
Model discovery plan and e-trial precedents released

By David Outerbridge, Torys LLP

The Ontario E-Discovery Implementation Committee (EIC) has recently released six new important model documents. Four of the documents are closely linked to the January 1, 2010 amendments to the Ontario *Rules of Civil Procedure* relating to mandatory discovery plans and the principle of proportionality. Two other documents relate to electronic trials.

The six model precedents are:

- a checklist for preparing a discovery plan
- two model discovery plan templates--a long form and a short form
- a proportionality chart to be used on a motion seeking discovery relief
- an e-trial checklist
- a guidance document explaining the essential elements of an electronic trial

Model discovery plans

Under new Rule 29.1 of the *Rules of Civil Procedure*, parties to civil litigation matters in Ontario are required to negotiate and agree upon a discovery plan before seeking discovery in the action. Although the rule prescribes a list of essential topics to be addressed in the discovery plan, there is no prescribed form for the plan and many possible topics are not identified. The EIC's two model discovery plan templates are designed to assist in filling that gap.

The short form template addresses the bare bones of a discovery plan as prescribed by Rule 29.1. The long form template addresses a number of other issues that parties may wish to negotiate as part of a discovery plan, especially in cases with a significant e-discovery component, such as agreed preservation steps, agreed search parameters, and an agreed exchange protocol for electronic data, among other things. The companion document titled "Checklist for Preparing a Discovery Plan" is a helpful guide regarding issues to consider and topics to negotiate. Both the checklist and the discovery plan templates are designed to be scalable to the needs of the specific case.

Proportionality chart

New Rule 29.2 of the *Rules of Civil Procedure* contemplates that a party moving for discovery relief will have to demonstrate that the relief sought is proportionate, taking into account the time and expense required to provide the discovery, prejudice to the party discovered, interference with the orderly progress of the action, the availability of alternative discovery, and the volume of documents requested to be produced.

The EIC's model proportionality chart is designed for use on a motion for discovery of documents, functioning in a manner similar to a refusals and undertakings chart. The moving party will complete columns of the chart identifying the nature of the production request, the relevance of the documents, and the proportionality factors that favour production. The responding party will then complete a responding column, and the right-hand column is for the court's disposition of the motion.

Electronic trials

There is increasing interest in the option of conducting trials electronically in Ontario, with several recent successful examples of major trials having been conducted in this manner. The EIC's "What is an Electronic Trial?" is a guidance document describing all key aspects of an e-trial, with topics including not only the logistics of an electronic trial but also issues of strategy and cost. The companion "E-Trial Checklist" is a handy guide for counsel to consult when preparing for and implementing an e-trial.

Finding the documents

The documents can be downloaded for free in Word or searchable pdf format from the e-discovery page of the Society's website. Click on "Electronic Discovery Related Precedents" at: <http://www.advocates.ca/Advocacy-and-Practice/E-discovery.html>. The EIC invites comments on the documents. Comments may be submitted to EIC member Michele A. Wright at mwright4@toronto.ca.

Also on the web site are ten previously released EIC model precedents and e-discovery guidance documents, including an annotated e-discovery checklist, sample memoranda to be sent to clients describing the documentary discovery process, a discovery plan in letter format, and a guidance document on minimizing e-discovery costs. All of the EIC documents include detailed annotations to *The Sedona Canada Principles Addressing Electronic Discovery*, which under Rule 29.1 parties now are mandated to "consult and have regard to" in preparing a discovery plan for an action.

About the EIC

The EIC is a joint committee established by the Ontario Bar Association and The Advocates' Society. It is composed of litigators

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David Outerbridge

The Advocates' Society 2010 - 2011

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from both the private and public sectors, and members of the judiciary in Ontario. Its mandate is to implement "on the ground," within the Ontario court system and litigation bar, best practices with respect to electronic discovery. The current members of the EIC are Stephanie Beaudry, Duncan Boswell, Tim Buckley, John Buhlman, Alex Cameron, the Honourable Justice Colin Campbell, Michael Fraleigh, Derek Freeman, Master Benjamin Glustein, Brett Harrison, Peter Henderson, Kathryn Manning, Brent McPherson, Brad Moore, Dera Nevin, David Outerbridge (chair), Ken Prehogan, Tom Sutton, Brendan Van Niejenhuis, David Wires, and Michele Wright. ■

Double honours at Ottawa dinner



The Advocates' Society and the Ottawa bar toasted Brian Crane, Q.C., of Gowling Lafleur Henderson LLP at the annual Ottawa Advocate Honouree Dinner at the NAC. Guest speakers were The Honourable Ian Binnie, of the Supreme Court of Canada; Martin Mason, of Gowling Lafleur Henderson LLP, and Jacquie McNish, of *The Globe and Mail*. William Sammon, of Barnes Sammon LLP served as M.C. Pictured above, front and centre, is **Brian Crane**, surrounded by family and Gowlings colleagues.



For more than a decade, Fay Brunning has chaired the Ottawa Advocate Honouree Dinner, shaping it from a small informal gathering to a black tie event that is one of the highlights of the season for the Ottawa bar, and establishing the tradition of a gift of Native Canadian art for the honouree. Fay chaired her final dinner this year, along with the incoming chair, Tara Sweeney, of Soloway Wright LLP, and it was Fay's turn to be honoured and presented with an original work of art. Pictured, left to right, are **Fay Brunning**, of Sack, Goldblatt, Mitchell LLP, and **Tara Sweeney**. ■