



# **The Foundation**

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## **State Best Practices Survey**

*Second Edition*

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### Question

### Alabama

1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?

No.

2. Are there Standard Form Interrogatories/Document Requests?

No. However, Appendix I. ("Forms") to the Ala. R. Civ. P. contains model interrogatories and document requests which have been approved by the Alabama Supreme Court.

3. Are there limits on the number of Interrogatories/Document Requests?

Yes. Ala. R. Civ. P. 33(a) (2011) limits parties to 40 interrogatories without leave of court. There is no limit on document requests.

“A party shall not propound more than forty (40) interrogatories to any other party without leave of court. Upon motion, and for good cause shown, the court may increase the number of interrogatories that a party may serve upon another party. For purposes of this rule, (1) any subpart or separable question (whether or not separately numbered, lettered, or paragraphed) propounded under an interrogatory shall be considered a separate interrogatory, and (2) the word “party” includes all parties represented by the same lawyer or firm. When the number of interrogatories exceeds forty (40) without leave of court, the party upon whom the interrogatories have been served need only answer or object to the first forty (40) interrogatories.” Ala. R. Civ. P. 33(a) (2011).

4. Are there time limits on depositions, or limits on the number of depositions?

No.

5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)

Yes. Ala. R. Civ. P. 30(b) (6) is substantially similar to Fed. R. Civ. P. 30(b) (6) (2011).

“A party may in the party’s notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b) (6) does not preclude taking a deposition by any other procedure authorized in these rules.” Ala. R. Civ. P. 30(b) (6) (2011).



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6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?
- Ala. R. Civ. P. 26 (b) (5) (A) (ii) allows a party to file a motion seeking expert discovery beyond interrogatories. However, general custom is for experts to be deposed by agreement. The party seeking discovery pays a reasonable fee for time spent in deposition, pursuant to Rule 26(b) (5) (C).
7. What is the Expert Standard (Frye/Daubert/Hybrid)?
- The Frye Standard. See e.g., Swanstrom v. Teledyne Cont'l Motors, Inc., 43 So. 3d 564, 580 (Ala. 2009) ("To date this Court has applied the 'general acceptance test' set out in Frye . . . as the standard for admitting expert testimony.")*
8. Are there other notable Discovery Rules?
- Ala. R. Civ. P. 29(2) requires only a written stipulation of the parties to modify the discovery procedures from those outlined in the rules for non-deposition discovery methods.
9. Is there mandatory mediation or arbitration?
- Ala. Code § 6-6-20(b) makes mediation mandatory before a trial (a) at any time when all parties agree, (b) upon motion of any party, or (c) upon order of the court.
10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?
- The Pretrial Conference is conducted by the judge if requested by the parties or included in a scheduling order. Pursuant to Ala. R. Civ. P. 16(a), the Pretrial Conference must occur at least 21 days before trial. Motions in limine are generally addressed at the Pretrial Conference but may be heard at other times according to the judge's discretion.
11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?
- This is a matter of judicial discretion and varies from court to court.
12. Who conducts voir dire (Court/Counsel)? Describe the process.
- Generally, the court conducts preliminary examination followed by extensive questioning by counsel, pursuant to Ala. R. Civ. P. 47(a) (2011).
13. How many jurors are there? How many alternates? How many peremptory challenges?
- There are 12 jurors. The number of alternates varies but pursuant to Rule 47, is not to be more than 6. The number of strikes depends on the number of prospective jurors in the venire, but is typically 4-6. Ala. Code § 12-16-140 explains that "in all civil actions triable by jury, either party may demand a struck jury and must thereupon be furnished by the clerk with a list of 24 jurors in attendance upon the court, from which a jury must be obtained by the parties or their attorneys alternately striking one from the list until 12 are stricken off, the party demanding the jury commencing." The verdict must be unanimous, unless the parties agree otherwise.



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14. Identify any “unusual” trial procedures. Jurors are only given an oral charge. They do not get to take the written jury charges with them into the jury room. Ala. R. Civ. P. 51.
15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions? There are no special court divisions, except in Birmingham where there are distinct courts for criminal, civil, domestic relations, etc. In most counties, circuit courts handle all these matters. There are two "tracks" for civil cases, standard and complex, with different discovery timetables.
16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)? No.
17. Is there a provision for Prejudgment interest? Prejudgment interest is required to be assessed only in contract cases (Ala. Code § 8-8-8) (“All contracts, express or implied, for the payment of money, or other thing, or for the performance of any act or duty bear interest from the day such money, or thing, estimating it at its money value, should have been paid, or such act, estimating the compensation therefore in money, performed.” Ala. Code § 8-8-8 (LexisNexis 2011)).
18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.) None.
19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed? Joint and several liabilities among tortfeasors with no contribution. There is an exception to the no contribution rule when one tortfeasor is passively negligent and the other active. Alabama is a pure contributory negligence state.
20. Are there legislative efforts under way that address any of the litigation practices in your state? None at this time (2011).



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Question	Alaska
1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?	Yes. Alaska R. Civ. P. 26(a) (2012).
2. Are there Standard Form Interrogatories/Document Requests?	No.
3. Are there limits on the number of Interrogatories/Document Requests?	Yes. Interrogatories are limited to 30. (“Without leave of court or written stipulation, a party may serve only thirty interrogatories upon another party, including all discrete subparts.” Alaska R. Civ. P. 33(a) (2012)).
4. Are there time limits on depositions, or limits on the number of depositions?	Yes, leave of court is required to take more than 3 depositions per party ( <u>exclusive</u> of parties, expert witnesses, treating physicians or document custodians). Alaska R. Civ. P. 30(a) (2) (2012). Depositions of parties, independent experts and treating physicians may not exceed 6 hours; all other depositions are limited to 3 hours. (“Oral depositions shall not, except pursuant to stipulation of the parties or order of the court, exceed six hours in length for parties, independent expert witnesses, and treating physicians and three hours in length for other deponents.” Alaska R. Civ. P. 30(d) (2) (2012)).  “A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2)... if, without the written stipulation of the parties, (A) a proposed deposition would result in more than three depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by third-party defendants, of witnesses other than: (i) parties, which means any individual identified as a party in the pleadings and any individual whom a party claims in its disclosure statements is covered by the attorney-client privilege; (ii) independent expert witnesses expected to be called at trial; (iii) treating physicians; and (iv) document custodians whose depositions are necessary to secure the production of documents or to establish an evidentiary foundation for the admissibility for documents.” Alaska R. Civ. P. 30(a) (2) (2012)).



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5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)

Yes. Alaska R. Civ. P. 30(b)(6) (2012) is very similar to FRCP 30(b)(6) (“A party may in the party’s notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subparagraph (b) (6) does not preclude taking a deposition by any other procedure authorized in these rules.” Alaska R. Civ. P. 30(b) (6) (2012)).

6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?

Yes; see Response to question 4.

“A party may depose any person who has been identified as an expert whose opinions may be presented at trial.” Alaska R. Civ. P. 26(b) (4) (A) (2012).

The party seeking the discovery deposition pays the witness. (“Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subparagraph; and (ii) with respect to discovery obtained under section (b) (4) (B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.” Alaska R. Civ. P. 26(b) (4) (C) (2012)).

7. What is the Expert Standard (Frye/Daubert/Hybrid)?

The *Daubert* standard applies. In *State v. Coon*, 974 P.2d 386 (Alaska 1999) the Supreme Court held:

“How should Alaska trial courts assess the reliability and relevance of proffered scientific evidence? The factors identified in *Daubert* provide a useful approach: (1) whether the proffered scientific theory or technique can be (and has been) empirically tested (i.e., whether the scientific method is falsifiable and refutable); (2) whether the theory or technique has been subject to peer review and publication; (3) whether the known or potential error rate of the theory or technique is acceptable, and whether the existence and maintenance of standards controls the technique's operation; and (4)



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whether the theory or technique has attained general acceptance.

Other factors may apply in a given case. After the Supreme Court issued its decision in *Daubert*, the Ninth Circuit suggested two ways to satisfy *Daubert's* requirement that the testimony be "derived by the scientific method [or] . . . based on scientifically valid principles." As described by Kesan, "either (a) the expert's proffered testimony must grow out of prelitigation research, or (b) the expert's research must be subjected to peer review." Kesan, giving the example of "independent" research funded by tobacco companies, appropriately notes the danger of a hidden litigation motive. Nonetheless, publication is at least more likely to provoke scrutiny and response, and reveal methodological deficiencies." *State v. Coon*, 974 P.2d 386, 395 (1999).

8. Are there other notable Discovery Rules?

Special, limited discovery procedures are applicable to cases of value less than \$100,000.

9. Is there mandatory mediation or arbitration?

Alaska R. Civ. P. 100 allows a party to move for an order compelling all parties to attend mediation. The rule also requires actual, if minimal, participation by all parties.

10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?

The final pretrial conference is held by the trial judge. The timing for hearing motions in limine varies by judge, but usually occurs shortly before trial, and often at the final pretrial conference.

11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?

Trial briefs are to be submitted shortly before trial. The timing is usually stipulated in the Court's Scheduling and Planning Order.

12. Who conducts voir dire (Court/Counsel)? Describe the process.

Counsel may conduct voir dire. The precise method is up to the trial judge and several variations are commonly used. The best practice is to have the trial judge describe the precise procedure at the final pretrial conference and the parties follow the same.

13. How many jurors are there? How many alternates? How many peremptory challenges?

Typically, there are 12 jurors and two alternates. Typically, there are 3 peremptory challenges per side.

"When a civil case that is to be tried by a jury is called for trial, the clerk shall draw from the trial jury box containing the names of those on the jury panel a number of names or numbers sufficient to name a jury of 12 unless the court directs otherwise. The prospective jurors shall be examined, challenged, and sworn as



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provided by rules of the supreme court.” Alaska Stat. § 09.20.090 (2012).

“The court may direct that one or two jurors in addition to the regular jury be called and impaneled to sit as alternate jurors”; “The court may direct that one or two jurors be called and impaneled in addition to the number of jurors required by law to comprise the jury.” Alaska R. Civ. P. 47(b) (2012).

“Each party may challenge peremptorily three jurors. Two or more parties on the same side are considered a single party for purposes of peremptory challenge, but where multiple parties having adverse interests are aligned on the same side, three peremptory challenges shall be allowed to each such party represented by a different attorney.” Alaska R. Civ. P. 47(d) (2012).

14. Identify any “unusual” trial procedures.

(1). Alaska allows one challenge “per side” of an assigned judge, without cause. The practical import is that we all have a single judge that we don’t want to hear our cases and are willing to accept any of the others in his/her stead. (2) The usual trial day is 8:30 a.m. to 1:30 p.m. with short breaks but no lunch. This leaves time for next day preparation and motion argument in the afternoon.

15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?

There are no special trial court divisions, but judges have discretion and will often depart from "standard" pretrial/discovery timetables for complex or unusual civil cases.

16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?

No.

17. Is there a provision for Prejudgment interest?

Yes. Per Alaska Stat. § 09.30.070, the prejudgment interest rate (adjusted annually) is set at 3 percentage points above the 12th Federal Reserve District discount rate in effect on January 2 of each year. (“(a) Notwithstanding AS 45.45.010, the rate of interest on judgments and decrees for the payment of money, including prejudgment interest, is three percentage points above the 12th Federal Reserve District discount rate in effect on January 2 of the year in which the judgment or decree is entered, except that a judgment or decree founded on a contract in writing, providing for the payment of interest until paid at a specified rate not exceeding



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the legal rate of interest for that type of contract, bears interest at the rate specified in the contract if the interest rate is set out in the judgment or decree. (b) Except when the court finds that the parties have agreed otherwise and except as provided by AS 45.05.111(d), prejudgment interest accrues from the day process is served on the defendant or the day the defendant received written notification that an injury has occurred and that a claim may be brought against the defendant for that injury, whichever is earlier. The written notification must be of a nature that would lead a prudent person to believe that a claim will be made against the person receiving the notification, for personal injury, death, or damage to property. (c) Prejudgment interest may not be awarded for future economic damages, future noneconomic damages, or punitive damages.” Alaska Stat. § 09.30.070 (2011)).

18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

A unique feature of the Alaska Rules of Civil Procedure is that the "prevailing party" is entitled as a matter of course to an award of partial attorneys' fees, in accordance with the schedule and provision in Alaska R. Civ. P. 82. In addition, Alaska R. Civ. P. 68 provides for a unique "offer of judgment" mechanism that can serve to shift and significantly increase the "non-prevailing" party's exposure to Alaska R. Civ. P. 82 fees. Alaska R. Civ. P. 68 has a unique three-tiered structure that provides a greater award of "reasonable actual" attorney fees, the earlier the offer is tendered (and not accepted). For example, an offer of judgment tendered within 60 days after the date set for exchange of initial disclosures and not accepted, which is beaten by 5 percent (or 10 percent if there are multiple defendants), results in an award of 75% of reasonable actual attorney fees, plus taxable costs.

19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

The Alaska Supreme Court has adopted *Daubert* but Superior Courts do not generally follow it and expert testimony is liberally admitted.

20. Are there legislative efforts under way that address any of the litigation practices in your state?

No.



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### Question

### Arizona

1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?

Yes. Arizona Rules of Civil Procedure, Rule 26.1 requires each party to disclose to every other party: the factual basis of the claim or defense, the legal theory behind each claim or defense, information regarding any witness expected to be called at trial and description of expected testimony, information regarding parties believed to have knowledge related to the case and what that knowledge relates to, information regarding anyone who has given a recorded statement in the case, information regarding experts, computation of damages alleged, information regarding any relevant tangible evidence a party plans to use at trial, and a list of documents believed to be relevant to subject matter of the action. Supplemental disclosure of new facts or documents must be made or a party will be prevented from use at trial. Ariz. R. Civ. P. 26.1 (2011).

2. Are there Standard Form Interrogatories/Document Requests?

Yes. There are Uniform Interrogatories provided for in Rule 33.1 Ariz. R. Civ. P. (2011). The Uniform Interrogatories are not mandatory and are listed in Rule 33 of the Ariz. R. Civ. P. A practitioner should use only those uniform interrogatories which fit the particular case. The Supreme Court has approved a set of Uniform Personal Injury Interrogatories, Contract Litigation Interrogatories, and Domestic Relations Interrogatories, and three sets of Uniform Interrogatories for Use in Medical Malpractice Cases ("The use of Uniform Interrogatories is not mandatory. The interrogatories should serve as a guide only, and may or may not be approved as to either form or substance in a particular case. They are not to be used as a standard set of interrogatories for submission in all cases. Any uniform interrogatory may be used where it fits the legal or factual issues of the particular case, regardless of how the action or claims are designated." Ariz. R. Civ. P. 33.1(f) (2011)).

3. Are there limits on the number of Interrogatories/Document Requests?

Yes. According to Rule 33.1 Ariz. R. Civ. P., "a party shall not serve upon any other party more than 40 interrogatories, which may be any combination of uniform or non-uniform interrogatories." Ariz. R. Civ. P. 33.1. Also, according to Rule 34(b) Ariz. R. Civ. P., requests for documents "shall not, without leave of court, cumulatively include more than ten (10) distinct items or specific categories of items." Ariz. R. Civ. P. 34(b) (2011).



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4. Are there time limits on depositions, or limits on the number of depositions?
- Yes. Rule 30(d) Ariz. R. Civ. P. states that "oral deposition of any party or witness, including expert witnesses, whenever taken, shall not exceed four (4) hours in length, except pursuant to stipulation of the parties, or upon motion and a showing of good cause." Ariz. R. Civ. P. 30(d) (2011). Depositions of parties, documents custodians and experts may be taken. All other depositions require stipulation or a motion to the court demonstrating "good cause."
5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)
- Yes. Rule 30(b)(6) Ariz. R. Civ. P. says that "A party may in the party's notice name as the deponent a public or private corporation or a partnership or association or governmental agency and designate with reasonable particularity the matters on which examination is requested. The organization or named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which that person will testify. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b) (6) does not preclude taking a deposition by any other procedure authorized in these rules." Ariz. R. Civ. P. 30(b) (6) (2011).
6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?
- Yes. Rule 30(a) Ariz. R. Civ. P. provides that after commencement of the action, the testimony of parties or any expert witnesses expected to be called may be taken by deposition upon oral examination. "After commencement of the action, the testimony of parties or any expert witnesses expected to be called may be taken by deposition upon oral examination." Ariz. R. Civ. P. 30(a). Under Rule 26(b) (4) (c), unless manifest injustice would result, the party requesting the discovery pays the expert a reasonable fee for time preparing for and giving a deposition. "Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert." Ariz. R. Civ. P. 26(b) (4) (C) (2011).



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7. What is the Expert Standard (Frye/Daubert/Hybrid)?

Arizona state courts traditionally applied the *Frye* test. However, by order of the Arizona Supreme Court in September 2011, effective June 1, 2012, the Rules of Evidence are amended to include revised Federal Rule 702 adopting essentially the *Daubert* test.

8. Are there other notable Discovery Rules?

Effective January 1, 2013, Arizona Rule 30(h), relating to depositions from a foreign jurisdiction will be deleted. In its stead, Rule 45.1 on the issuance of interstate depositions and discovery will be substituted. The new rule eliminates the need to file a civil action in order to have a subpoena issued to take a deposition, issue a records subpoena, or inspection of premises. The new procedure is derived from the Uniform Interstate Depositions and Discovery Act, 13 Pt.2 Uniform Laws Annotated 59 (West 2011 Supplement). To request an issuance of a subpoena under the new rule, a party must present a foreign subpoena to a clerk of the court in the county in which discovery is sought to be conducted. The foreign subpoena must include the phrase "For the issuance of an Arizona subpoena under Arizona Rule of Civil Procedure 45.1" below the case number. The clerk shall then promptly issue a signed, but otherwise blank, subpoena to the party requesting it, and the party shall complete the subpoena before service with the designated information required under Rule 45. That subpoena will be subject to objections and other defenses under Rule 45.

9. Is there mandatory mediation or arbitration?

Yes. Pursuant to Rule 72, Ariz. R. Civ. P. (2011) civil cases, in which (i) no party seeks affirmative relief other than money judgment and (ii) no party seeks an award in excess of the jurisdictional limit for arbitration set by local rules, are submitted to arbitration in accordance with A.R.S. § 12-133. But, this arbitration is not binding. A.R.S. § 12-133 (2011) explains that "the superior court, by rule of court, shall do both of the following: 1. Establish jurisdictional limits of not to exceed sixty-five thousand dollars for submission of disputes to arbitration. 2. Require arbitration in all cases which are filed in superior court in which the court finds or the parties agree that the amount in controversy does not exceed the jurisdictional limit. Also, Ariz. R. Civ. P. Rule 16.1 (2011) provides for Mandatory Settlement Conferences at the request of any party (except as to lower court appeals, medical malpractice cases, and cases subject to compulsory arbitration under A.R.S. § 12-133).



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10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?

Pretrial Conferences in Arizona are conducted by the trial judge. The timing and existence of pretrial conference is county, judge and party dependant. When motions in limine are to be addressed depends on the individual judge, but most tend to address them at the Pretrial Conference. There is no set timing on the Pretrial Conference. Pretrial Conference Rule 16 provides that in any action, the court may direct the parties, the attorneys and, if appropriate, representatives of the parties having authority to settle, to participate, either in person or, with leave of court, by telephone, in a conference or conferences before trial to expedite the disposition of the action, establish early and continuing control so that the case will not be protracted because of lack of management, discourage wasteful pretrial activities and improve the quality of the trial through more thorough preparation. Ariz. R. Civ. P. 16 (2011). Ariz. R. Civ. P. 16(d) requires a joint pretrial statement.

11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?

It varies by judge court and is in the court's discretion.

12. Who conducts voir dire (Court/Counsel)? Describe the process.

It varies by judge court. Usually the court will conduct some preliminary voir dire and then counsel is allowed to ask follow up questions. Often, sides are allowed to submit written questions to the judge to be asked. Ariz. R. Civ. P. 47(b) (2011) describes the process: "1. Prior to examination of jurors with respect to their qualifications, an oath or examination shall be administered. 2. Upon request and with the court's consent, the parties may present brief opening statements to the entire jury panel, prior to voir dire. The court may require counsel to present such opening statements. 3. The court shall control voir dire and conduct a thorough oral examination of prospective jurors. Upon the request of any party, the court shall permit that party a reasonable time to conduct a further oral examination of the prospective jurors. In courts of record, voir dire shall be conducted on the record unless waived by the parties on the record. The court may impose reasonable limitations with respect to questions allowed during a party's examination of the prospective jurors. The court shall ensure the privacy of prospective jurors is reasonably protected. The court may terminate or limit voir dire on grounds of abuse. Nothing in this Rule shall preclude the use of written questionnaires to be completed by the prospective jurors, in addition to oral examination. The court may permit written questions to be submitted following review and approval by the court."



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13. How many jurors are there? How many alternates? How many peremptory challenges?

Arizona Revised Statutes § 21-102 (2011) sets forth the jury size requirements. The jury will be 8 people with a concurrence of all in a criminal trial and a concurrence of 6 in a civil trial. If the criminal trial is a death penalty trial, then the jury will be 12 people with a unanimous vote necessary for the verdict. See A.R.S. §21-102 (2011). Ariz. R. Civ. P. 47(f) (2011) allows for "not more than 6 jurors in addition to the regular jury be called and impaneled to sit as alternate jurors." Ariz. R. Civ. P. 47(e) (2011) gives each side 4 peremptory challenges.

Ariz. Rev. Stat. § 21-102. Juries; size; degree of unanimity required; waiver

A. A jury for trial of a criminal case in which a sentence of death or imprisonment for thirty years or more is authorized by law shall consist of twelve persons, and the concurrence of all shall be necessary to render a verdict.

B. A jury for trial in any court of record of any other criminal case shall consist of eight persons, and the concurrence of all shall be necessary to render a verdict.

C. A jury for trial in any court of record of a civil case shall consist of eight persons, and the concurrence of all but two shall be necessary to render a verdict.

D. In a court not of record, a jury for trial of any case shall consist of six persons. The concurrence of all in a criminal case and all but one in a civil case shall be necessary to render a verdict.

E. The parties in a civil case, and the parties with the consent of the court in a criminal case, may waive trial by jury, or at any time before a verdict is returned consent to try the case with or receive a verdict concurred in by a lesser number of jurors than that specified above." Ariz. Rev. Stat. § 21-102 (2011).

Ariz. R. Civ. P. 47(e): "Manner of challenging; number of peremptory challenges. -- Each side shall be entitled to four peremptory challenges. For the purposes of this rule, each case, whether a single action or two or more actions consolidated or consolidated for trial, shall be treated as having only two sides. Whenever it appears that two or more parties on a side have an adverse or hostile interest, the court may allow additional



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peremptory challenges, but each side shall have an equal number of peremptory challenges. If the parties on a side are unable to agree upon the allocation of peremptory challenges among themselves, the allocation shall be determined by the court. Any individual party, without consent of any other party, may challenge for cause.” Ariz. R. Civ. P. 47(e) (2011).

Ariz. R. Civ. P. 47(f): “Alternate jurors. -- The court may direct that not more than six jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. If alternate jurors are impaneled, their identity shall not be determined until the end of trial. At the time of impanelment, the trial judge should inform the jurors that at the end of the case, the alternates will be determined by lot in a drawing held in open court. The trial judge shall also explain the need for alternate jurors and the procedure regarding alternates to be followed at the end of trial. The alternate, or alternates, upon being physically excused by the court at the end of trial, shall be instructed to continue to observe the admonitions to jurors until they are informed that a verdict has been returned or the jury discharged. In the event a deliberating juror is excused due to inability or disqualification to perform required duties, the court may substitute an alternate juror, choosing from among the alternates in the order previously designated, unless disqualified, to join in the deliberations. If an alternate joins the deliberations, the jury shall be instructed to begin deliberations anew. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impaneled, 2 peremptory challenges if 3 or 4 alternate jurors are to be impaneled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impaneled.” Ariz. R. Civ. P. 47(f) (2011).



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14. Identify any “unusual” trial procedures.      There are some unusual trial procedures in Arizona related to juries, as set forth in Ariz. R. Civ. P. Rules 47(g) and 39(b) (2011): Rule 47(g) (Juror Notebooks - In its discretion, the court may authorize documents and exhibits to be included in notebooks for use by the jurors during trial to aid them in performing their duties). Rule 39(b) (“Order of Trial by Jury; Questions by Jurors to Witnesses or the Court - The trial by a jury shall proceed in the following order, unless the court for good cause stated in the record, otherwise directs: (1) Immediately after the jury is sworn, the court shall instruct the jury concerning its duties, its conduct, the order of proceedings, the procedure for submitting written questions of witnesses or of the court as set forth in Rule 39(b)(10), and the elementary legal principles that will govern the proceeding. . . .(10) Jurors shall be permitted to submit to the court written questions directed to witnesses or to the court. Opportunity shall be given to counsel to object to such questions out of the presence of the jury. Notwithstanding the foregoing, for good cause the court may prohibit or limit the submission of questions to witnesses.”)
15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?      Yes. The Arizona trial court has separate divisions for tax cases, juvenile cases, family law cases, complex civil litigation, and probate and mental health cases. Some civil cases in Arizona are designated as "complex" and are assigned to the Complex Civil Litigation calendar. See Rule 8(i), Ariz. R. Civ. P. (2011). The complex case designation is not appealable. These complex cases are ones which require continuous judicial management to avoid undue burdens on the court, to expedite the case and keep costs reasonable. In determining whether a case is complex, the court will consider: number of difficult and/or time consuming pretrial motions, large number of witnesses or evidence, large number of parties, related actions pending in other courts, need for post judgment judicial supervision, benefit of assignment to judge with substantial knowledge of specific area of law and any other factor which warrants complex designation or is required to serve interests of justice. Plaintiff may designate the case as complex when filing the initial complaint or a defendant may at or before filing first responsive pleading. Alternatively, a judge may designate a case complex.



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16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?

Yes. Ariz. Rev. Stat. § 12-684 (2011) provides that "In any product liability action where the manufacturer refuses to accept a tender of defense from the seller, the manufacturer shall indemnify the seller for any judgment rendered against the seller and shall also reimburse the seller for reasonable attorneys' fees and costs incurred by the seller in defending such action, unless: The seller had knowledge of the defect in the product; or The seller altered, modified or installed the product, and such alteration, modification or installation was a substantial cause of the incident giving rise to the action, was not authorized or requested by the manufacturer and was not performed in compliance with the directions or specifications of the manufacturer." Seller is also given indemnity against a manufacturer when a judgment is entered in favor of the plaintiff and the plaintiff must first attempt to satisfy the judgment by collecting from the manufacturer in Arizona or in the state where the manufacturer's principal place of business is located. Additionally, manufacturers shall be indemnified by the seller who shall also reimburse the manufacturer for attorney's fees and costs if the seller provided the plans or specifications which were the cause of the alleged defect.

17. Is there a provision for Prejudgment interest?

Yes. Ariz. Rev. Stat. § 44-1201 (2011) provides for a rate of interest of 10% per annum, unless another rate is contracted for in writing ("Interest on any loan, indebtedness or other obligation shall be at the rate of ten per cent per annum, unless a different rate is contracted for in writing, in which event any rate of interest may be agreed to. Interest on any judgment that is based on a written agreement evidencing a loan, indebtedness or obligation that bears a rate of interest not in excess of the maximum permitted by law shall be at the rate of interest provided in the agreement and shall be specified in the judgment.

Unless specifically provided for in statute or a different rate is contracted for in writing, interest on any judgment shall be at the lesser of ten per cent per annum or at a rate per annum that is equal to one per cent plus the prime rate as published by the board of governors of the federal reserve system in statistical release H.15 or any publication that may supersede it on the date that the judgment is entered. The judgment shall state the applicable interest rate and it shall not change after it is entered." Ariz. Rev. Stat. § 44-1201(A)-(B) (2011).



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18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

The state courts are now employing e-filing in civil cases under [azturbocourt.gov](http://azturbocourt.gov).

19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

E-Discovery can potentially lead to an uneven playing field because the parties are required to disclose the materials, but the process of e-discovery can be so burdensome and expensive that it may be crippling for the disclosing party. There are no established rules about cost shifting, but this issue is determined on a case by case basis. Additionally, Arizona's mandatory disclosure rule, while allowing for less trickery and ethically questionable acts by counsel, gives everything away about the case for plaintiff, with very little effort on plaintiff's part at the beginning. This process can also be extremely expensive and burdensome for a defendant, even for a frivolous lawsuit. Although there is already a statute requiring the plaintiff to pay defendants' attorneys' fees in a contract case if the plaintiff does not prevail, no such rule exists in tort cases.

20. Are there legislative efforts under way that address any of the litigation practices in your state?

None of a material nature.



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Question	Arkansas
1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?	No.
2. Are there Standard Form Interrogatories/Document Requests?	No.
3. Are there limits on the number of Interrogatories/Document Requests?	Not by state-wide rule; some local rules may be impose limits. (“Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall answer to the extent the interrogatory is not objectionable.” Ark. R. Civ. P. 33(b) (2012)).
4. Are there time limits on depositions, or limits on the number of depositions?	No. However, motions can be filed seeking limits if discovery seems onerous (“The court may by order limit the time permitted for the conduct of a deposition, but must allow additional time if needed for a fair examination of the deponent or if the deponent or another person impedes or delays the examination.” Ark. R. Civ. P. 30(d) (2) (2012)).
5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)	Yes. The rule is similar to Fed. R. Civ. P. 30(b)(6) (“A party may in his notice and in the subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b) (6) does not preclude taking a deposition by any other procedure authorized by these rules.” Ark. R. Civ. P. 30(b) (6) (2012)).



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6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?
- Yes. The deposing party pay's the expert's deposition costs/fees (“Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.” Ark. R. Civ. P. 26(b) (4) (C) (2012)).
7. What is the Expert Standard (Frye/Daubert/Hybrid)?
- Daubert* applies, but with limitations: “This court has not previously adopted the holding in *Daubert*. We do so now.” *Farm Bureau Mutual Ins. Co. v. Foote*, 14 S.W.3d 512, 519, 341 Ark. 105, 115 (Ark. 2000). *See also Bayer CropScience LP v. Schafer*, 2011 Ark. 518 (Ark. 2011) (noting in *Foote* Arkansas Supreme adopted the analysis set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, and applying *Foote* and *Daubert*).
8. Are there other notable Discovery Rules?
- Yes. Ark. R. Civ. P. 26.1 regarding electronic discovery, which is an optional rule because either the parties must agree that it applies or the court must order that it applies on motion for good cause shown.
9. Is there mandatory mediation or arbitration?
- No. However, local rules permit state court district judges to order the parties to mediator.
10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?
- A pretrial conference is conducted by the trial judge if one is ordered. Motions may or may not be addressed at the pretrial conference, depending on the judge. If a party requests it, most judges are amenable to deciding motions in limine at a pretrial hearing.
11. What are the court’s practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?
- It varies by local rule of court or the judge’s practice.



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12. Who conducts voir dire (Court/Counsel)? Describe the process. Voir dire is a very open process, and is limited only by the judge's preference.
13. How many jurors are there? How many alternates? How many peremptory challenges? Twelve, if demanded in the initial pleadings. Most state court judges still seat 12, although some are going to 6 or 8 if the parties will agree. Ark. R. Civ. P. 48. As to alternates and peremptory challenges:
- (b) Alternate Jurors. -- The court may direct that not more than two jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the qualifications, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to one peremptory challenge in addition to those otherwise allowed by law if one or two alternate jurors are to be impanelled. The additional peremptory challenge may be used against an alternate juror only and the other peremptory challenges allowed by law shall not be used against an alternate juror. Ark. R. Civ. P. 48(b).
14. Identify any "unusual" trial procedures. None.
15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions? In some counties, domestic matters are all heard by the same judge. In some counties, probate matters may be assigned to one court. Local Rules in some jurisdictions have longer tracks to trial for "complex" cases or motions for scheduling order can be filed in complex cases and judges can give complex cases a special setting.
16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)? The Arkansas Products Liability Act provides that a distributor, who is not the manufacturer, is entitled to a cause of action for indemnity against the manufacturer if the product is proven defective. Ark. Code Ann. § 16-116-107 (2012). It does not provide that the distributor can be dismissed, and if the distributor has modified the product, it may not be entitled to indemnification. See Ark. Code Ann. § 16-116-106 (2012).



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17. Is there a provision for Prejudgment interest?

Yes. Prejudgment interest runs at 6% by statute. (“The rate of interest for contracts in which no rate of interest is agreed upon shall be six percent per annum.” Ark. Const. Art. 19, § 13(d) (2012)).

18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

Local rules of practice vary by judicial district.

19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

Discovery is very broad and now with e-discovery, costs to defendants have escalated. Some guidance and rules making would be beneficial. Discovery may be served with the complaint. Ark. R. Civ. P. 33(a), 34(b) 1 and 36(a).

20. Are there legislative efforts under way that address any of the litigation practices in your state?

The Arkansas Civil Justice Reform Act was passed in 2003. Three major sections of the Act have been ruled unconstitutional, including limits on the amount of punitive damages. *Bayer Crop Science LP v. Schafer*, 2011 Ark. 518 (Ark 2011).



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### Question

### California

1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?

No.

2. Are there Standard Form Interrogatories/Document Requests?

Yes. Use of Official Form Interrogatories and Requests for Admissions is optional. (Code Civ. Proc., §§ 2033.740, subd. (a), 2033.710.) The Judicial Council approved forms are found on the California Courts official website in the Forms section. (<<http://www.courts.ca.gov/forms.htm>>.)

3. Are there limits on the number of Interrogatories/Document Requests?

See below:

**Unlimited Civil Cases** (value exceeds \$25,000)

In addition to the Official Form Interrogatories, each party may propound up to 35 Special Interrogatories to other parties. (Code Civ. Proc., § 2030.030, subd. (a)(1).) However, under the “Rule of 35 Plus,” a party may propound additional Special Interrogatories by concurrently serving a Declaration of Necessity saying that more interrogatories are needed due to the “complexity or the quantity of the existing and potential issues in the particular case.” (Code Civ. Proc., §§ 2030.040, subd. (a), 2030.050; e.g., Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial FORMS (The Rutter Group 2012) Form 8:16.) Parties may stipulate in writing to change limits on any discovery vehicle. (Code Civ. Proc., § 2016.030.) Furthermore, a party may propound Supplemental Interrogatories to obtain updates of responses at least three times. (Code Civ. Proc., § 2030.070, subd. (b).)

There is no limit on the number of Inspection Demands (including Requests for Production of Documents). (Code Civ. Proc., § 2031.050, subd. (a).) A party may propound Supplemental Inspection Demands to obtain updates of responses at least three times. (Code Civ. Proc., § 2031.050.) Inspection Demands must be written and numbered consecutively. (Code Civ. Proc., § 2031.030, subd. (a).)

There is no limit on Requests for Admission relating to the genuineness of documents. (Code Civ. Proc., § 2033.030, subd. (a).) However, the “Rule of 35 Plus” applies to Requests for Admission not related to the genuineness of documents. (Code Civ. Proc., § 2033.030, subd. (a).) A party has the right to serve up to 35 Requests for Admission on each other party. Also, unlike Interrogatories,



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Official Form Requests for Admission count against the 35 limit. (Code Civ. Proc., § 2033.030.) However, like Interrogatories, parties may exceed the limit by concurrently serving a Declaration of Necessity. (Code Civ. Proc., §§ 2033.030, subd. (b), 2033.040, subd. (a).)

### **Limited Civil Cases** (value less than \$25,000)

Each party is limited to a total of 35 discovery requests, including Form and Special Interrogatories, Requests for Admissions, and Inspection Demands. (Code Civ. Proc., §§ 94, 95.) There are procedures available to supplement the limit, such as case questionnaire forms, and requests for statements of witnesses and evidence. (Code Civ. Proc., § 94.)

4. Are there time limits on depositions, or limits on the number of depositions?

Effective January 1, 2013, depositions are limited to seven hours of total testimony. (Legis. Counsel's Dig., Assem. Bill No. 1875, approved by Governor, Sept. 17, 2012 (2011-2012 Reg. Sess.)) The rule is set forth in Code of Civil Procedure section 2025.290. There are several exceptions where the seven hour limit does not apply:

- Depositions of experts;
- Depositions of persons most qualified;
- Depositions in civil cases designated as being complex;
- Depositions in cases brought by employees or applicants for employment against employers for acts or omissions relating to an employment relationship.

Further, parties may stipulate that the time limit shall not apply to a specific deposition or all depositions in a case.

### **Unlimited Civil Cases** (value exceeds \$25,000)

There is no limit on the number of depositions a party may take; however, natural persons may be deposed only once, except for good cause. (Code Civ. Proc., § 2025.610, subds. (a) & (b); see *Fairmont Insurance Co. v. Superior Court* (2000) 22 Cal.4th 245, 254.)

### **Limited Civil Cases** (value less than \$25,000)

Each party is generally limited to one deposition. (Code Civ. Proc., § 94, subd. (b).)



