**Discovery Disputes and Motions to Compel**

Discovery disputes are undoubtedly among the least favorite issues arising in civil litigation.

PURPOSE OF THIS PODCAST:

1. Analyze the nature of discovery
2. Explore the tools available to the trial judge
3. Offer suggestions for how to deal with discovery disputes when they arise

Origins of “Discovery”

A product of the Civil Practice Act, originally codified in 1966

Prior to 1966, TRIAL BY AMBUSH!

Purpose of Discovery:

“Specifically designed to fulfill a two-fold purpose:

1) issue formulation and

2) factual revelation.”[[1]](#endnote-1)

Said another way:

“The Broad purpose of the discovery rules is to enable parties to prepare for trial so that each party will know the issues and will be fully prepared on the facts.”[[2]](#endnote-2)

The Rules of Discovery Under the Civil Practice Act are designed to “remove the potential for secrecy and hiding of material that existed under the previous system”.[[3]](#endnote-3)

THUS, we are trying to do away with the trial by ambush that existed prior to the adoption of the Civil Practice Act- keep that in mind.

**Civil Practice Act (Ch. 11, T. 9)**

**and USCR 6.4**

O.C.G.A. §9-11-26 sets out the methods and scope of discovery and O.C.G.A. §9-11-37 sets forth the Court’s ability to control discovery and issue sanctions for the failure to comply. USCR 6.4 specifically directs the parties how to operate if a dispute arises.

**Methods and Scope of Discovery**

O.C.G.A. §9-11-26(a) says parties may engage in discovery by:

1) Depositions

2) Interrogatories

3) Request for Production of Documents or Things

4) Request for Entry Upon Land or Property for Inspection

5) Physical and Mental Examinations; and

6) Requests for Admissions.

That same statute also sets out the scope of discovery as follows:

“Parties may obtain discovery regarding *any matter*, *not privileged*, which is *relevant to the subject matter* involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party…. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”

In analyzing the scope of this language, the Courts have concluded that “The use of the discovery process has been held to be broadly construed.”[[4]](#endnote-4)

“Broad use of discovery favors supplying a party with the facts underlying the opponent’s case, without reference to whether the facts sought are admissible at trial.”[[5]](#endnote-5)

So in discovery, keep in mind that the concept of what is “discoverable” in the action is not constrained by what one party may define as “relevant”, but is instead liberally construed to anything NOT PRIVILEGED that might reasonably lead to admissible evidence- THAT’S A PRETTY BROAD DEFINITION!

**The real Beauty of the Civil Discovery Procedure**

In my opinion, the real genius- the real beauty- of the civil practice rules of discovery is that the system is designed to run WITHOUT the intervention of the trial judge and to operate OUTSIDE the court system.

The parties control the progress of discovery unless there is a problem.

Think about it, unless the trial judge intervenes, pursuant to USCR 5.1:

1. Discovery begins AUTOMATICALLY after the filing of the answer.
2. Discovery ends AUTOMATICALLY after six months.
3. The parties don’t even have to file their discovery with the Court, only a certificate acknowledging that they have sent and/or responded to it.
4. O.C.G.A.§ 9-11-29 even allows the parties to modify the discovery procedures in any way they like by stipulation.

THAT’S BEAUTIFUL! If there are no problems, you won’t even know that discovery is ongoing until the parties tell you that the case is ready for trial!

**Discovery Dispute Resolution Process**

Even the process for resolution of a discovery dispute is initiated by the parties. USCR 6.4 requires that “PRIOR to filing a motion seeking resolution of a discovery dispute, counsel for the moving party SHALL CONFER with counsel for the opposing party and any objecting person or entity in a GOOD FAITH effort to resolve the matters involved.”

So before the parties can invoke the power of the Court to intervene, they must first try to resolve the conflict themselves. That’s beautiful! Before they can come running to you, whining about the other party’s conduct, they have to have an actual conversation among the parties about the problem. What a concept!

