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Discovery Abuse in the State of Georgia – Just How Bad Is It?

By Cleveland Distinguished Chair of Legal Ethics and Professionalism C. Ronald Ellington



How frequently do Georgia lawyers encounter discovery abuse in civil litigation? What are the most prevalent kinds of discovery abuse? Do attorneys who usually represent plaintiffs perceive discovery abuse occurring more often or at about the same rate as attorneys from the defense bar? Is discovery abuse worse in metro-Atlanta than small town Georgia?

Accurate answers to these and other questions can provide valuable information not only about the extent of discovery abuse in civil litigation but possible steps to combat it. Anecdotal evidence suggests that “hardball discovery” by “Rambo litigators” is rampant and results in unnecessary cost and delay and, sometimes, unjust outcomes. Just how bad is the problem really?

Survey Respondents

To attempt to answer these questions, a team of University of Georgia researchers surveyed approximately 4,500 Georgia lawyers. Surveys were sent to members of the General Practice and Trial Section of the State Bar of Georgia, the Georgia Trial Lawyers Association and the Georgia Defense Lawyers Association as well as the Georgia members of the American College of Trial Lawyers. Responses were received from 1,415 lawyers (or 35 percent of those surveyed).

Those responding were broadly representative of the Georgia bar. Fifty-five percent of the respondents were either sole practitioners or practiced in a law firm of two to five attorneys. Fifteen percent, in contrast, practiced in firms of 50 or more lawyers.

Those responding were relatively experienced (55 percent have 16 or more years in practice) and a substantial number (72 percent) spent at least 75 percent of their time in litigation

rather than other types of practice.

There was substantial representation from both the plaintiff and defense bars. Forty-two percent of respondents usually represented plaintiffs, while 25 percent usually represented defendants and roughly one-third represented both. Over 47 percent of those responding reported they principally practiced in metro-Atlanta, while some 35 percent principally practiced outside the Atlanta area.

Expecting Discovery Abuse

What does the survey tell us about the prevalence of discovery abuse? Characterizing discovery conduct as “abusive” is understandably subjective. No lawyer looks in the mirror and sees a discovery abuser. It is always the opponent. Nevertheless, the respondents were largely experienced attorneys who spend substantial portions of their work life in litigation.

To the question, “When a case begins, do you usually expect to encounter discovery abuse?” only 40 percent responded affirmatively. Should this result be viewed as good news or bad news? That 60 percent of the respondents do *not* expect to encounter discovery abuse may indicate that systemic discovery abuse is not endemic. Without a meaningful baseline, it is difficult to judge just how much perceived abuse of discovery is a natural, unavoidable byproduct of the adversary system. Still, the fact that 40 percent of those responding say they usually expect to encounter what they regard as discovery abuse tends to suggest there is a problem.

Analysis of the data reveals some interesting aspects of the inquiry. There is a statistically significant difference in the expectations of lawyers primarily practicing in metro-Atlanta as compared to the rest of the state. While only 32 percent of the lawyers outside metro-Atlanta expect to encounter abuse, over 44 percent of those in metro-Atlanta do. This result seems to confirm the belief that lawyers who know each other and who anticipate facing each other on another

day are less likely to engage in abusive behavior than those lawyers who have less familiarity with each other and who will not be opposing each other on a regular basis.

The data show a marked disparity between the perception of discovery abuse by members of the plaintiff’s bar and those on the defense side. Interestingly, 80 percent of defense attorneys responded they *do not* usually expect to encounter discovery abuse, while 58 percent of lawyers who represent plaintiffs report that they *do*. This is a telling difference and may reflect that ordinarily the plaintiff is more likely to need to obtain information in the hands of the defendant than vice versa.

Reported Frequency of Incidents

Fortunately, very few lawyers report they have encountered the illegal and unethical conduct of “destroying relevant documents” or “falsifying discovery responses.” However, a larger number (30 percent) believe relevant documents have been withheld.

What are the most common abuses “frequently” or “almost always” encountered? (See chart on facing page.) This ranking indicates the most fertile soil for discovery abuse lies in document production, not deposition practice. Only one of the seven most frequently encountered sins of discovery abuse, the use of so-called “speaking objections” to coach deponents, involved deposition practice.

It is worth noting the ills of discovery abuse most frequently encountered are found in document production. It is for these ills that we are most in need of a cure. Hopefully, this research project will help to guide reform efforts.

The team conducting this research included UGA professors C. Ronald Ellington, Susette M. Talarico and Susan B. Haire with the assistance of doctoral candidate Brian M. Harward. This synopsis is drawn from a forthcoming article to be published in the Georgia Law Review.

What are the most common abuses “frequently” or “almost always” encountered?

RANK	TYPE OF ABUSE	% REPORTING
No. 1	Asserting undifferentiated boilerplate objections in response to discovery requests, such as relevancy, vagueness, overly broad, etc.	80%
No. 2	Making overly broad, overly burdensome requests of marginal relevance to the needs of the case	60%
No. 3	Failing to produce documents or redacting documents on “relevance” grounds	48%
No. 4	Making “speaking objections” to coach deponents during depositions	46%
No. 5	Delaying the production of critical documents (or producing in waves) to impede use of documents at depositions or in trial	37%
No. 6	Asserting privileges for non-production of documents (work product or attorney-client) without a proper basis	36%
No. 7	Parsing document requests so narrowly that documents fairly comprehended are not produced	35%



Ball Receives Lifetime Achievement Award

Milner S. Ball (J.D.'71), Caldwell chair in constitutional law, recently

received a Lifetime Achievement Award from Hamline University School of Law's *Journal of Law and Religion*. This honor is bestowed annually on someone whose life and work exemplifies the vision and work of the publication. The journal is an inter-faith periodical committed to the integrated disciplines of law, religion and ethics. Last year's award recipient, Jawdat Said, is a renowned Islamic scholar from Syria.

Also an ordained Presbyterian minister, Ball has been a major contributor to the fields of law and religion for over three decades. Through his work, he strives to promote a dialogue on the relationship between theology and law. He has authored many books on these subjects and frequently serves as a guest lecturer at leading academic institutions around the globe.

Ball supplements his scholarly pursuits with many social causes. Passionate about social justice, he is the founder of Georgia Law's Public Interest Practicum, a program that places law students in local soup kitchens, housing projects and other settings where they offer legal support to the poor, needy and disenfranchised.

“Receiving an award of this caliber is a great honor,” Ball said. “However, I am not unique in my desire to help others. Many of my colleagues at Georgia Law are just as dedicated and perform many hours of pro bono work. I am privileged to work with them and to also be recognized in this way by Hamline's *Journal of Law and Religion*.”

Ball earned his bachelor's degree from Princeton University and received his divinity degree from Harvard University. He completed his Juris Doctor at UGA in 1971. Ball has been selected twice as a Fulbright Scholar.