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5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)

Yes. The deposition of any entity may be taken by examining an officer or agent designated by the entity to testify on its behalf. (Code Civ. Proc., § 2025.010.) The deposition notice or subpoena must “describe with reasonable particularity the matters on which examination is requested.” (Code Civ. Proc., § 2025.230.) The entity designates and produces the person most qualified (“PMK”) to testify on its behalf about these matters.

6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?

Yes. Any party may depose experts designated by another party. (Code Civ. Proc., § 2034.410.) Experts are entitled to their “reasonable and customary” fees for time spent in deposition from the party who noticed the deposition. (Code Civ. Proc., § 2034.430, subd. (b).)

7. What is the Expert Standard (Frye/Daubert/Hybrid)?

California uses the *Kelly* general acceptance test to determine the admissibility of new or novel scientific principles. (*People v. Kelly* (1976) 549 P.2d 1240, 1243; *People v. Leahy* (1994) 8 Cal.4th 587, 604; see also *People v. Nolan* (2002) 95 Cal.App.4th 1210, 1212.) *Kelly* uses a three-step approach to evaluate the reliability of new scientific methods or techniques. *Kelly*, as applied by California courts, is less stringent than *Daubert* often making it difficult for the defense to prevent courts from admitting expert testimony on new or novel scientific theories.

8. Are there other notable Discovery Rules?

In 2009, California enacted the Electronic Discovery Act, which governs discovery of “electronically-stored information” (“ESI”). (See Code Civ. Proc., § 2016.020; see also *R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 Cal.App.4th 486, 498.) Code of Civil Procedure section 2031 covers the unique aspects of ESI discovery concerning Inspection and Production of documents and other tangible things.

9. Is there mandatory mediation or arbitration?

See below:  
**Unlimited Civil Cases** (value exceeds \$25,000)

Arbitration is mandatory in unlimited cases pending in superior courts having 18 or more judges where “the amount in controversy in the opinion of the court will not exceed \$50,000 for each plaintiff.” (Code Civ. Proc., §§ 1141.11, subs. (a), (b); Cal. Rules of Court, rule 3.811(a) (1).) However, the following cases are exempt from mandatory arbitration: cases seeking equitable relief, class actions, small claims cases, unlawful detainer actions, cases “not amendable to arbitration,” and cases involving multiple causes of action or cross-complaints where at least one claim exceeds \$50,000. (Cal.



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Rules of Court, rule 3.811(b) (1)-(8).) In superior courts having less than 18 judges, mandatory arbitration is governed by local rule. (Code Civ. Proc., § 1141.11, subd. (b); Cal. Rules of Court, rule 3.811(a) (2).)

### **Limited Civil Cases** (value less than \$25,000)

Mandatory arbitration for limited cases is governed by local rule. (Code Civ. Proc., § 1141.11, subd. (c); Cal. Rules of Court, rule 3.811(a) (3).)

10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?

Generally, the pretrial conference is governed by local court rules. Some courts refer to the proceeding as the “Final Status Conference,” which is a conference between the trial judge and counsel at which final orders are made governing trial. Other courts prefer an “In-Chambers Conference,” which is conducted in the judge’s chambers on the first day of trial. Motions *in limine* are typically heard before trial, but they may be brought during trial when unanticipated evidentiary issues arise. (*People v. Morris* (1991) 53 Cal.3d 152, 188.) The trial judge has discretion to set the “timing and place of filing and service” of the motion *in limine*. (Cal. Rules of Court, rule 3.1112.) Local rules govern the procedures for motions *in limine*.

11. What are the court’s practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?

Trial submission procedures are governed by local rules, which have the force and effect of law so long as they are not contrary to higher authority. (Code Civ. Proc., § 575.1.) Local court rules may be obtained from the courtroom clerk, and are frequently posted on the particular superior court’s website. Procedures vary between judges so attorneys should familiarize themselves with the particular preferences of the trial judge.

12. Who conducts voir dire (Court/Counsel)? Describe the process.

Both the trial judge and counsel participate in voir dire. The trial judge conducts the initial examination of prospective jurors. (Code Civ. Proc., § 222.5.) Many judges ask the standard questions provided in the California Rules of Court Standards of Judicial Administration, Standard 3.25(c). After the judge concludes his/her initial questioning, each party may examine the prospective jurors. (Code Civ. Proc., § 222.5.) Traditionally, the plaintiff will question the original 12 jurors, then the defense will proceed, and then the first wave of peremptory challenges will begin. Replacement jurors will then be called, but are often questioned separately from jurors remaining from the original 12. Judges customarily place time limits on counsel’s voir dire. Judges’ practices vary widely so it is essential for counsel to familiarize themselves with their judge’s procedures.



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The judge will often discuss his particular voir dire procedure at the pretrial conference.

13. How many jurors are there? How many alternates? How many peremptory challenges?

California provides for 12 person juries. (Code Civ. Proc., § 220.) Each side gets six peremptory challenges. In multi-party proceedings, each side gets eight peremptory challenges and the court decides what constitutes a “side” for the purpose of allocating peremptory challenges. (Code Civ. Proc., § 231, subd. (c).) The parties may stipulate to a jury of less than 12 jurors before or during trial. The court determines the number of alternate jurors. (Code Civ. Proc., § 234.) Each side gets one additional peremptory challenge for each alternate juror. (Code Civ. Proc., § 234.)

14. Identify any “unusual” trial procedures. None.

15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?

Varies depending on the county where the case is filed. Larger counties are more likely to have special trial courts. Check with the court’s local rules.

If a case is designated complex, it is often placed on a longer discovery timetable.

California provides for Consolidation and Coordination of proceedings. Consolidation is a procedure uniting separate lawsuits for trial when the lawsuits involve common questions of law or fact, and are pending in the same court. (Code Civ. Proc., § 1048.) Coordination enables lawsuits that are pending in different courts, but share common questions of law or fact, to be tried together. (Code Civ. Proc., §404.) Only cases that have been deemed “complex” may be coordinated. The procedure for obtaining coordination is extensive and can be expensive, but it offers the advantage of consistency in rulings and can reduce long-term litigation costs. California implemented a pilot program to develop procedures for coordinating complex cases. The proceedings are known as Judicial Council Coordinated Proceedings (JCCP), and are governed by the California Rules of Court, Title 5, Division II.

16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?

No.



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17. Is there a provision for Prejudgment interest?

Several bases exist for the award of prejudgment interest in both contract and tort actions.

A party may recover prejudgment interest on liquidated damages from the time the right to recover arises. (Civ. Code, § 3287, subd. (a); see *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 174-175.) However, prejudgment interest is not allowed if the liquidated damages claim is brought under a statute that implicitly precludes the award. (*Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 384, 398.)

Prejudgment interest may also be recoverable on unliquidated contract claims. (Civ. Code, § 3287, subd. (b).)

The jury has discretion to award prejudgment interest in actions based on tort, oppression, fraud, and/or malice. (Civ. Code, § 3288.) Code of Civil Procedure section 998 offers to compromise by plaintiffs may provide a vehicle for recovery of interest. If the defendant rejects the offer and the plaintiff obtains a “more favorable” judgment at trial, then the plaintiff is entitled to 10% interest on the entire judgment calculated from the date of the offer. (Civ. Code, § 3291.)

The prejudgment interest rate depends on the nature of the claim on which the judgment is based. A 7% per annum rate applies to tort or other noncontractual claims. (See Cal. Const., art. XV, § 1; see also *Children’s Hospital & Medical Center v. Bonta* (2002) 97 Cal.App.4th 740, 775.) In a contract claim, any legal rate specified in the contract applies, but, if not specified, then a 10% per annum rate applies. (Civ. Code, § 3289, subs. (a) & (b); see *Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1585.)

18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

None.

19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

Products liability law favors the plaintiff’s side.



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20. Are there legislative efforts under way that address any of the litigation practices in your state?

The Judicial Council and the Consumer Attorneys of California continue a joint effort to change the voir dire process. The plaintiff's bar has advanced an amendment that prohibits the court from limiting the time for voir dire. A non-substantive amendment was enacted that prevents the trial judge from establishing a blanket policy for voir dire time limits. The Judicial Council is concerned a prohibition against any form of time limits for voir dire will unduly interfere with the court's ability to manage the process in a timely fashion. Efforts are ongoing to develop a consensus approach to balance all interests.



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### Question

### Colorado

1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?

Yes. Rule 26 of the Colorado Rules of Civil Procedure contains a mandate similar to F.R.C.P. 26. C.R.C.P. 26(a)(1) that requires automatic disclosure of persons likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings. The disclosures must be made within 35 days of the at issue date. Automatic disclosure is also required of (1) documents and tangible things in the party's control that are relevant to such disputed facts; (2) a description of the categories of damages and a computation of damages, and; (3) insurance contracts that may satisfy part of a judgment. Colo. R. Civ. P. 26(a)(2) requires automatic disclosure of witnesses retained to provide expert testimony, along with a written report or summary of opinions. Colo. R. Civ. P. 26 (2011). Colorado has a specific Rule 16.1 establishing "Simplified Procedure for Civil Actions" for claims less than \$100,000.00, unless a party "opts out." Disclosure obligations should be considered heightened under Rule 16.1, because discovery is not normally permitted. Colo. R. Civ. P. 16.1 (2012).

2. Are there Standard Form Interrogatories/Document Requests?

Yes-as to interrogatories. Colo. R. Civ. P. 33(e) (2012) expresses approval of "Pattern Interrogatories Under Rule 33," which are set forth, separately for civil actions and for domestic relations proceedings, in the appendix of forms following the C.R.C.P. Some of the pattern interrogatories for civil actions have clear application to particular cases-for example contract cases-and so discriminating use is necessary ("The pattern interrogatories set forth in the Appendix to Chapter 4, Form 20, are approved. Any pattern interrogatory and its subparts shall be counted as one interrogatory. Any subpart to a non-pattern interrogatory shall be considered as a separate interrogatory." Colo. R. Civ. P. 33(e) (2012)).

3. Are there limits on the number of Interrogatories/Document Requests?

Yes. Except for good cause shown, a party may serve on each adverse party 30 written interrogatories and 20 requests for production. Colo. R. Civ. P. 26(b)(2)(B), (D) (2011). In order to reduce abuses associated with subparts, each interrogatory or request will consist of a single question or request. Case law exists to help determine whether an interrogatory or request consists of subparts. *Leaffer v. Zarlengo*, 44 P.3d 1072 (Colo. 2002). "A party may serve on each adverse party 30 written interrogatories, each of which shall consist of a single question." Colo. R. Civ. P. 26(b) (2) (B) (2012). "A party may serve each adverse party requests for production of documents or tangible things or for entry, inspection or testing of



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land or property pursuant to C.R.C.P. 34, except such requests for production shall be limited to 20 in number, each of which shall consist of a single request.” Colo. R. Civ. P. 26(b) (2) (D) (2012)).

4. Are there time limits on depositions, or limits on the number of depositions?

Yes. Except for good cause shown, a party may take one deposition of each adverse party and may depose two other persons, exclusive of designated experts. Colo. R. Civ. P. 26(b)(2)(A) (“A party may take one deposition of each adverse party and of two other persons, exclusive of persons expected to give expert testimony disclosed pursuant to subsection 26(a)(2).” Colo. R. Civ. P. 26(b) (2) (A) (2012)).

Unless authorized by the court or by stipulation of the parties, a deposition is limited to one day of seven hours. Colo. R. Civ. P. 30(d) (2) (2012). A court may order the duration of a deposition increased or decreased (“Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours. By order, the court may limit the time permitted for the conduct of a deposition to less than seven hours, or may allow additional time if needed for a fair examination of the deponent and consistent with C.R.C.P. 26(b) (2), or if the deponent or another person impedes or delays the examination, or if other circumstances warrant.” Colo. R. Civ. P. 30(d) (2) (2012)).

5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)

Yes. Colo. R. Civ. P. 30(b) (6) (2012) almost duplicates its federal counterpart and allows a party to notice the deposition of a public or private corporation or a partnership or association or governmental agency. (“A party may in his notice name as the deponent a public or private corporation or a partnership or association or governmental agency and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection (b) (6) does not preclude taking a deposition by any other procedure authorized in these rules.” Colo. R. Civ. P. 30(b) (6) (2012)).



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6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?

Yes. Under Colo. R. Civ. P. 26(b)(4) (2011) a party may depose any person who has been identified as an expert and whose opinions may be presented at trial and, unless manifest injustice would result, must pay the expert a reasonable fee for the time spent in responding to discovery. Under the same rule, but only under exceptional circumstances, a party may discover the opinions of an expert specially retained by the adverse party, even when the expert is not expected to be called as a witness at trial. (“A party may depose any person who has been identified as an expert whose opinions may be presented at trial.” Colo. R. Civ. P. 26(b) (4) (A), (2012). (“A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only as provided by C.R.C.P. 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.” Colo. R. Civ. P. 26(b) (4) (B) (2012). “Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subsection (b)(4); and (ii) with respect to discovery obtained pursuant to subsection (b)(4)(B) of this Rule, the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.” Colo. R. Civ. P. 26(b) (4) (C). (2012)).

7. What is the Expert Standard (*Frye*/*Daubert*/Hybrid)?

In *People v. Shreck*, 22 P.3d 68, 77 (Colo. 2001), the Colorado Supreme Court abandoned the *Frye* standard and adopted Colorado Rule of Evidence Rule 702 to govern the admissibility of scientific evidence. Consistent with *Daubert*, the test is applied to determine whether proffered evidence is both reliable and relevant, based on the totality of the circumstances in any specific case.

“Thus, we conclude that *Frye*’s general acceptance test, particularly when viewed rigidly, is unsuitable as the sole dispositive standard for determining the admissibility of scientific evidence in Colorado. We therefore hold that the rules of evidence, particularly CRE 702 and CRE 403, represent a better standard, because their flexibility is consistent with a liberal approach that considers a wide range of issues... Given the flexible, fact-specific nature of the inquiry, we decline to mandate that a trial court consider any particular set of factors when making its determination of reliability. Instead we



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hold that the CRE 702 inquiry contemplates a wide range of considerations that may be pertinent to the evidence at issue... Our determination that a trial court may, but need not consider the factors listed in *Daubert* is consistent with the United States Supreme Court’s reasoning in *Kumho Tire Co. v. Carmichael*: “The factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert’s particular expertise, and the subject of his testimony.”” *People v. Shreck*, 22 P.3d 68, 77-78 (Colo. 2001).

8. Are there other notable Discovery Rules?

Colo. R. Civ. P. 16(b) (10) (2012) establishes the presumptive discovery starting and end dates that will apply unless disputed and modified for good cause. Colo. R. Civ. P. 121 sets forth Colorado’s Practice Standards and Local Rules that preempt and control over contrary local rules. Several of the sections within Rule 121 control various discovery procedures and issues, including: Section 1-12 (addressing reasonable notice for taking of depositions and procedures for motions for protective orders and to compel); and Section 1-13 (procedures for deposition by audio tape recording). Colo. R. Civ. P. 121 (2012).

9. Is there mandatory mediation or arbitration?

Colo. R. Civ. P. 121 §1-17 (2011) contains provisions allowing for court ordered settlement conferences.

10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?

The Colorado Rules do not mandate a “pre-trial conference.” A Trial Management conference may be held by the judge if counsel believes it may be helpful or if there are disputed matters in the Trial Management Order prepared by agreement of the parties. Colo. R. Civ. P. 16(f) (2) (2012). Treatment of motions in limine—whether pre-trial or at trial—depends on the specific judge and the circumstances.

11. What are the court’s practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?

The procedures for submission and the form of the Trial Management Order and trial materials are specified at Colo. R. Civ. P. 16(f), (2012).

12. Who conducts voir dire (Court/Counsel)? Describe the process.

The trial court and counsel for the parties conduct voir dire. The court starts the process by identifying the parties, the nature of the case, and the applicable legal standards. Then the parties or their counsel “shall” be permitted to ask the jurors additional questions, subject to reasonable limitations imposed by the judge. Colo. R. Civ. P. 47(2012)



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13. How many jurors are there? How many alternates? How many peremptory challenges?

The Colorado law establishes 6 as the default number of jurors, although the parties may agree to less. One or 2 alternate jurors may be impaneled. Under Colo. R. Civ. P. 47(h) (2011), each side shall be entitled to 4 peremptory challenges and, if there is more than one party on a side, they must join in the challenge. Additional challenges may be allowed if the ends of justice so require. (“A jury in civil cases shall consist of six persons, unless the parties agree to a smaller number, which shall be not less than three.” Colo. Rev. Stat. § 13-71-103 (2012). “In all civil and criminal trials, the court may call and impanel alternate jurors to replace jurors who are disqualified or who the court may determine are unable to perform their duties prior to deliberation. Alternate jurors shall be summoned in the same manner, have the same qualifications, be subject to the same examination and challenges, take the same oath, and have the same functions, powers, and privileges as regular jurors. An alternate juror who does not replace a regular juror shall be discharged at the time the jury retires to consider its verdict, unless otherwise provided by law, by agreement of the parties, or by order of the court. The seating of an alternate juror entitles each party to an additional peremptory challenge, which may be exercised as to any prospective jurors.” Colo. Rev. Stat. § 13-71-142 (2012). “Peremptory Challenges. Each side shall be entitled to four peremptory challenges, and if there is more than one party to a side they must join in such challenges. Additional peremptory challenges in such number as the court may see fit may be allowed to parties appearing in the action either under Rule 14 or Rule 24 if the trial court in its discretion determines that the ends of justice so require.” Colo. R. Civ. P. 47(h) (2012)).

14. Identify any “unusual” trial procedures.

No.

15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?

Some judicial districts have special trial court divisions. This varies by district. There are not different timetables for discovery by division, but individual trial courts can vary discovery deadlines as necessitated by the particular case.



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16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?

The statutory protections offered by Colorado to distributors and sellers are set forth as follows: (1) No product liability action shall be commenced or maintained against any seller of a product unless said seller is also the manufacturer of said product or the manufacturer of the part thereof giving rise to the product liability action. Nothing in this part 4 shall be construed to limit any other action from being brought against any seller of a product. (2) If jurisdiction cannot be obtained over a particular manufacturer of a product or a part of a product alleged to be defective, then that manufacturer's principal distributor or seller over whom jurisdiction can be obtained shall be deemed, for the purposes of this section, the manufacturer of the product. Colo. Rev. Stat. § 13-21-402 (2012).

17. Is there a provision for Prejudgment interest?

Yes. In actions for personal injuries resulting from tort claims, the plaintiff is entitled "in the complaint" to claim interest on the damages alleged from the date the action accrued. Colo. Rev. Stat. § 13-21-101 (2012). Prejudgment interest may also be awarded to creditors or when money or property has been wrongly withheld. Colo. Rev. Stat. § 5-12-102 (2012). ("In all actions brought to recover damages for personal injuries sustained by any person resulting from or occasioned by the tort of any other person, corporation, association, or partnership, whether by negligence or by willful intent of such other person, corporation, association, or partnership and whether such injury has resulted fatally or otherwise, it is lawful for the plaintiff in the complaint to claim interest on the damages alleged from the date said suit is filed; and, on and after July 1, 1979, it is lawful for the plaintiff in the complaint to claim interest on the damages claimed from the date the action accrued. When such interest is so claimed, it is the duty of the court in entering judgment for the plaintiff in such action to add to the amount of damages assessed by the verdict of the jury, or found by the court, interest on such amount calculated at the rate of nine percent per annum on actions filed on or after July 1, 1975, and at the legal rate on actions filed prior to such date, and calculated from the date such suit was filed to the date of satisfying the judgment and to include the same in said judgment as a part thereof. On actions filed on or after July 1, 1979, the calculation shall include compounding of interest annually from the date such suit was filed. On and after January 1, 1983, if a judgment for money in an action brought to recover damages for personal injuries is appealed by the judgment debtor, interest, whether prejudgment or post judgment, shall be calculated on such sum at the rate set forth in subsections (3) and (4) of this section from the date the action accrued and shall include compounding of interest annually from the



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date such suit was filed.” Colo. Rev. Stat. § 13-21-101 (2012)).

18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

None.

19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

The rules of Civil Procedure do not create a distinct advantage for either the plaintiff or the defendant.

20. Are there legislative efforts under way that address any of the litigation practices in your state?

Pursuant to a Directive from the Colorado Supreme Court, Colorado is adopting Pilot Rules for Certain District Court Civil Cases (CJD 11-02), effective January 1, 2012 in four Denver Metro area judicial districts, including the City and County of Denver. The Pilot Rules apply to a broad range of cases, including product liability and non-medical professional liability actions. The Pilot Project affects all aspects of the progress of a case including all pretrial activity. See [www.courts.state.co.us/Courts/Supreme\\_Court/Directives/Index.cfm](http://www.courts.state.co.us/Courts/Supreme_Court/Directives/Index.cfm)

There are no legislative changes that will impact litigation procedures. The Colorado Supreme Court adopted new deadlines, some which are jurisdictional in 2012. Each deadline should be confirmed to be compliant with the new rules.



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### Question

### Connecticut

1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?

Yes. Disclosure of expert witness information is mandatory (for each person who may be called to testify as an expert witness at trial). See Conn. Prac. Book §13-4 (2012). There are also mandatory disclosures for certain domestic relations actions. Conn. Prac. Book §25-32 (2012).

2. Are there Standard Form Interrogatories/Document Requests?

Yes. For personal injury cases alleging liability based upon operation or ownership of a motor vehicle or ownership, maintenance or control of real property, standard form discovery is used. Conn. Prac. Book §13-6(b) (“In all personal injury actions alleging liability based on the operation or ownership of a motor vehicle or alleging liability based on the ownership, maintenance or control of real property, the interrogatories shall be limited to those set forth in Forms 201, 202 and/or 203 of the rules of practice, unless upon motion, the judicial authority determines that such interrogatories are inappropriate or inadequate in the particular action.” Conn. Prac. Book 13-6(b) (2012); *see also* Conn. Prac. Book 13-9(a) (form document requests). There are standard form interrogatories in certain types of mass torts, multi-party litigation with asbestos being a prime example.

3. Are there limits on the number of Interrogatories/Document Requests?

For personal injury cases alleging liability based upon operation or ownership of a motor vehicle or ownership, maintenance or control of real property, interrogatories and document requests are limited to those form interrogatories set forth in the rules of practice. *See* Conn. Prac. Book §13-6(b) (2012) (“In all personal injury actions alleging liability based on the operation or ownership of a motor vehicle or alleging liability based on the ownership, maintenance or control of real property, the interrogatories shall be limited to those set forth in Forms 201, 202 and/or 203 of the rules of practice, unless upon motion, the judicial authority determines that such interrogatories are inappropriate or inadequate in the particular action... Unless the judicial authority orders otherwise, the frequency of use of interrogatories in all actions except those for which interrogatories have been set forth in Forms 201, 202 and/or 203 of the rules of practice is not limited”); Conn. Prac. Book §13-9(a) (“In all personal injury actions alleging liability based on the operation or ownership of a motor vehicle or alleging liability based on the ownership, maintenance or control of real property, the requests for production shall be limited to those set forth in Forms 204, 205 and/or 206 of the rules of practice, unless, upon



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- motion, the judicial authority determines that such requests for production are inappropriate or inadequate in the particular action”). Upon motion, the court can permit additional interrogatories/ document requests in particular cases. Otherwise, unless ordered by the court, there are no limitations on the number of interrogatories or document requests that may be served.
4. Are there time limits on depositions, or limits on the number of depositions? Generally, no. However, “[t]he judicial authority may for good cause shown increase or decrease the time for taking the deposition.” *See* Conn. Prac. Book §13-27(e) (2012).
5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.) Yes. *See* Conn. Prac. Book §13-27(h) (2012) (“A party may in the notice and in the subpoena name as the deponent a public or private corporation or a partnership or an association or a governmental agency or a state officer in an action arising out of the officer's performance of employment and designate with reasonable particularity the matters on which examination is requested. The organization or state officer so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection does not preclude the taking of a deposition by any other procedure authorized by the rules of practice.”); *see also DDF Props. Co, Inc. v. Konover Constr. Corp.*, 2000 Conn. Super., LEXIS 254, WL 1513928 (Conn. Super. Ct. Sept. 2000) (“Conn. Prac. Book § 13-27(h) requires a corporation to provide one or more persons who accurately and fully answer questions on the particular subjects presaged by the notice”).
6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)? Yes. *See* Conn. Prac. Book §13-4(c); *see also* Conn. Prac. Book §13-4(d)(2) (2012) (“Unless otherwise ordered by the judicial authority upon motion, a party may take the deposition of any expert witness whose records are disclosed pursuant to subdivision (1) of subsection (d) of this section in the manner prescribed in Section 13-26 et seq. governing deposition procedure generally”). The deposing party pays. *See* Conn. Prac. Book §13-4(c) (2); Conn. Prac. Book §13-4(d)(3) (2012) (“Unless otherwise ordered by the judicial authority for good cause shown, or agreed upon by the parties, the fees and expenses of the expert witness for any such deposition, excluding preparation time, shall be paid by the party or parties taking the deposition. Unless otherwise ordered, the fees and expenses hereunder shall include only (A) a reasonable fee for the



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time of the witness to attend the deposition itself and the witness's travel time to and from the place of deposition; and (B) the reasonable expenses actually incurred for travel to and from the place of deposition and lodging, if necessary. If the parties are unable to agree on the fees and expenses due under this subsection, the amount shall be set by the judicial authority, upon motion.”).

7. What is the Expert Standard (Frye/Daubert/Hybrid)?

*The Daubert standard is used. See State v. Porter, 241 Conn. 57, 59, 698 A.2d 739, 742 (1997) (“We conclude that Daubert provides the proper threshold standard for the admissibility of scientific evidence in Connecticut”); Conn. Code of Evidence 7-2 (2009); see also Message Ctr. Mgt. v. Shell Oil Prods. Co., 85 Conn. App. 401, 419, 857 A.2d 936, 950 (2004).*

8. Are there other notable Discovery Rules?

Under the Connecticut rules, a party may obtain discovery of information or disclosure, production and inspection of papers, books, documents, or electronically stored information which is *material to the subject matter involved* in the pending action, which are not privileged. *See Conn. Prac. Book §13-2 (2012).* The rule speaks in the terms of “materiality” rather than “relevancy”.

9. Is there mandatory mediation or arbitration?

Not across the board. “The court, on its own motion, may refer to an arbitrator any civil action in which, in the discretion of the court, the reasonable expectation of a judgment is less than \$50,000, exclusive of interest and costs and in which a claim for a trial by jury and a certificate of closed pleadings have been filed.” *Conn. Prac. Book §23-61 (2012).* In such a case, the decision of the arbitrator shall become a judgment of the court unless a claim for a trial de novo is filed within 20 days of the date when the decision is mailed, as evidenced by the postmark. *Conn. Prac. Book §23-66 (2012).* In addition, a court may, upon stipulation of the parties, refer a civil action to a program of alternative dispute resolution agreed to by the parties. *See Conn. Prac. Book §23-67 (2012).* Mediation can be imposed in certain administrative actions. For example, the State Board of Mediation and Arbitration can impose mandatory binding arbitration whenever collective bargaining negotiations between municipalities and the representatives of their employees have reached an impasse. *See Conn. Gen. Stat. §7-473c (b) (2012).* The Commission on Human Rights and Opportunities may compel mediation of complaints pending before the commission. *See Conn. Gen. Stat. §46a-83(c) (2012).*



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10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?

Cases in which the pleadings are closed may be assigned for a Pretrial Conference. Conn. Prac. Book §14-11 (2012). Pretrial sessions may be assigned to "available judges or judge trial referees." Conn. Prac. Book §14-13 (2012). As a practical matter, there may be more than one Pretrial Conference over the life of a case. When a party against whom a claim is made is insured, an insurance adjuster must be available by telephone, or in some instances attend the Pretrial Conference, as ordered by the court. Conn. Prac. Book §14-13 (2012). A Trial Management Conference is routinely conducted approximately one week before trial. The timing of hearing of motions in limine varies. Once a case has been assigned for trial, motions in limine are heard at the discretion of the assigned judge. If a case has not yet been assigned for trial, motions in limine may be heard by a judicial authority upon good cause shown. *See* Conn. Prac. Book §15-3 (2012).

11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?

It is similar to Federal practice.

12. Who conducts voir dire (Court/Counsel)? Describe the process.

By constitutional amendment, "[t]he right to question each juror individually by counsel shall be inviolate." Conn. Const. Amend. IV (1972) (amending Article I, § 19). Thus, "[e]ach party shall have the right to examine, personally or by counsel, each juror outside the presence of other prospective jurors as to qualifications to sit as a juror in the action, or as to the person's interest, if any, in the subject matter of the action, or as to the person's relations with the parties thereto." Conn. Practice Book §16-6 (2012); *see also*, Conn. Gen. State. §51-240 (2012).

13. How many jurors are there? How many alternates? How many peremptory challenges?

For a capital offense, there must be not less than 12 jurors, unless the defendant consents to a smaller jury. In all other cases, there must be not less than 6 jurors. *See* Conn. Const. Amend. IV ("The right of trial by jury shall remain inviolate, the number of such jurors, which shall not be less than six, to be established by law; but no person shall, for a capital offense, be tried by a jury of less than twelve jurors without his consent. In all civil and criminal actions tried by a jury, the parties shall have the right to challenge jurors peremptorily, the number of such challenges to be established by law. The right to question each juror individually by counsel shall be inviolate."). However, "[t]he parties, after submission of the matter to the jury and prior to the verdict, may, by stipulation in writing and the approval of the judicial authority, elect to have the



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verdict rendered by a number of jurors fewer than prescribed by law. The judicial authority shall not permit such an election or stipulation unless the defendant, after being advised by the judicial authority of his or her right to a trial by a full jury, personally waives such right either in writing or in open court on the record.” Conn. Prac. Book §42-3 (2012).

Each party in a civil action is entitled to three (3) peremptory challenges. *See* Conn. Gen. Stat. § 51-241 (2012). Where the court determines a unity of interests exists, several plaintiffs or several defendants may be considered as a single party for the purpose of making challenges. *Id.*; *see also* Conn. Prac. Book §16-5 (2012).

“On the trial of any civil action to a jury, each party may challenge peremptorily three jurors. Where the court determines a unity of interest exists, several plaintiffs or several defendants may be considered as a single party for the purpose of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly. For the purposes of this section, a ‘unity of interest’ means that the interests of the several plaintiffs or of the several defendants are substantially similar. A unity of interest shall be found to exist among parties who are represented by the same attorney or law firm. In addition, there shall be a presumption that a unity of interest exists among parties where no cross claims or apportionment complaints have been filed against one another. In all civil actions, the total number of peremptory challenges allowed to the plaintiff or plaintiffs shall not exceed twice the number of peremptory challenges allowed to the defendant or defendants, and the total number of peremptory challenges allowed to the defendant or defendants shall not exceed twice the number of peremptory challenges allowed to the plaintiff or plaintiffs.” Conn. Gen. Stat. § 51-241 (2012).

If alternate jurors are seated, each party is entitled to a total of 4 peremptory challenges. *See* Conn. Gen. Stat. §51-243(a) (2012).

“In any civil action to be tried to the jury in the Superior Court, if it appears to the court that the trial is likely to be protracted, the court may, in its discretion, direct that, after a jury has been selected, two or more additional jurors shall be added to the jury panel, to be known as ‘alternate jurors’. Alternate jurors shall have the same qualifications and be selected and subject to examination and challenge in the same manner and to the same extent as the jurors constituting the regular panel. In any case when the court directs the



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selection of alternate jurors, each party may peremptorily challenge four jurors. Where the court determines a unity of interest exists, several plaintiffs or several defendants may be considered as a single party for the purpose of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly. For the purposes of this subsection, a ‘unity of interest’ means that the interests of the several plaintiffs or of the several defendants are substantially similar. A unity of interest shall be found to exist among parties who are represented by the same attorney or law firm. In addition, there shall be a presumption that a unity of interest exists among parties where no cross claims or apportionment complaints have been filed against one another. In all civil actions, the total number of peremptory challenges allowed to the plaintiff or plaintiffs shall not exceed twice the number of peremptory challenges allowed to the defendant or defendants, and the total number of peremptory challenges allowed to the defendant or defendants shall not exceed twice the number of peremptory challenges allowed to the plaintiff or plaintiffs.” Conn. Gen. Stat. § 51-243(a) (2012).

14. Identify any “unusual” trial procedures.

None.

15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?

Yes. There are a number of trial court limited "Special Sessions", including Child Protection Session ( a juvenile trial court, accepting child protection cases referred by local juvenile court judges), Complex Litigation Docket (handles civil cases with multiple litigants and/or legally challenging issues or multi-million dollar claims for damages), Community Court (addresses "quality of life" crimes such as simple possession of marijuana, breach of peace, criminal mischief, criminal trespass, larceny (shoplifting), disorderly conduct, threatening, prostitution, solicitation of prostitutes, illegal liquor possession by a minor, public nuisance, public drunkenness, excessive noise, and illegal vending), Regional Daily Trial Docket (handles contested custody and visitation matters referred to it from any Judicial District in the state) and Tax Session (hears appeals from orders or decisions of the Commissioner of Revenue Services and other statutorily designated administrative bodies).

16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?

No.



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17. Is there a provision for Prejudgment interest? Under Conn. Gen. Stat. §37-3a(a) (2012), “[e]xcept as provided in [sections 37-3b](#), [37-3c](#) and [52-192a](#), interest at the rate of ten percent a year, and no more, may be recovered and allowed in civil actions . . . as damages for the detention of money after it becomes payable.” Under Conn. Gen. Stat. §37-3a(b) (2011), “[i]n the case of debt arising out of services provided at a hospital, prejudgment . . . interest shall be no more than five percent per year. The awarding of interest in such cases is discretionary.”
18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.) None
19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed? No.
20. Are there legislative efforts under way that address any of the litigation practices in your state? As of October 1, 2012, amounts paid, including the amounts written off by medical providers and insurers, may be considered in determining the collateral source offset to a judgment. *See* Conn. Gen. Stat. § 52-225a (b).



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### Question

### Delaware

1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?

Yes. All eyewitnesses, fact witnesses, statements, photographs and applicable policy limits have to be identified with initial pleadings. Del. R. Civ. Proc. 26 (2011).

2. Are there Standard Form Interrogatories/Document Requests?

No.

3. Are there limits on the number of Interrogatories/Document Requests?

No. "Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party." Del. R. Civ. P. 33(a) (2011).

4. Are there time limits on depositions, or limits on the number of depositions?

Not generally, but the court may limit time permitted for the deposition. "By order, the court may limit the time permitted for the conduct of a deposition, but shall allow additional time consistent with Rule 26(b) (2) if needed for a fair examination of the deponent or if the deponent or another party impedes or delays the examination." Del. R. Civ. P. 30(d) (2) (2011). "After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant..." Del. R. Civ. 30(a) (2011).

5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)

Yes. The rule is the same as the Federal Rule of Procedure. ("A party may in the party's notice name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. The persons so designated shall testify as to matters known or reasonably available to the organization." Del. R. Civ. P. 30(b) (6) (2011)).



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6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?
- Yes. The deposing party pays the expert's deposition costs/fees. (“Unless manifest injustice would result, (i) the Court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this Rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this Rule the Court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this Rule the Court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.” Del. R. Civ. P. 26(b) (4) (C) (2011)).
7. What is the Expert Standard (*Frye/Daubert/Hybrid*)?
- The Daubert* standard applies. “[W]e hereby adopt the holdings of *Daubert* and *Carmichael* as the correct interpretation of Delaware Rule of Evidence 702.” *M.G. Bancorporation v. Le Beau*, 737 A.2d 513, 522 (Del. 1999); “In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the United States Supreme Court held that Federal Rule of Evidence 702 superseded the *Frye* standard for determining the admissibility of expert scientific testimony... Because Delaware Rule of Evidence 702 is identical to the federal rule, this Court adopted *Daubert*, and its progeny, as the law governing the admissibility of expert evidence.” *General Motors Corp. et. al. v. Grenier*, 981 A.2d 531, 536 (Del. 2009).
8. Are there other notable Discovery Rules?
- Plaintiffs in a personal injury case must identify all treating health providers for the last 10 years in their initial Form 30 Interrogatory Answers filed with the Complaint.
9. Is there mandatory mediation or arbitration?
- Yes. Alternative Dispute Resolution is mandatory. The parties can choose between Mediation, Arbitration or Neutral Assessment.
10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?
- The Pretrial Conference is held 30 – 60 days before trial. It is conducted by the assigned trial judge. Motions in Limine normally have to be filed 10 days before trial so the trial judge has the opportunity to rule prior to trial.
11. What are the court’s practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?
- Any trial exhibit must be previously listed in the Pretrial Stipulation and Order.



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12. Who conducts voir dire (Court/Counsel)? Describe the process.

The Clerk of the Court reads several standard voir dire. Any party may submit proposed additional voir dire to be read to the jury panel by the clerk.