In addition, the Rule requires that the conference be in GOOD FAITH, not some lame attempt to resolve it.

Finally, before they can file the motion, the moving party also has to CERTIFY that the good faith effort has been made to resolve the conflict.

That’s genius!

So, let’s review: if parties come to you with a conflict, the first inquiry should be as to what efforts have been made to resolve the conflict before bringing it to you. You can evaluate whether they have, in fact, made a good faith effort to resolve it. If not, you have the option of sending them away to start over (with your direction, of course). You also have the power to sanction for failures to operate under the statute, which we will discuss in a moment.

**Discovery Dispute Resolution by the Court**

When the parties’ good faith efforts have failed, they may bring their dispute to you. Then what?

My first step in resolution of these disputes is INFORMAL

SUGGESTION: Offer the parties the opportunity to bring discovery disputes to you prior to filing a formal motion. I often hear these disputes in a telephone conference if no one objects. Why?

1. It is quick, easy and cheap (parties don’t have to pay lawyers for a formal hearing)
2. No delay (discovery disputes can often put an immediate and total halt to the lawsuit until resolved)
3. Festering disputes cause attorneys to become entrenched and combative; and
4. A quick telephone conference can usually resolve the dispute.

I have also observed that a quick phone conversation can help me determine who the troublemaker may be in the discovery process and hopefully put them back on track. Those disputes often result from:

1. A party taking an unreasonable position; or
2. A client being uncooperative with their own counsel.

An additional advantage is that the phone conference often gives me a chance to see if I need to intervene further in the process to keep discovery- and the case- from going off the rails.

**Two Schools of Thought on the Control of Discovery:**

**Tight Reins vs. Laissez Faire**

There are two basic schools of thought as to how to govern the discovery process. Both have their advantages and therefore their adherents. Luckily for you, Wade is in one school, and I am in the other.

**Tight Reins**

Wade, why don’t you tell them a bit about how you control the discovery process using a scheduling order?

***Wade prattles on…***

**Tain:** Much as I hate to admit it, Wade’s approach does have a basis in the USCR. Superior Court Rule 5.4 provides for an early discovery planning conference if the parties agree, if a party petitions the court or if the court orders it on its own.

**Laissez Faire**

I’m in the laissez faire school of civil discovery. It probably comes from my background as an old civil trial attorney, where I didn’t want any old trial judge telling me how to prosecute my case.

At any rate, I usually don’t enter any kind of order concerning discovery unless or until there is a problem. In other words, *if you don’t invite me to your discovery party, I won’t crash it.* I will say, though, that if there is any hint of a discovery issue, most lawyers know that the parties can get a phone conference with me by just calling my assistant and scheduling a conference call with the other party. Or if I get one of those whiney letters or emails about how the other side is being difficult, my staff will automatically set a conference call.

If anyone objects to a phone conference, I won’t have it, but we’ll set a hearing on the issue as soon as possible- probably the following Friday after 5:00.

Anything can happen after a phone conference, from me simply giving the parties some direction without a formal order, to a formal order summarizing our conference and my rulings, to a request from me for a proposed formal scheduling order governing the rest of the discovery period.

The important takeaway for you from this exploration of these two schools of thought is that the appellate courts have given the trial courts very broad discretion in how to handle discovery issues.

**Scheduling Orders**

I think Wade and I agree that one of the most effective mechanisms for controlling discovery is the scheduling order. I use them most after discovery issues have arisen. I usually ask the parties to develop a proposed, consolidated discovery order that sets forth the remaining discovery in some detail.

For instance, I want to know

1. what depositions the parties want to take,
2. how soon they can be taken,
3. when written discovery will be complete,
4. when experts will be identified and deposed,
5. when all discovery will be completed, and
6. the date by which any dispositive motions will be filed.

I also want to set a time by which the pretrial order will be filed so that the case can be set for trial.

