

The MSBA's Updated Answer to Discovery Disputes: Proposed Revisions to the Discovery Guidelines of The Maryland State Bar Association

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In 1986 the Maryland State Bar Association and the Conference of Circuit Court Judges approved the Discovery Guidelines of the Maryland State Bar Association. While not officially part of the Maryland Rules, the Discovery Guidelines were created to assist practitioners in mitigating and resolving discovery disputes, and over the years, many judges and practitioners have relied upon the Guidelines for direction. However, the Discovery Guidelines, which are published at the beginning of Title 2, Chapter 400 of *Michie's Annotated Code of Maryland*, have not been updated for more than two decades.

In the Spring of 2012, a Special Committee was commissioned by the Litigation Section of the Maryland State Bar Association to reexamine the Discovery Guidelines, and, if necessary, to revise them in an effort to provide current practitioners with an updated guide for navigating Maryland discovery issues. Over the past eighteen months, the Special Committee has reviewed the Discovery Guidelines, as last revised in February 1990, and compared them with the current Maryland Rules, the Discovery Guidelines for the United States District Court for the District of Maryland, and discovery guidelines from various other state and federal jurisdictions.

As a result of its research, the Special Committee determined that portions of the Discovery Guidelines could be amended to reflect developments in Maryland law, and to assist practitioners in resolving disputes that have become more common in recent years. Accordingly, the Committee created a set of Revised Discovery Guidelines that it will present for review and comment by the Litigation Section Council in May 2014.

It was not the intent of the Special Committee to completely rewrite the Discovery Guidelines. Indeed, many of the principles set forth in the February 1990 version of the Guidelines have stood the test of time, and were not altered by the Committee. By way of example, the Committee made no changes to current Guideline 6 regarding the assertion of privileges at depositions. When asserting a privilege during a deposition and refusing to provide information on the basis of the privilege, current Guideline 6 provides, among other things, that an attorney should identify the nature of the privilege he or she is asserting on behalf of the client. Current Guideline 6 also provides that an attorney should disclose some details of the privileged information that is being withheld (to the extent the attorney can avoid revealing privileged information) and establishes what latitude an attorney seeking the information has during the deposition to question the witness regarding the assertion of the privilege. These ideals remain as relevant today as they were when the Guidelines were originally drafted. Therefore, the Special Committee was of the opinion that current Guideline 6 should remain the same.

The Committee determined that other Guidelines, however, should be revised as the Maryland Rules and common law have evolved over time. By way of example, current Guideline 2 governs stipulations setting discovery deadlines, and encourages parties to supplement the Court's Scheduling Order or, if no Scheduling Order exists, to stipulate to certain discovery issues. Current Guideline 2 calls for parties to agree on dates by which the parties would designate expert witnesses, dates by which the discovery depositions of experts would be completed, dates by which a party is required to apply to the Court to show good cause as to why the designation of additional experts would be permitted, the date by which all written discovery should be served, and the date by which all discovery must be concluded.

Since February 1990, detailed Scheduling Orders have become mandatory in most Circuit Court civil cases. Indeed, Maryland Rule 2-504 mandates that, unless otherwise ordered by the County Administrative Judge, in every civil action, the court shall enter a Scheduling Order, containing, among other things, deadlines for identifying expert witnesses and completing discovery. Additionally, many jurisdictions now include in the Scheduling Order, most of the deadlines set forth in current Guideline 2. While additional stipulations regarding discovery deadlines may have been necessary in 1990, the Special Committee believes that, in light of the more detailed Scheduling Orders issued by the Courts today, a simpler, streamlined Guideline was appropriate. Revised Guideline 2 still encourages attorneys to enter into written discovery stipulations to supplement the Court's Scheduling Order. However, the supplemental topics referenced in Revised Guideline 2 include milestone dates for Spoliation Motions and Motions *In Limine*, or other discovery issues that are not normally subject to deadlines set in a Rule 2-504 Scheduling Order.

The Special Committee also wanted to recognize, where possible, advancements in technology and the impact of technology on everyday practice. Therefore, the Committee is recommending a New Guideline 6, which encourages attorneys to exchange discovery requests and responses in commonly-accepted word processing format in an effort to reduce the clerical effort required to prepare responses to discovery and motions. While exchanging electronic versions of discovery documents is not required under the Maryland Rules, it is a frequent occurrence in today's practice and benefits clients, attorneys, and their staff. It is the hope of the Special Committee that New Guideline 6 will encourage attorneys and parties to take a more practical and efficient approach to paper discovery that will save time, money, and resources.

The Special Committee also recommends the addition of New Guideline 11, which deals with disputes regarding expert witness fees. After reviewing the Federal Discovery Guidelines that deal with this issue, the Committee thought that the addition of a Guideline on expert witness fees would assist practitioners in dealing with a dispute that has become more common as expert witness fees have increased. New Guideline 11 encourages counsel to familiarize

themselves with Maryland Rule 2-402(g)(3) concerning fees associated with expert depositions. New Guideline 11 also states that, even if a dispute regarding expert fees arises, counsel should make good faith efforts to resolve the dispute without the assistance of the Court; if no resolution can be reached, the expert's deposition should proceed as scheduled unless otherwise ordered by the Court, and the parties should thereafter promptly raise the fee dispute with the Court. Since the adoption of the February 1990 Discovery Guidelines, the Court of Special Appeals of Maryland, in *Kilsheimer v. Dewberry & Davis*, 106 Md. App. 600 (1995), has provided practitioners with factors that may be considered by the Court in determining the reasonableness of an expert's fee. Therefore, New Guideline 11 specifically references that case to guide practitioners with regard to the factors that should be addressed in resolving the dispute.

While revising the Discovery Guidelines, the Special Committee went to great lengths to keep in mind the purpose of the Guidelines. The Maryland State Bar Association strives to encourage professionalism and civility among practitioners in this State. In proposing its revisions to the Discovery Guidelines, the Committee sought to provide practical advice to assist practitioners in avoiding discovery disputes and, if necessary, in resolving such disputes more efficiently. Our profession and the public stand to benefit greatly if attorneys utilize the Discovery Guidelines to efficiently and effectively resolve discovery issues in a civil and professional manner.