13. How many jurors are there? How many alternates? How many peremptory challenges?

There are 12 jurors if requested on the face of the Complaint or Answer. If 12 are not requested, the 6 jurors sit. With a 12 person jury, there are 2 alternates. In non-capital murder trials, 3 peremptory challenges are allowed. (“In the demand for a trial by jury a party may further specify that the party demands trial by a jury of 12 persons; otherwise, the party shall be deemed to have consented to trial by a jury of 6 persons. A demand for trial by a jury of 12 persons shall be deemed to apply to all triable issues for which any party demands trial by jury as provided in Rules 38(b) and (c) of these Rules. If a party in the demand for trial by jury does not demand trial by jury of 12 persons, any other party within 10 days after service of the demand for trial by jury or within such lesser time as the Court may order, may serve a demand for trial by a jury of 12 persons.” Del. Super. Ct. R. Civ. P. 38(d) (2011); (“The Court may direct that not more than 6 jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impaneled, 2 peremptory challenges if 3 or 4 alternate jurors are to be impaneled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impaneled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by law shall not be used against an alternate juror.” Del. Super. Ct. R. Civ. P. 47(b) (2011); (“Each party shall be entitled to 3 peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly. For good cause, the court may grant the parties such additional peremptory challenges as the court, in its discretion, deems appropriate. A request for additional challenges shall be



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made before commencement of the drawing of the jury or at such earlier time as ordered by the court.” Del. Super. Ct. R. Civ. P. 47(c) (2011)).

14. Identify any “unusual” trial procedures.

Some of our trial judges allow note taking, by the jury, in complex cases. Some of our trial judges have begun reading the Jury Instructions prior to counsels’ closing arguments.

15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?

Yes. We have complex litigation divisions, which have been primarily our asbestos and benzene cases in Delaware.

16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?

No. Case law allows a product distributor to avoid liability if the product has not been altered. (“Sealed container law”).

17. Is there a provision for Prejudgment interest?

Yes. If the plaintiff makes a written demand in a personal injury case at least 30 days prior to trial and the verdict equals or exceeds that demand (“In any tort action for compensatory damages in the Superior Court or the Court of Common Pleas seeking monetary relief for bodily injuries, death or property damage, interest shall be added to any final judgment entered for damages awarded, calculated at the rate established in subsection (a) of this section, commencing from the date of injury, provided that prior to trial the plaintiff had extended to defendant a written settlement demand valid for a minimum of 30 days in an amount less than the amount of damages upon which the judgment was entered.” Del. Code Ann. tit 6, § 2301(d) (2011)).

18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

Delaware has recently implemented a new ADR system exclusively for complex litigation (over 1 million dollars).

19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

No.



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20. Are there legislative efforts under way that address any of the litigation practices in your state?      No as of 2011.



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### Question

### District of Columbia (DC)

1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?

No. D.C. Super. Ct. R. Civ. Proc. 26 (2012).

2. Are there Standard Form Interrogatories/Document Requests?

Yes, for discretionary use. A list of model interrogatories appears in the Appendix to the Civil Rules.

3. Are there limits on the number of Interrogatories/Document Requests?

Yes to the interrogatories. D.C. Super. Ct. R. Civ. P. 33(a) (2012). ("No party shall serve upon another party, at 1 time or cumulatively, more than 40 written interrogatories, including parts and subparts, unless otherwise ordered by the Court upon motion for good cause shown or upon its own motion, or unless the parties have agreed between themselves to a greater number." The Rules do not place a limit on the number of document requests. However, pursuant to SCR 26(b) (1), "the Court may...limit the number of requests under Rule 36." D.C. Super Ct. R. Civ. P. 26(b) (1) (2012)).

4. Are there time limits on depositions, or limits on the number of depositions?

Yes to both. D.C. Super. Ct. R. Civ. P. 30(a) (2) (2011). ("A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b) (1), if... (A) a proposed deposition would result in more than ten depositions being taken under this Rule ["Depositions upon oral examination"] or Rule 31 ["Deposition upon written questions"] by the plaintiffs, or by the defendants, or by third party defendants." ; D.C. Super. Ct. R. Civ. P. 30(d) (2) (2012). ("Unless otherwise authorized by the Court or stipulated by the parties, a deposition is limited to one day of seven hours. The Court must allow additional time consistent with Rule 26(b) (1) if needed for a fair examination of the deponent or if the deponent or another person or other circumstances impedes or delays the examination.")

5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)

D.C. Superior Court Rule 30(b) (6) is substantively identical to Fed. R. Civ. P. 30(b) (6). D.C. Sup. Ct. R. Civ. P. 30(b) (6) (2012). ("A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate 1 or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated,



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- the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b) (6) does not preclude taking a deposition by any other procedure authorized in these Rules.”
6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?
- Yes, they may depose opposing experts, and the party seeking discovery pays. D.C. Sup. Ct. R. Civ. P. 26(b) (4) (A) (2012). (“(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the Court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)( C) of this Rule, concerning fees and expenses as the Court may deem appropriate.” ; D.C. Sup. Ct. R. Civ. P. 26(b) (4) (C) (2012). (“Unless manifest injustice would result, (i) the Court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii)...of this Rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this Rule the Court may require... the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.”)
7. What is the Expert Standard (Frye/Daubert/Hybrid)?
- The District of Columbia uses the *Frye* general acceptance test. See, e.g., *Benn v. U.S.*, 978 A.2d 1257, 1269 n. 44 (D.C. 2009) (“*Daubert* has not been adopted in this jurisdiction.”).
8. Are there other notable Discovery Rules?
- The D.C. Superior Court Civil Rules track closely the Federal Rules of Civil Procedure and, as such, contain no additional notable differences.
9. Is there mandatory mediation or arbitration?
- No. However, there is a mandatory initial scheduling and settlement conference at which the trial judge will explore possibilities for early resolution through settlement or alternative dispute resolution techniques.
10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?
- According to the rules, “The lead counsel who will conduct the trial for each of the represented parties, and...all parties shall attend the pretrial and settlement conference. Such counsel and unrepresented parties must bring to the conference their trial exhibits, copies of



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which were served on other parties [at the meeting three weeks prior to the pretrial conference].... The conference will generally be held by the judge who will preside at trial.... If settlement of the case cannot be achieved within a reasonable time, the judge will discuss...the pretrial filings of the parties [including motions in limine, which are to be filed and served two weeks prior to the pretrial conference, pursuant to SCR 16(d)] ... and will set a trial date for the case." D.C. Super. Ct. R. Civ. P. 16(f) (2012). Rule 16(g) provides: "After the pretrial conference, an order shall be entered reciting the action taken. Insofar as possible, the Court will resolve all pending disputes in the pretrial order. With respect to some matters, it may be necessary to reserve ruling until the time of the trial or require additional briefing by the parties prior to trial." D. C. Super. Ct. R. Civ. P. 16(g) (2012).

11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?

The Rule provides: "After the pretrial conference... [e]xhibits, the authenticity of which is not genuinely in dispute, will be deemed authentic and the offering party will not be required to authenticate these exhibits at trial. The pretrial order may set limits with respect to the time for voir dire, opening statement, examination of witnesses, and closing argument and may also limit the number of lay and expert witnesses who can be called by each party. The pretrial order shall control the further course of the action unless modified by a subsequent order. The pretrial order may be modified at the discretion of the Court for good cause shown and shall be modified if necessary to prevent manifest injustice." D.C. Super. Ct. R. Civ. P. 16(g) (2012).

12. Who conducts voir dire (Court/Counsel)? Describe the process.

D.C. Super. Ct. R. Civ. P. 47(a) provides that: "The Court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the Court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper." )



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13. How many jurors are there? How many alternates? How many peremptory challenges?

"In all jury cases the jury shall consist of six jurors plus such number of additional jurors as the Court may deem necessary. The Court shall seat a jury of not fewer than six and not more than twelve members and all jurors shall participate in the verdict unless excused from service by the Court pursuant to Rule 47(b)." [this states that "[t]he Court may for good cause excuse a juror from service during trial or deliberation"]. "Unless the parties otherwise stipulate, (1) the verdict shall be unanimous and (2) no verdict shall be taken from a jury reduced in size to fewer than six members." D.C. Super. Ct. R. Civ. P. 48 (2011); *see also*, Comment on D.C. Super. Ct. R. Civ. P. 48: "Identical to Fed. R. Civ. P. 48 except that a jury demands under SCR 38 ["Jury trial of right"] is conclusively presumed to be to a jury of 6 persons unless the demand expressly states otherwise"; "In civil cases, each party shall be entitled to 3 peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the Court may allow additional peremptory challenges and permit them to be exercised separately or jointly. All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the Court." D.C. Super. Ct. R. Civ. P. 47-I (2012).

14. Identify any "unusual" trial procedures.

D.C. Super. Ct. R. Civ. P. 39-II states "Except by permission of the Court only one attorney for each party shall examine a witness or address the Court on a question arising in a trial. With the approval of the Court, two attorneys for each party may address the Court or jury in final arguments on the facts" (2012).



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15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?

The Civil Division of the D.C. Superior court maintains a Civil I calendar for complex litigation. On a rotational basis, two judges manage the Civil I calendar, currently consisting of approximately 600 cases. Twelve judges manage the Civil II calendar, consisting of approximately 9,000 standard civil cases. While there is no general discovery timetable applicable to all cases on either calendar, the Civil I calendar involves a protracted litigation process. The applicable rules provide additional guidance: D.C. Super. Ct. R. Civ. P. 40-II (a): "All cases involving claims for relief based upon exposure to asbestos or asbestos products shall be designated to a Civil I calendar. All other cases...may be designated to a Civil I calendar upon motion by any party or joint motion of the parties, subject to approval by the judge assigned to the case and by the Presiding Judge of Civil Division, or cases may be so designated upon recommendation of the assigned judge *sua sponte* if the designation is approved by the Presiding Judge" (2011). D.C. Super. Ct. R. Civ. P. 40-II (b): "In certifying a case to a Civil I calendar, the Presiding Judge may consider the estimated length of trial, the number of witnesses that may appear, the number of exhibits that may be introduced, the nature of the factual and legal issues involved, the extent to which discovery may require supervision by the Court, the number of motions that may be filed in the case, or any other relevant factors" (2012).

16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?

"Generally, the manufacturer's duty to provide a non-defective product may not be delegated to another distributor farther down the stream of commerce, because the duty runs to the ultimate user not the immediate purchaser. Although privity between the manufacturer and ultimate consumer is not required for the consumer to hold the manufacturer liable, an intermediary seller in privity with the manufacturer receives an implied warranty that the product is safe for its intended use. When a breach of that warranty exposes the retailer to liability in circumstances where its fault lay only in failing to discover and correct a defect created by the manufacturer, upon whose skill and expertise it reasonably relied, we think it equitable to shift the burden of loss entirely to the manufacturer." *East Penn Mfg. Co. v. Pineda*, 578 A.2d 1113, 1126-27 (D.C. 1990) (citations omitted).



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17. Is there a provision for Prejudgment interest?

There is no provision for prejudgment interest in the Rules. Pursuant to D.C. Code § 15-109, "[i]n an action to recover damages for breach of contract the judgment shall allow interest on the amount for which it is rendered from the date of the judgment only. This section does not preclude the jury, or the court, if the trial be by the court, from including interest as an element in the damages awarded, if necessary to fully compensate the plaintiff. In an action to recover damages for a wrong the judgment for the plaintiff shall bear interest." Whether prejudgment interest is available in some or all tort actions is unclear. The D.C. Court of Appeals has held that pre-judgment interest may be awarded for the tort of conversion. *See Duggan v. Keto*, 554 A.2d 1126, 1140 (D.C. 1989) (disagreeing with *Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835 (D.C. Cir. 1981), which held that neither D.C. common law nor the D.C. Code provides for the award of prejudgment interest in tort actions).

18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

D.C. Super. Ct. R. Civ. P. 40-I(b): "The Civil Clerk's Office shall randomly distribute all cases assigned pursuant to paragraph (a)(1) ["Assignment of cases"] of this Rule to the judges assigned to the Civil Division. Comment SCR 40-I(b): "Its purpose is to insure equitable allocation of the caseload to all judges assigned to the Division and to preclude any potential for litigants to predetermine the judge to whom the case will be assigned" (2011).

19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

One minor change that could potentially be detrimental to defendants is found in Rule 23 ["Class actions"], which provides that "[t]he cost of notice shall be paid by the plaintiff unless the Court, upon conducting a hearing...concludes (1) that the plaintiff class will more likely than not prevail on the merits and (2) that it is necessary to require the defendant to pay some or all of that cost in order to prevent manifest injustice." D.C. Super. Ct. R. Civ. P. 23(c)(2) (2011). This departure from the Federal Rules was a direct response to *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), which held that under Federal Rule 23, the costs of notice could not be shifted to the defendant, except perhaps in cases involving fiduciary, and, the Court could not make a preliminary determination of the merits of the case.

20. Are there legislative efforts under way that address any of the litigation practices in your state?

None as of 2011.



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### Question

### Florida

1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?

No.

2. Are there Standard Form Interrogatories/Document Requests?

Yes, as to interrogatories. No, as to document requests. (“If the supreme court has approved a form of interrogatories for the type of action, the initial interrogatories on a subject included therein shall be from the form approved by the court. A party may serve fewer than all of the approved interrogatories within a form. Other interrogatories may be added to the approved forms without leave of court, so long as the total of approved and additional interrogatories does not exceed 30.” Fla. R. Civ. P. 1.340(a) (2011)).

3. Are there limits on the number of Interrogatories/Document Requests?

A party may not serve more than 30 interrogatories, including standard interrogatories. Parties are not required to use all of the standard interrogatories approved for a particular cause of action, but may substitute with tailored interrogatories, so long as the total does not exceed 30. *See* Fla.R.Civ.P. 1.340(a).

There is no limit to the number of requests for production of documents a party can serve on an opposing party. *See* Fla.R.Civ.P. 1.350.

There is no limit to the number of subpoenas for document production a party can serve on non-parties. *See* Fla.R.Civ.P. 1.351.

A party may serve no more than 30 requests for admissions on an opposing party, unless the court permits a greater number on motion and notice and for good cause. *See* Fla.R.Civ.P. 1.370.

4. Are there time limits on depositions, or limits on the number of depositions?

No.

5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b)(6))

Yes. The state rule is identical to the Federal Rule. (“In the notice a party may name as the deponent a public or private corporation, a partnership or association, or a governmental agency, and designate with reasonable particularity the matters on which examination is requested. The organization so named shall



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designate one or more officers, directors, or managing agents, or other persons who consent to do so, to testify on its behalf and may state the matters on which each person designated will testify. The persons so designated shall testify about matters known or reasonably available to the organization. This subdivision does not preclude taking a deposition by any other procedure authorized in these rules.” Fla. R. Civ. P. 1.310(b)(6) (2011)).

6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?

Yes. The deposing party traditionally pays for an expert’s deposition appearance. “The testimony of an expert or skilled witness may be taken at any time before the trial in accordance with the rules for taking depositions and may be used at trial, regardless of the place of residence of the witness or whether the witness is within the distance prescribed by rule 1.330(a)(3). No special form of notice need be given that the deposition will be used for trial.” Fla. R. Civ. P. 1.390(b) (2011). “An expert or skilled witness whose deposition is taken shall be allowed a witness fee in such reasonable amount as the court may determine. The court shall also determine a reasonable time within which payment must be made, if the deponent and party cannot agree. All parties and the deponent shall be served with notice of any hearing to determine the fee.” Fla. R. Civ. P. 1.390(c) (2011).

7. What is the Expert Standard (Frye/Daubert/Hybrid)?

The *Frye* standard applies. “Despite the Supreme Court’s decision in *Daubert*, we have since repeatedly reaffirmed our adherence to the *Frye* standard for admissibility of evidence.” *Marsh v. Valyou*, 977 So. 2d 543, 547 (Fla. 2007).

8. Are there other notable Discovery Rules?

Fla. R. Civ. P. Rule 1.390 provides a specific procedure for deposing experts. Rule 1.310 prohibits instructions to a deponent not to answer except to preserve a privilege, enforce a limitation on discovery imposed by the court or present a motion for protective order (2011).

Effective September 1, 2012, the Florida Supreme Court adopted amendments to the Florida Rules of civil Procedure to specifically authorize discovery of ESI. The essence of the amendments are: 1) a case management order may address production format, preservation and limitation of production of ESI; 2) objections can be based on accessibility and cost, and the producing party has the burden of establishing these limitations – court must weigh expense versus benefit and whether it can be obtained from another less expensive source; 3) if produced the documents must be in the form in which they are maintained or in a reasonably usable form but the requesting party may specify the form subject to objection



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- and disclosure of the form the producing party wishes to use; 4) absent exceptional circumstances a court may not impose sanctions for failing to provide ESI lost as a result of routine, good faith operation of the EI system; 5) the same rules apply to third party document subpoenas.
9. Is there mandatory mediation or arbitration? Yes. Mediation is mandatory. A court can order non-binding arbitration and can award attorneys fees to a losing party if he/she refuses to be bound and demands trial.
10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial? A pretrial conference is conducted by the judge. Motions in limine can be addressed at any time the court wants to hear them.
11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge? It varies by judge but they all have pretrial orders and some circuits have uniform pretrial orders with the usual requirements.
12. Who conducts voir dire (Court/Counsel)? Describe the process. Voir dire is conducted by counsel. It is essentially uncontrolled. The plaintiff goes first, then defendant.
13. How many jurors are there? How many alternates? How many peremptory challenges? There are 6 jurors in civil cases, with as many alternates as the judge and parties think may be necessary given the length of the trial. "The right of trial by jury shall be secure to all and remain inviolate. The qualification and the number of jurors, not fewer than six, shall be fixed by law." Fla. Const. Art. I, § 22 (2011).
- "Each party is entitled to 3 peremptory challenges of jurors, but when the number of parties on opposite sides is unequal, the opposing parties are entitled to the same aggregate number of peremptory challenges to be determined on the basis of 3 peremptory challenges to each party on the side with the greater number of parties. The additional peremptory challenges accruing to multiple parties on the opposing side shall be divided equally among them. Any additional peremptory challenges not capable of equal division shall be exercised separately or jointly as determined by the court." Fla. R. Civ. P. 1.431(d) (2011).
- "(1) The court may direct that 1 or 2 jurors be impaneled to sit as alternate jurors in addition to the regular panel. Alternate jurors in the order in which they are called shall replace jurors who have become unable or disqualified to perform their duties before the jury retires to consider its verdict. Alternate jurors shall be drawn in the same manner, have the same qualifications, be subject to the



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same examination, take the same oath, and have the same functions, powers, facilities, and privileges as principal jurors. An alternate juror who does not replace a principal juror shall be discharged when the jury retires to consider the verdict.

(2) If alternate jurors are called, each party shall be entitled to one peremptory challenge in the selection of the alternate juror or jurors, but when the number of parties on opposite sides is unequal, the opposing parties shall be entitled to the same aggregate number of peremptory challenges to be determined on the basis of 1 peremptory challenge to each party on the side with the greater number of parties. The additional peremptory challenges allowed pursuant to this subdivision may be used only against the alternate jurors. The peremptory challenges allowed pursuant to subdivision (d) of this rule shall not be used against the alternate jurors.” Fla. R. Civ. P. 1.431(g)(1)-(2) (2011).

14. Identify any “unusual” trial procedures.      None.
15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?      Several of the larger circuits have designated complex commercial divisions.
16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?      No.
17. Is there a provision for Prejudgment interest?      Yes, for economic damages. “... Nothing contained herein shall affect a rate of interest established by written contract or obligation. Any judgment for money damages or order a judicial sale and any process or writ directed to a sheriff for execution shall bear, on its face, the rate of interest that is payable on the judgment. The rate of interest stated in the judgment, as adjusted in subsection (3), accrues on the judgment until it is paid.” Fla. Stat. Ann. § 55.03(1)-(2) (LexisNexis 2011).
18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)      In 2006 a Joint committee of the Florida Bar and the conferences of Circuit and County Court Judges authored the Handbook on Discovery Practice. All practitioners conducting discovery in Florida should read it.



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19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

The Florida Standard Jury Instructions are undergoing revisions, and plaintiffs' lawyers predominate on the committee. A number of defense lawyers recently submitted comments

20. Are there legislative efforts under way that address any of the litigation practices in your state?

Medical malpractice reform is complete, but the current (2011) legislative session is likely to pass additional tort reform.



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### Question

### Georgia

1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?

No.

2. Are there Standard Form Interrogatories/Document Requests?

No.

3. Are there limits on the number of Interrogatories/Document Requests?

Yes. O.C.G.A. § 9-11-34(a)(1) limits interrogatories to 50. No limit for document requests.

4. Are there time limits on depositions, or limits on the number of depositions?

Not as part of the GA Civil Practice Act. However Rule 5.3 of the Uniform Rules of the Superior Courts Limits depositions to 1 day of 7 hours. (“Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours. The court must allow additional time if needed for a fair examination of the deponent or another person or other circumstances impedes or delays the examination.” Ga. Sup. Ct. R. 5.3 (2011)).

5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)

Yes. OCGA 9-11-30(b) (6) is similar to FRCP 30(b) (6).

6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?

It depends. A party usually has the right to depose the opposing party's expert witnesses and, if asked for opinions, the deposing party pays the expert's deposition costs/fees. (“A party may obtain discovery under Code Section 9-11-30, 9-11-31, or 9-11-34 from any expert described in this paragraph, the same as any other witness, but the party obtaining discovery of an expert hereunder must pay a reasonable fee for the time spent in responding to discovery by that expert, subject to the right of the expert or any party to obtain a determination by the court as to the reasonableness of the fee so incurred.” Ga. Code Ann. § 9-11-26(b)(4)(A)(ii) (2011); “Unless manifest injustice would result: (i) The court shall require the party seeking discovery to pay the expert a reasonable fee for time spent in responding to discovery under subparagraph (b) of this paragraph; and (ii) With respect to discovery obtained under division (ii) of subparagraph (A) of this paragraph, the court may require, and with respect to discovery obtained under subparagraph (B) of this paragraph the court shall



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- require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.” Ga. Code Ann. § 9-11-26(b) (4) (C) (i)-(ii) (2011)).
7. What is the Expert Standard (Frye/Daubert/Hybrid)?
- The *Daubert* standard applies. (“It is the intent of the legislature that, in all civil cases, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states. Therefore, in interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases.” Ga. Code Ann. § 24-9-67.1(f) (2011)).
8. Are there other notable Discovery Rules?
- No.
9. Is there mandatory mediation or arbitration?
- Not statewide. Mediation or arbitration may be required in a court by court/judge by judge basis
10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?
- Pretrial conferences are usually held. Under Uniform Superior Court Rule 7.1, pre-trial conferences are conducted by the trial judge sua sponte or upon motion. Motions in limine are usually addressed at the Pretrial Conference.
11. What are the court’s practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?
- It varies. Often it is much the same as the federal pretrial order but not as detailed.
12. Who conducts voir dire (Court/Counsel)? Describe the process.
- In Georgia State Courts counsel conducts voir dire, which is usually thorough. In USDC voir dire is usually conducted by the court and is usually limited.
13. How many jurors are there? How many alternates? How many peremptory challenges?
- In Georgia state courts there is a right to a 12 member jury; parties may agree by written and filed stipulation to any number less than 12. The court may direct 1 or 2 alternate jurors under OCGA 9-11-47. Six peremptory challenges are permitted per side (from 24). In the USDC the number of jurors depends on the judge.
14. Identify any “unusual” trial procedures.
- None.



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15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?

No separate civil trial divisions, except in Atlanta (Fulton County Superior Court, which has business and family court divisions). Discovery timetables in the Civil Practice Act are the same for all civil cases.

16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?

No.

17. Is there a provision for Prejudgment interest?

Yes. For unliquidated damages, plaintiff may recover prejudgment interest if plaintiff makes a written demand for an account of unliquidated damages, such demand is refused, and the verdict is not less than the demand (“In all cases where an amount ascertained would be the damages at the time of breach, it may be increased by the addition of legal interest from that time until the recovery.” Ga. Code Ann. § 13-6-13 (2011)); (“Where a claimant has given written notice by registered or certified mail or statutory overnight delivery to a person against whom claim is made of a demand for an amount of unliquidated damages in a tort action and the person against whom such claim is made fails to pay such amount within 30 days from the mailing or delivering of the notice, the claimant shall be entitled to receive interest on the amount demanded if, upon trial of the case in which the claim is made, the judgment is for an amount not less than the amount demanded. However, if, at any time after the 30 days and before the claimant has withdrawn his or her demand, the person against whom such claim is made gives written notice by registered or certified mail or statutory overnight delivery of an offer to pay the amount of the claimant's demand plus interest under this Code section through the date such notice is given, and such offer is not accepted by the person making the demand for unliquidated damages within 30 days from the mailing or delivering of such notice by the person against whom such claim is made, the claimant shall not be entitled to receive interest on the amount of the demand after the thirtieth day following the date on which the notice of the offer is mailed or delivered even if, upon trial of the case in which the claim is made, the judgment is for an amount not less than the sum demanded pursuant to this Code section.” Ga. Code Ann. § 51-12-14 (2011)).



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18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

Substantial tort reform legislation was passed in 2004. The Georgia Supreme Court upheld the constitutionality of a “gross negligence” standard for emergency health care workers, and also upheld the written offer of settlement provision. The written offer of settlement provision in O.C.G.A. § 9-11-68 triggers fee-shifting if the plaintiff recovers less than 75% of the settlement offer. The Georgia Supreme Court struck down the \$350,000 cap on non-economic damages in medical malpractice cases.

19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

Punitive damages amounts are largely uncontrolled by the courts.

20. Are there legislative efforts under way that address any of the litigation practices in your state?

Complete and total “loser pays” was proposed by the previous Governor in 2009. Although a revival of “loser pays” has been mentioned, no proposed legislation that would address litigation practices in Georgia is currently pending.



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### Question

### Hawaii

1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?

No. Discovery is liberal. However, all discovery in cases covered by the Hawaii Rules of Civil Procedure (Hawaii R. Civ. P.) and the Rules of the Circuit Courts of the state of Hawaii (Haw. R. Circuit Cts.) must be initiated by a party. There are required pre-trial disclosures, prescribed in Haw. R. Circuit Cts. Rule 18 (2012); however those usually occur near to trial and after discovery cut off.

2. Are there Standard Form Interrogatories/Document Requests?

No, not in Circuit Courts, which are courts of general jurisdiction. The exception is for Circuit Court cases that go into the Court Annexed Arbitration Program (CAAP (the CAAP is a mandatory, non-binding arbitration program for certain civil cases, intended to provide simplified procedure and accelerated time table for equitable resolution of certain types of cases)). Rule 14(B) of the Hawaii Arbitration Rules (HAR), which govern the CAAP, provides that a party may, at any time, serve on other parties the standard form interrogatories and requests for production that have been approved for the CAAP program. This can be modified at the discretion of the arbitrator.

3. Are there limits on the number of Interrogatories/Document Requests?

For interrogatories, Yes. This is addressed both in Hawaii R. Civ. P. and in the Haw. R. Circuit Cts.. (“Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 60 in number, counting any subparts or sub questions as individual questions, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b) (2).” Haw. R. Civ. P. 33(a) (2012)); (“Those interrogatories shall not exceed 60 in number, counting any subparts or subsections as individual questions, without prior leave of court or written stipulation of the parties pursuant to Rule 29 of the Hawai’i Rules of Civil Procedure” Haw. R. Circuit Cts. Rule 30(b) (2012)).

As to document production requests, there is no limit.



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4. Are there time limits on depositions, or limits on the number of depositions?
- Yes. Absent leave of court or stipulation, a deposition is limited to one (1) day of seven (7) hours. Hawaii R. Civ. P. 30(d) (2) (2012). Absent stipulation, leave of court is required if the proposed deposition would result in more than 10 depositions being taken or if the person to be examined already had been deposed in the case. Haw. R. Civ. P. 30(a) (2) (2012). However, "[b]y order, the court may alter the limits . . . on the number of depositions [.]" Hawaii R. Civ. P. 26(b) (2) (2012).
5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)
- Yes. Hawaii R. Civ. P. 30(b) (6) (2012) which is substantially similar to the federal rule. ("A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b) (6) does not preclude taking a deposition by any other procedure authorized in these rules." Haw. R. Civ. P. 30(b) (6) (2012)).
6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?
- Yes, as to experts expected to testify at trial. Hawaii R. Civ. P. 26(b) (5) (A) (2012) ("A party may depose any person who has been identified as an expert whose opinions may be presented at trial.") The deposing party generally pays. Hawaii R. Civ. P. 26(b) (5) (C) (2012). Additionally, "A party may, through interrogatories and/or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." Haw. R. Civ. P. 26(b)(5)(B) (2012); "Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b)(5)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses



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reasonably incurred by the latter party in obtaining facts and opinions from the expert.” Haw. R. Civ. P. 26(b) (5) (C) (2012).

### 7. What is the Expert Standard (Frye/Daubert/Hybrid)?

Hawaii common law has recognized both the *Frye* and the *Daubert* standard but has not incorporated either; the Hawaii standard cannot be accurately characterized as a hybrid of those decisions, either. Courts may, but need not, use elements of both decisions in making expert admissibility rulings. Hawaii Rules of Evidence (HRE) 702 and 703 govern the admissibility of expert testimony. HRE 702 specifies the standard for admissibility as: “If scientific, technical or other specialized knowledge will assist the Trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience or training or education may testify thereto in the form of an opinion or otherwise. In determining the issue of assistance to the Trier of fact, the court may consider the trustworthiness and validity of the scientific technique or mode of analysis employed by the proffered expert.” HRE 703 addresses the bases of expert opinion testimony and provides: “The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. The court may, however, disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.”

There is considerable common law in the state providing guidance for the application of these evidentiary rules. Some of the most important decisions include, *State v. Vliet*, 95 Haw. 94, 105, 19 P.3d 42, 53 (2001) (“[T]his court has not adopted the *Daubert* test); *Tabieros v. Clark Equip. Co.*, 85 Haw. 336, 944 P.2d 1279 (1997); *State v. Maelega*, 80 Haw. 172, 907 P.2d 758 (1995); *State v. Montalbo*, 73 Haw. 130, 828 P.2d 1274 (1992); *State v. Davis*, 53 Haw. 582, 499 P.2d 663 (1972).

The Hawaii Supreme Court has established a 2-pronged approach for the application of HRE 702 and 703: it must be relevant and reliable. *Maelaga*, 80 Haw. at 181, 907 P.2d at 767. Expert testimony is reliable only where the proffered opinions or inferences are “the product of an explicable and reliable system of analysis [.]” *Montalbo*, 73 Haw. at 138, 828 P.2d at 1280 (quoting *State v. Kim*, 64 Haw. 598, 604-05, 645 P.2d 1330, 1336 (1982)). To be relevant in assisting the Trier of fact, expert testimony must be based upon “skill, knowledge, or experience in the field in



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question." *Tabieros*, 85 Haw. at 351, 944 P.2d at 1294. However, an expert may be excluded despite considerable experience on a broad topic area if he or she has only limited experience on the narrow issues in the litigation. *City & County of Honolulu v. Market Place Ltd.*, 55 Haw. 226, 248, 517 P.2d 7, 22-23 (1973). Moreover, "[A]ssumptions ... based on mere speculation' that are foundational to an expert's opinion testimony render the latter 'inadmissible as untrustworthy,' i.e., as unreliable." *Tabieros*, 85 Haw. at 391, 944 P.2d at 1334 (internal quotations omitted). Nor is it proper for an expert to "serve as a mere conduit for [some] hearsay opinion, the factual basis of which is not established through evidence, of another expert who does not testify, when the expert who does testify lacks the requisite qualifications to render the opinion in his own right." *Davis*, 53 Haw. at 589-90, 499 P.2d at 669.

8. Are there other notable Discovery Rules?

The Hawaii Rules of Civil Procedure do not include provisions specifically addressing discovery of electronically stored information. Hawaii Rules follow the pattern of the Federal Rules prior to the December 2006 e-discovery amendment.

9. Is there mandatory mediation or arbitration?

Arbitration: The Court Annexed Arbitration Program, established under Hawaii Rev. Stat. § 601-2 (2011) is a mandatory, non-binding arbitration program for certain types of civil cases. Pursuant to Hawaii Arbitration Rule 6, matters subject to arbitration include all tort cases having a probable jury award value, not reduced by the issue of liability and not in excess of \$150,000 exclusive of interests and costs. The Arbitration Judge may accept into, or remove from, the Program any action where good cause for acceptance or removal is found.

Pursuant to Hawaii Arbitration Rules 21 and 22, the parties have 20 days after entry of a CAAP arbitration award to file a request for trial de novo. If a party files such request, the CAAP arbitration award can be entered as a final judgment of the court. Pursuant to Hawaii Arbitration Rule 25, the "prevailing party" in a trial de novo is a party who (1) appealed and improved upon the arbitration award by 30% or more or (2) did not appeal and the appealing party failed to improve upon the arbitration award by 30% or more. Hawaii Arbitration Rule 26 provides for sanctions against a non-prevailing appealing party.

Mediation: there is no provision for mandatory mediation in civil cases. However, parties must, in their respective pre-trial



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statements, identify any party who objects to alternative dispute resolution and the reasons for objecting. Haw. R. Circuit Cts. 12(b) (7) (2012). Alternative dispute resolution is also a subject of discussion at the trial setting status conference which must be attended by each party's lead counsel. Haw. R. Circuit Cts. 12(c) (2012).

**Mandatory Settlement Conference:** Pursuant to Haw. R. Circuit Cts. 12(a) (2012) a settlement conference may be ordered by the court at any time before trial and any party may also file a request for a settlement conference at any time before trial. Although the Rule appears to be permissive, most judges include a mandatory settlement conference during the period leading up to trial. In the First Circuit (Oahu), the settlement conference will be conducted by the trial judge if set for a jury trial and by the trial judge's "partner judge" if set for a non-jury trial.

10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?

Pursuant to Hawaii R. Civ. P. 16(d) (2012), "[a]ny final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances." Motions in limine may be, but are not necessarily, addressed at the Pretrial Conference. Hawaii R. Civ. P. 16(c) (11) (2012). The Pretrial Conference is one of many items scheduled at the Trial Setting Status Conference. Pursuant to Haw. R. Circuit Cts. 12(c) the Trial Setting Status Conference is to be scheduled by the Plaintiff within 60 days of filing the initial Pretrial Statement (which must be filed within 8 months after the Complaint is filed). Following the Trial Setting Status Conference, the judge usually enters a Scheduling Order, setting forth all of the dates and deadlines established at the Conference. The Pretrial Conference is generally held within several weeks of the trial and is conducted by the Trial Judge. Deadlines for filing, memoranda in opposition and hearing of in limine motions are usually discussed and set at the Trial Setting Status Conference and included in the Scheduling Order. They may be adjusted, if necessary, at the Pretrial Conference. Hearings of Motions in Limine are usually held before jury selection.

11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?

Trial submissions are at the judge's discretion and vary from Court to Court.

12. Who conducts voir dire (Court/Counsel)? Describe the process.

Jury selection is governed by Hawaii R. Civ. P. 47 (2012). Under Rule 47(a), each party may, at the court's discretion, present a "mini-opening statement" to the jury panel. The mini-opening statement is limited to a brief statement of the facts expected to be



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proven prior to the commencement of jury selection. The court shall permit the parties or their attorneys to conduct the examination of each prospective juror. The court may conduct such examination, but in such instance, the court shall permit the parties or the attorneys to supplement the examination by further inquiry.

These are general parameters only and the implementation and execution of these parameters are within the discretion of the Court. Therefore, jury selection varies by judge and type of case. In complex or high profile cases, a jury questionnaire may be sent to prospective jurors in advance, to screen for certain disqualifying factors. Hawaii R. R. Civ. P. is very clear that the parties or their attorneys shall be permitted to conduct the examination of each prospective juror. Often the court will conduct some preliminary voir dire to cover general items. Counsel for each party then have an opportunity to supplement the court's examination with further inquiry.

13. How many jurors are there? How many alternates? How many peremptory challenges?

Number of Jurors: Civil juries are comprised of 12 people and it shall be sufficient for the return of a verdict if at least five-sixths of the jurors agree on the verdict. Hawaii Rev. Stat. §§ 635-20 and 635-26 (2012). Pursuant to Hawaii R. Civ. P. Rule 48 (2012), the parties may stipulate that the jury shall consist of any number less than 12 or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

Number of Alternates: Hawaii R. Civ. P. Rule 47(b) (2012) provides that the court may direct that not more than six jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. In practice, the number of alternate jurors is usually determined through discussions of the court and counsel, taking into consideration factors such as the complexity of the case and the expected length of trial.

Peremptory Challenges: By statute, in civil cases each party is allowed to challenge peremptorily three jurors, without assigning any reason. Hawaii Rev. Stat. § 635-29 (2012). The statute gives the court the discretion to treat two or more plaintiffs or defendants as a single party, or the court may allow additional peremptory challenges. In practice, the number and manner of exercising peremptory challenges are matters for discussion at the Pretrial Conference.