If the parties cannot agree on all the provisions for the consolidated order, I have them submit the portions on which they do agree and set out the grounds for disagreement. I then enter a scheduling order based on my rulings about discovery.

In addition, I often require scheduling orders when the parties want to extend discovery. I believe it makes more sense to have the parties state with some specificity what discovery they want to accomplish during the extension and how soon they can accomplish it. That avoids needless, open-ended discovery extensions.

**Trial Court Authority to Control Discovery**

Trial judges have broad authority to control the discovery process. For this reason, I feel like you can get as creative as you like in fashioning a discovery process as long as you are reasonably catering it to the case. USCR 5.1 even allows the trial court to shorten the six-month discovery period.[[6]](#endnote-6)

The policy of the appellate courts of this state is not to interfere with the trial judge’s broad discretion granted under the discovery provisions of the Civil Practice Act.[[7]](#endnote-7) In fact, the standard the Supreme Court has used to analyze a trial court’s actions is one of my favorite standards- “clear abuse of discretion”.[[8]](#endnote-8)

**Motions to Compel Discovery**

Motions compelling discovery are governed by O.C.G.A. §9-11-37 and USCR 6.4. If a motion to compel discovery is filed under the statute, once you’ve determined that all the requisite good faith efforts have been made to resolve the dispute, and once the certification is filed with the motion, you have yourself a genuine motion to compel.

**Notice O.C.G.A. §9-11-37(a)**

The statute requires “reasonable notice” to the parties and “all persons affected thereby”. Obviously this may include third parties from whom discovery is sought or whose records are being requested.

**Appropriate Court O.C.G.A. §9-11-37(a)(1)**

Applications for motions to compel discovery are to be made in the county where the action is pending or in the case of depositions, in the county where the deposition is sought to be taken. Applications to compel a deposition to a party may be made either in the court where the action is pending or where the deposition is sought to be taken.

**Responses to Discovery**

One thing is clear, discovery cannot simply be ignored or bad things will happen. For example, if one simply fails to make any response to discovery, O.C.G.A. §9-11-37(d) allows the court to impose some severe sanctions. A failure to respond to requests for admissions to a party, for example, means the requests are deemed admitted by operation of law. Failure to respond for deposition, to answer interrogatories or to respond to a request for inspection can result in imposition of any of the sanctions outlined in O.C.G.A. §9-11-37(b)(2)(A)-(C).

Those sanctions include:

1. An order that certain facts shall be taken as established for the purposes of the action in accordance with the claim of the party obtaining the order;
2. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence; and/or
3. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; and/or
4. An order of contempt for failure to comply with the court’s order to submit to discovery.

The court is not limited to those sanctions that are set out in the statute. The statute specifically says the court may make such orders “as are just” in responding to the failure of a party to comply with discovery.[[9]](#endnote-9)

As a general rule, the appellate courts prefer sanctions less severe than dismissal and default unless other reasonable measures have failed.[[10]](#endnote-10) In other words, the ultimate sanctions should be reserved for those situations where a party has disobeyed a previous order of the trial court and compliance has not been obtained by lesser measures. In addition, the ultimate sanctions of dismissal and default should not be invoked unless requested.[[11]](#endnote-11)

**“Games” Not Tolerated**

The rules of discovery do not allow gamesmanship in order to avoid sanctions. For example, evasive or incomplete answers to interrogatories and questions on deposition are treated as a failure to answer.[[12]](#endnote-12) Likewise, a party cannot avoid sanction once a motion is filed by making a late or untimely response.[[13]](#endnote-13)

**Protective Orders**

O.C.G.A. §9-11-26(c) allows a person from whom discovery is sought to apply for a protective order to protect such person from “annoyance, embarrassment, oppression, or undue burden or expense”. The statute sets forth a number of alternatives the court may select rather that allowing the discovery to proceed. Again, this is an area in which the appellate courts have allowed wide discretion to the trial courts to protect persons from abuses of discovery. Attorneys fees are available if the motion is denied in whole or in part.

