our rationale was that early disclosure of known material facts should not be difficult—we would require only disclosure of facts that

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<sup>6</sup> We understand that in Canada, the parties are required to list all documents relevant to the issues, which are supposed to be defined by the pleadings.

<sup>7</sup> Approximately 12 states appear to have some kind of requirement for fact-based pleading, either by procedural rule or judicial interpretation.

are known—and should result in early narrowing of the issues and consequently in less discovery, not more.

Simply put, the Final Report is not meant to close the doors to litigants. On the contrary, our Principles are meant to encourage use of our civil justice system by those who currently are foreclosed due to excessive delay and expense.

Dated: March 26, 2010

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