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14. Identify any “unusual” trial procedures.      None.
15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?
- In the First Circuit Court (Oahu), where there are a number of judges on the civil bench, some judges are designated to handle certain calendars, such as probate or tax matters. Other judges specialize on a more informal basis in areas that have a high volume of very similar cases, such as asbestos and, more recently, foreclosures. Complex litigation falls into the latter category. There is usually a single judge or a small number of judges at any given time to which all such cases are referred.
- The process for designating a case as Complex Litigation is set forth in Haw. R. Circuit Cts. Rule 12 (k) (2012). Pursuant to this Rule, Complex Litigation matters where a jury will decide all issues are assigned to a single judge to handle until conclusion. Non-jury Complex Litigation matters will be assigned to a trial judge for handling until trial, but may be reassigned to a separate judge for the actual trial. The judge assigned to a complex case is in charge of all aspects of case management, including the determination of deadlines that the Rules prescribe for non-complex cases.
16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?
- No. Hawaii does not have a statute that protects distributors from consumer claims simply by identifying the manufacturer of a product.
17. Is there a provision for Prejudgment interest?
- Yes, Haw. Rev. Stat. § 636-16 (2012) confers upon courts significant discretion to award prejudgment interest (“[i]n awarding interest in civil cases, the judge is authorized to designate the commencement date to conform with the circumstances of each case, provided that the earliest commencement date in cases arising by breach of contract, it may be the date when the injury first occurred and in cases arising by breach of contract, it may be the date when the breach first occurred.” The judge is authorized to designate the commencement date to conform with the circumstances of each case, provided that the earliest commencement date in tort cases is the date when the injury first occurred and in contract cases, when the breach first occurred. Prejudgment interest may be awarded for any substantial delay in the proceedings and no purposeful delay on the part of the non-moving party is required. *Ditto v. McCurdy*, 86 Hawaii 93, 113-14, 947 P.2d 961, 981-82 (Haw. Ct. App. 1997); *County of Hawaii v. C&J Coupe Family, Ltd. P’ship*, 124 Haw. 281, 311, 242 P.3d 1136, 1166 (Haw. 2010) (Haw. Rev. Stat. § 636-16, “which applies



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in all civil cases, vests a court with discretion to award prejudgment interest."). Under Haw. Rev. Stat. §478-2 (2012), "[w]hen there is no express written contract fixing a different rate of interest, interest shall be allowed at the rate of ten percent a year[.]" (There are special provisions that apply to obligations of the State.) Prejudgment interest may be denied where the defendant's conduct did not cause any delay in the proceedings, the plaintiff caused or contributed to the delay or an extraordinary damage award has already compensated the plaintiff. *Roxas v. Marcos*, 89 Haw. 91, 153, 969 P.2d 1209, 1271, *recon. denied*, 1999 Hawaii LEXIS 95 (Haw. Jan. 28 1999). Prejudgment interest may not be awarded on punitive damages. *Ditto*, 86 Haw. at 114, 947 P.2d at 982.

18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

Although slowed by budget constraints, Hawaii courts are increasingly taking advantage of electronic communication opportunities. Evaluations of judges are handled electronically and are encouraged via e mails from court administration to attorneys. Hawaii now employs e filing at the appellate level.

19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

There may be anecdotal reports of cases in which the playing field is not perceived to be level; however, there do not appear to be any systemic problems.

20. Are there legislative efforts under way that address any of the litigation practices in your state?

Legislation is introduced from time to time; however, no significant legislation is believed to be pending at the present time.



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### Question

### Idaho

1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?

No. However, some trial court judges impose mandatory disclosures of documents prior to initiation of discovery, by scheduling order. Some trial court judges impose mandatory disclosure requirements concerning witnesses and experts, again by pretrial scheduling order.

2. Are there Standard Form Interrogatories/Document Requests?

No.

3. Are there limits on the number of Interrogatories/Document Requests?

Interrogatories are limited to 40 in number, including all subparts. There are no other limits. “No party shall serve upon any other single party to an action more than forty (40) interrogatories, in which sub-parts of interrogatories shall count as separate interrogatories, without first obtaining a stipulation of such party to additional interrogatories or obtaining an order of the court upon a showing of good cause granting leave to serve a specific number of additional interrogatories.” Idaho R. Civ. P. 33(a) (3) (2011).

4. Are there time limits on depositions, or limits on the number of depositions?

Not by rule. The trial courts may impose limits as part of the scheduling order if requested.

5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)

Yes. The state rule mirrors F.R.C.P. 30(b) (6). (“A party may in the party’s notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b) (6) of this rule does not preclude taking a deposition by any other procedure authorized in these rules.” Idaho R. Civ. P. 30(b) (6) (2011)).

6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?

Yes. Unless the parties agree how costs are to be split, the court may order expert deposition expenses to be incurred by the parties as determined in the court’s discretion. (“Unless manifest injustice would result, (i) the court shall require that the party seeking



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discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and, in the event discovery is obtained by deposition under (b)(4)(A)(i) of this rule, the party seeking discovery shall pay the expert a reasonable fee for the time spent testifying at said deposition; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.” Idaho R. Civ. P. 26(b) (4) (C) (2011)).

7. What is the Expert Standard (Frye/Daubert/Hybrid)?

The Idaho Supreme Court has not has not adopted *Daubert*, although it has used some of Daubert's standards in assessing whether the basis of an expert's opinion is scientifically valid. The trial courts generally impose the *Daubert* standard.

“Expert opinion which is speculative, conclusory, or unsubstantiated by facts in the record is of no assistance to the jury in rendering its verdict and, therefore, is inadmissible as evidence. *Bromley*, 132 Idaho at 811, 979 P.2d at 1169. The Court has not adopted the *Daubert* standard for admissibility of an expert's testimony but has used some of *Daubert's* standards in assessing whether the basis of an expert's opinion is scientifically valid. See *Swallow v. Emergency Med. of Idaho*, 138 Idaho 589, 595 n.1, 67 P.3d 68, 74 (2003) (“this Court has not adopted the *Daubert* test for admissibility”). The *Daubert* standards of whether the theory can be tested and whether it has been subjected to peer-review and publication have been applied, but the Court has not adopted the standard that a theory must be commonly agreed upon or generally accepted. Compare *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593-95, 113 S. Ct. 2786, 2796-97 (1993) with *Merwin*, 131 Idaho at 646, 962 P.2d at 1030.” *Weeks v. East Idaho Health Servs.*, 153 P.3d 1180, 1184, 143 Idaho 834, 838 (Idaho 2007)).

8. Are there other notable Discovery Rules?

No.

9. Is there mandatory mediation or arbitration?

No.



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10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?

A Pretrial Conference is typically held within 3 weeks of trial and conducted by the trial judge. Motions in limine may be addressed at the pretrial or separately.

11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?

Trial submissions (trial briefs) and jury instructions, witness and exhibit lists are generally due no later than seven days before trial, or earlier if imposed by court order.

12. Who conducts voir dire (Court/Counsel)? Describe the process.

Generally the trial court asks preliminary questions. Counsel is then allowed 1 hour for voir dire of the panel, including a mini-opening statement at the beginning of each party's voir dire.

13. How many jurors are there? How many alternates? How many peremptory challenges?

There are 12 jurors: Alternates are generally selected. It is becoming more common, for example, if a jury plus 2 alternates is to be selected, the court will sit 14 jurors and draw by lot to determine who will be the alternate at the close of the case. Each civil litigant is allowed 4 peremptory challenges.

“In civil actions the jury may consist of twelve or of any number less than twelve upon which the parties may agree in open court. Provided, that in cases of misdemeanor and in civil actions within the jurisdiction of any court inferior to the district court, whether such case or action be tried in such inferior court or in district court, the jury shall consist of not more than six.” Idaho Const. Art. 1, § 7 (2011).

“A trial jury consists of twelve (12) men or women or both: provided, that in civil actions the jury may consist of any number less than twelve (12) upon which the parties may agree in open court: and provided, further, that in cases of misdemeanor and in civil actions involving not more than five hundred dollars (\$ 500), exclusive of costs, the jury shall consist of not more than six (6).” Idaho Code Ann. § 2-105 (2011).

“A court may direct that one or more jurors in addition to the regular panel be called and impaneled to sit as jurors. All jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges prior to deliberations. If one or two additional jurors are called, each party is entitled to one (1) peremptory challenges in addition to those otherwise allowed by law. If more than two (2) additional jurors are called, each party shall be entitled to two (2) peremptory challenges in



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addition to those otherwise provided by law. At the conclusion of closing arguments, jurors exceeding the number required of a regular panel shall be removed by lot. Those removed by lot may be discharged after the jury retires to consider its verdict, unless the court otherwise directs as indicated below.” Idaho R. Civ. P. 47(1) (1) (2011).

“If the court determines that those jurors removed by lot must be available to replace any jurors who may be excused during deliberations due to death, illness or otherwise as determined by the court, the bailiff, sheriff or other person appointed by the court shall take custody of said jurors until discharged by the court. In the event a deliberating juror is removed, the court shall order the juror discharged and draw the name of an alternate juror who shall then take the discharged juror's place in the deliberations. The court shall instruct the panel to set aside and disregard all past deliberations and begin anew with the new juror as a member of the panel.” Idaho R. Civ. P. 47(1) (2) (2011).

“After all challenges for cause have been ruled upon by the court, each party shall have four (4) peremptory challenges which shall be exercised in accordance with this rule. In the event there are co parties as plaintiffs, defendants or otherwise, the court shall determine the degree of conflict of interest, if any, between or among the co parties and shall in its discretion allocate the full number of peremptory challenges authorized by this rule to each of the co parties, or apportion the authorized peremptory challenges between and among the co parties, or in its discretion allocate an equal or unequal number of peremptory challenges to each of the co parties.” Idaho R. Civ. P. 47(j) (2011).

14. Identify any “unusual” trial procedures. None.

15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions? No.

16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?

Idaho’s product liability act does provide some immunity to a distributor other than the manufacturer, unless the distributor knows or has reason to know of a defect. A distributor may be entitled to indemnity against the manufacturer.



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17. Is there a provision for Prejudgment interest?

Yes, for liquidated damages. Plaintiff may recover pretrial interest on an offer of settlement, if rejected, and the verdict exceeds the offer.

“If the adverse party, at any time after service of such offer of settlement and prior to its revocation, serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance, together with proof of service thereof, and thereupon judgment shall be entered for the amount of the offer. In the event that an offer of settlement is revoked by a claimant or not accepted, evidence of the offer is not admissible except in a proceeding to determine costs or to award interest pursuant to this section.” Idaho Code Ann. § 12-301(b) (2011).

“If such offer of settlement is not accepted prior to trial pursuant to subsection (b) above, and the action reaches a final judgment by the court after trial, the court shall inquire as to whether any prevailing claimant made an offer of settlement, pursuant to subsection (a) of this section, which an adverse party failed to accept. If the court finds that such claimant has recovered an amount equal to or greater than his offer of settlement, the court shall add to the judgment, annual interest on the amount contained in such offer, computed from the date that the offer of settlement was served and shall enter judgment accordingly. For purposes of such computation, the last offer of settlement which was equal to or less than the damages awarded such claimant, together with the costs and attorney fees, if any, awarded to him shall be used. A subsequent offer made pursuant to subsection (a) revokes any previous offer.” Idaho Code Ann. § 12-301(c) (2011).

“For purposes of this section, "annual interest" shall mean the rate specified in section 28-22-104(2), Idaho Code.” Idaho Code Ann. § 12-301(d) (2011).

18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

None.

19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

The Idaho Supreme Court has adopted a change to Rule 35(a), Idaho Rules of Civil Procedure, allowing a representative of a party to be present during a physical or mental examination of that party at the request of an adverse party. The rule change has resulted in numerous physicians refusing to conduct independent



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medical examinations.

20. Are there legislative efforts under way that address any of the litigation practices in your state?

No, as of 2012.



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### Question

### Illinois

1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?

No. Not in law division filings (cases where the ad damnum is greater than \$50,000).

2. Are there Standard Form Interrogatories/Document Requests?

Yes, in certain cases, including motor vehicle, matrimonial, and medical malpractice cases. “The Supreme Court, by administrative order, may approve standard forms of interrogatories for different classes of cases.” Ill. Sup. Ct. R. 213(j) (2012).

3. Are there limits on the number of Interrogatories/Document Requests?

Yes. Generally, a party may not serve more than 30 interrogatories, including subparts, without leave of court or agreement of the parties. There are no limits on document requests. (“...A party shall not serve more than 30 interrogatories, including sub-parts, on any other party except upon agreement of the parties or leave of court granted upon a showing of good cause. A motion for leave of court to serve more than 30 interrogatories must be in writing and shall set forth the proposed interrogatories and the reasons establishing good cause for their use.” Ill. Sup. Ct. R. 213(c) (2012)). As a practical matter, most judges grant motions seeking to propound more than 30 interrogatories in complex cases.

4. Are there time limits on depositions, or limits on the number of depositions?

There is no limit on the number of depositions. Discovery depositions are limited to 3 hours, but you can petition the court or agree to a different time limit. (“No discovery deposition of any party or witness shall exceed three hours regardless of the number of parties involved in the case, except by stipulation of all parties or by order upon showing that good cause warrants a lengthier examination.” Ill. Sup. Ct. R. 206(d) (2012)).

5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)

Yes. “A party may in the notice and in a subpoena, if required, name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons to testify on its behalf, and may set forth, for each person designated, the matters on which that person will testify. The subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization.” Ill. Sup. Ct. R. 206(a) (1) (2012).



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6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?
- Yes. (“... [E]xpert witnesses may be deposed, but only if they have been identified as witnesses who will testify at trial... The party at whose instance the deposition is taken shall pay a reasonable fee to the deponent, unless the deponent was retained by a party to testify at trial or unless otherwise ordered by the court.” Ill. Sup. Ct. R. 222(f) (2) (b) (2012)). In Illinois the retaining party generally pays their expert’s fees when the expert is deposed by opposing counsel.
7. What is the Expert Standard (Frye/Daubert/Hybrid)?
- The *Frye* test is used.
- “In Illinois, scientific evidence is admissible at trial only if it meets the standard expressed in *Frye*, which dictates that “scientific evidence is admissible at trial only if the methodology or scientific principle upon which the opinion is based is ‘sufficiently established to have gained general acceptance in the particular field in which it belongs.’” *People v. McKown*, 875 N.E.2d 1029, 1034, 226 Ill. 2d 245, 254, quoting *In re Commitment of Simons*, 213 Ill. 2d 523, 529-30, 821 N.E.2d 1184, 290 Ill. Dec. 610 (2004), quoting *Frye*, 293 F. 1013, 1014 (D.C. Cir. 1923).
8. Are there other notable Discovery Rules?
- Illinois has a “Respondent in Discovery” designation which allows plaintiff to name an individual as a respondent and obtain a deposition within 6 months of filing. Plaintiff may convert the individual to a defendant within 6 months of designation as a respondent. This is a trap for the unwary as your client may be deposed before everyone is in the case or before the deposition of the plaintiff is taken.
9. Is there mandatory mediation or arbitration?
- There is mandatory arbitration only for cases valued less than \$50,000.
10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?
- Pretrial conferences in Cook County, Chicago, IL are normally settlement conferences. Unless a case is specially set, the parties do not know the identity of the trial judge until the morning of trial so no motions are heard at a pretrial conference. There is no rule about the timing of a Pre-Trial Conference. In counties other than Cook County, the judge that presides over discovery and motion practice will likely preside over the trial as well. Motions in limine are generally addressed immediately prior to trial.



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11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?

It varies by judge and so, is discretionary. In personal injury cases there are generally no trial submissions (excluding motions in limine).

12. Who conducts voir dire (Court/Counsel)? Describe the process.

The court asks initial questions to qualify potential jurors. Most Illinois state court judges allow counsel broad discretion in supplemental questioning, but the discretion differs from county to county, and between judges within each county.

13. How many jurors are there? How many alternates? How many peremptory challenges?

There are usually 12 jurors and 2 alternates. Five peremptory challenges are allowed per side for one plaintiff-one defendant cases.

“It shall be the duty of the clerk of the court at the commencement of each week at which any cause is to be tried by a jury to write the name of each petit juror summoned and retained for that week on a separate ticket, and put the whole into a box or other place for safekeeping; and as often as it shall be necessary to impanel a jury, the clerk, sheriff or coroner shall, in the presence of the court, draw by chance 12 names (or 14 where alternate jurors are required) out of such box or other place, which shall designate the persons to be sworn on the jury, and in the same manner for the second jury, in their turn, as the court may order and direct.” 705 Ill. Comp. Stat. Ann. 305/20(a) (LexisNexis 2012). Names of jurors may also be drawn randomly by a computer. 705 Ill. Comp. Stat. Ann. 305/20(b).

“Each side shall be entitled to 5 peremptory challenges. If there is more than one party on any side, the court may allow each side additional peremptory challenges, not to exceed 3, on account of each additional party on the side having the greatest number of parties. Each side shall be allowed an equal number of peremptory challenges. If the parties on a side are unable to agree upon the allocation of peremptory challenges among themselves, the allocation shall be determined by the court.” 735 Ill. Comp. Stat. Ann. 5/2-1106(a) (LexisNexis 2012).

“The court may direct that 1 or 2 jurors in addition to the regular panel be impaneled to serve as alternate jurors. Alternate jurors, in the sequence in which they are ordered into the jury box, shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable to perform their duties. Alternate jurors shall be drawn in the same manner, have the same qualifications, be subject to the same examination and challenges, take the same



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oath, and have the same functions, powers, facilities, and privileges as the principal jurors. An alternate juror who does not replace a principal juror shall be discharged at the time the jury retires to consider its verdict. If alternate jurors are called each side shall be allowed one additional peremptory challenge, regardless of the number of alternate jurors called. The additional peremptory challenge may be used only against an alternate juror, but any unexercised peremptory challenges may be used against an alternate juror.” 735 Ill. Comp. Stat. Ann. 5/2-1106(b) (LexisNexis 2012).

14. Identify any “unusual” trial procedures.

None.

15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?

Law division cases (greater than \$50,000) are placed on either an 18 month or a 28 month discovery track in Cook County. Normally attorneys seek and are granted more time for discovery. There are individual asbestos dockets in Cook County and Madison County, Illinois.

16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?

Yes. A distributor can file an affidavit certifying the correct identity of the manufacturer of the product. The distributor can then have strict products liability counts against it dismissed, if the identified manufacturer is solvent, if the court has jurisdiction over the manufacturer, and if the statute of limitations or statute of repose does not bar an action against the manufacturer. However, if the distributor knew of, or contributed to, the defect then it cannot get a dismissal. See 735 ILCS 5/2-621 (LexisNexis 2012).

17. Is there a provision for Prejudgment interest?

Not unless the amount in controversy is specifically calculable. Most tort cases rely upon a jury to determine damages. In such cases, no prejudgment interest is awarded.

18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

None.

19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

Joint and several liability apply.



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20. Are there legislative efforts under way that address any of the litigation practices in your state?      No, not as of 2012. Damage caps found unconstitutional (2010) and tort reform found unconstitutional (1997).



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Question	Indiana
1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?	No.
2. Are there Standard Form Interrogatories/Document Requests?	No.
3. Are there limits on the number of Interrogatories/Document Requests?	<p>No limits are imposed by the Indiana Rules of Trial Procedure:</p> <p>Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is an organization including a governmental organization, or a partnership, by any officer or agent, who shall furnish such information as is available to the party.</p> <p>Ind. R. Trial P. 33(A) (2012).</p> <p>However, some counties have their own local rules that may limit the number of Interrogatories/Document Requests. For example, Marion County (Indianapolis) has a limit of 25 Interrogatories, including subparts. LR49-TR33 Rule 213 (2012).</p>
4. Are there time limits on depositions, or limits on the number of depositions?	No.
5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)	<p>Yes, Ind. R. Trial P. 30(B) (6) (2012), is very similar to F.R.C.P. 30(b) (6). It provides:</p> <p>A party may in his notice name as the deponent an organization, including without limitation a governmental organization, or a partnership and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, executive officers, or other persons duly authorized and consenting to testify on its behalf. The persons so designated shall testify as to matters known or available to the organization. This subdivision (b) (6) does not preclude taking a deposition by any other procedure authorized in these rules.</p> <p>Ind. R. Trial P. 30(B) (6).</p>



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6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?
- Yes. Pursuant to Ind. R. Trial P. 26(B) (4) (a) (ii) (2012), this is to be permitted only upon motion. However, in practice, this is considered a matter of right and agreement is almost always reached without resorting to the Court. The party taking the expert's deposition is required to pay the expert a reasonable fee for time spent in responding to discovery. *Id.* at 26(B) (4) (c).
7. What is the Expert Standard (Frye/Daubert/Hybrid)?
- The standard for the admissibility of expert testimony is very similar, but not identical to *Daubert*. The standard is set forth in Indiana Rule of Evidence 702 and 703. In *Kubsch v. State*, the court explained:
- When determining whether scientific evidence is admissible under 702(b), we consider the factors discussed in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993). In that case the Supreme Court held that for scientific knowledge to be admissible under Federal Evidence Rule 702, the trial court judge must determine that the evidence is based on, among other things, scientifically valid methodology. *Id.* at 592-93. To assist trial courts in making this determination, the Court outlined a non-exclusive list of factors that may be considered: whether the theory or technique can be and has been tested, whether the theory has been subjected to peer review and publication, whether there is a known or potential error rate, and whether the theory has been generally accepted within the relevant field of study. *Id.* at 593-94, 113 S.Ct. 2786.
- This court has held that the concerns driving *Daubert* coincide with the express requirement of Indiana Rule of Evidence 702(b) that the trial court be satisfied of the reliability of the scientific principles involved. *Steward v. State*, 652 N.E.2d 490, 498 (Ind. 1995). Thus, although not binding upon the determination of the state evidentiary law issues, the federal evidence law of *Daubert* and its progeny is helpful to the bench and bar in applying Indiana Rule of Evidence 702(b).
- 784 N.E.2d 905, 921(Ind. 2003).
8. Are there other notable Discovery Rules?
- No.
9. Is there mandatory mediation or arbitration?
- Not by rule; however, Indiana does have Indiana Rules of Alternative Dispute Resolution. *See* IN ST ADR Rule 1.1 et seq. (2012). Also, Indiana trial judges will often require a matter to be



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- mediated before a trial will be allowed to proceed.
10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial? By rule, the Pretrial Conference is not typically conducted until after there has been a reasonable opportunity to complete discovery. Ind. R. Trial P. 16(B) (2012). In practice, many courts conduct a Pretrial Conference early in the case to work out a discovery schedule that results in a Scheduling Order. The trial judge conducts most Pretrial Conferences. Motions in Limine are usually addressed at the Final Pretrial Conference.
11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge? It varies by judge and court.
12. Who conducts voir dire (Court/Counsel)? Describe the process. A combination method is used. See Ind. R. Trial P. 47(D) (2012). The judge usually begins with some general questions for the entire panel and then turns it over to the attorney for inquiry. Voir dire is typically limited to a half day.
13. How many jurors are there? How many alternates? How many peremptory challenges? Civil trials have juries of 6 members, plus no more than 3 alternates. Ind. R. Trial P. 47(A), (B) (2012). Each side is allowed three (3) peremptory challenges, with additional peremptory challenges that depend on the number of alternate jurors seated. *Id.* at 47(C).
14. Identify any "unusual" trial procedures. None.
15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions? Marion County (Indianapolis) has Marion County Circuit Mass Tort Litigation Rules. IN ST MARION MASS Rule 600 et seq. (2012).
16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)? Yes. Pursuant to Ind. Code § 34-20-2-3 (2012), a product liability action based on the doctrine of strict liability in tort (manufacturing defects only) may not be maintained against anyone but the manufacturer of the product or a part of the product. If the court is unable to hold jurisdiction over the manufacturer, then the principal distributor or seller will be deemed the manufacturer. *Id.* at § 34-20-2-4.



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17. Is there a provision for Prejudgment interest?

Yes. Ind. Code § 34-51-4 et seq. (2012), permits prejudgment interest in civil tort actions at a simple interest rate of 6% –10% for a period of not more than 48 months, both being set within the court’s discretion. *Id.* at § 34-51-4-8, 9. Ind. Code § 34-51-4-8, also sets out that:

Prejudgment interest begins to accrue on the latest of the following dates:

- (1) Fifteen (15) months after the cause of action accrued.
- (2) Six (6) months after the claim is filed in the court if Ind. Code § 34-18-8 and Ind. Code § 34-18-9 do not apply.
- (3) One hundred eighty (180) days after a medical review panel is formed to review the claim under Ind. Code § 34-18-10 (or Ind. Code § 27-12-10 before its repeal).

(b) The court shall exclude from the period in which prejudgment interest accrues any period of delay that the court determines is caused by the party petitioning for prejudgment interest.

Additionally, interest cannot be assessed against the State or on any amount of punitive damages. *Id.* at § 34-51-4-3, 4. Interest is also not assessed on certain timely offers to settle, as well as when the claimant fails to make a settlement offer. *Id.* at § 34-51-4-5, 6.

18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

Indiana has adopted a set of jury rules. *See* IN ST JURY Rule 1 et seq. (2012). These rules address all aspects of a juror's experience, and among other things, permit jurors to take notes, to pose written questions to witnesses, and to discuss the evidence among themselves during recesses in the trial.

In 2010, the Indiana Judges Association released a new “plain English” 2010 Edition of Indiana Model Jury Instructions (Civil). Like previous versions, these instructions address a broad range of tort claims. Rule 51(E) of the Indiana Trial Rules, “Indiana Pattern Jury Instructions (Criminal)/Indiana Model Jury Instructions (Civil),” as amended effective Jan. 1, 2011, provides that:

Any party requesting a trial court to give any instruction from the Indiana Pattern Jury Instructions (Criminal)/Indiana Model Jury Instructions (Civil), prepared under the sponsorship of the Indiana



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Judges Association, may make such request in writing without copying the instruction verbatim, by merely designating the number thereof in the publication.

Ind. R. Trial P. 51(E) (2012).

19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

No.

20. Are there legislative efforts under way that address any of the litigation practices in your state?

No, not as of 2012.



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Question	Iowa
1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?	No.
2. Are there Standard Form Interrogatories/Document Requests?	No.
3. Are there limits on the number of Interrogatories/Document Requests?	Yes. Interrogatories are limited to 30. There is no limit on the number of document requests. (“A Party shall not serve more than 30 interrogatories on any other party except upon agreement of the parties or leave of court granted upon a showing of good cause. A motion for leave of court to serve more than 30 interrogatories must be in writing and shall set forth the proposed interrogatories and the reasons establishing good cause for their use.” Iowa R. Civ. P. 1.509(1) (2011)). Actual practice with respect to this limitation varies from county to county and/or district to district.
4. Are there time limits on depositions, or limits on the number of depositions?	No.
5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)	No. However, the Rules of Civil Procedure authorize a party to require that the deposition of an officer/partner/managing agent of an adverse party that is not a natural person take place in the county where the action is pending. (“Service on the party or the party’s attorney of record of notice of the taking of the deposition of the party or of an officer, partner, or managing agent of any party, who is not a natural person, as provided in rule 1.707(1), is sufficient to require the appearance of a deponent for the deposition.” Iowa. R. Civ. P. 1.707(4) (2011)). It is not clear whether this extends to more than one witness per entity.
6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?	A party can depose, on notice and without court order, any person identified as a testifying expert. Iowa R. Civ. P. 1.508(1) (b) (1). The person taking the deposition pays a fee – “not to exceed the expert’s customary hourly or daily fee” - for the time spent at the deposition and for traveling to and from it, but not for preparation time. Iowa R. Civ. P. 1.508(6).
7. What is the Expert Standard (Frye/Daubert/Hybrid)?	At present the standard is a hybrid. The broad test for admissibility of expert testimony has two preliminary areas of judicial inquiry that must be considered before admitting expert testimony: (1) court must first determine if the



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testimony will assist the trier of fact in understanding the evidence or to determine a fact in issue, including whether there is reliable body of scientific, technical, or other specialized knowledge that is relevant in assisting trier of fact, and (2) determine if witness is qualified to testify. I.C.A. Rule 5.702.

In assessing the reliability of scientific evidence under the first area of preliminary inquiry, Iowa courts utilize an ad hoc approach to decide if the scientific area of expertise produces results that are reliable enough to assist the Trier of fact. *State v. Hall*, 297 N.W.2d 80, 85 (Iowa 1980) (rejecting *Frye* test of general scientific acceptance). When the scientific evidence is particularly novel or complex, Iowa courts are to follow *Daubert*. “We emphasize that the ad hoc *Hall* test remains our general approach to evaluating reliability, but the rapid advancements in science and medicine have presented particularly unique challenges for courts seeking to ensure the integrity of scientific evidence used by juries. This judicial role has become increasingly difficult and complex, yet important, as the access to and availability of sources of information and opinions continue to expand. Thus, we encourage a more expansive judicial gate keeping function in difficult scientific cases. At the same time, it follows that application of *Daubert* considerations is not appropriate in cases involving “technical [] or other specialized knowledge” because such nonscientific evidence is not as complex. *Johnson v. Knoxville Community School District*, 570 N.W.2d 633, 639 (Iowa 1997). The Iowa Supreme Court has not mandated the application of *Daubert* to cases involving nonscientific opinion evidence, “that do not involve technical or other specialized knowledge because such nonscientific evidence is not as complex. For example, we have previously noted the inapplicability of *Daubert* to “general medical issues.” *Johnson*, 570 N.W.2d at 638 (quoting *Thornton v. Caterpillar, Inc.*, 951 F. Supp. 575, 578 (D.S.C. 1997)). In *Ranes v. Adams Labs., Inc.*, 778 N.W.2d 677, 685-6 (Iowa 2010), the Court excluded medical opinion testimony when there was not an accepted methodology for determining either general or specific causation in a pharma case.

8. Are there other notable Discovery Rules?

The deposition of an expert is usable at trial by any party without any showing that the expert is unavailable. Iowa R. Civ. P. 1.704(4).



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9. Is there mandatory mediation or arbitration? No.
10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial? Pretrial Conferences are held about 10 days before trial. They are not necessarily conducted by the trial judge. Motions in Limine may or may not be addressed at the Pretrial Conference. Actual practice varies from district to district.
11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge? It varies from district to district. None are as demanding as federal court.
12. Who conducts voir dire (Court/Counsel)? Describe the process. The Court handles about 10% while counsel handles about 90% of the voir dire. Most judges permit voir dire that "argues" the case but the trend is in the other direction.
13. How many jurors are there? How many alternates? How many peremptory challenges? There are 8 jurors, with no alternates except by agreement in a lengthy case. Four peremptory strikes are allowed per side. Multiple defendants are handled on a case-by-case basis.
- "At each jury trial a person designated by the court shall select 16 jurors by drawing their names from a box without seeing the names. All jurors so drawn shall be listed. Computer selection processes may be used instead of separate ballots to select jury panels. Before drawing begins, either party may require that the names of all jurors be called, and have an attachment for those absent who are not engaged in other trials; but the court may wait for its return or not, in its discretion." Iowa R. Civ. P. 1.915(1) (2001).
- "Each side must strike four jurors. Where there are two or more parties represented by different counsel, the court in its discretion may authorize and fix an additional number of jurors to be impaneled and strikes to be exercised. After all challenges are completed; plaintiff and defendant shall alternately exercise their strikes." Iowa R. Civ. P. 1.915(7) (2001).
- The U.S. District Courts have between 6 and 12 jurors, with no alternates. Even if some jurors are discharged during the trial, if at least 6 remain, then the case will be submitted for a verdict.



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- “Civil juries will be composed of at least 6 and no more than 12 jurors, in the discretion of the presiding judge. If any jurors are discharged during the trial, the case will be tried and submitted to all of the remaining jurors, so long as at least 6 jurors remain. There will be no alternate jurors.” N. & S.D. Iowa Civ. L.R. 48(a) (2011).
14. Identify any “unusual” trial procedures. None.
15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions? No.
16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)? “Distributors” have immunity if they did not participate in design, manufacture, labeling, or assembly, and if the manufacturer is subject to the court’s jurisdiction and has assets. Iowa Code § 613.18 (2011)
17. Is there a provision for prejudgment interest? Yes. “Interest, except interest awarded for future damages, shall accrue from the date of the commencement of the action.” Iowa Code § 668.13(1) (2011).
18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.) None.
19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed? In the typical third-party action by an employee injured under circumstances that generated payment of workers’ compensation benefits, the third-party defendant (e.g., a products defendant or another construction entity at the construction site) cannot assert a claim against the employer for contribution and cannot get the employer listed on the fault allocation verdict form. The third-party defendant can argue that the employer was at fault, but the jury has no way to allocate the fault other than to the plaintiff or the third-party defendant.
20. Are there legislative efforts under way that address any of the litigation practices in your state? No pending legislation as of the end of 2012. The Iowa Supreme Court has charged a committee, however, with the task of revising the civil procedure rules to make civil litigation less expensive and less time-consuming from beginning to end. The Court also has charged the committee



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with creating rules for an elective “fast track” for civil cases.  
The committee expects to report recommended rule changes in 2013.



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Question	Kansas
1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?	No.
2. Are there Standard Form Interrogatories/Document Requests?	While the Kansas Rules of Civil Procedure do not contain provisions regarding standard form interrogatories/document requests, many of the judicial districts in Kansas require standard form interrogatories/document requests by local rule. For example, Local Rule 11 of the Tenth Judicial District [Johnson County, KS], requires that parties propound approved standard opening interrogatories in automobile negligence cases. District Court Rule 3.201(2) requires that a party, without the receipt of formal discovery requests, provide to other parties answers to standard interrogatories and responses to standard requests for production of documents in all civil cases. Practitioners are advised to consult the local rules of the judicial district in which his or her case is pending. Links to local rules for the various judicial districts can be found at <a href="http://www.kscourts.org">http://www.kscourts.org</a> or on electronic legal research databases.
3. Are there limits on the number of Interrogatories/Document Requests?	Yes. The Kansas District Court Rule 135(b) (2011) provides that in all damage actions the number of interrogatories shall be limited to thirty (30) interrogatories counting subparagraphs unless the court authorizes additional interrogatories upon motion or at the case management or other conference. There are no limits regarding the number of requests for production that may be served. In addition to consulting the Kansas Supreme Court Rules Relating to District Courts, practitioners are advised to consult the local rules of the judicial district in which the action is pending to ensure compliance with the local rules regarding the format and limitations of discovery.



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4. Are there time limits on depositions, or limits on the number of depositions?

While the Kansas Rules of Civil Procedure and the Kansas Rules Relating to District Courts do not contain any provisions regarding time limits on depositions or limits on the number of depositions, the local rules of various judicial districts may contain provisions regarding time limits on depositions and limits on the number of depositions. For example, District Court Rule 3.201(6) of the Third Judicial District [Shawnee County, KS] provides that the parties are limited to the taking of 4 depositions per party and that the deposition of a non-party witness shall not exceed 2 hours in length, and the deposition of a party or an expert witness shall not exceed 4 hours in length.

5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)

Yes. Kansas Stat. Ann. § 60-230(6) (2012) provides that a party may in the notice and in a subpoena name as the deponent a public or private corporation or a partnership, association or governmental agency or other entity and designate with reasonable particularity the matters on which examination is requested. The named organization shall designate one or more officers, directors, managing agents or other persons who consent to testify on its behalf and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The designated persons shall testify about information known or reasonably available to the organization. Note that Kansas Stat. Ann. § 60-245 governs the issuance of subpoenas and Kansas Stat. Ann. § 60-245(a) (1) (c) (2012) governs subpoenas of records of a business not a party. (“In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which the person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This subsection does not preclude a deposition by any other procedure allowed by the rules of civil procedure.” Kan. Stat. Ann. § 60-230(6) (2012)).

6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?

Yes. Kansas Stat. Ann. § 60-226(b) (5) (2012) provides that a party may depose any person who has been identified as an expert whose opinions may be presented at trial. The deposition of an opposing expert shall not be conducted until after the expert disclosure is made pursuant to Kansas Stat. Ann. § 60-226(b) (6)



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(2012). If a disclosure is required under subsection (b) (6), the deposition may be conducted only after the disclosure is provided. The party seeking the deposition shall pay the expert's reasonable fee for time spent in the deposition.

“A party may depose any person who has been identified as an expert whose opinions may be presented at trial.” Kan. Stat. Ann. § 60-226(5) (A) (2012). “Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only: (i) As provided in subsection (b) of K.S.A. 60-235, and amendments thereto; or (ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.” Kan. Stat. Ann. § 60-226(5) (B) (2012).

“Unless manifest injustice would result, the court must require that the party seeking discovery: (i) Pay the expert a reasonable fee for time spent in responding to discovery under subsection (b) (5) (A) or (b) (5) (B); and (ii) for discovery under (b) (5) (B), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.” Kan. Stat. Ann. § 60-226(5) (C) (2012).