O.C.G.A. §9-11-37(d)(2) is clear that failure to respond to discovery may not be excused on the ground that the discovery is objectionable UNLESS the party failing to act has applied for a protective order. Simply raising the objection, without further action, will not protect one failing to respond to discovery.

**Attorney’s Fees**

O.C.G.A. §9-11-37 is the exclusive vehicle for the imposition of attorney’s fees for discovery violations. For example, fees cannot be awarded under O.C.G.A. §9-15-14 for a discovery violation or sanction.

Under O.C.G.A. §9-11-37, an award of attorney’s fees and reasonable expenses is *mandatory* to the prevailing party on a motion to compel. In such instance, the award can be made against “the party or deponent whose conduct necessitated the motion or attorney advising such conduct or both.” The exception is where the court finds that the motion or opposition thereto was “substantially justified or that other circumstances make an award of expenses unjust.”[[14]](#endnote-14)

An award of fees and expenses requires an “opportunity for hearing” after the motion to compel is decided. My interpretation of the phrase “opportunity for hearing” means the court could say, for example, if either party requests a hearing within ten days, one will be scheduled, otherwise the court will decide the matter of fees without hearing.

**Conclusion**

I hope these insights into discovery and discovery disputes have been helpful.

Just remember, try to resolve discovery disputes as soon as possible so that they don’t interrupt the progress of the case.

Use your broad discretion to be as creative as possible to formulate useful solutions tailored to the facts of your case.

And use the sanctions afforded by the statutes to assure that the parties are complying with the requirements of the Civil Practice Act.

1. *Travis Meat and Seafood Co. v. Ashworth*, 127 Ga. App 284 (1972); *International Serv. Ins. Co. v. Bowen*, 130 Ga. App. 140 ( ); *Clarkson Indus., Inc. v. Price*, 135 Ga. App. 787 (1975) overruled on other grounds, *Tobacco Road, Inc. v. Callaghan*, 174 Ga. App 539 (1985). [↑](#endnote-ref-1)
2. *Travis Meat and Seafood v. Ashworth*; *International Serv. Ins. Co v. Bowen, Clarkson Indus., Inc. v. Price*. [↑](#endnote-ref-2)
3. *Hanna Creative Enterprises, Inc. v. Alterman Foods, Inc*., 156 Ga. App. 376 (1980). [↑](#endnote-ref-3)
4. *Travis Meat and Seafood; International Serv. Ins. Co.* [↑](#endnote-ref-4)
5. *Setzers Super Stores of Ga., Inc. v. Higgins*, 104 Ga. App. 116 (1961) [↑](#endnote-ref-5)
6. *Walton v. Datry*, 185 Ga. App 88 (1987). [↑](#endnote-ref-6)
7. *Vaughn & Co. v. Saul*, 143 Ga. App. 74 (1977) [↑](#endnote-ref-7)
8. *Ambassador College v. Goetzke*, 244 Ga. 322 (1979), cert. denied, 444 U.S. 1079 (1980). [↑](#endnote-ref-8)
9. O.C.G.A. §9-11-37(b)(2). [↑](#endnote-ref-9)
10. *Joel v. Duet Holdings, Inc.*, 181 Ga. App. 705 (1987). [↑](#endnote-ref-10)
11. *Citibank, N.A. v. Hill*, 161 Ga. App. 186 (1982). [↑](#endnote-ref-11)
12. O.C.G.A. §9-11-37(a)(3). [↑](#endnote-ref-12)
13. *Bryant v. Nationwide Ins. Co.*, 183 Ga. App. 577 (1987); *Singleton v. Eastern Carriers, Inc*., 192 Ga. App. 227 (1989). [↑](#endnote-ref-13)
14. O.C.G.A. §9-11-37(a)(4)(A) and (B). [↑](#endnote-ref-14)