### 7. What is the Expert Standard (Frye/Daubert/Hybrid)?

Expert testimony in Kansas is governed by Kansas Stat. Ann. § 60-456 (2012). Kansas Stat. Ann. § 60-456(b) states that if the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are (1) based on facts or data perceived by or personally known or made known to the witness at the hearing and (2) within the scope of the special knowledge, skill, experience or training possessed by the witness. The *Frye* test, however, acts as a qualification to the 60-456(b) statutory standards. *Frye* is applied in circumstances where a new or experimental scientific technique is employed by an expert witness. Note that Kansas Stat. Ann. § 60-3412 (2012) provides that in any medical malpractice liability action in which the standard of care given by a practitioner of the healing arts is at issue, no person shall qualify as an expert witness on such issue unless at least 50% of such person's professional time within the two-year period preceding the incident giving rise to the action is devoted to actual clinical practice in the same profession in which the defendant is licensed.



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“If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are (1) based on facts or data perceived by or personally known or made known to the witness at the hearing and (2) within the scope of the special knowledge, skill, experience or training possessed by the witness.” Kan. Stat. Ann. § 60-456(b) (2012).

“In any medical malpractice liability action, as defined in K.S.A. 60-3401 and amendments thereto, in which the standard of care given by a practitioner of the healing arts is at issue, no person shall qualify as an expert witness on such issue unless at least 50% of such person’s professional time within the two-year period preceding the incident giving rise to the action is devoted to actual clinical practice in the same profession in which the defendant is licensed.” Kan. Stat. Ann. § 60-3412 (2012).

8. Are there other notable Discovery Rules?

Because the Kansas Rules of Civil Procedure governing discovery are patterned after the Federal Rules of Civil Procedure there are no notable discovery rules other than the individual judicial districts' local rules governing discovery practices and procedures.

9. Is there mandatory mediation or arbitration?

Kansas Stat. Ann. §60-216(b) (1) (B) (2012) provides that whether an action is suitable for alternative dispute resolution is determined at the Case Management Conference. A Case Management Conference must be conducted within 45 days of filing the answer. §60-216(b)

10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?

Kansas Stat. Ann. § 60-216 (2012) governs Pretrial Conferences in Kansas. Kansas Stat. Ann. § 60-216(b) provides that the date(s) for the Pretrial Conference and the Final Pretrial Conference will be determined at the Case Management Conference. Kansas Stat. Ann. § 60-216(c) provides that at the Pretrial Conference the court may consider and take appropriate action with respect to (1) simplification of the issues; (2) determination of the issues of law which may eliminate or affect the trial of issues of fact; (3) the necessity or desirability of amendments to the pleadings; (4) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof; (5) limitation of the number of expert witnesses; (6) the advisability of a preliminary reference of issues to a master; and (7) such other matters as may aid in the disposition of the action. Kansas Stat. Ann. § 60-216(e) provides that in any action, the court shall on the request of either party, or may in its discretion without such request, conduct a Final Pretrial Conference in accordance with procedures established by rule of



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the supreme court. Kansas District Court Rule 140 provides that the Final Pretrial Conference shall be held before a judge at least 2 weeks prior to the trial. Practitioners should consult the local rules for the judicial district in which their cases are pending, as many of them have requirements related to Pretrial Conferences. For example, Local Rule 207 of the Eighteenth Judicial District [Sedgwick County] requires the parties to submit a joint pretrial order, or in the event this is not possible, individual pretrial questionnaires, in advance of the Pretrial Conference in a format established by the local rule. Many jurisdictions also require that the attorney who attends the Pretrial Conference be lead counsel at trial. Motions in Limine are typically addressed at the Final Pretrial Conference.

11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?

Kansas District Court Rule 140 provides that the Court shall prepare the pretrial orders or designate counsel to do so. Practitioners need to consult the local rules of the district where the trial will take place. For example, District Court Rule 13 of the Tenth Judicial District [Johnson County] requires the parties to confer and attempt to prepare a joint pretrial order. If agreement cannot be reached, competing language may be included. Witnesses and exhibits not listed in the pretrial order shall not be permitted to be used at trial.

12. Who conducts voir dire (Court/Counsel)? Describe the process.

Kansas Stat. Ann. § 60-247(b) (2012) provides that prospective jurors shall be examined under oath as to their qualifications to sit as jurors. The court shall permit the parties or their attorneys to conduct an examination of prospective jurors.

13. How many jurors are there? How many alternates? How many peremptory challenges?

Kansas Stat. Ann. § 60-247(a) (2012) provides for the empanelling of twelve jurors in civil trials. Kansas Stat. Ann. §60-248(a) (2012), however, provides that the parties may stipulate that the jury shall consist of any number less than 12, or that a verdict or finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury. Kansas Stat. Ann. § 60-248(g) (2012) provides that whenever the jury consists of 12 members, the agreement of 10 jurors shall be sufficient to render a verdict. In all other cases, subject to the stipulation of the parties as provided in subsection (a), the verdict shall be by agreement of all the jurors. Kansas Stat. Ann. § 60-248(h) (2012) provides that the trial judge may empanel one or more alternate or additional jurors whenever, in the judge's discretion, the judge believes it advisable to have alternate jurors available to replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable to perform their duties. Kansas Stat. Ann. § 60-247(c)



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(2012) provides that in civil cases, each party shall be entitled to 3 peremptory challenges, except each party is entitled to 1 peremptory challenge to an alternate juror. Multiple defendants or multiple plaintiffs shall be considered as a single party for the purpose of making challenges except that if the judge finds there is a good faith controversy existing between multiple plaintiffs or multiple defendants, the court in its discretion and in the interest of justice, may allow any of the parties, single or multiple, additional peremptory challenges and permit them to be exercised separately or jointly.

“The court must call enough prospective jurors so that, after challenges for cause and peremptory challenges allowed by law, there will remain 12, or sufficient jurors to be sworn to try the case.” Kan. Stat. Ann. § 60-247(a) (2012).

“After the panel has been passed for cause, each party is entitled to three peremptory challenges, except as provided in subsection (h) of K.S.A. 60-248, and amendments thereto, when there are alternate jurors. Multiple plaintiffs or multiple defendants are considered a single party for the purpose of making challenges. However, if the court finds a good faith controversy exists between multiple plaintiffs or multiple defendants, the court may allow any of the parties, single or multiple, additional peremptory challenges and permit them to be exercised separately or jointly. Peremptory challenges must be exercised in a manner that will not communicate to the challenged prospective juror the identity of the challenging party or attorney.” Kan. Stat. Ann. § 60-247(c) (2) (2012).

The parties may stipulate that the jury consist of any number less than 12 or, subject to the provisions subsection (g), that a verdict or a finding of a stated majority of the jurors be taken as the verdict or finding of the jury.” Kan. Stat. Ann. § 60-248(a) (2012).

“When the jury consists of 12 members, the agreement of 10 jurors is sufficient to render a verdict. In all other cases, subject to the stipulation of the parties as provided in subsection (a), the verdict must be by agreement of all the jurors. The verdict must be in writing and signed by the presiding juror. The court or clerk must read the verdict to the jurors and ask whether it is their verdict. The court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of assent by the number of jurors required, the court must either direct the jury to deliberate further or order a new trial. If the required numbers of



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jurors agree and no party requires the jurors to be polled individually, the verdict is complete and the court must then discharge the jury. If the verdict is defective in form only, the verdict may be corrected by the court, with the assent of the jury, before the jury is discharged.” Kan. Stat. Ann. § 60-248(g) (2011).

“The court may empanel one or more alternate jurors to replace jurors who, prior to the time the jury retires to consider its verdict, are found to be unable to perform their duties. Alternate jurors must be selected in the same manner, have the same qualifications, be subject to the same examination and challenges, take the same oath and have the same functions, powers and privileges as the regular jurors. Each party is entitled to one peremptory challenge to the alternate jurors. The alternate jurors must be seated near the regular jurors, with equal ability to see and hear the proceedings, and they must attend the entire trial. The alternate jurors must obey the orders of and are bound by the admonition of the court upon each adjournment, but if the regular jurors are ordered to be kept in custody during the trial, the alternate jurors also must be confined with the other jurors. Upon submission of the case to the jury, the alternate jurors may be discharged or they may be retained separately and not discharged until the jury reaches its decision. If the alternate jurors are not discharged on submission of the case and if any regular juror is discharged before the jury reaches a decision, the court may draw the name of an alternate juror to replace the discharged juror, subject to the same rules and regulations as though the juror had been selected as one of the original jurors.” Kan. Stat. Ann. § 60-248(h) (2011).

14. Identify any “unusual” trial procedures.

None.

15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?

No. Note, however, that Kan. Stat. Ann. § 65-4901 *et seq.* and Kansas District Court Rule 142 provide that any party to a medical malpractice case may request that the court convene a medical malpractice screening panel, or one may be convened *sua sponte* by the court. The membership of the screening panel shall be selected as follows: (1) a health care provider designated by the defendant; (2) a health care provider designated by the plaintiff; (3) a health care provider selected jointly by the plaintiff and the defendant; and (4) an attorney selected by the judge of the district court. Kan. Stat. Ann. § 65-4901. The screening panel shall prepare a written report of its findings, which identify the relevant standard of care, whether there was a departure from the standard of care, and whether such departure proximately caused plaintiff’s



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- injuries. Supreme Court Rule 142. The written report of the panel shall be admissible in subsequent proceedings in the case. Kan. Stat. Ann. § 65-4904(c). Practitioners should consult the local rules of the district court in which their cases are pending for further procedures pertaining to medical malpractice screening panels.
16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?
- Kansas Stat. Ann. § 60-3306 (2012) states that a product seller shall not be subject to liability in a product liability claim arising from an alleged defect in a product, if the product seller establishes that: (a) such seller had no knowledge of the defect; (b) such seller in the performance of any duties the seller performed, or was required to perform, could not have discovered the defect while exercising reasonable care; (c) the seller was not a manufacturer of the defective product or product component; (d) the manufacturer of the defective product or product component is subject to service of process either under the laws of the state of Kansas or the domicile of the person making the product liability claim; and (e) any judgment against the manufacturer obtained by the person making the product liability claim would be reasonably certain of being satisfied.
17. Is there a provision for Prejudgment interest?
- In Kansas, prejudgment interest is generally allowable on liquidated claims pursuant to the provisions Kansas Stat. Ann. § 16-201 (2012), which provides that creditors shall be allowed to receive interest at the rate of ten percent per annum... for any money after it becomes due; for money lent or money due on settlement of account, from the day of liquidating the account and ascertaining the balance.
- “Creditors shall be allowed to receive interest at the rate of ten percent per annum, when no other rate of interest is agreed upon, for any money after it becomes due; for money lent or money due on settlement of account, from the day of liquidating the account and ascertaining the balance; for money received for the use of another and retained without the owner's knowledge of the receipt; for money due and withheld by an unreasonable and vexatious delay of payment or settlement of accounts; for all other money due and to become due for the forbearance of payment whereof an express promise to pay interest has been made; and for money due from corporations and individuals to their daily or monthly employees, from and after the end of each month, unless paid within fifteen days thereafter.” Kan. Stat. Ann. § 16-201 (2012).



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18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

Kansas Court Rules and Procedures consist of the Kansas Rules of Civil Procedure, District Courts Rules, and the Local Rules of District Courts. Practitioners are advised to consult all of them to ensure compliance with all applicable rules and procedures.

19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

Because the Kansas Rules of Civil Procedure governing discovery are patterned after the Federal Rules of Civil Procedure, Plaintiff and Defendant are on a fairly level playing field.

20. Are there legislative efforts under way that address any of the litigation practices in your state?

As of 2011, there are no legislative efforts under way that address any of the litigation practices in the state of Kansas.



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### Question

### Kentucky

1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?

No. However, judges typically require such disclosures as part of the Scheduling Order in a civil action.

2. Are there Standard Form Interrogatories/Document Requests?

Official Form 19 of the Kentucky Rules of Civil Procedure provides a sample Request for Production of Documents. Ky. R. Civ. P. Form 19 (2012). (However, Official Form 20 of the Kentucky Rules of Civil Procedures provides a form for a Request for Admission. Ky. R. Civ. P. Form 20 (2011)).

3. Are there limits on the number of Interrogatories/Document Requests?

Yes. Under Ky. R. Civ. P. 33.01 (2012), a party may only serve 30 interrogatories, unless the Court orders otherwise. However, the following are not included in the maximum allowed: interrogatories requesting (1) the name and address of the person answering; (2) the names and addresses of the witnesses; and (3) whether the person answering is willing to supplement his or her answers. There is no limit on the number of requests for production that may be propounded. *See* Ky. R. Civ. P. 34.01 (2012).

“Each party may propound a maximum of 30 interrogatories and 30 requests for admission to each other party; for purposes of this rule, each subpart of an interrogatory or request shall be counted as a separate interrogatory or request. The following shall not be included in the maximum allowed: interrogatories requesting (a) the name and address of the person answering; (b) the names and addresses of the witnesses; and (c) whether the person answering is willing to supplement his answers if information subsequently becomes available. Any party may move the Court for permission to propound either interrogatories or requests for admission in excess of the limit of 30.” Ky. R. Civ. P. 33.01(3) (2012).



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4. Are there time limits on depositions, or limits on the number of depositions?

There is only one time limitation with respect to the taking of depositions, which is set forth in Ky. R. Civ. P. 30.01. If the plaintiff seeks to take a deposition prior to 30 days after the service of any defendant, he or she must seek leave of the court to do so. (Two exceptions to this Rule: (1) if a defendant has already served a notice of deposition or other discovery or (2) if the plaintiff provides notice that the deponent is about to go out of state and follows the specific provisions of Ky. R. Civ. P. 30.02(2)). There are no limits on the number of depositions which may be taken in an action or the length of time a deposition may last. (“After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons upon any defendant, except that leave is not required (a) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (b) if special notice is given as provided in Rule 30.02(2).” Ky. R. Civ. P. 30.01 (2012)).

5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)

Yes. Ky. R. Civ. P. 30.02(6) governs the designation and deposition of a corporate designee. The Rule is based upon Fed. R. Civ. P. 36(b) (prior to the 2000 amendment) and is comparable in substance. (“A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. The paragraph (6) does not preclude taking a deposition by any other procedure authorized in these rules.” Ky. R. Civ. P. 30.02(6) (2011)).

6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?

Yes. Pursuant to Ky. R. Civ. P. 26.02(4) (a) (ii), a party may take the deposition of an opponent's expert as a matter of right. A litigant who seeks to obtain the opinions held by an opponent's expert must pay the expert a reasonable fee, based upon the normal rates of the expert.

“After a party has identified an expert witness in accordance with



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paragraph (4)(a)(i) of this rule or otherwise, any other party may obtain further discovery of the expert witness by deposition upon oral examination or written questions pursuant to Rules 30 and 31. The court may order that the deposition be taken, subject to such restrictions as to scope and such provisions, pursuant to paragraph (4)(c) of this rule, concerning fees and expenses as the court may deem appropriate.” Ky. R. Civ. P. 26.02(4) (a) (ii) (2012).

“A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35.02 or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.” Ky. R. Civ. P. 26.02(4) (b) (2012).

“Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under paragraphs (4)(a)(ii) and (4)(b) of this rule, and (ii) with respect to discovery obtained under paragraph (4)(a)(ii) of this rule the court may require, and with respect to discovery obtained under paragraph (4)(b) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.” Ky. R. Civ. P. 26.02(4) (c) (2011).

7. What is the Expert Standard (Frye/Daubert/Hybrid)?

Kentucky adopted the *Daubert* standard in *Mitchell v. Commonwealth*, 908 S.W.2d 100 (Ky. 1995), (overruled in part on other grounds by *Fugate v. Commonwealth*, 993 S. W.2d 931 (Ky. 1999)). Kentucky later adopted the reasoning of *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1993), which expanded the applicability of the *Daubert* principles to all expert testimony, in *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575 (Ky. 2000).

“[W]e adopt the standard of review set forth in *Daubert*.” *Mitchell v. Commonwealth*, 908 S.W.2d 100, 101 (Ky. 1995).

“After careful review of the additional briefing on the issue, review of the *Kumho* decision itself, and consideration of the oral arguments presented, we adopt the reasoning of *Kumho* and hold that *Daubert* and *Mitchell* apply not only to testimony based on



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"scientific" knowledge, but also to testimony based on "technical" and "other specialized" knowledge. [See KRE 702]. We also conclude that a trial court may consider one or more of the more specific factors that *Daubert* [and *Mitchell*] mention when doing so will help determine that testimony's reliability. But . . . the test of reliability is "flexible," and *Daubert's* [and *Mitchell's*] list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants [the trial] court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination. See *General Electric Co. v. Joiner*, 522 U.S. 136, 143, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997) ([a trial court's reliability determination is reviewed for abuse of discretion]). *Kumho*, 526 U.S. at , 119 S. Ct. at 1171, 143 L. Ed. 2d at 246-47. Therefore, the Court of Appeals' central holding that *Daubert* and *Mitchell* only apply to testimony based on scientific knowledge is in error." *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000).

8. Are there other notable Discovery Rules?

Ky. R. Civ. P. 26.03 (2012) does not require an attorney seeking a protective order to certify that it has conferred with opposing counsel in an effort to resolve the dispute without court action.

Ky R. Civ. P. 34 (2012) does not refer to the discovery of Electronically Stored Information, unlike Fed. R. Civ. P. 34 (2012).

9. Is there mandatory mediation or arbitration?

Mediation is not mandatory under the Kentucky Rules of Civil Procedure, but is often required by the local court rules or by the order of the trial court. Further, trial courts will often name a specific mediator as part of their Scheduling Orders.

10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?

Pre-trial conferences in Kentucky state court are conducted by the trial judge and held near or shortly after the close of discovery. They are also typically limited to the scheduling of a trial date. Motions in limine are not addressed at the pre-trial conference. Although practices vary by judge, motions in limine may be heard at a hearing specifically designated for such matters, at trial or a combination of both. Ky. R. Civ. P. 16 (2011).

“(1) In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider: (a) The simplification of the issues; (b) The necessity or desirability of amendments to the pleadings; (c) The possibility of obtaining admissions of fact and documents which will avoid



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unnecessary proof; (d) The limitation of the number of expert witnesses; (e) The advisability of a preliminary reference of issues to a commissioner; (f) Such other matters as may aid in the disposition of the action.

(2) The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at or before the trial to prevent manifest injustice. The court in its discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to nonjury actions or extend it to all actions.” Ky. R. Civ. P. 16 (2012).

11. What are the court’s practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?

Pre-trial submissions are not mandatory under the Kentucky Rules of Civil Procedure. Therefore, the requirement of a pre-trial submission and its content will vary by judge.

12. Who conducts voir dire (Court/Counsel)? Describe the process.

“The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.” Ky. R. Civ. P. 47.01 (2012).

13. How many jurors are there? How many alternates? How many peremptory challenges?

Twelve jurors will be selected with 2 alternates. However, only 9 jurors are needed to reach a verdict. Pursuant to Ky. R. Civ. P. 47.03, each opposing side shall have 3 peremptory challenges, but co-parties having antagonistic interests shall have 3 peremptory challenges each.

“(1) Juries for all trials in Circuit Court shall be composed of twelve (12) persons. Juries for all trials in District Court shall be composed of six (6) persons.

(2) In Circuit Court, at any time before the jury is sworn, the parties with the approval of the court may stipulate that the jury shall consist of any number less than twelve (12), except that no jury shall consist of less than six (6) persons.



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(3) A unanimous verdict is required in all criminal trials by jury. The agreement of at least three-fourths (3/4) of the jurors is required for a verdict in all civil trials by jury in Circuit Court. The agreement of at least five-sixths (5/6) of the jurors is required for a verdict in all civil trials by jury in District Court.” Ky. Rev. Stat. Ann. § 29A.280 (1)-(3) (2012).

“(1) In civil cases each opposing side shall have three peremptory challenges, but co-parties having antagonistic interests shall have three peremptory challenges each.

(2) If one or two (2) additional jurors are called, the number of peremptory challenges for each side and antagonistic co-party shall be increased by one.

(3) After the parties have been given the opportunity of challenging jurors for cause, each side or party having the right to exercise peremptory challenges shall be handed a list of qualified jurors drawn from the box equal to the number of jurors to be seated plus the number of allowable peremptory challenges for all parties. Peremptory challenges shall be exercised simultaneously by striking names from the list and returning it to the trial judge. If the number of prospective jurors remaining on the list exceeds the number of jurors to be seated, the cards bearing numbers identifying the prospective jurors shall be placed in a box and thoroughly mixed, following which the clerk shall draw at random the number of cards necessary to comprise the jury or, if so directed by the court, a sufficient number of cards to reduce the jury to the number required by law, in which latter event the prospective jurors whose identifying cards remain in the box shall be impaneled as the jury.” Ky. R. Civ. P. 47.03(1)-(3) (2012).

14. Identify any “unusual” trial procedures.

In Kentucky, the defense closes first.

15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?

Currently, Kentucky does not have special trial court divisions, but in 2007 formed a Mass Tort and Class Action Litigation Committee to determine whether Kentucky's current rules and/or system required amendment to adequately address these types of cases.

The Kentucky Mass Tort and Class Action Litigation Committee’s final report proposed rule changes in March 2010 to the Kentucky Supreme Court. These proposed changes went into effect on



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January, 1, 2011, and included major additions to Ky. R. Civ. P. 23, making the Kentucky rule more in sync with Fed. R. Civ. P. 23. The Committee did not recommend making a special trial court division, however.

16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?

Yes. KRS § 411.340 (2012) provides that: In any product liability action, if the manufacturer is identified and subject to the jurisdiction of the court, a wholesaler, distributor, or retailer who distributes or sells a product, upon his showing by a preponderance of the evidence that said product was sold by him in its original manufactured condition or package, or in the same condition such product was in when received by said wholesaler, distributor or retailer, shall not be liable to the plaintiff for damages arising solely from the distribution or sale of such product, unless such wholesaler, distributor or retailer breached an express warranty or knew or should have known at the time of distribution or sale of such product that the product was in a defective condition, unreasonably dangerous.

17. Is there a provision for Prejudgment interest?

Prejudgment interest must be awarded in circumstances where there is an undisputed claim for liquidated damages (i.e., certiorari fixed by agreement of the parties or by operation of law). See *Nucor Corp. v. General Electric Co.*, 812 S.W.2d 136 (Ky. 1991). The rate shall be set at an amount up to 8%. *Pursley v. Pursley*, 144 S.W.3d 820, 828 (Ky. 2004).

“When the damages are “liquidated,” prejudgment interest follows as a matter of course. Precisely when the amount involved qualifies as “liquidated” is not always clear, but in general “liquidated” means “made certain or fixed by agreement of parties or by operation of law.”” *NucorCorp v. General Electric Co.*, 812 S.W.2d 136, 141 (Ky. 1991), (quoting *Black’s Law Dictionary* 930 (6th ed. 1990)).

18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

None.



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19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

Yes. Kentucky at this time does not impose any mandatory time frame in which to receive a Scheduling Order in a civil action. Scheduling Orders are issued by the trial court upon motion of the parties, but the issuance of such an order may be delayed at the court's discretion. This disadvantages counsel if faced with an opponent who is unprepared and/or unwilling to move the litigation forward.

20. Are there legislative efforts under way that address any of the litigation practices in your state?

As of 2012, there have been no successful legislative efforts in Kentucky to address litigation practices. H.B. 316 was a failed legislative effort which would have imposed presuit screening requirements on plaintiffs in nursing home litigation.



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### Question

### Louisiana

1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?

No.

2. Are there Standard Form Interrogatories/Document Requests?

No.

3. Are there limits on the number of Interrogatories/Document Requests?

Yes. Parties are initially limited to 35 interrogatories including subparts. However, by *ex parte* motion, a party may obtain leave of court to serve an additional 35 interrogatories. Thereafter, additional interrogatories will only be allowed for good cause and following a contradictory hearing. See La. Code Civ. Proc. art. 1457(B) (West 2012). (“During an entire proceeding, written interrogatories served in accordance with Paragraph A shall not exceed thirty-five in number, including subparts, without leave of court. Additional interrogatories, not to exceed thirty-five in number including subparts, shall be allowed upon *ex parte* motion of any party. Thereafter, any party desiring to serve additional interrogatories shall file a written motion setting forth the proposed additional interrogatories and the reasons establishing good cause why they should be allowed to be filed. The court after contradictory hearing and for good cause shown may allow the requesting party to serve such additional interrogatories as the court deems appropriate. Local rules of court may provide a greater restriction on the number of written interrogatories.” La. Code Civ. Proc. Ann. art. 1457(B) (2012)). There is no limit for the number of requests for production.

4. Are there time limits on depositions, or limits on the number of depositions?

No. Louisiana law does not impose an express limit on either the number of depositions allowed or the length of any particular deposition. However, Code of Civil Procedure Article 1444 does allow a party or a deponent to suspend an ongoing deposition and move for the court to limit the examination “upon a showing that the examination is being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass, or oppress the deponent or party[.]” La. Code Civ. Proc. Ann. art. 1444 (2012). Similarly, if the number of depositions noticed becomes excessive, a party may seek a protective order pursuant to La. Code Civ. Proc. art. 1426 (West 2012).



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5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)

Yes. La. Code Civ. Proc. art. 1442 sets forth Louisiana's procedural rules on this subject, and its language is virtually identical to F.R.C.P. 30(b)(6) ("A party may in his notice name as the deponent a public or private corporation or a partnership or association or governmental agency and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. The persons so designated shall testify as to matters known or reasonably available to the organization. This Article does not preclude taking a deposition by any other procedure authorized in this Chapter." La. Code Civ. Proc. Ann. art. 1442 (2012)).

6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?

Yes. La. Code Civ. Proc. art. 1425 (2012) allows the deposition of testifying experts. It also provides the parties with the ability to seek a court order requiring the production of expert reports similar in substance to those required by F.R.C.P. 26(a)(7)(b); such reports are not otherwise required under Louisiana law. With respect to the payment of fees, the party seeking the deposition is required to pay the expert "a reasonable fee for time spent responding to discovery." See La. Code Civ. Proc. art. 1425(D) (3) (2012). The standard practice is to pay for deposition time and some preparation time to review records (if applicable) – but not to pay for time spent preparing with opposing counsel.

"Except as otherwise provided in Paragraph E of this Article, a party may, through interrogatories, deposition, and a request for documents and tangible things, discover facts known or opinions held by any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under Paragraph B, the deposition shall not be conducted until after the report is provided." La. Code Civ. Proc. Ann. art. 1425(D) (1) (2012). "A party may, through interrogatories or by deposition, discover facts known by and opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Article 1464 or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." La. Code Civ. Proc. Ann. art. 1425(D) (2) (2012).



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“Unless manifest injustice would result, the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this Paragraph; and with respect to discovery obtained under Subparagraph (2) of this Paragraph, the court shall also require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.” La. Code Civ. Proc. Ann. art. 1425(D) (3) (2012).

7. What is the Expert Standard (Frye/Daubert/Hybrid)?

Louisiana has adopted the *Daubert* standard concerning the admissibility of expert testimony. See *State v. Foret*, 628 So.2d 1116, 1122-23 (La. 1993); see also La. Code Evid. Art. 702 (West 2012) (Louisiana’s statutory pronouncement on the admissibility of expert testimony).

“The above-noted similarity between the federal and Louisiana rules on the admission of expert testimony, coupled with similar guidelines for the admissibility of expert scientific testimony pronounced by this court in *Catanese*, persuade this court to adopt *Daubert’s* requirement that expert scientific testimony must rise to a threshold level of reliability in order to be admissible under La.C.E. art. 702. As we find the *Daubert* court’s “observations” on what will help to determine this threshold level of reliability to be an effective guide, we shall adopt these “observations”, as well.” *State v. Foret*, 628 So.2d 1116, 1123 (La. 1993).

8. Are there other notable Discovery Rules?

La. Code Civ. Proc. art. 1425(E) (2012) extends work-product protection to any drafts of expert reports and/or communications with experts.

9. Is there mandatory mediation or arbitration?

The Louisiana Binding Arbitration Law (La. R.S. 9:4201, *et seq.*) does not provide for mandatory arbitration absent a written agreement to arbitrate. Mediation, however, may be ordered by the court in most cases. See Louisiana Mediation Act (La. R.S. 9:4101, *et seq.* (2012)). Notwithstanding, the true efficacy of the Mediation Act is questionable since courts “shall” rescind any order compelling mediation if it is objected to by any party.



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10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?

Procedures vary widely depending on the particular judicial district. In some Louisiana district courts, a pretrial conference is not required. In contrast, other courts will not allow a trial date to be set until a pretrial conference is held. *See* Appendix 8, District Court Rules. When ordered, the trial judge almost uniformly conducts the conference. Local rules should be examined on this subject at the outset of litigation. Similarly, there is no standard procedure with respect to the timing of motions in limine. The Code of Civil Procedure simply indicates that motions in limine may be addressed at the pretrial conference or at trial. *See* La. Code Civ. Proc. art. 1551 (2012). Practices again vary by venue, and local rules should be consulted.

11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?

Trial submission practices vary widely depending on the particular district court and judge, though typically Louisiana state court trial submissions are less comprehensive than what is required in federal court. *See* Appendix 8, District Court Rules (2012). Louisiana's Code of Civil Procedure addresses this topic only in broad strokes, indicating merely that the trial judge may, at the pretrial and scheduling conference, rule in advance on the admissibility of evidence, may have the parties identify documents and exhibits they expect to submit at trial, and may rule on the form of presentation of testimony or other evidence, including by electronic devices. La. Code Civ. Proc. art. 1551(A) (3) (2012).

12. Who conducts voir dire (Court/Counsel)? Describe the process.

Both the court and counsel participate in voir dire. The court's examination of prospective jurors is meant to determine their qualifications, but it may examine the potential jurors further (i.e. "for cause") as the court sees fit. La. Code Civ. Proc. art. 1763(A) (2012). Thereafter, counsel is provided the opportunity to question the potential jurors. La. Code Civ. Proc. art. 1763(B) (2012). Ultimately, however, the scope of counsel's examination is left to the discretion of the court. *See* La. Code Civ. Proc. art. 1763 and comments (a) & (b) (2012). Louisiana's district courts tend to allow a fairly broad voir dire of potential jurors, though this varies by venue.

13. How many jurors are there? How many alternates? How many peremptory challenges?

Louisiana's Code of Civil Procedure allows for juries of either 6 or 12, and the court has the discretion to impanel 1 or more alternates. La. Code Civ. Proc. arts. 1761 and 1769 (2012). The number of peremptory challenges is dictated by the size of the jury. For juries of 6, plaintiffs (as a group) are allowed a total of 3 peremptory challenges. La. Code Civ. Proc. art. 1764 (2012). The same is true for defendants as a group. For juries of 12, each side is allowed 6 peremptory challenges. *Id.* Disputes among co-plaintiffs or co-



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defendants concerning the allocation of challenges as between themselves are resolved by the court before voir dire. *Id.*

“The court may direct that one or two jurors in addition to the regular panel be called and impanelled to sit as alternate jurors. Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the principal jurors. An alternate juror who does not replace a principal juror shall be discharged when the jury retires to consider its verdict. If one or two alternate jurors are called, each side shall have an equal number of peremptory challenges. The court shall determine how many challenges shall be allowed and shall allocate them among the parties on each side. The additional peremptory challenges may be used only against an alternate juror, and the other peremptory challenges allowed by law shall not be used against the alternate jurors.” La. Rev. Stat. Ann. § 38:375 (2012).

“In cases to be tried by jury, twelve jurors summoned in accordance with law shall be chosen by lot to try the issues specified unless the parties stipulate that the case shall be tried by six jurors. The method of calling and drawing by lot shall be at the discretion of the court.” La. Code Civ. Proc. Ann. art. § 1761 (2012).

“(A.) If a trial is by a jury of six, each side is allowed three peremptory challenges. If there is more than one party on any side, the court may allow each side additional peremptory challenges, not to exceed two. (B.) If trial is by a jury of twelve, each side is allowed six peremptory challenges. If there is more than one party on any side, the court may allow each side additional peremptory challenges, not to exceed four. (C.) Each side shall be allowed an equal number of peremptory challenges. If the parties on a side are unable to agree upon the allocation of peremptory challenges among themselves, the allocation shall be determined by the court before the examination on the voir dire.” La. Code Civ. Proc. Ann. art. § 1764 (2012).

14. Identify any “unusual” trial procedures. None.



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15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?

Louisiana does not have special trial divisions for particular types of *civil* matters. Some districts, however, do maintain special divisions for family or juvenile matters. Consequently, discovery timetables do not vary by subject-matter, but the parties are always free to solicit a case-specific scheduling order from the court pursuant to District Court Rule 9.14. *See also* La. Code Civ. Proc. art. 1551 (2012).

16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?

No.

17. Is there a provision for Prejudgment interest?

Yes. The court shall award interest as prayed for or as provided by law. *See* La. Code Civ. Proc. art. 1921(2012). In actions grounded in contract, legal interest is due from the time a debt becomes due and shall be calculated in accordance with La. Rev. Stat. 9:3500(2011). In actions grounded in tort, legal interest attaches from the date of judicial demand and shall be calculated in the amount as designated by La. R.S. 13:4202:

“A. Interest is either legal or conventional.

B. Legal interest is fixed at the following rates, to wit:

(1) At the rate fixed in R.S. 13:4202 on all sums which are the object of a judicial demand, whence this is called judicial interest; and

(2) On sums discounted at banks at the rate established by their charters.

C. (1) The amount of the conventional interest cannot exceed twelve percent per annum. The same must be fixed in writing; testimonial proof of it is not admitted in any case.

(2) Except in the cases herein provided, if any person shall pay on any contract a higher rate of interest than the above, as discount or otherwise, the same may be sued for and recovered within two years from the time of such payment.

(3) (a) The owner or discounter of any note or bond or other written evidence of debt for the payment of money, payable to order or bearer or by assignment, shall have the right to claim and recover the full amount of such note, bond, or other written



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evidence of debt and all interest not beyond twelve percent per annum interest that may accrue thereon, notwithstanding that the rate of interest or discount at which the same may be or may have been discounted has been beyond the rate of twelve percent per annum interest or discount.

(b) This provision shall not apply to the banking institutions of this state in operation under existing laws or to a consumer credit transaction as defined by the Louisiana Consumer Credit Law.

(4) (a) The owner of any promissory note, bond, or other written evidence of debt for the payment of money to order or bearer or transferable by assignment shall have the right to collect the whole amount of such promissory note, bond, or other written evidence of debt for the payment of money, notwithstanding such promissory note, bond, or other written evidence of debt for the payment of money may include a greater rate of interest or discount than twelve percent per annum; such obligation shall not bear more than twelve percent per annum after maturity until paid.

(b) This provision shall not apply to a consumer credit transaction as defined by the Louisiana Consumer Credit Law.

(c) Where usury is a defense to a suit on a promissory note or other contract of similar character, it is permissible for the defendant to show the usury whether same was given by way of discount or otherwise, by any competent evidence.

D. The provisions of this Article shall not apply to a loan made for commercial or business purposes or deferring payment of an obligation for commercial or business purposes." La. Rev. Stat. Ann. § 9:3500 (2012).

“(1) On and after January 1, 2002, the rate shall be equal to the rate as published annually, as set forth below, by the commissioner of financial institutions. The commissioner of financial institutions shall ascertain, on the first business day of October of each year, the Federal Reserve Board of Governors approved "discount rate" published daily in the Wall Street Journal. The effective judicial interest rate for the calendar year following the calculation date shall be three and one-quarter percentage points above the discount rate as ascertained by the commissioner.



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(2) The judicial interest rate for the calendar year following the calculation date shall be published in the December issue of the Louisiana Bar Journal, the December issue of the Louisiana Register, and in one daily newspaper of general circulation in each of the cities of Alexandria, Baton Rouge, Lake Charles, Lafayette, Monroe, New Orleans, and Shreveport. The notice in the daily newspapers shall be published on two separate occasions, with at least one week between publications, during the month of December. The publication in the Louisiana Register shall not be considered rulemaking, within the intentment of the Administrative Procedure Act, R.S. 49:950 et seq., and particularly R.S. 49:953.” La. Rev. Stat. Ann. § 13:4202 (2012).

18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

Though not necessarily a best practice, it is noteworthy that Louisiana has adopted a pure comparative fault system by statute. La. Civ. Code art. 2323 (2012). In practice, this system is preferable insofar as it: (1) reduces a defendant’s liability to account for a plaintiff’s comparative fault, (2) allows for an allocation of fault with respect to all tortfeasors – regardless of whether a plaintiff opts to name them as a party, and (3) prevents a defendant from “overpaying” as a result of the insolvency of another co-defendant. One by-product of the system, however, is that plaintiffs’ attorneys feel compelled to name all conceivable defendants, based on thin claims, simply to avoid the “empty chair defense” by other defendants at trial. Moreover, and for the same reason, plaintiffs’ counsel generally is unwilling to voluntarily dismiss such thin claims for fear of the empty chair. This results in “non-target” defendants being forced to file summary-judgment motions, which plaintiffs often will not oppose.

19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

No.

20. Are there legislative efforts under way that address any of the litigation practices in your state?

The Louisiana Law Institute and Louisiana State Bar Association continually review and propose modifications to Louisiana’s Code of Civil Procedure and Uniform District Court Rules. Presently, however, no major overhauls of Louisiana’s procedural rules are being considered.



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### Question

### Maine

1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?

No. *See* Me. R. Civ. P. 26 (2011).

2. Are there Standard Form Interrogatories/Document Requests?

Form 9.10 in the Appendix of Forms for the Rules of Civil Procedure pertains to Document Requests. There are no standard form Interrogatories. Me. R. Civ. P. Form 9.10 (2011).

3. Are there limits on the number of Interrogatories/Document Requests?

Yes. Unless otherwise ordered by the court, more than one set of Interrogatories may be served, but not more than a total of 30 interrogatories may be served by each, with distinct question subparts counting as separate Interrogatories. Me. R. Civ. P. 33 (2011). Parties may serve 1 request for production of documents. Me. R. Civ. P. 34 (2011). Although the rule does not specify how many items may be requested, parties generally limit the number to 30. (“Unless otherwise ordered by the court, more than one set of interrogatories may be served, but not more than a total of 30 interrogatories may be served by a party on any other party. Each distinct subpart in an interrogatory shall be deemed a separate interrogatory for the purposes of this rule.” Me. R. Civ. P. 33(a) (2011)).

4. Are there time limits on depositions, or limits on the number of depositions?

Yes. No deposition shall exceed 8 hours of testimony unless the court otherwise allows additional time as justice requires, or if the deponent or another party impedes or delays the examination. Me.R.Civ.P. 30(d) (2) (2011). Unless otherwise ordered by the court, each party may take no more than 5 depositions. Me.R.Civ.P. 30(a) (2011) (“No deposition shall exceed 8 hours of testimony, but the court may allow additional time on such terms as justice requires for a fair examination of the deponent or if the deponent or another party impedes or delays the examination.” Me. R. Civ. P. 30(d) (2) (2011)).

5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)

Yes. Me.R.Civ.P. 30(b) (6) (2011) is virtually identical to the federal rule. (“A party may in the party’s notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and designate with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for



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each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b) (6) does not preclude taking a deposition by any other procedure authorized in these rules.” Me. R. Civ. P. 30(b) (6) (2011)).

6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?

Although the rules indicate that parties are only entitled to interrogatories relating to expert information, the reality is that parties depose opposing experts routinely, as though it were a matter of right. *See* Me.R.Civ.P. 26(b)(4) (“A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and to identify the data or other information considered by the witness in forming the opinions, any exhibits to be used as a summary of or support for the opinions, the qualifications of the witness, including a list of all publication authored by the witness within the preceding ten years, and the compensation to be paid for the study and testimony, provided however, that, unless otherwise ordered by the court, information relating to qualifications, publications and compensation need not be provided for experts who have been treating physicians of a party for any injury that is a subject of the litigation.” Me. R. Civ. P. 26(4) (A) (i) (2011)).

Unless parties agree otherwise, a party generally pays opposing expert fees for the actual deposition testimony, but the party will pay for deposition preparation costs for its own expert. Additionally, if an expert deposition is used in lieu of live testimony at trial, a prevailing party may be able to recover its deposition costs. *See* Me.R.Civ.P. 54(g) (2011); 14 M.R.S.A. § 1502-C; 16 M.R.S.A. § 251; *Poland v. Webb*, 711 A.2d 1278 (Me. 1998).



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7. What is the Expert Standard (Frye/Daubert/Hybrid)?

Maine follows the expert standard set forth in *State v. Williams*, 388 A.2d 500 (Me. 1978), and applies the factors listed in *Searles v. Fleetwood Homes of Pennsylvania*, 878 A.2d 509 (Me. 2005). Specifically, the proponent of expert testimony must establish that “(1) the testimony is relevant pursuant to M.R. Evid. 401, and (2) it will assist the Trier of fact in understanding the evidence or determining a fact in issue.” *Searles*, 878 A.2d 515-516 (citing *Williams*, 388 A.2d at 504). Factors to consider include “(1) whether any studies tendered in support of the testimony are based on facts similar to those at issue; (2) whether the hypothesis of the testimony has been subject to peer review; (3) whether an expert’s conclusion has been tailored to the facts of the case; (4) whether any other experts attest to the reliability of the testimony; (5) the nature of the expert’s qualifications; and (6) if a causal relationship is asserted, whether there is a scientific basis for determining that such a relationship exists.” *State v. Bickart*, 963 A.2d 183, 188 (Me. 2009) (quoting *Searles*, 878 A.2d at 516).

8. Are there other notable Discovery Rules?

No.

9. Is there mandatory mediation or arbitration?

Unless it falls under one of the nine exemptions to the rule, all civil actions in Superior Court require the parties to complete an alternative dispute resolution conference within 120 days of the date of the scheduling order. Me.R.Civ.P. 16B (2011).

10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?

A court may conduct a pretrial management conference, but it is not required. Me.R.Civ.P. 16(b) (2011). Motions in limine are addressed before trial, though sometimes they are addressed immediately before trial.

11. What are the court’s practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?

Maine does not have a rule comparable to the Federal Pretrial Order rule. When a case is set for trial, the court will issue a form pretrial order, specifying the date for trial and deadlines for pretrial preparation. Me.R.Civ.P. 16 Advisory Committee’s Notes (2005).

12. Who conducts voir dire (Court/Counsel)? Describe the process.

The court generally conducts voir dire, but may in its discretion allow parties or attorneys to conduct the examination. Me.R.Civ.P. 47(a) (2011). The court permits parties or attorneys to suggest additional questions to supplement the inquiry. *Id.*



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13. How many jurors are there? How many alternates? How many peremptory challenges?

Civil trials have 8 or 9 jurors, and no more than 3 alternates, and each party is allowed 3 peremptory challenges. Me.R.Civ.P. 47(d), 48(b) (2011). If there are 1 or 2 alternate jurors, each party is entitled to 1 additional peremptory challenge; if there are 3 alternate jurors, each is entitled to 2 additional peremptory challenges. Me.R.Civ.P. 47(c) (3), (d) (2011).

“The court may direct that not more than three jurors in addition to the regular panel be called and impaneled to sit as alternate jurors as provided by law. The manner and order of exercising peremptory challenges to alternate jurors shall be the same as provided for peremptory challenges of regular jurors. Each side is entitled to one peremptory challenge in addition to those otherwise allowed by this rule if one or two alternate jurors are to be impaneled, and two peremptory challenges if three alternate jurors are to be impaneled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by this rule shall not be used against an alternate juror.” Me. R. Civ. P. 47(d) (2011).

“Each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purpose of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.” Me. R. Civ. P. 47(c) (3) (2011).

“All civil trials by jury shall be to juries consisting of eight or nine jurors unless the parties thereto stipulate that the jury may consist of any number of jurors less than eight. The parties may also stipulate that the verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury. Any stipulation as to the number of the jury shall also provide whether and by what amount the number of peremptory challenges to be allowed shall be reduced. Unless stipulated by the parties, no jury shall be seated with less than eight members. Where personal emergency or disqualification causes a juror to be excused after the jury is seated, no verdict may be taken from a jury reduced to fewer than seven members, unless stipulated by the parties.” Me. R. Civ. P. 48(b) (2011).

14. Identify any “unusual” trial procedures.

None.



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15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?

Yes. There are special divisions for small claims, drug, family, traffic, and business and consumer, each with their own timetables.

16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?

No. Both are potentially liable. *See* 14 M.R.S.A. § 221 (2011).

17. Is there a provision for Prejudgment interest?

Yes: 14 M.R.S.A. § 1602-B (2011).

“1. IN SMALL CLAIMS. In small claims actions, prejudgment interest is not recoverable unless the rate of interest is based on a contract or note.

2. ON CONTRACTS AND NOTES. In all civil and small claims actions involving a contract or note that contains a provision relating to interest, prejudgment interest is allowed at the rate set forth in the contract or note.

3. OTHER CIVIL ACTIONS; RATE. In civil actions other than those set forth in subsections 1 and 2, prejudgment interest is allowed at the one-year United States Treasury bill rate plus 3%.

A. For purposes of this subsection, "one-year United States Treasury bill rate" means the weekly average one-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the last full week of the calendar year immediately prior to the year in which prejudgment interest begins to accrue.

B. If the Board of Governors of the Federal Reserve System ceases to publish the weekly average one-year constant maturity Treasury yield or it is otherwise unavailable, then the Supreme Judicial Court shall annually establish by rule a rate that most closely approximates the rate established in this subsection.

4. STATED RATE. When prejudgment interest is awarded pursuant to subsection 2 or 3, the applicable rate must be stated in the judgment.

5. ACCRUAL; SUSPENSION; WAIVER. Prejudgment interest



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accrues from the time of notice of claim setting forth under oath the cause of action, served personally or by registered or certified mail upon the defendant until the date on which an order of judgment is entered. If a notice of claim has not been given to the defendant, prejudgment interest accrues from the date on which the complaint is filed. In actions involving a contract or note that contains a provision relating to interest, the rate of interest is fixed as of the time the notice of claim is given or, if a notice of claim has not been given, as of the date on which the complaint is filed. If the prevailing party at any time requests and obtains a continuance for a period in excess of 30 days, interest is suspended for the duration of the continuance. On petition of the non-prevailing party and on a showing of good cause, the trial court may order that interest awarded by this section be fully or partially waived.

6. EFFECT ON POST-JUDGMENT INTEREST. This section does not affect post-judgment interest imposed by section 1602-C. Prejudgment interest may not be added to the judgment amount in determining the sum upon which post-judgment interest accrues.

7. RATE ON ACCRUAL OF INTEREST PRIOR TO JULY 1, 2003. Notwithstanding subsection 3, for actions in which the interest begins to accrue, as determined pursuant to subsection 5, prior to July 1, 2003, the rate of prejudgment interest on civil actions other than those set forth in subsection 2 is as follows:

A. If the judgment does not exceed \$ 30,000, the rate for prejudgment interest is 8%; and

B. If the judgment exceeds \$ 30,000; the rate of prejudgment interest is the one-year United States Treasury bill rate, as defined in subsection 3, plus 1%.” 14 Me. Rev. Stat. Ann. tit. 14, § 1602-B (2011).

18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

None.



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19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed? No.

20. Are there legislative efforts under way that address any of the litigation practices in your state? No.



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### Question

### Maryland

1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?

No.

2. Are there Standard Form Interrogatories/Document Requests?

Yes. See Md. R. App. Form 1-12 (2012).

3. Are there limits on the number of Interrogatories/Document Requests?

There are no limitations in the rules for document requests. Yes. Parties are limited to propounding 30 interrogatories. "Any party may serve written interrogatories directed to any other party. Unless the court orders otherwise, a party may serve one or more sets having a cumulative total of not more than 30 interrogatories to be answered by the same party. Interrogatories, however grouped, combined, or arranged and even though subsidiary or incidental to or dependent upon other interrogatories, shall be counted separately." Md. R. 2-421(a) (2012).

4. Are there time limits on depositions, or limits on the number of depositions?

No. There are no rule-based limits on the number of depositions or the length of the deposition. However, a court may impose limits in a particular case. For example, one Maryland federal judge limits each side (even if there are two or more parties on a particular side) to 30 hours of fact witness deposition unless the judge rules otherwise.

5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)

Yes. Maryland Rule 2-412(d) permits a party, by filing a deposition notice or serving a subpoena, to name as the deponent a corporation, partnership, association, or government agency and describe with "reasonable particularity" the matters on which the examination is requested. It is the responsibility of the organization to designate one or more of its employees or agents who will testify on its behalf.

"A party may in a notice and subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, managing agents, or other persons who will testify on its behalf regarding the matters described and may set forth the matters on which each person designated will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available



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to the organization.” Md. R. 2-412(d) (2012).

6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?

Yes. Maryland rules permit a party to depose an adversary's experts. The party taking the deposition is responsible for paying the expert a “reasonable fee” for time spent attending the deposition, as well as for time and expenses incurred in travelling. In addition, if a party is permitted to depose an expert who was not retained as a testifying expert, the deposing party is responsible for paying the expert a reasonable fee for preparing for the deposition. “A party also may take the deposition of the expert.” Md. R. 2-402(g) (1) (A) (2012).

“Unless the court orders otherwise on the ground of manifest injustice, the party seeking discovery: (A) shall pay each expert a reasonable fee, at a rate not exceeding the rate charged by the expert for time spent preparing for a deposition, for the time spent in attending a deposition and for the time and expenses reasonably incurred in travel to and from the deposition; and (B) when obtaining discovery under subsection (g)(2) [experts not expected to be called at trial] of this Rule, shall pay each expert a reasonable fee for preparing for the deposition.” Md. R. 2-402(g) (1) (B) (3) (2012).

7. What is the Expert Standard (*Frye/Daubert/Hybrid*)?

Maryland is a *Frye* jurisdiction although recent decisions by the Maryland Court of Appeals have moved it very close to a *Daubert* standard.

“The *Frye-Reed* test originated from two cases: *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), *superseded by statute*, Fed. R. Evid. 702, and *Reed v. State*, 283 Md. 374, 391 A.2d 364 (1978). *Frye* held that courts may admit expert testimony if it is based on a scientific principle or discovery that has general acceptance in the scientific community. 293 F. at 1014. The principle expressed in *Frye* became incorporated into Maryland law with the *Reed* decision, where the Court of Appeals held that before a scientific opinion will be received as evidence at trial, “the basis of the opinion must be shown to be generally accepted as reliable within the expert’s particular scientific field.” 283 Md. at 381. Under the *Frye* standard, “if the validity of a new scientific technique is in controversy in the relevant scientific community or if it is generally regarded as an experimental technique, then expert testimony based upon its validity cannot be admitted into evidence.” *Id.*



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8. Are there other notable Discovery Rules? Maryland Rule 2-422 imposes limitations on the production of Electronically Stored Information and substantially tracks the amendments to Federal Rule of Civil Procedure 34.
9. Is there mandatory mediation or arbitration? No. It is, however, relatively common for courts to require participation in settlement conferences.
10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial? There is no standardized and uniform rule in the 23 Maryland counties and Baltimore City for conducting pretrial conferences. The practice differs from judge to judge, even within the same jurisdiction. In general, unlike a pretrial conference in federal court, a Pretrial Conference in Maryland is more in the nature of a settlement conference where matters of law and evidence are not addressed. The pretrial conference date is assigned in the scheduling order, which is issued at the time a defendant files the answer. Motions in limine, if addressed at all, are addressed on the morning of trial or the day before by the trial judge, who often is not assigned until the business day before trial starts (i.e., for a Monday trial, the judge is not assigned until the preceding Friday).
11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge? Practices of individual judges vary. In general however, most Maryland judges do not require the same degree of trial submissions as their federal counterparts. For example, few state court judges require the marking of all trial exhibits, and in Baltimore City, at the Pretrial Conference, the parties are required to file a list of exhibits and identify trial witnesses. Again, preferences of judges vary.
12. Who conducts voir dire (Court/Counsel)? Describe the process. Although Maryland Rule 2-512(d) gives a trial judge the discretion to permit parties to conduct voir dire, in civil cases, the trial judge generally conducts voir dire based on questions submitted by counsel. The judge is only required to ask questions that would disqualify a juror for bias. As to other questions, the judge has broad discretion. Depending upon the sensitivity of the question and importance to the issues in the case, the judge may call jurors to the bench for additional questioning and the opportunity for counsel to ask follow-up questions. In general, there is very limited opportunity for attorneys to ask jurors questions in the voir dire process.



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13. How many jurors are there? How many alternates? How many peremptory challenges?

Pursuant to Rule 2-511, a civil jury in Maryland consists of 6 people. If the Court approves and the parties agree, they can accept a verdict from fewer than 6 jurors if during the trial 1 of the 6 jurors becomes disqualified or is unable to perform the juror's duty. "The jury shall consist of six persons. With the approval of the court, the parties may agree to accept a verdict from fewer than six jurors if during the trial one or more of the six jurors becomes or is found to be unable or disqualified to perform a juror's duty." Md. R. 2-511(b) (2012).

Courts generally sit 1 or 2 alternate jurors depending upon the length of the trial. At any time before the beginning of jury deliberations, a jury member may be replaced with an alternate. Md. Rule 2-512(f). However, "[w]hen the jury retires to consider its verdict, the trial judge shall discharge any remaining alternates." *Id.* It is important to note that alternate jurors may not be substituted for regular jurors once deliberations have begun, and they may not attend deliberations. *Grimstead v. Brockington*, 417 Md. 332, 334, 10 A.3d 168, 169 (2010). Doing so constitutes reversible error and grounds for a new trial. *Id.*, 10 A.3d at 169. With respect to the number of peremptory challenges, Rule 2-512 (e) provides that each party is permitted 4 peremptory challenges and 1 peremptory challenge for each group of 3 or less alternates to be impaneled. All plaintiffs and all defendants are considered a single party unless a judge specifically finds that the parties have adverse interests.

"Each party is permitted four peremptory challenges plus one peremptory challenge for each group of three or less alternates to be impaneled. For purposes of this section, all plaintiffs shall be considered as a single party and all defendants shall be considered as a single party unless the trial judge determines that adverse or hostile interests between plaintiffs or between defendants justify allowing one or more of them the separate peremptory challenges available to a single party. The parties shall simultaneously exercise their peremptory challenges by striking names from a copy of the jury list." Md. R. 2-512(e) (2) (2012).

14. Identify any "unusual" trial procedures.

None.



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15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?

With the exception of the asbestos docket, in general there are no special trial court divisions. However, in Baltimore City there is a business and technology case management system. The Baltimore City Court also offers Advanced Science and Adjudication Resource project trained judges, who may be specially assigned upon request.

While not a special division *per se*, there is a complex case track in Baltimore City and cases on the complex track do have different discovery time tables. Be sure to check the court's local rules.

16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?

Yes. The statute permits a "product seller," which includes a distributor, to defend against a claim of property damage or personal injury caused by allegedly defective design or manufacture of a product. Md. Code Ann., Cts. & Jud. Proc. § 5-405(b) (West 2012). The seller must prove the following: (1) the product was acquired and sold in a "sealed container or in an unaltered form"; (2) the seller had no knowledge of the defect; (3) the seller could not have discovered the defect while exercising reasonable care; (4) the seller did not "manufacture, produce, design, or designate the specifications for the product" that caused the injury or damage; and (5) the seller did not "alter, modify, assemble, or mishandle the product while in the seller's possession." *Id.* In order for the defense to succeed, however, the manufacturer must be subject to service of process under Maryland law, and the breach of any express warranties made by the seller must not be the proximate and substantial cause of the plaintiff's injury. *Id.* § 5-405(c).

17. Is there a provision for Prejudgment interest?

Yes. "Except as provided in § 11-106 of this subtitle, the legal rate of interest on a judgment shall be at the rate of 10 percent per annum on the amount of judgment." Md. Code Ann., Cts. & Proc. § 11-107(a) (West 2012).

18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

Defendants may assert general denials in the Answer for certain causes of actions. "When the action in any count is for breach of contract, debt, or tort and the claim for relief is for money only, a party may answer that count by a general denial of liability." Md. R. 2-323(d) (2012).

Maryland law provides for statutory caps on non-economic damages in personal injury and wrongful death actions. Section 11-108(b) of the Courts and Judicial Proceedings Article of the Maryland Code sets forth the caps on non-economic damages for



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personal injury and wrongful death actions. The non-economic damages cap for medical malpractice claims is contained in two sections: the cap for actions arising before January 1, 2005 is in § 11-108 (b) and the cap for claims that arise on or after January 1, 2005 are in § 3-2A-09. Juries are not to be informed of the cap on non-economic damages. Md. Code Ann., Cts. & Jud. Proc. §§ 3-2A-09(c); 11-108(d) (1) (West 2012). If the jury verdict exceeds the cap, the judge must reduce the amount to conform to the cap. *Id.* §§ 3-2A-09(c); 11-108(d)(2)

19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

The defense bar is generally opposed to joint and several liabilities because it makes settlement difficult for defendants whose liability exposure is more marginal than that of co-defendants. Plaintiffs frequently invoke the mantra that if a defendant is found to be even 1% liable, the defendant must pay a pro rata share. By the same token, the defense bar has not pushed for comparative fault in Maryland. Maryland still imposes a contributory negligence standard, which means that any negligence on the part of the plaintiff is a complete bar to recovery. This is a standard the defense bar has traditionally wanted to keep, and since comparative fault among defendants would also lead to the elimination of contributory negligence, the defense bar has not made a strong push to eliminate joint and several liabilities. Each year, the General Assembly seems to get closer to abandoning contributory negligence, cognizant of the fact that Maryland is one of only five states that still have this standard. If this occurs, the defense bar will seek to have joint and several liability eliminated.

20. Are there legislative efforts under way that address any of the litigation practices in your state?

The defense bar anticipates that the viability of contributory negligence will be re-evaluated with more vigor than usual in the upcoming legislative session. Maryland's highest court (the Court of Appeals) is currently considering a case in which contributory negligence barred the plaintiff's recovery under facts that demonstrated the plaintiff was only minimally negligent. *See Coleman v. Soccer Association of Columbia*, No.9 (September Term, 2012). The Court of Appeals has already signaled in prior cases that the doctrine of contributory negligence, while constitutional, is outdated and practically unworkable. It is expected that the Court will uphold the constitutionality of the doctrine in *Coleman* but signal to the General Assembly that legislative abolishment of contributory negligence should be considered.



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### Question

### Massachusetts

1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?

No.

2. Are there Standard Form Interrogatories/Document Requests?

No.

3. Are there limits on the number of Interrogatories/Document Requests?

Yes. Interrogatories are limited to 30, although this rule is typically waived or modified by motion. There is no limit as to the number of Requests for Production of Documents and Other Things. (“No party shall serve upon any other party as of right more than thirty interrogatories, including interrogatories subsidiary or incidental to, or dependent upon, other interrogatories, and however the same may be grouped or combined; but the interrogatories may be served in two or more sets, as long as the total number of interrogatories served does not exceed thirty. The court on motion for good cause shown may allow service of additional interrogatories; or the party interrogated, subject to Rule 29, may agree to such service.” Mass. R. Civ. P. 33(a) (2) (LexisNexis 2011)).

4. Are there time limits on depositions, or limits on the number of depositions?

No.

5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)

Yes. State Rule 30 (b) (6) is virtually identical to the federal rule. (“A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b) (6) does not preclude taking a deposition by any other procedure authorized in these rules.” Mass. R. Civ. P. 30(b) (6) (LexisNexis 2011)).



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6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?

Only by agreement or motion. Typically the deposing party pays for the expert's deposition time.

“A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.” Mass. R. Civ. P. 26(b) (4) (A) (i)-(ii) (2011).

“A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.” Mass. R. Civ. P. 26(b) (4) (B) (2011).

“Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.” Mass. R. Civ. P. 26(b) (4) (C) (2011).

7. What is the Expert Standard (Frye/Daubert/Hybrid)?

The *Daubert* Standard is used. See *Commonwealth v. Lanigan*, 419 Mass. 15, 641 N.E. 2d 1342(1994).

“We accept the basic reasoning of the *Daubert* opinion because it is consistent with our test of demonstrated reliability. We suspect that general acceptance in the relevant scientific community will continue to be the significant, and often the only, issue. We accept the idea, however, that a proponent of scientific opinion evidence



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may demonstrate the reliability or validity of the underlying scientific theory or process by some other means, that is, without establishing general acceptance.” *Commonwealth v. Lanigan*, 641 N.E.2d 1342, 1349, 419 Mass. 15, 21 (Mass. 1994).

8. Are there other notable Discovery Rules?

No

9. Is there mandatory mediation or arbitration?

One county has mandatory conciliation. (Middlesex-Lowell Session Only).

10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?

Pretrial Conferences are typically held 2-4 months before a trial date is set (trial dates are assigned at the Final Pre-Trial Conference). Judges are supposed to conduct the conferences but clerks frequently do. Judges rotate through sessions, so the judge conducting the conference may not be the trial judge - which is why the clerks often conduct them unless there is a particular issue or dispute that needs to be addressed. Motions in Limine are not heard until shortly before trial when the trial judge is known.

11. What are the court’s practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?

There is no uniform practice, but recently most judges are scheduling a "Final Trial Conference" 1 -2 weeks before the trial date at which trial submissions are to be filed and considered.

12. Who conducts voir dire (Court/Counsel)? Describe the process.

Judges ask statutory questions of the full jury panel. Any jurors who respond "yes" are brought to side bar for further discussion with the judge asking questions. Judges consider additional written questions that he/she may ask. Some judges permit more expanded questioning, but almost always by the judge rather than by counsel.

13. How many jurors are there? How many alternates? How many peremptory challenges?

There are 12 jurors, with 2 alternates. Four peremptory challenges are allowed per party. If there are multiple defendants, the plaintiff gets 4 challenges for each additional defendant who gets them. Judges usually ask parties to agree to let alternates sit - otherwise 2 are drawn at random.

“The parties may stipulate that the jury shall consist of any number less than twelve, or less than six in the District Court, or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.” Mass. Ann. Laws R. Civ. P. 48 (2011).

“In a civil case each party shall be entitled to four peremptory challenges. Such challenges shall be made before the commencement of the trial and may be made after it has been



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determined that person called to serve as a juror stands indifferent to the case.” Mass. Ann. Laws ch. 234, § 29 (2011).

“Courts other than district courts. The court may order impaneled a jury of not more than sixteen members and the court shall have jurisdiction to try the case with such jury as provided by law. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 of 2 additional jurors is to be impaneled, and 2 peremptory challenges if 3 or 4 additional jurors are to be impaneled.” Mass. Ann. Laws R. Civ. P. 47(b) (2011).

“District court: additional jurors. The court may order impaneled a jury of not more than eight members and the court shall have jurisdiction to try the case with such jury as provided by law. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 additional jurors are to be impaneled.” Mass. Ann. Laws. R. Civ. P. 47(c) (2011).

14. Identify any “unusual” trial procedures.

The defense closes first. There is no rebuttal.

15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?

There is a Business Litigation session in Suffolk County (Boston). All cases in all sessions are assigned to a "track" with timetables at the outset of the case. Parties can seek "retracking" or extension of the schedule.

16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?

No.

17. Is there a provision for Prejudgment interest?

Yes. Prejudgment interest accrues at the rate of 12% per year (not compounded), from the date of the complaint. Subsequently added parties are subject to the original date. (“In any action in which a verdict is rendered or a finding made or an order for judgment made for pecuniary damages for personal injuries to the plaintiff or for consequential damages, or for damage to property, there shall be added by the clerk of court to the amount of damages interest thereon at the rate of twelve per cent per annum from the date of commencement of the action even though such interest brings the amount of the verdict or finding beyond the maximum liability imposed by law.” Mass. gen.. Laws ch. 231, § 6B (2011); (“In any action in which damages are awarded, but in which interest on said damages is not otherwise provided by law, there shall be added by



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the clerk of court to the amount of damages interest thereon at the rate provided by section six B to be determined from the date of commencement of the action even though such interest brings the amount of the verdict or finding beyond the maximum liability imposed by law.” Mass. gen. Laws ch. 231, § 6H (2011)).

18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

None.

19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

The 12% pre-judgment interest rate. A Rule 68 Offer of Judgment is useless, because a defense verdict is not considered a "verdict against Defendant for less than offer" and therefore does not trigger Rule 68.

20. Are there legislative efforts under way that address any of the litigation practices in your state?

No.



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Question	Michigan
1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?	No.
2. Are there Standard Form Interrogatories/Document Requests?	No.
3. Are there limits on the number of Interrogatories/Document Requests?	No. The Michigan Court Rules (MCR) does not limit the number of interrogatories a party may serve. However, a Michigan court could limit the number of interrogatories by a protective order under MCR 2.302(c) (2011). See <i>Dafter Twp v. Reid</i> 159 Mich. App.149, 406 NW2d 255 (1987).
4. Are there time limits on depositions, or limits on the number of depositions?	Mich. Ct. R. 2.306 (2012) contains the same basic deposition procedures as FRCP 30. There are no limits on the number of depositions. "On motion for good cause, the court may extend or shorten the time for taking the deposition..." Mich. Ct. R. 2.306(B) (2) (2012).
5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)	Yes. In a notice and subpoena, a party can name a corporation or other entity as a deponent. Mich. Ct. R. 2.306(B) (5) (2011). While the rule refers to a "notice and subpoena", no subpoena is required if the deponent is a party, MCR 2.306(B) (5) is similar to FRCP 30(b) (6) ("In a notice and subpoena, a party may name as the deponent a public or private corporation, partnership, association, or governmental agency and describe with reasonable particularity the matters on which examination is requested. The organization named must designate one or more officers, directors, or managing agents, or other persons, who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena must advise a nonparty organization of its duty to make the designation. The persons designated shall testify to matters known or reasonably available to the organization. This sub rule does not preclude taking a deposition by another procedure authorized in these rules." Mich. Ct. R. 2.306(B) (5) (2012)).



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6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?

Yes. Unless manifest injustice would result, the court shall require the party seeking expert discovery to pay the expert a reasonable fee for time spent in a deposition, but not including preparation time. The party seeking discovery shall also pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

“A party may take the deposition of a person whom the other party expects to call as an expert witness at trial.” Mich. Ct. R. 2.302(B) (4) (a) (ii) (2012).

“Unless manifest injustice would result (i) the court shall require that the party seeking discovery under sub rules (B)(4)(a)(ii) or (iii) or (B)(4)(b) pay the expert a reasonable fee for time spent in a deposition, but not including preparation time; and (ii) with respect to discovery obtained under sub rule (B)(4)(a)(ii) or (iii), the court may require, and with respect to discovery obtained under sub rule (B)(4)(b) the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.” Mich. Ct. R. 2.302(B) (4) (c) (i)-(ii) (2012).

7. What is the Expert Standard (Frye/Daubert/Hybrid)?

The *Daubert* standard is used.

“It is well-established that the proponent of evidence “bears the burden of establishing relevance and admissibility.” At the time this case was tried, the proponent of expert opinion evidence bore the burden of establishing admissibility according to the *Davis-Frye* “general acceptance” standard. MRE 702 has since been amended explicitly to incorporate *Daubert’s* standards of reliability. But this modification of MRE 702 changes only the factors that a court may consider in determining whether expert opinion evidence is admissible. It has not altered the court’s fundamental duty of ensuring that all expert opinion testimony—regardless of whether the testimony is based on “novel” science—is reliable. Thus, properly understood, the court’s gatekeeper role is the same under *Davis-Frye* and *Daubert*. Regardless of which test the court applies, the court may admit evidence only once it ensures, pursuant to MRE 702, that expert testimony meets that rule’s standard of reliability. In other words, both tests require courts to exclude junk science; *Daubert* simply allows courts to consider more than just “general acceptance” in determining whether expert testimony must be excluded. *Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 408, 470 Mich. 749,



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781-82 (Mich. 2004).

8. Are there other notable Discovery Rules? No.
9. Is there mandatory mediation or arbitration? In Michigan, there is mandatory "case evaluation," which replaced former provisions for mandatory mediation. Mich. Ct. R. 2.403 (2001). Each side presents their arguments to a 3 attorney panel, who then assign a dollar figure to the case. If both sides accept the figure, the case is settled for that amount. If either side rejects, the case proceeds, but a rejecting party is exposed to liability for the other side's costs and fees incurred after rejection unless the rejecting party improves its position at trial by at least 10%. Case evaluation is mandatory in tort cases.
10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial? The court may hold one or more conferences at any time with the attorneys alone or with the parties. It may do so on its own initiative or at the request of a party Mich. Ct. R. 2.401(A) (2012). Motions in Limine are heard at any time before jury selection, but are often subject to deadlines contained in the court's scheduling order.
11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge? It varies by judge. Some judges have standing orders requiring counsel appearing in their courts to comply with additional practices and procedures.
12. Who conducts voir dire (Court/Counsel)? Describe the process. Voir dire may be conducted by the Court or by Counsel.
13. How many jurors are there? How many alternates? How many peremptory challenges? Jury trials in civil cases are by juries of 6 members, unless the parties stipulate in writing for less than 6. The court may direct that 7 or more jurors be impaneled to sit. If so, after the court has instructed the jury and the action is ready to be submitted, the court will randomly select 6 jurors to constitute the jury. Each party may exercise 3 peremptory challenges.
- "The court may direct that 7 or more jurors be impaneled to sit. After the instruction to the jury have been given and the action is ready to be submitted, unless the parties have stipulated that all the jurors may deliberate, the names of the jurors must be placed in a container and names drawn to reduce the number of jurors to 6, who shall constitute the jury. The court may retain the alternate jurors during deliberations. If the court does so, it shall instruct the alternate jurors not to discuss the case with any other person until the jury completes its deliberations and is discharged. If an



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alternate juror replaces a juror after the jury retires to consider its verdict, the court shall instruct the jury to begin its deliberations anew.” Mich. R. Civ. P. 2.511(B) (2012).

“Each party may peremptorily challenge three jurors. Two or more parties on the same side are considered a single party for purposes of peremptory challenges. However, when multiple parties having adverse interest are aligned on the same side, three peremptory challenges are allowed to each party represented by a different attorney, and the court may allow the opposite side a total number of peremptory challenges not exceeding the total number of peremptory challenges allowed to multiple parties.” Mich. R. Civ. P. 2.511(E) (2) (2012).

14. Identify any “unusual” trial procedures.

Jurors are permitted to question trial witnesses. The trial court may encourage parties to prepare and to provide the jury with concise written summaries of specific depositions rather than requiring an entire deposition to be read at trial. The trial court may instruct jurors that they are permitted to discuss the case in the jury room during trial recesses. Following closing arguments, the trial court may provide its own summary of the evidence. In this same regard, in addition to opening and closing statements, the trial court may allow parties to “present interim commentary” at certain points of time during trial.

15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?

No.

16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?

No.

17. Is there a provision for Prejudgment interest?

Yes. According to Mich. Comp. Laws Serv. § 600.6013, pre-judgment interest is allowed on the entire judgment from the date the complaint was filed. (“(1) Interest is allowed on a money judgment recovered in a civil action, as provided in this section. However, for complaints filed on or after October 1, 1986, interest is not allowed on future damages from the date of filing the complaint to the date of entry of the judgment. As used in this subsection, “future damages” means that term as defined in section 6301.



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(2) For complaints filed before June 1, 1980, in an action involving other than a written instrument having a rate of interest exceeding 6% per year, the interest on the judgment is calculated from the date of filing the complaint to June 1, 1980, at the rate of 6% per year and on and after June 1, 1980, to the date of satisfaction of the judgment at the rate of 12% per year compounded annually.

(3) For a complaint filed before June 1, 1980, in an action involving a written instrument having a rate of interest exceeding 6% per year, the interest on the judgment is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate specified in the instrument if the rate was legal at the time the instrument was executed. However, the rate after the date judgment is entered shall not exceed either of the following:

(a) Seven percent per year compounded annually for a period of time between the date judgment is entered and the date of satisfaction of the judgment that elapses before June 1, 1980.

(b) Thirteen percent per year compounded annually for a period of time between the date judgment is entered and the date of satisfaction of the judgment that elapses after May 31, 1980.

(4) For a complaint filed on or after June 1, 1980, but before January 1, 1987, interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate of 12% per year compounded annually unless the judgment is rendered on a written instrument having a higher rate of interest. In that case interest is calculated at the rate specified in the instrument if the rate was legal at the time the instrument was executed. The rate shall not exceed 13% per year compounded annually after the date judgment is entered.

(5) Except as provided in subsection (6), for a complaint filed on or after January 1, 1987, but before July 1, 2002, if a judgment is rendered on a written instrument, interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate of 12% per year compounded annually, unless the instrument has a higher rate of interest. In that case, interest shall be calculated at the rate specified in the instrument if the rate was legal at the time the instrument was executed. The rate shall not exceed 13% per year compounded annually after the date judgment is entered.

(6) For a complaint filed on or after January 1, 1987, but before July 1, 2002, if the civil action has not resulted in a final, non-appealable judgment as of July 1, 2002, and if a judgment is or has been rendered on a written instrument that does not evidence indebtedness with a specified interest rate, interest is calculated as provided in subsection (8).



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(7) For a complaint filed on or after July 1, 2002, if a judgment is rendered on a written instrument evidencing indebtedness with a specified interest rate, interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate specified in the instrument if the rate was legal at the time the instrument was executed. If the rate in the written instrument is a variable rate, interest shall be fixed at the rate in effect under the instrument at the time the complaint is filed. The rate under this subsection shall not exceed 13% per year compounded annually.

(8) Except as otherwise provided in subsections (5) and (7) and subject to subsection (13), for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, according to this section. Interest under this subsection is calculated on the entire amount of the money judgment, including attorney fees and other costs. The amount of interest attributable to that part of the money judgment from which attorney fees are paid is retained by the plaintiff, and not paid to the plaintiff's attorney.

(9) If a bona fide, reasonable written offer of settlement in a civil action based on tort is made by the party against whom the judgment is subsequently rendered and is rejected by the plaintiff, the court shall order that interest is not allowed beyond the date the bona fide, reasonable written offer of settlement is filed with the court.

(10) Except as otherwise provided in subsection (1) and subject to subsections (11) and (12), if a bona fide, reasonable written offer of settlement in a civil action based on tort is not made by the party against whom the judgment is subsequently rendered, or is made and is not filed with the court, the court shall order that interest be calculated from the date of filing the complaint to the date of satisfaction of the judgment.

(11) If a civil action is based on medical malpractice and the defendant in the medical malpractice action failed to allow access to medical records as required under section 2912b (5), the court shall order that interest be calculated from the date notice was given in compliance with section 2912b to the date of satisfaction of the judgment.

(12) If a civil action is based on medical malpractice and the plaintiff in the medical malpractice action failed to allow access to medical records as required under section 2912b (5), the court shall



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order that interest be calculated from 182 days after the date the complaint was filed to the date of satisfaction of the judgment.

(13) Except as otherwise provided in subsection (1), if a bona fide, reasonable written offer of settlement in a civil action based on tort is made by a plaintiff for whom the judgment is subsequently rendered and that offer is rejected and the offer is filed with the court, the court shall order that interest be calculated from the date of the rejection of the offer to the date of satisfaction of the judgment at a rate of interest equal to 2% plus the rate of interest calculated under subsection (8).

(14) A bona fide, reasonable written offer of settlement made according to this section that is not accepted within 21 days after the offer is made is rejected. A rejection under this subsection or otherwise does not preclude a later offer by either party.” Mich. Comp. Laws Serv. § 600.6013 (LexisNexis 2012)).

18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

None.

19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

No.

20. Are there legislative efforts under way that address any of the litigation practices in your state?

Yes. Mich. Comp. Laws Serv. § 600.8031, et. seq., effective 2013, requires each circuit with at least three judges to have a business court. Circuits with fewer than three judges may seek an administrative order for a business court. Newly passed Mich. Comp. Laws Serv. § 600.2164a permits a party to introduce expert witness testimony via video communication equipment. The party must file a written motion seeking to present the expert testimony by video and must also pay for the costs associated with the use of video communication equipment, unless the court directs otherwise.



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### Question

### Minnesota

1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?

No.

2. Are there Standard Form Interrogatories/Document Requests?

No.

3. Are there limits on the number of Interrogatories/Document Requests?

Yes. Rule 33.01 of the Minnesota Rules of Civil Procedure (2011) limits the number of interrogatories that may be served by a party to 50. Each subdivision is counted as an interrogatory. There is no specified limit on the number of Requests for Production of Documents (“No party may serve more than a total of 50 interrogatories upon any other party unless permitted to do so by the court upon motion, notice and a showing of good cause. In computing the total number of interrogatories each subdivision of separate questions shall be counted as an interrogatory.” Minn. R. Civ. P. 33.01(a) (2011)).

4. Are there time limits on depositions, or limits on the number of depositions?

Rule 30.04(b) Minn. R. Civ. P. (2011) limits a deposition to one day of seven hours. There is no limit on the number of depositions. Courts will often, after consulting with the parties at the Scheduling Conference, set a limit on the number of depositions that may be taken. (“Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours. The court must allow additional time consistent with Rule 26.02(a) if needed for a fair examination of the deponent or if the deponent or another person, or other circumstance, impedes or delays the examination.” Minn. R. Civ. P. 30.04(b) (2011)).

5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)

Yes. Rule 30.02(f) is similar to F.R.C.P. 30(b)(6) (“A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership, association, or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This provision



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does not preclude taking a deposition by any other procedure authorized in these rules.” Minn. R. Civ. P. 30.02(f) (2011))

6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?

The Minn. Rules of Civil Procedure do not provide for depositions of experts. Generally, the parties are able to agree that experts may be deposed. In the absence of an agreement, courts will generally grant motions to take expert depositions. There is no "hard and fast" rule as to who pays for an expert's deposition time. Generally, the parties work it out. Rule 35.04 of Minn. R. Civ. P. (2011) provides that discovery depositions of treating or examining medical experts shall not be taken except upon order of the court after a showing of good cause; see also Minn. R. Civ. P. 26.02(e) (2011); (“Depositions of treating or examining medical experts shall not be taken except upon order of the court for good cause shown upon motion and notice to the parties and upon such terms as the court may provide.” Minn. R. Civ. P. 35.04(b) (2011)).

7. What is the Expert Standard (Frye/Daubert/Hybrid)?

The *Frye-Mack* Standard is used, See *Goeb v. Tharaldson*, 615 N.W.2d 800 (Minn. 2000) (“Having reviewed the cases and the commentary surrounding this issue, we reaffirm our adherence to the *Frye-Mack* standard and reject *Daubert*. Therefore, when novel scientific evidence is offered, the district court must determine whether it is generally accepted in the relevant scientific community. See *Moore*, 458 N.W.2d at 97-98; *Schwartz*, 447 N.W.2d at 424-26. In addition, the particular scientific evidence in each case must be shown to have foundational reliability. See *Moore*, 458 N.W.2d at 98; *Schwartz*, 447 N.W.2d at 426-28. Foundational reliability "requires the 'proponent of a \* \* \* test [to] establish that the test itself is reliable and that its administration in the particular instance conformed to the procedure necessary to ensure reliability.'" *Moore*, 458 N.W.2d at 98 (alteration in original) (quoting *State v. Dille*, 258 N.W.2d 565, 567 (Minn. 1977)). Finally, as with all testimony by experts, the evidence must satisfy the requirements of Minn. R. Evid. 402 and 702--be relevant, be given by a witness qualified as an expert, and be helpful to the Trier of fact. See *State v. Nystrom*, 596 N.W.2d 256, 259 (Minn. 1999).” *Goeb v. Tharaldson*, 615 N.W.2d 800, 814 (2000)).

8. Are there other notable Discovery Rules?

No.



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9. Is there mandatory mediation or arbitration?
- Minnesota state courts require the parties, at some stage of the litigation, to engage in alternate dispute resolution (ADR). The vast majority of cases utilize mediation as the preferred form of ADR. Other types of ADR supported by the courts include: Arbitration; Consensual Special Magistrate; Summary Jury Trial; Early Neutral Evaluation; Non-Binding Advisory Opinion; Neutral Fact Finding; Mini-trial; and Mediation-Arbitration blend. See, Minnesota Rules of Practice, Rule 114.02 (2011).
10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?
- The Pretrial Conference is generally held 3 to 6 weeks in advance of the trial date before the trial judge. There is no set rule as to when motions in limine will be heard. It is generally up to each judge. Motions in limine will sometimes be heard both at the pretrial conference and just before trial start.
11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?
- There is no set practice in Minnesota state courts regarding trial submissions. It varies widely from judge to judge.
12. Who conducts voir dire (Court/Counsel)? Describe the process.
- Voir dire is conducted mainly by the attorneys although the trial judge will ask a number of preliminary questions. Most Minnesota state court judges will keep a "tight reign" on attorneys conducting voir dire.
13. How many jurors are there? How many alternates? How many peremptory challenges?
- In a civil case, there are typically 6 jurors for a case with 1 or 2 alternates depending on the length of the trial. Generally, the court allows, in a 2 party case, 2 peremptory challenges per side. In multi-party cases, judges generally provide an even number of challenges to each side even though a defendant may end up with only 1 challenge in those types of cases ("The court shall seat a jury of not fewer than six and not more than twelve members and all jurors shall participate in the verdict unless excused from service by the court pursuant to Rule 47.04. Unless otherwise provided by law or the parties otherwise stipulate, (1) the verdict shall be unanimous and (2) no verdict shall be taken from a jury reduced in size to fewer than six members." Minn. R. Civ. P. 48 (2011)). Minn. R. Civ. P. 47.02 (2011), which governed peremptory challenges and alternate jurors, has been abrogated.
14. Identify any "unusual" trial procedures.
- In Minnesota, the defendant conducts voir dire first. The plaintiff gives its opening statement first. The defendant presents its closing argument first and the plaintiff closes last with no rebuttal.



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15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?

There are no special court divisions or "specialty" courts in the civil sections of Minnesota state courts. All of the asbestos cases in the state are consolidated before one judge in one county. There are no set or prescribed discovery timetables for different cases.

16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?

Yes. See Minn. Stat. § 544.41 (2011) - Product Liability; limit on liability of non-manufacturers.

17. Is there a provision for Prejudgment interest?

Yes. See Minn. Stat. § 549.09 - Interest on verdicts, awards, and judgments. See also, Olson, *Minnesota's Prejudgment Interest Statute: The Past Five Years*, 62 Hennepin Lawyer 10 (Jan. - Feb. 1993).

“(b) Except as otherwise provided by contract or allowed by law, pre-verdict, pre-award, or pre-report interest on pecuniary damages shall be computed as provided in paragraph (c) from the time of the commencement of the action or a demand for arbitration, or the time of a written notice of claim, whichever occurs first, except as provided herein. The action must be commenced within two years of a written notice of claim for interest to begin to accrue from the time of the notice of claim. If either party serves a written offer of settlement, the other party may serve a written acceptance or a written counteroffer within 30 days. After that time, interest on the judgment or award shall be calculated by the judge or arbitrator in the following manner. The prevailing party shall receive interest on any judgment or award from the time of commencement of the action or a demand for arbitration, or the time of a written notice of claim, or as to special damages from the time when special damages were incurred, if later, until the time of verdict, award, or report only if the amount of its offer is closer to the judgment or award than the amount of the opposing party's offer. If the amount of the losing party's offer was closer to the judgment or award than the prevailing party's offer, the prevailing party shall receive interest only on the amount of the settlement offer or the judgment or award, whichever is less, and only from the time of commencement of the action or a demand for arbitration, or the time of a written notice of claim, or as to special damages from when the special damages were incurred, if later, until the time the settlement offer was made. Subsequent offers and counteroffers supersede the legal effect of earlier offers and counteroffers. For the purposes of clause (2), the amount of settlement offer must be



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allocated between past and future damages in the same proportion as determined by the Trier of fact. Except as otherwise provided by contract or allowed by law, pre-verdict, pre-award, or pre-report interest shall not be awarded on the following:

(1) judgments, awards, or benefits in workers' compensation cases, but not including third-party actions;

(2) judgments or awards for future damages;

(3) punitive damages, fines, or other damages that are noncompensatory in nature;

(4) judgments or awards not in excess of the amount specified in section 491A.01; and

(5) that portion of any verdict, award, or report which is founded upon interest, or costs, disbursements, attorney fees, or other similar items added by the court or arbitrator.

(c)(1) For a judgment or award of \$50,000 or less or a judgment or award for or against the state or a political subdivision of the state, regardless of the amount, the interest shall be computed as simple interest per annum. The rate of interest shall be based on the secondary market yield of one year United States Treasury bills, calculated on a bank discount basis as provided in this section.

On or before the 20th day of December of each year the state court administrator shall determine the rate from the one-year constant maturity treasury yield for the most recent calendar month, reported on a monthly basis in the latest statistical release of the board of governors of the Federal Reserve System. This yield, rounded to the nearest one percent, or four percent, whichever is greater, shall be the annual interest rate during the succeeding calendar year. The state court administrator shall communicate the interest rates to the court administrators and sheriffs for use in computing the interest on verdicts and shall make the interest rates available to arbitrators.

This clause applies to any section that references section 549.09 by citation for the purposes of computing an interest rate on any amount owed to or by the state or a political subdivision of the state, regardless of the amount.



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(2) For a judgment or award over \$50,000, other than a judgment or award for or against the state or a political subdivision of the state, the interest rate shall be ten percent per year until paid.

(3) When a judgment creditor, or the judgment creditor's attorney or agent, has received a payment after entry of judgment, whether the payment is made voluntarily by or on behalf of the judgment debtor, or is collected by legal process other than execution levy where a proper return has been filed with the court administrator, the judgment creditor, or the judgment creditor's attorney, before applying to the court administrator for an execution shall file with the court administrator an affidavit of partial satisfaction. The affidavit must state the dates and amounts of payments made upon the judgment after the most recent affidavit of partial satisfaction filed, if any; the part of each payment that is applied to taxable disbursements and to accrued interest and to the unpaid principal balance of the judgment; and the accrued, but the unpaid interest owing, if any, after application of each payment." Minn. Stat. § 549.09 (2011).

18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

None.

19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

1. The inability to depose treating doctors, particularly in drug and medical device product liability cases. 2. The lack of any consistent provision for "staggered" expert disclosures and expert depositions. 3. Minnesota has not adopted or addressed *Iqbal/Twombly* pleading standards yet. 4. Minnesota courts are still struggling, like all courts - state and federal - with electronic discovery issues.

20. Are there legislative efforts under way that address any of the litigation practices in your state?

No, as of 2011.



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### Question

### Mississippi

1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?

No.

2. Are there Standard Form Interrogatories/Document Requests?

No.

3. Are there limits on the number of Interrogatories/Document Requests?

Yes. Under Miss. R. Civ. P. 33 (2012) interrogatories to parties may not exceed 30 in number. However, there is no similar limitation on requests for documents. Rule 33 provides that “[a]ny party may serve as a matter of right upon any other party written interrogatories not to exceed thirty in number to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Each interrogatory shall consist of a single question. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. Leave of court, to be granted upon a showing of necessity, shall be required to serve in excess of thirty interrogatories.” Miss. R. Civ. P. 33(a) (2012).

4. Are there time limits on depositions, or limits on the number of depositions?

No, unless the court orders otherwise upon party's motion.

5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)

Yes. Miss. R. Civ. P. 30(b) (6) (2012) mirrors the federal rule. Rule 30(b)(6) provides that “[a] party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection (b) (6) does not preclude taking a deposition by any other procedure authorized in these rules.” Miss. R. Civ. P. 30(b) (6) (2012).



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6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?

Under Miss. R. Civ. P. 26 (2012), a party does not have an automatic right to depose an expert that the opposing party intends to call upon to testify at trial. Discovery beyond interrogatories may be had only when deemed appropriate by the trial judge upon motion of a party. If deemed appropriate, Mississippi adheres to the following fee shifting provisions under Miss. R. Civ. P. 26(b) (4) (C) (2012). In summary, if a party seeks additional discovery of an expert beyond the interrogatories, the party must pay for the expert's time spent in responding; and a party who seeks expert discovery beyond the interrogatories may be required to pay the opposing party the costs incurred in obtaining facts and opinions from the expert. These fee shifting provisions can be avoided if manifest injustice would result. With respect to experts employed by parties in anticipation of litigation but not intended to be called to testify at trial, no discovery may be had unless a party shows "exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions in the same subject by other means." Miss. R. Civ. P. 26(b) (4) (B). In its entirety, Rule 26(b)(4)(A)(i)-(ii) provides that "[d]iscovery of facts known and opinions held by experts, otherwise discoverable under subsection (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows: (A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subsection (b)(4)(C) of this rule, concerning fees and expenses, as the court may deem appropriate." Miss. R. Civ. P. 26(b) (4) (A) (i)-(ii) (2012).

As previously summarized, Rule 26(b) (4) (B) provides that "[a] party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." Miss. R. Civ. P. 26(b) (4) (B) (2012).

With respect to the allocation of fees, Rule 26(b)(4)(C) provides



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that “[u]nless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subsections (b)(4)(A)(ii) and (b)(4)(B) of this rule, and (ii) with respect to discovery obtained under subsection (b)(4)(A)(ii) of this rule, the court may require, and with respect to discovery obtained under subsection (b)(4)(B) of this rule, the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.” Miss. R. Civ. P. 26(b) (4) (C) (2012).

7. What is the Expert Standard (Frye/Daubert/Hybrid)?

Mississippi courts have employed a "modified *Daubert*" approach since 2003. The official comment provides that “Rule 702 does not relax the traditional standards for determining that the witness is indeed qualified to speak an opinion on a matter within a purported field of knowledge, and that the factors mentioned in *Daubert* do not constitute an exclusive list of those to be considered in making the determinations.” As further interpreted by the Court, “[t]he current version of Rule 702 recognizes that the *Daubert* rule, as modified, provides a superior analytical framework for evaluating the admissibility of expert witness testimony. Considering this Court’s recent May 29, 2003, adoption of revised Rule 702 with the additional language found in the federal rule, this Court today adopts the federal standards and applies our amended Rule 702 for assessing the reliability and admissibility of expert testimony.” Miss. Transp. Comm’n. v. McLemore, 863 So. 2d 31, 40 (2003).

8. Are there other notable Discovery Rules?

Mississippi adopted e-discovery amendments in 2003.

9. Is there mandatory mediation or arbitration?

Mediation is mandatory only by court order. The Mississippi Mediation Rules for Civil Litigation provide procedures for referral of civil cases to mediation.

10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?

Under Miss. R. Civ. P. 16, the pretrial conference may be discretionary or mandatory, if all parties request same. Rule 16 provides that “[i]n any action the court may, on its own motion or on the motion of any party, and shall on the motion of all parties, direct the attorneys for the parties to appear before it at least twenty days before the case is set for trial...” At the pretrial conference, motions in limine need not be discussed, but Rule 16(e) does provide that the number of expert witnesses that may be utilized at trial is a subject that should be addressed.



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11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge? Judges use the pretrial conference and Miss. R. Civ. P. 16 to facilitate the trial of the case. Some judges enter an order following the conference, reciting the action taken at the conference. Others do not.
12. Who conducts voir dire (Court/Counsel)? Describe the process. Under Miss. Code Ann. § 13-5-29 (2012), parties or their attorneys may question jurors who are being impaneled. Individual jurors may be examined only when proper to inquire as to answers given or for other good cause allowed by the court.
13. How many jurors are there? How many alternates? How many peremptory challenges? Circuit and Chancery court juries consist of 12 members. County court juries seat only 6. In all three divisions, the judge has the discretion to seat 1 or 2 alternates. In Circuit or Chancery court, each party has 1 challenge for alternates.
- Under MRCP 47(c), each side may exercise four peremptory challenges in an action before a twelve-person jury. In actions tried before a six-person jury, each side may exercise two peremptory challenges. Where one or both sides are composed of multiple parties, the court may allow challenges to be exercised separately or jointly, and may allow additional challenges. In all actions the number of challenges allowed for each side shall be identical. If one side gets extra peremptory challenges, the other side must get an equal amount of challenges. Peremptory challenges cannot be based on race or gender.
14. Identify any "unusual" trial procedures. None at this time.
15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions? Chancery division has jurisdiction over domestic matters, equity matters and juvenile matters (if a county does not have a county division). Circuit courts hear felony criminal prosecutions and civil lawsuits; they also hear appeals from county, justice and municipal courts and from administrative boards. County courts have exclusive jurisdiction over eminent domain proceedings consistent with Miss. Code. Ann. § 11-27-3 (2012) and juvenile matters and may adjudicate civil matters when there is less than \$200,000.00 in dispute.
- Under MRPC 26(e), unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence so long as not operating to delay another parties discovery. MRCP 26(c) provides that at any time after the commencement of the action, the court may hold a conference on



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- the subject of discovery, and shall do so at the request of any party. At this conference a schedule of discovery is determined.
16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?
- Miss. Code Ann. § 11-1-63(h) (2012) immunizes innocent sellers who are not actively negligent, but instead are mere conduits of a product.
17. Is there a provision for Prejudgment interest?
- Miss. Code Ann. § 75-17-7 (2012) gives judges discretion to assess prejudgment interest. Both the rate and the date interest begins to accrue is left to the discretion of the judge, except that the starting date cannot be earlier than the date of filing.
- “All judgments or decrees founded on any sale or contract shall bear interest at the same rate as the contract evidencing the debt on which the judgment or decree was rendered. All other judgments or decrees shall bear interest at a per annum rate set by the judge hearing the complaint from a date determined by such judge to be fair but in no event prior to the filing of the complaint.” Miss. Code Ann. § 75-17-7 (2012).
18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)
- None.
19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?
- Venue is the only area in which the playing field may be tilted. In certain counties, it is difficult for defendants to get a fair trial.
20. Are there legislative efforts under way that address any of the litigation practices in your state?
- Not currently.



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### Question

### Missouri

1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?

No.

2. Are there Standard Form Interrogatories/Document Requests?

It varies depending on the circuit. For example, in certain types of cases (e.g., slip and fall, medical malpractice, and auto accidents), the City of St. Louis has approved “form” discovery the parties must submit to each other and answer without objections; additionally, the parties are allowed to add up to four of their own interrogatories, after which court approval is needed to submit more. Many circuits do not have form discovery.

3. Are there limits on the number of Interrogatories/Document Requests?

Not in the Missouri Rules of Civil Procedure. However, Jackson County (Kansas City area) limits each party to two sets of interrogatories totaling no more than 30 interrogatories in the aggregate; each interrogatory may have no more than two subparts (Local Rule 32.2). No limit, but only one set of interrogatories is permitted under the State Rules.

“No party may, without leave of court, serve more than one set of interrogatories to be answered by the same party.” Mo. Rev. Stat. § 510.020 (2012).

4. Are there time limits on depositions, or limits on the number of depositions?

No. The rules place no time limits on depositions and do not limit the number of depositions that may be taken. Of course, the trial judge regulates discovery and may enter protective orders upon motion.

5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)

Yes. The rules in Missouri regarding corporate designee depositions are similar to Rule 30(b) (6) of the Federal Rules of Civil Procedure. Missouri Rule 57.03(b)(4) provides that a party may name as the deponent a public or private corporation, a partnership or association, or a governmental agency and describe “with reasonable particularity” the matters on which testimony is requested. The named organization must then designate one or more officers, directors, managing agents, or other persons to testify on its behalf and may set forth for each person designated the matters on which he or she will testify. The persons designated must testify regarding “matters known or reasonably available to the organization.”

“A party may in the notice and in a subpoena name as the deponent



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a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This Rule 57.03(b) (4) does not preclude taking a deposition by any other procedure authorized in these rules.” Mo. R. Civ. P. 57.03(b) (4) (2012).

6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?

Yes. For retained experts, Mo. R. Civ. P. Rule 56.01(b) (4) (b) (2011) provides that “[a] party may discover by deposition the facts and opinions to which the expert is expected to testify. Unless manifest injustice would result, the court shall require that the party seeking discovery from an expert pay the expert a reasonable hourly fee for the time such expert is deposed.” Missouri rules require the parties to disclose their experts, but expert reports are not required. (For non-retained experts, see Mo. R. Civ. P. 56.01(b) (5) (2012); there is no rule regarding who pays for a non-retained expert’s time.)

“A party may discover by deposition the facts and opinions to which the expert is expected to testify. Unless manifest injustice would result, the court shall require that the party seeking discovery from an expert pay the expert a reasonable hourly fee for the time such expert is deposed.” Mo. R. Civ. P. 56.01(b) (4) (B) (2012).

“A party, through interrogatories, may require any other party to identify each non-retained expert witness, including a party, whom the other party expects to call at trial who may provide expert witness opinion testimony by providing the expert’s name, address, and field of expertise. For the purpose of this Rule 56.01(b)(5), an expert witness is a witness qualified as an expert by knowledge, experience, training, or education giving testimony relative to scientific, technical or other specialized knowledge that will assist the trier of fact to understand the evidence. Discovery of the facts known and opinions held by such an expert shall be discoverable in the same manner as for lay witnesses.” Mo. R. Civ. P. 56.01(b) (5)



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(2012).

### 7. What is the Expert Standard (Frye/Daubert/Hybrid)?

Missouri has not adopted *Daubert* and follows a modified *Frye* standard regarding the admissibility of expert opinions. In civil cases, the admission of expert testimony is governed by Section 490.065 RSMo, which reads like Federal Rule of Evidence 702 but in practice is not applied in the same way. The court must identify the relevant field in which data and facts are accepted, and must “consider whether the facts and data used by the expert are of a type reasonably relied upon by experts in that field or if the methodology is otherwise reasonably reliable”; if not, “then the testimony does not meet the statutory standard and is inadmissible.” *State Bd. of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146, 156-57 (Mo. banc 2003). Generally, Missouri courts have been fairly liberal on the admission of expert testimony, making it difficult to strike an expert, especially when compared to the practice in federal courts.

“This Court reaffirms its holding in *Lasky v. Union Electric Co.*, 936 S.W.2d 797 (Mo. banc 1997), that the standard for the admission of expert testimony in civil cases is that set forth in section 490.065. As discussed herein, this is also the standard to be applied in administrative cases. To the extent that civil cases decided since *Lasky* apply *Frye* or some other standard, they are incorrect and should no longer be followed. Section 490.065.3 requires that the facts and data on which an expert relies must be those reasonably relied on by experts in the relevant field.”

To the extent that civil cases decided since *Lasky* apply *Frye* or some other standard, they are incorrect and should no longer be followed. Section 490.065.3 requires that the facts and data on which an expert relies must be those reasonably relied on by experts in the relevant field. Here, the relevant field is physicians treating persons with vascular disease. Because the AHC failed to properly apply this standard, this Court reverses the circuit court’s judgment and remands the case.” *State Bd. of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 149 (Mo. banc 2003).

“So far as I know, no Missouri court has accepted the invitation to hold a “*Daubert*” hearing such as those in federal trial courts in which the validity of expert testimony is evaluated in hearings that may last for days. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). That, I hope, is because Missouri lawyers and judges realize that §



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490.065, RSMo 2000, differs from the expert provisions of the Federal Rules of Evidence and does not make the judge a gatekeeper of the validity of expert testimony. The criterion that the statute provides in civil cases is limited to the question of whether the facts and data on which an expert relies are those reasonably relied on by experts in the relevant field. (See also *State Bd. of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 149 (Mo. banc 2003), and (*McDonagh*) at 160 (Wolff, J., concurring).” *State ex rel. Crown Power & Equip. Co v. Ravens*, 309 S.W.3d 798, 807 (Mo. 2009).

8. Are there other notable Discovery Rules?

Mo. R. Civ. P. 57.01(b) (3) and 58.01(b) (3) (2011) require that all discovery be e-mailed or sent via CD-ROM or diskette to the other parties who are not in default. Additionally, though parties typically have 30 days in which to respond to discovery, Mo. R. Civ. P. 57.01(c)(1) and 58.01(c)(1) (2011) provide that parties shall not be required to respond to discovery before the expiration of 45 days after entering their appearance or being served with process (whichever is earlier). Also, though not codified in the Missouri Rules of Civil Procedure, the recent case of *Proctor v. Messina*, 320 S.W.3d 145 (Mo. banc 2010), is seen as prohibiting attorneys from speaking, *ex parte*, with a plaintiff’s treating physicians in light of the federal Health Insurance Portability and Accountability Act (HIPAA). Therefore, defense attorneys now apparently are required to depose treating physicians to assess a plaintiff’s injuries and damages.

9. Is there mandatory mediation or arbitration?

Not currently. Nevertheless, some judges will order or strongly encourage mediation in their cases. A commission of the Missouri Supreme Court has recommended adopting a rule requiring mandatory mediation. (Action on that recommendation could be taken later in 2011.)

10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?

Mo. R. Civ. P. 62.01 (2012) deals with pre-trial procedures. Details not addressed by the rule vary by judge. Typically, pretrial conferences are held a few days before trial, and are conducted by the trial judge. The timing on hearing motions in limine will vary as well. They can be heard at the pretrial conference, but also on the eve of trial, depending on the judge’s preference.



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11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?

It varies by judge. In larger or complex cases, the attorneys sometimes agree among themselves whether to exchange deposition designations, witness lists, and other documents or information typically required by federal courts. There is, however, no statewide standard requiring the submission of pre-trial compliance materials.

12. Who conducts voir dire (Court/Counsel)? Describe the process.

Counsel conducts voir dire, and is typically given much leeway. It is not uncommon for attorneys to "try their case" during voir dire.

13. How many jurors are there? How many alternates? How many peremptory challenges?

In most cases, there are 12 jurors plus 2 alternates. In larger or complex cases lasting more than 2 weeks, 3 or more alternates may be used. Missouri does not require unanimity in civil cases; only 9 of the 12 jurors must agree to reach a verdict. Each side typically receives 3 peremptory challenges, with adjustments made in unusual cases involving issues of alignment or third-party claims. *Batson* challenges are not as common as in federal court.

"In all trials of civil actions before a circuit judge, or an associate circuit judge sitting as a circuit judge, a jury shall consist of twelve persons selected pursuant to sections 494.400 to 494.505, unless all parties agree on a lesser number, but not less than eight, in which case the number of veniremen shall be reduced accordingly. Three-fourths or more jurors may return a lawful verdict. All verdicts shall be signed by each juror who agrees to the verdict." Missouri Rev. Stat. § 494.490 (2012).

"In trials of civil causes each party shall be entitled to peremptorily challenge three jurors. When there are multiple plaintiffs or defendants, all plaintiffs and all defendants shall join in their challenges as if there were one plaintiff and one defendant. The court in its discretion may allocate the allowable peremptory challenges among the parties' plaintiff or defendant upon good cause shown and as the ends of justice require. In all cases, the plaintiff shall announce its challenges first." Missouri Rev. Stat. § 494.480(1) (2012).

"If in any case to be tried before a jury it appears to the court to be appropriate, the court may direct that a number of jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be selected in the same manner, shall have the same qualifications, shall be subject to the same



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examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the principal jurors. Alternate jurors who do not replace principal jurors shall be discharged after the jury retires to consider its verdict. Each side is entitled to one peremptory challenge in addition to those otherwise allowed by law for each two alternate jurors to be impaneled. The additional peremptory challenge may be used against an alternate juror only, and the other peremptory challenges allowed by law shall not be used against the alternates.” Mo. Rev. Stat. § 494.485 (2012).

14. Identify any “unusual” trial procedures.

Missouri rules are largely modeled on the Federal Rules of Civil Procedure, so there is nothing particularly unusual about them. Of course, some Missouri jurisdictions may have local rules or customs that an attorney may never have encountered before. For example, in the City of St. Louis, a central docketing system is used, and the trial judge is not assigned until the time of trial.

15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?

In the City of St. Louis, Division 1 handles scheduling issues and two other divisions handle most motions in all cases (though a few cases are specially assigned to a division, in which case the judge in that division will handle motions). In some of the larger jurisdictions such as the City of St. Louis and St. Louis County, there is Family Court, Juvenile Court, and even Domestic Violence divisions, but Missouri courts generally do not set up separate divisions based on the type of claim filed. Also, Missouri’s standard discovery rules are generally applied in all civil cases.

16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?

Yes. Missouri has an “innocent seller” statute, Section 537.762 RSMo. It generally provides that if the manufacturer of the product at issue (or another defendant “from whom total recovery may be had for plaintiff’s claim”) is in the case, then the court may dismiss a supplier without prejudice. In practice, the statute is unevenly applied, in that some judges are reluctant to dismiss the supplier. (Federal courts sitting in Missouri have treated the statute as “procedural” in nature and therefore not binding on them.)



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17. Is there a provision for Prejudgment interest?

Yes. Under Section 408.040 RSMo, prejudgment interest in tort cases starts to run when a demand is rejected or when 90 days pass without a response, after which interest accumulates at the Federal Funds Rate plus 3% (by comparison, the post-judgment statutory interest rate is 5% plus the Federal Funds Rate). The demand must be written and follow a certain form, as set forth in the statute. In contract cases, the rate is set by the contract; if no rate is specified in the contract, the rate is 9% (Section 408.020 RSMo). In non-tort actions, interest allowed on money due under a judgment is 9% from the date judgment is entered.

“...In tort actions, if a claimant has made a demand for payment of a claim or an offer of settlement of a claim, to the party, parties or their representatives, and to such party's liability insurer if known to the claimant, and the amount of the judgment or order exceeds the demand for payment or offer of settlement, then prejudgment interest shall be awarded, calculated from a date ninety days after the demand or offer was received, as shown by the certified mail return receipt, or from the date the demand or offer was rejected without counter offer, whichever is earlier. In order to qualify as a demand or offer pursuant to this section, such demand must:

(1) Be in writing and sent by certified mail return receipt requested; and

(2) Be accompanied by an affidavit of the claimant describing the nature of the claim, the nature of any injuries claimed and a general computation of any category of damages sought by the claimant with supporting documentation, if any is reasonably available; and

(3) For wrongful death, personal injury, and bodily injury claims, be accompanied by a list of the names and addresses of medical providers who have provided treatment to the claimant or decedent for such injuries, copies of all reasonably available medical bills, a list of employers if the claimant is seeking damages for loss of wages or earning, and written authorizations sufficient to allow the party, its representatives, and liability insurer if known to the claimant to obtain records from all employers and medical care providers; and

(4) Reference this section and be left open for ninety days.

Unless the parties agree in writing to a longer period of time, if the claimant fails to file a cause of action in circuit court prior to a date



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one hundred twenty days after the demand or offer was received, then the court shall not award prejudgment interest to the claimant. If the claimant is a minor or incompetent or deceased, the affidavit may be signed by any person who reasonably appears to be qualified to act as next friend or conservator or personal representative. If the claim is one for wrongful death, the affidavit may be signed by any person qualified pursuant to section 537.080, to make claim for the death. Nothing contained herein shall limit the right of a claimant, in actions other than tort actions, to recover prejudgment interest as otherwise provided by law or contract.” Mo. Rev. Stat. § 408.040(2) (2012).

“In tort actions, a judgment for prejudgment interest awarded pursuant to this subsection should bear interest at a per annum interest rate equal to the intended Federal Funds Rate, as established by the Federal Reserve Board, plus three percent. The judgment shall state the applicable interest rate, which shall not vary once entered.” Mo. Rev. Stat. § 408.040(3) (2011).

“Creditors shall be allowed to receive interest at the rate of nine percent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made; for money recovered for the use of another, and retained without the owner's knowledge of the receipt, and for all other money due or to become due for the forbearance of payment whereof an express promise to pay interest has been made.” Mo. Rev. Stat. § 408.020 (2011).



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18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

Setoffs and Effect of Settlement. To obtain a set off for payments made by others, a party must plead an affirmative defense; in doing so, it is advisable to cite Section 537.060 RSMo, which governs contribution among tortfeasors. Under the same statute, a plaintiff's settlement with a tortfeasor, if made in good faith, discharges all liability for contribution or non-contractual indemnity to any other tortfeasor. Joint and Several Liability; Punitive Damages. Under Section 537.067 RSMo, if the jury apportions fault and a defendant is found to be less than 51% at fault, then that defendant is only severally liable for the judgment. Furthermore, a defendant is only severally liable for a punitive damage award, regardless of the percentage of fault assessed. The jury may not be informed of the effect of this statute. Under Section 510.265 RSMo, punitive damages in most actions are limited to \$500,000 or five times the compensatory damages, whichever is greater. Also, punitive damages may only be awarded based on clear and convincing evidence. Under Section 490.715.5 RSMo, "a rebuttable presumption [exists] that the dollar amount necessary to satisfy the [plaintiff's] financial obligation to the health care provider represents the value of the medical treatment rendered." At first glance, the statute seems to set up a presumption that damage awards for medical expenses should equal the amount paid, not the amount billed. The meaning of the law has recently been called into question, however, in *Berra v. Danter*, 299 S.W.3d 690 (Mo.App. E.D. 2009), which held that the amount reflected in billing statements should merely be considered in determining the reasonable value of plaintiff's medical treatment. Venue. With rare exception, tort cases must be brought and tried in the county in which the tort is alleged to have occurred.

In *Watts ex. Rel. Watts V. Lester E. Cox Medical Centers*, No SC91867, 2012 WL 3101657, at \*2-3 (Mo. banc July 31, 2012), the Court held that Mo. Rev. Stat. §538.210, the statutory section placing a cap on non-economic damages in the count of \$350,000 was unconstitutional to the extent it infringed "on the jury's constitutionally protected purpose of determining the amount of damages sustained by an injured party." This right derives from Article I, Section 22(a) of the Missouri Constitution, which creates a right to trial by jury. *Id.* At \*3.



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19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

By and large, the Missouri rules create a level playing field, and the majority of judges throughout the state are generally fair to the parties. In some Missouri jurisdictions, as in other states, there are some judges who tilt one way or the other, but not usually to such an extent that they gain statewide notoriety. To the extent a particular judge or venue may seem unfair, there are some remedies available. For example, within certain time periods, Rule 51.05 allows a change of judge as of right, and Rule 51.03 allows a change of venue as of right from a county with a population of 75,000 or less. Such changes also may be sought for cause, in certain circumstances. The City of St. Louis and Jackson County (Kansas City area) are often cited as jurisdictions that are liberal in favor of tort plaintiffs. Several years ago, the City of St. Louis was named a “judicial hellhole” by the American Tort Reform Association (ATRA). In recent years, however, the City of St. Louis has been less so as former suburbanites and many young professionals have moved in. This trend is reflected in the City’s absence from the ATRA list in 2009 and 2010, though the City did receive a “dishonorable mention” for a \$21 million fee award for lawyers in a class action case in which clients received \$20 and coupons worth less than \$25. (Both the City of St. Louis and Jackson County were on ATRA’s “Watch List” as recently as 2008. St. Louis County was also on the 2008 “Watch List,” but was absent from the most recent report. Though it is true St. Louis County is less conservative than it once was, many St. Louis area lawyers questioned St. Louis County’s placement on the “Watch List.” ATRA’s 2008 comments concerning St. Louis County appeared to focus on a few extreme or unusual outcomes.)

20. Are there legislative efforts under way that address any of the litigation practices in your state?

Significant changes in a number of areas (e.g., venue, joint and several liabilities, punitive damages) resulted from tort reform litigation that took effect in 2005. During the last 2-3 years, there have been efforts to repeal or change Missouri’s Non-Partisan Court Plan, under which candidates for all appellate courts (and for certain trial courts in the St. Louis, Kansas City, and Springfield metropolitan areas) are chosen. The selection process involves nominations by a panel consisting of (1) attorneys elected by their peers; and (2) persons appointed by the governor. The panel nominates three candidates and the governor picks one (if the governor then fails to choose one, the panel does so). The Missouri Bar and many plaintiff’s and defense attorneys have defended the current system. In 2010, a statewide initiative petition proposed repealing the Non-Partisan Court Plan and requiring all judges to be elected. There were not enough



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signatures to place the proposal on the ballot at that time. However, Amendment 3 to repeal the Non-Partisan Court Plan will appear on the November 2012 election ballot. This is a hotly contested issue because most but not all attorneys in major metropolitan areas prefer the current system, as it tends to have a moderating or balancing effect on the makeup of the judiciary.



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Question	Montana
1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?	No.
2. Are there Standard Form Interrogatories/Document Requests?	No.
3. Are there limits on the number of Interrogatories/Document Requests?	Yes. Interrogatories are limited to 50 (counting subparts) per Rule 33(a), MT Rules of Civil Procedure (2011). There is no limit on document requests (“Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. Unless otherwise ordered or stipulated, no party may serve on any other party more than 50 interrogatories in the aggregate. Each subpart shall be counted as a separate interrogatory. Additional interrogatories may be submitted for good cause only by leave of court.” Mont. Code Ann. § 25-20-33(a) (2011)).
4. Are there time limits on depositions, or limits on the number of depositions?	Per Rule 30(d) (2) of the MT Rules of Civil Procedure, each deposition is limited to one day of seven hours; there is no limit on the number of depositions in a case. (“Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours. The court must allow additional time consistent with Rule 26(b) (2) if needed for a fair examination of the deponent or if the deponent or another person, or other circumstance, impedes or delays the examination.” Mont. Code Ann. § 25-20-30(d) (2) (2011)).
5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)	Yes. The provisions of M.R.C.P 30(b) (6) are identical to the federal rule. (“A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b) (6) does not preclude taking a deposition by



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any other procedure authorized in these rules.” Mont. Code Ann. § 25-20-30(b) (6) (2011)).

6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?

Expert depositions are permitted. There is no establishing rule about who is to pay for the expert's time. Frequently, the party taking the deposition pays for that time. It is also not uncommon for the party defending the deposition to absorb that cost if there are numerous expert depositions being taken all around and all counsel agree to the latter. (“Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows: (A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.” Mont. Code Ann. § 25-20-26(b) (4) (A)-(C) (2011)).



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7. What is the Expert Standard (Frye/Daubert/Hybrid)?

A Frye/Daubert hybrid standard is used.

“Mont. R. Evid. 702 provides if scientific, technical, or other specialized knowledge will assist the Trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise. It is better to admit relevant scientific evidence in the same manner as other expert testimony and allow its weight to be attacked by cross-examination and refutation. *State v. Damon*, 2005 MT 218, P17, 328 Mont. 276, 119 P.3d 1194 (internal quotations omitted).

We held the district court's gatekeeper role in applying the *Daubert* factors, which guide trial courts in their assessment of the reliability of proffered scientific expert testimony, applies only to the admission of novel scientific evidence in Montana. *Damon*, P18. Novelty in Montana is assessed from a very narrow perspective. *Damon*, P18.” *Harris v. Hanson*, 201 P.3d 151, 158, 2009 MT 13, P32-P33 (Mont. 2009).

8. Are there other notable Discovery Rules?

Montana currently tracks the identically numbered federal rules with the two notable exceptions being the absence of requirements in Rule 26(a) for mandatory pre-discovery disclosures and for signed expert reports; parties are required to provide the former expert disclosures consistent with the old versions of Federal Rule 26(b)(4).

9. Is there mandatory mediation or arbitration?

Mediation is not required by rule. However most state district court judges will require that the parties undertake mediation before a trial date will be given.



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10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?

In state court, preliminary pretrial conferences (PPTC) are convened for scheduling purposes at the initiative of one of the parties. Typically, the judge's clerk presides at those PPTC's, at which the case is scheduled out. There is currently a split amongst state trial judges on how they schedule cases. The majority still set a trial date at the PPTC and will usually set a final pretrial conference in the preceding week to 10 days before the commencement of trial. A minority now simply schedule a date for the final pretrial conference, by which the parties are to have the case fully worked up, including a final pretrial order ready for the judge's signature. If that is accomplished by the time set for the final pre-trial conference, those judges will then set a trial date, 60 to 120 days out from the conference. In either scenario, the trial judge will conduct the final pretrial conference. Motions in limine are typically addressed then or at a separate hearing in advance of trial. The timing of filing such motions is typically addressed in the scheduling order issued following the preliminary pretrial conference.

11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?

The practice typically is similar to federal practice, although not by rule.

12. Who conducts voir dire (Court/Counsel)? Describe the process.

Counsel conducts voir dire, although some state district judges have taken to asking preliminary questions. They and others have begun to impose time limits on counsel's voir dire although the practice is by no means uniform.

13. How many jurors are there? How many alternates? How many peremptory challenges?

The text of the rule, but not the substance has changed as follows:  
“(b) Manner of Selection and Order of Examination of Jurors.  
1. (1) Order of Examination. From the entire jury panel, an initial panel of 20 jurors shall be called in the first instance, and before any voir dire examination of the jury shall be had. Examination of all jurors in the initial panel shall be completed by the plaintiff before examination by the defendant. If challenges for cause are allowed, an additional juror shall be called from the entire panel immediately upon the allowance of challenge, and the juror called to replace the juror excused for cause shall take the number of the juror who has been excused, to provide a full initial panel of 20 jurors, whose examination shall be completed before any peremptory challenges are made.  
(2) Peremptory Challenges.  
(A) When the voir dire examination has been completed, each side shall have four peremptory challenges, and they shall be exercised by the plaintiff first striking one, the defendant then striking one,



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and so on, until each side has exhausted or waived its right.

(B) In the event one or more alternate jurors are called, the next jurors remaining in the initial panel, if any, shall be called by the clerk to be the alternate jurors.

(C) In the event all jurors remaining of the original initial panel of 20 jurors, including those substituted for those jurors excused for cause, have been subjected to peremptory challenge, then the clerk shall call additional jurors from the remainder of the jury panel to provide alternate jurors who will be subject to challenge as provided by law.

(D) In the event there is more than one party defendant, and should it appear that each defendant is entitled to peremptory challenges, then the original panel shall be increased to provide four additional jurors for each defendant who is entitled to exercise peremptory challenges.

(E) The clerk shall keep a record of the order in which jurors are called, and in the event the entire initial panel has not been exhausted by challenges, the court shall excuse sufficient of the last-called jurors until a jury of 12 persons and the determined number of alternates shall remain to make up the trial jury.

(c) Alternate Jurors. The court may direct that one or two jurors in addition to the regular panel be called and impaneled to sit as alternate jurors.

(1) Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury arrives at its verdict, become unable or disqualified to perform their duties.

(2) An alternate juror shall not join the jury in its deliberation unless called upon by the court to replace a member of the jury.

(3) The alternate juror's conduct during the period in which the jury is considering its verdict shall be regulated by instructions of the trial court.

(4) Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the principal jurors.

(5) An alternate juror who does not replace a principal juror shall be discharged after the jury arrives at its verdict.

(6) If one or two alternate jurors are called, each party is entitled to one peremptory challenge in addition to those otherwise allowed by subdivision (b) of this rule.

(7) The additional peremptory challenge may be used only against an alternate juror, and other peremptory challenges allowed by law shall not be used against the alternates.”



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14. Identify any “unusual” trial procedures.      None.
15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?      No.
16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?      No.
17. Is there a provision for Prejudgment interest?      Yes. Prejudgment interest is allowed for claims for sums certain or "capable of being made certain."
- “Each person who is entitled to recover damages certain or capable of being made certain by calculation and the right to recover that is vested in the person upon a particular day is entitled also to recover interest on the damages from that day except during the time that the debtor is prevented by law or by the act of the creditor from paying the debt.” Mont. Code Ann. § 27-1-211 (2011).
18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)      None.
19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?      Substantively-yes; procedurally-no
20. Are there legislative efforts under way that address any of the litigation practices in your state?      Montana Rules of Civil Procedure, Montana Rules of Appellate Procedure, and Montana Uniform District Court Rules were amended effective October 1, 2011. Pro Hac Vice fee increased from \$345 to \$385, effective October 1, 2012.



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Question	Nebraska
1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?	No.
2. Are there Standard Form Interrogatories/Document Requests?	No.
3. Are there limits on the number of Interrogatories/Document Requests?	Yes. Interrogatories are limited to 50. There is no limit on document requests. (“Unless otherwise permitted by the court for good cause shown, no party shall serve upon any other party more than fifty interrogatories. Each question, sub question, or subpart shall count as one interrogatory.” Neb. Ct. R. Disc. § 6-333(a) (2011)).
4. Are there time limits on depositions, or limits on the number of depositions?	No.
5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)	Yes. The rule is similar to the federal rule. (“A party may in his or her notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he or she will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b) (6) does not preclude taking a deposition by any other procedure authorized in these rules.” Neb. Ct. R. Disc. § 6-330(b) (6) (2011)).
6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?	Yes. Typically the party requesting the deposition pays for the expert’s time during the deposition, but not for the preparation. (“(A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the



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court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivisions (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.” Neb. Ct. R. Disc. § 6-326(4) (A)-(C) (2011).

7. What is the Expert Standard  
(*Frye/Daubert/Hybrid*)?

The *Daubert* standard is used.

“We are persuaded that Nebraska should join the majority of jurisdictions that have already concluded that the *Daubert* standards provide a more effective and just means of evaluating the admissibility of expert opinion testimony...Specifically, we hold that in those limited situations in which a court is faced with a decision regarding the admissibility of expert opinion evidence, the trial judge must determine at the outset, pursuant to Neb. Evid. R. 702, whether the expert is proposing to testify to (1) scientific, technical, or other specialized knowledge that (2) will assist the Trier of fact to understand or determine a fact in issue. This entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue.” *Schafersman v. Coop*, 631 N.W.2d 862, 876-877, 262 Neb. 215, 231-232 (Neb. 2001).



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8. Are there other notable Discovery Rules? No.
9. Is there mandatory mediation or arbitration? No.
10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial? The pretrial conference is conducted by the trial judge. Motions in limine are typically not handled then, but closer to trial. The timing of the pretrial conference varies by judge, but is typically held within a month of trial.
11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge? It varies widely by judge, but most require information similar to the requirements of the federal rules, including exhibit and witness lists, jury instructions and trial briefs.
12. Who conducts voir dire (Court/Counsel)? Describe the process. The court typically begins with very basic questions, followed by a relatively short time period (usually 30-60 minutes) for each party.
13. How many jurors are there? How many alternates? How many peremptory challenges? Juries usually are composed of 12 members with no alternates. Usually 3 peremptory challenges are permitted per side.  
  
"The judge shall examine all jurors so selected who appear and if, after all excuses have been allowed more than twenty-four petit jurors for each judge sitting with a jury, who are qualified and not excluded by the terms of section 25-1601, shall remain, the court may excuse by lot such number in excess of twenty-four as the court may see fit. Those jurors who have been discharged in excess of twenty-four for each judge, but are qualified, shall not be discharged permanently, but shall remain subject to be resummoned for jury service upon the same panel and before a new key number is selected." Neb. Rev. Stat. Ann. § 25-1631.03 (2011).
14. Identify any "unusual" trial procedures. None.
15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions? No.



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16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?

Nebraska law bars a strict liability claim against a seller or lessor who was not involved in manufacturing the product. Otherwise, no.

17. Is there a provision for Prejudgment interest?

Yes, by statute that requires a written demand for judgment and an outcome that exceeds the demand, unless interest is otherwise provided by statute in the particular type of case, or by contract.

“(1) Except as provided in section 45-103.04, interest as provided in section 45-103 shall accrue on the unpaid balance of unliquidated claims from the date of the plaintiff’s first offer of settlement which is exceeded by the judgment until the entry of judgment if all of the following conditions are met:

(a) The offer is made in writing upon the defendant by certified mail, return receipt requested, to allow judgment to be taken in accordance with the terms and conditions stated in the offer;

(b) The offer is made not less than ten days prior to the commencement of the trial;

(c) A copy of the offer and proof of delivery to the defendant in the form of a receipt signed by the party or his or her attorney is filed with the clerk of the court in which the action is pending; and

(d) The offer is not accepted prior to trial or within thirty days of the date of the offer, whichever occurs first.

(2) Except as provided in section 45-103.04, interest as provided in section 45-104 shall accrue on the unpaid balance of liquidated claims from the date the cause of action arose until the entry of judgment.” Neb. Rev. Stat. § 45-103.02 (2011).

18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

None.

19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

No.



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20. Are there legislative efforts under way that address any of the litigation practices in your state?      No, not as of 2012.



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### Question

### Nevada

1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?

Yes. Nevada has adopted most of the provisions in F.R.C.P. 26 and they are embodied in Nev. R. Civil. P. 16.1 (2011).

2. Are there Standard Form Interrogatories/Document Requests?

No.

3. Are there limits on the number of Interrogatories/Document Requests?

Yes. Nev. R. Civil. P. 33(a) (2011) limits the number of interrogatories to 40, including all discrete subparts. There is no limit on document requests. (“Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 40 in number including all discrete subparts, to be answered by the party served or, if the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b) (2)...” Nev. R. Civ. P. 33(a) (2011)).

4. Are there time limits on depositions, or limits on the number of depositions?

No.

5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)

Yes. Nev. R. Civil. P. 30(b) (6) is essentially the same as F.R.C.P. 30(b) (6). (“A party may in the party’s notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b) (6) does not preclude taking a deposition by any other procedure authorized in these rules.” Nev. R. Civ. P. 30(b) (6) (2011)).



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6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?

Yes. Pursuant to Nev. R. Civil. P., 26(b) (4) a party may depose any person who has been identified as an expert whose opinions may be presented at trial. When an expert report is required by Nev. R. Civil. P. 16.1(a) (2), the deposition is not to be conducted until after the report is provided. The party seeking discovery is to pay the expert a reasonable fee for the time spent in responding to either interrogatories or a deposition. Nev. R. Civil. P. 30(h) specifically states that the party asking questions during a deposition pays for the actual time consumed in the examination of the expert. The party noticing the deposition is to tender a fee based on the anticipated length of that party's examination of the witness.

"A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under Rule 16.1(a) (2) (B) or 16.2(a) (3), the deposition shall not be conducted until after the report is provided." Nev. R. Civ. P. 26(b) (4) (A) (2011).

"A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." Nev. R. Civ. P. 26(b) (4) (B) (2011).

"Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b) (4) (B) of this rule, the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert." Nev. R. Civ. P. 26(b) (4) (C) (2011).

"A party desiring to depose any expert who is to be asked to express an opinion, shall pay the reasonable and customary hourly or daily fee for the actual time consumed in the examination of that expert by the party noticing the deposition. If any other attending party desires to question the witness, that party shall be responsible for the expert's fee for the actual time consumed in that party's examination. If requested by the expert before the date of the



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deposition, the party taking the deposition of an expert shall tender the expert's fee based on the anticipated length of that party's examination of the witness. If the deposition of the expert takes longer than anticipated, any party responsible for any additional fee shall pay the balance of that expert's fee within 30 days of receipt of a statement from the expert. Any party identifying an expert whom that party expects to call at trial is responsible for any fee charged by the expert for preparing for and reviewing the deposition." Nev. R. Civ. P. 30(h) (2011).

### 7. What is the Expert Standard (Frye/Daubert/Hybrid)?

Nevada has not specifically adopted *Daubert*. The Nevada statute concerning the admission of expert testimony is NRS 50.275, which tracks Federal Rule of Evidence 702.

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge

The Nevada Supreme Court has stated that "*Daubert* and the federal court decisions discussing it may provide persuasive authority in determining whether expert testimony should be admitted in Nevada court." *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008) (en banc). In the case *Hallmark v. Eldridge*, the Nevada Supreme Court held:

. . . the witness must satisfy the following three requirements: (1) he or she must be qualified in an area of "scientific, technical or other specialized knowledge"; (the qualification requirement); (2) his or her specialized knowledge must "assist the trier of fact to understand the evidence or to determine a fact in issue" (the assistance requirement); and (3) his or her testimony must be limited to "matters within the scope of his or her specialized knowledge" (the limited scope requirement)

*Hallmark*, 124 Nev. at 498, 189 P.3d at 650. In determining qualifications of an expert, the court indicated it must consider the formal schooling and academic degrees, licensure, employment experience, practical experience and specialized training. In determining whether the expert testimony will assist the trier of fact, the court indicated it must consider if the testimony is relevant and the product of reliable methodology.



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In determining whether an expert's opinion is based upon reliable methodology, a district court should consider whether the opinion is (1) within a recognized field of expertise; (2) testable and has been tested; (3) published and subjected to peer review; (4) generally accepted in the scientific community; and (5) based more on particularized facts rather than assumption, conjecture, or generalization.

If the expert formed his or her opinion based upon the results of a technique, experiment, or calculation, then a district court should also consider whether (1) the technique, experiment, or calculation was controlled by known standards; (2) the testing conditions were similar to the conditions at the time of the incident (3) the technique, experiment, or calculation had a known error rate and (4) it was developed by the proffered expert for the purposes of the present dispute.

*Hallmark*, 124 Nev. at 501–502, 189 P.3d at 652.

In a subsequent opinion *Higgs v. State of Nevada*, 222 P.3d 648 (Nev. 2010), the Nevada Supreme Court specifically rejected the assertion that its decision in the *Hallmark* case was a complete acceptance and adoption of the *Daubert* standard. “To the extent that *Daubert* espouses a flexible approach to the admissibility of expert witness testimony, this court has held it is persuasive. . . . But, to the extent that courts have construed *Daubert* as a standard that requires mechanical application of its factors, we decline to adopt it. We see no reason to limit the factors that trial judges in Nevada may consider when determining expert witness testimony admissibility.” *Higgs v. State*, 222 P.3d at 657–58 (internal citations omitted).

Therefore, in Nevada, the courts will use a standard nearly identical to *Daubert*, but without the requirement to mechanically apply all of *Daubert's* provisions. This gives the courts significantly more discretion and flexibility as to the qualification of experts for testimony.



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8. Are there other notable Discovery Rules? Nevada has one of the broadest rules for initial disclosures requiring production of (A) The name and, if known, the address and telephone number of each individual likely to have information discoverable under Rule 26(b), including for impeachment or rebuttal, identifying the subjects of the information and (B) A copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and which are discoverable under Nev. R. Civ. Proc. 16.1 (2011).
9. Is there mandatory mediation or arbitration? Yes, Nevada has Rules Governing Alternative Dispute Resolution for both mediation and arbitration. The Nevada Arbitration Rules apply to all civil cases commenced in the district courts that have a probable jury award value not in excess of \$50,000 per plaintiff, exclusive of interest and costs, and regardless of comparative liability, except class actions, appeals from courts of limited jurisdiction, probate actions, divorce and other domestic relations actions, actions seeking judicial review of administrative decisions, actions concerning title to real estate, actions for declaratory relief, actions governed by the provisions of Nev. Rev. Stat. § 41A.003 to 41A.069 (medical and dental malpractice), inclusive, actions presenting significant issues of public policy, actions in which the parties have agreed in writing to submit the controversy to arbitration or other alternative dispute resolution method prior to the accrual of the cause of action, actions seeking equitable or extraordinary relief, actions that present unusual circumstances that constitute good cause for removal from the program, actions in which any of the parties is incarcerated and actions utilizing mediation pursuant to Subpart C of the rules. Any matters subject to the Court Annexed Arbitration Program may voluntarily be placed into the Mediation Program.
10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial? Pretrial conferences are set by each trial judge and the requirements vary from department to department. Normally, motions in limine are independently scheduled and heard. Such motions in Southern Nevada's Eighth Judicial District Court must be in writing and filed not less than 45 days prior to trial. Nev. EDCR 2.47.



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11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?

Trial counsel are required to meet prior to any calendar call or pretrial conference, exchange exhibits and lists of witnesses and submit a joint pretrial memorandum containing (1) A brief statement of the facts of the case. (2) A list of all claims for relief designated by reference to each claim or paragraph of a pleading and a description of the claimant's theory of recovery with each category of damage requested. (3) A list of affirmative defenses. (4) A list of all claims or defenses to be abandoned. (5) A list of all exhibits, including exhibits which may be used for impeachment, and a specification of any objections each party may have to the admissibility of the exhibits of an opposing party. If no objection is stated, it will be presumed that counsel has no objection to the introduction into evidence of these exhibits. (6) Any agreements as to the limitation or exclusion of evidence. (7) A list of the witnesses (including experts), and the address of each witness which each party intends to call. Failure to list a witness, including impeachment witnesses, may result in the court's precluding the party from calling that witness. (8) A brief statement of each principal issue of law which may be contested at the time of trial. This statement shall include with respect to each principal issue of law the position of each party. (9) An estimate of the time required for trial. Jury instructions, proposed voir dire questions, original depositions, legal trial briefs and exhibit lists are due at the calendar call.

12. Who conducts voir dire (Court/Counsel)? Describe the process.

The judge is required to conduct voir dire examination of jurors per Nev. EDCR 7.70 in Southern Nevada. Most judges grant counsel leave to ask further voir dire questions. Voir dire questions that are to be asked by the parties must be submitted to the court in chambers not later than 4:00 p.m. on the judicial day before trial begins.

13. How many jurors are there? How many alternates? How many peremptory challenges?

There are 8 jurors. Agreement of 6 is required for a verdict. Usually 1 alternate is selected. Each side is permitted 4 peremptory challenges pursuant to Nev. Rev. Stat. § 16.040(2011).

“Either party may challenge the jurors. The challenges must be to individual jurors and be peremptory or for cause. Each side is entitled to four peremptory challenges.

If there are two or more parties on any side and their interests are diverse, the court may allow additional peremptory challenges, but not more than four, to the side with the multiple parties. If the



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multiple parties on a side are unable to agree upon the allocation of their additional peremptory challenges, the court shall make the allocation.” Nev. Rev. Stat. § 16.040(1)-(2) (2011).

“The judge may require that the clerk draw a number of names to form a panel of prospective jurors equal to the sum of the number of regular jurors and alternate jurors to be selected and the number of peremptory challenges to be exercised. The persons whose names are called must be examined as to their qualifications to serve as jurors. If any persons on the panel are excused for cause, they must be replaced by additional persons who must also be examined as to their qualifications. The jury must consist of eight persons, unless the parties consent to a lesser number. The parties may consent to any number not less than four. This consent must be entered by the clerk in the minutes of the trial. When a sufficient number of prospective jurors have been qualified to complete the panel, each side shall exercise its peremptory challenges out of the hearing of the panel by alternately striking names from the list of persons on the panel. After the peremptory challenges have been exercised, the persons remaining on the panel who are needed to complete the jury shall, in the order in which their names were drawn, be regular jurors or alternate jurors.” Nev. Rev. Stat. § 16.030(4) (2011).

14. Identify any “unusual” trial procedures.

In cases where punitive damages are sought, the trial is bifurcated pursuant to Nev. Rev. Stat. § 42.005 (2011). The Trier of fact shall make a finding of whether such damages will be assessed. If such damages are to be assessed, a subsequent proceeding must be conducted before the same Trier of fact to determine the amount of such damages. The findings required by this section, if made by a jury, must be made by special verdict along with any other required findings. The jury must not be instructed, or otherwise advised, of the limitations on the amount of an award of punitive damages. Evidence of the financial condition of the defendant is not admissible for the purpose of determining the amount of punitive damages to be assessed until the commencement of the subsequent proceeding.

15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?

Yes, based on local rules in particular judicial districts. In Southern Nevada, the Eighth Judicial District, there is a Family Division, a Business Court and Construction Defect Court.



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16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?

No.

17. Is there a provision for Prejudgment interest?

Yes. Nev. Rev. Stat. § 17.130 provides for prejudgment interest, when not provided by contract, at prime plus 2 % on the January 1 or July 1 prior to trial. Interest runs from the time of service of the summons and complaint.

“When no rate of interest is provided by contract or otherwise by law, or specified in the judgment, the judgment draws interest from the time of service of the summons and complaint until satisfied, except for any amount representing future damages, which draws interest only from the time of the entry of the judgment until satisfied, at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the commissioner of financial institutions on January 1 or July 1, as the case may be, immediately preceding the date of judgment, plus 2 percent. The rate must be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied.” Nev. Rev. Stat. § 17.130(2) (2011).

18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

Learned Intermediary

Prior to 2011, the Nevada Supreme court had avoided the issue of learned intermediary. However, in November of 2011, in an unanimous opinion, it issued the decision in *Klasch v. Walgreen Co.*, 264 P.3d 1155 (Nev. 2011), formally adopting the learned intermediary doctrine:

Although this court has not previously considered the learned-intermediary doctrine, the issues raised in this appeal compel us to consider its applicability and scope. In so doing, we first adopt the learned-intermediary doctrine in the context of pharmacist/customer tort litigation and hold that pharmacists have no duty to warn of a prescribed medication’s generalized risks.

We next consider whether the learned-intermediary doctrine likewise insulates a pharmacist from liability when he or she has knowledge of a customer-specific risk. Following the modern trend of case law, we conclude that the learned-intermediary doctrine does not foreclose a pharmacist’s potential for liability when the pharmacist has knowledge of a customer-specific risk. Instead, under these circumstances, a pharmacist has a duty to



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exercise reasonable care in warning the customer or notifying the prescribing doctor of the risk.

*Klasch*, 264 P.3d at 1157–58. Although the court language seems to limit the adoption of the learned intermediary to the “pharmacist/customer” scope, it has been widely argued since then that the court also adopted the doctrine as to drug manufacturers and physicians. However, there is no specific language in published opinions that confirms that.

In *Klasch*, the court mentions drug manufacturers only in the following context:

Traditionally, the learned-intermediary doctrine has been used to insulate drug manufacturers from liability in products-liability lawsuits. Under the learned-intermediary doctrine, a drug manufacturer is immune from liability to a patient taking the manufacturer’s drug so long as the manufacturer has provided the patient’s doctor with all relevant safety information for that drug. It is then up to the patient’s doctor--who has the benefit of knowing the patient’s specific situation--to convey to the patient any information that the doctor deems relevant.

Jurisdictions adopting the learned intermediary doctrine in the context of pharmacist/customer tort litigation have put forth a similar rationale: that between the doctor and the pharmacist, the doctor is in the best position to warn the customer of a given medication’s generalized risks. Or, viewed more pragmatically, the doctrine prevents pharmacists from constantly second-guessing a prescribing doctor’s judgment simply in order to avoid his or her own liability to the customer.. In this sense, the learned-intermediary doctrine preserves the pharmacist’s role as a conduit for dispensing much-needed prescription medications

Because we believe that these public-policy considerations are sound, we adopt the learned intermediary doctrine in the context of pharmacist/customer tort litigation.

*Klasch*, 264 P.3d at 1158–59. Again, nothing specifically on point regarding drug manufacturers. However, it has been argued that given the right circumstances and factual pattern, the court would possibly extend the learned intermediary to drug manufacturers.



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19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

In actions for medical or dental malpractice, damages are limited to \$350,000 for noneconomic damages

20. Are there legislative efforts under way that address any of the litigation practices in your state?

No, not as of 2011.



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### Question

### New Hampshire

1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?

No, except in Carroll and Strafford Counties under the pilot program, <http://www.courts.state.nh.us/supreme/orders/04-06-2010-Order-adopting-PAD-Pilot-Project-Rules.pdf> (PR) where disclosures akin to the federal court practice are required. However, unlike the Federal Rules, the Pilot Project rule requires that the disclosing party actually turn over to the opposing party a copy of all such discoverable materials, PR 3(a) (2), and also requires that the disclosing party provide a summary of the information known to each individual identified under PR 3(a) (1) unless that information is contained in the materials disclosed under PR 3(a) (2) (2011).

2. Are there Standard Form Interrogatories/Document Requests?

No.

3. Are there limits on the number of Interrogatories/Document Requests?

Yes. N.H. Superior Court Rule 36 limits Interrogatories to 50, including subsidiary, incidental or dependent on another interrogatory. There is no limit on the number of requests for production. Under the pilot program in Carroll and Strafford Counties, <http://www.courts.state.nh.us/supreme/orders/04-06-2010-Order-adopting-PAD-Pilot-Project-Rules.pdf>, there is a limit of 25 interrogatories including sub-parts.

“A party may file more than one set of interrogatories to an adverse party, but the total number of interrogatories shall not exceed fifty, unless the Court otherwise orders for good cause shown after the proposed additional interrogatories have been filed. In determining what constitutes an interrogatory for the purpose of applying this limitation in number, it is intended that each question be counted separately, whether or not it is subsidiary or incidental to or dependent upon or included in another question, and however the questions may be grouped, combined or arranged.” N.H. Super. Ct. R. 36 (2011).

“A party may propound more than one set of interrogatories to an adverse party, but the total number of interrogatories shall not exceed twenty-five (25), unless the court otherwise orders for good cause shown after the proposed additional interrogatories have been filed with the court.” N.H. Sup. Ct. PAD P.R. 4(a) (2010).



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4. Are there time limits on depositions, or limits on the number of depositions?

No, except in Carroll and Strafford Counties under the pilot program, <http://www.courts.state.nh.us/supreme/orders/04-06-2010-Order-adopting-PAD-Pilot-Project-Rules.pdf>, where there is no limit on the number of depositions but the combined total time of the depositions taken by a party is limited to 20 hours unless otherwise agreed.

“A party may take as many depositions as necessary to adequately prepare a case for trial so long as the combined total of deposition hours does not exceed twenty (20) unless otherwise stipulated by counsel or ordered by the court for good cause shown.” N.H. Sup. Ct. PAD P.R. 4(b) (2010).

5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)

No.

6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?

Yes. The typical practice is that the deposing party pays the travel and deposition time for the expert deposition.

“Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision b(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows: (a) (i) A party may through interrogatories require any other party to identify each person, whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the Court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision b(3)(c) of this rule, concerning fees and expenses as the Court may deem appropriate.

(b) A party may discover facts known or opinions held by an expert, who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(c) Unless manifest injustice would result, (i) the Court shall require that the party seeking discovery pay the expert a reasonable



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fee for time spent in responding to discovery under subdivisions b(3)(a) and b(3)(b) of this rule, and (ii) with respect to discovery obtained under subdivision b(3)(a)(ii) of this rule, the Court may require, and with respect to discovery obtained under subdivision b(3)(b), the Court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.” N.H. Super. Ct. R. 36 (2011).

### 7. What is the Expert Standard (Frye/Daubert/Hybrid)?

The *Daubert* Expert Standard has been codified in N.H. RSA 516:29-a: I. A witness shall not be allowed to offer expert testimony unless the court finds: (a) Such testimony is based upon sufficient facts or data; (b) Such testimony is the product of reliable principles and methods; and (c) The witness has applied the principles and methods reliably to the facts of the case. II. (a) In evaluating the basis for proffered expert testimony, the court shall consider, if appropriate to the circumstances, whether the expert's opinions were supported by theories or techniques that: (1) Have been or can be tested; (2) Have been subjected to peer review and publication; (3) Have a known or potential rate of error; and (4) Are generally accepted in the appropriate scientific literature. (b) In making its findings, the court may consider other factors specific to the proffered testimony. *Baxter v. Temple*, 157 N.H. 280 (2008).

“I. A witness shall not be allowed to offer expert testimony unless the court finds:

(a) Such testimony is based upon sufficient facts or data;

(b) Such testimony is the product of reliable principles and methods; and

(c) The witness has applied the principles and methods reliably to the facts of the case.

II. (a) In evaluating the basis for proffered expert testimony, the court shall consider, if appropriate to the circumstances, whether the expert's opinions were supported by theories or techniques that:

(1) Have been or can be tested;

(2) Have been subjected to peer review and publication;



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(3) Have a known or potential rate of error; and

(4) Are generally accepted in the appropriate scientific literature.

(b) In making its findings, the court may consider other factors specific to the proffered testimony.” N.H. Rev. Stat. Ann. § 516:29-a (LexisNexis 2011).

8. Are there other notable Discovery Rules?

The pilot project in Carroll and Strafford Counties, <http://www.courts.state.nh.us/supreme/orders/04-06-2010-Order-adopting-PAD-Pilot-Project-Rules.pdf>, has implemented electronic discovery rules. There are no similar rules in the other counties at this time.

9. Is there mandatory mediation or arbitration?

N.H. Superior Court Rule 170 makes ADR mandatory. Parties can either select from a list of volunteer mediators, paid mediators or hire their own private mediator. The ADR election also provides for arbitration as an option, though it is very rarely selected.

10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?

There are typically 2 pretrial conferences. The first is held to set the discovery and trial schedule. The practice now, however, is for the parties to stipulate to a discovery and trial schedule and file it with a request for waiver of the initial conference. The Final Pretrial conference is typically held 2 weeks prior to trial. Ideally, motions in limine are heard at that time, but it is often the case that the court reserves ruling on such motions until the day of trial, sometimes because the judge pre-trying the case may not be the trial judge.

11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?

There is no deadline for motions in limine unless specifically spelled out in the structuring conference order, but the practice is to have them filed more than 10 days before the final pretrial conference. Jury instructions, witness lists and exhibit lists are due at the final pretrial conference.

12. Who conducts voir dire (Court/Counsel)? Describe the process.

Attorney conducted voir dire is permitted provided that both sides agree to do so (N.H. Rev. Stat. Ann. § 500-A: 12-a (2011)). Otherwise, the court conducts voir dire and will entertain written questions from the parties to be posed to the venire.

13. How many jurors are there? How many alternates? How many peremptory challenges?

There are usually 12 jurors. However Superior Court Rule 9 provides that the case may proceed with fewer than 12 jurors unless prior to selection of the jury, a party notifies the court of an objection to proceeding with a diminished panel. NH Law allows



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for alternate jurors at the judge's discretion (N.H. Rev. Stat. Ann. § 500-A: 13(2011)). Each side is typically allowed 3 peremptory challenges. In cases involving multiple defendants, the number of defense challenges will be negotiated with the court.

"If any juror or jurors become disabled, or otherwise unavailable, during the course of a trial, the trial will continue with the jurors who remain, unless prior to the selection of the jury, a party notifies the Court that he objects to such procedure." N.H. Superior Ct. R. 9 (2011).

"Each party in a civil cause is entitled to three peremptory challenges of jurors drawn for the trial. The peremptory challenges shall be exercised alternately, beginning with the plaintiff. When the plaintiff and defendant have exhausted their challenges the court shall take unusual care that the jurors who take the places of the ones last challenged shall be wholly indifferent and impartial and reasonably satisfactory to both sides." N.H. Rev. Stat. Ann. § 519:19 (2011).

"In the trial in the superior court of any civil or criminal case, when it appears to the presiding justice that there is reason for the selection of alternate jurors, the jurors shall, at the direction of the presiding justice, be drawn, selected and impaneled in the same manner as the regular jurors." N.H. Rev. Stat. Ann. § 500A-13 (2011).

14. Identify any "unusual" trial procedures.

The defense closes first. The plaintiff has first presentation on opening, and last bite on closing. Also, as a result of case law, settling parties, parties that have not been sued, and immune defendants may be included on a special verdict form for an allocation of fault.

15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?

There is no difference in discovery timetables for different cases as the timetables are set by agreement or case specific court order. New Hampshire has just instituted a "Business and Commercial Dispute" docket (N.H. Rev. Stat. Ann. § 491:7-a (2011)).

16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?

No.



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17. Is there a provision for Prejudgment interest?

Yes. N.H. Rev. Stat. Ann. § 336:1(II) (2011) provides: “The annual simple rate of interest on judgments, including prejudgment interest, shall be a rate determined by the state treasurer as the prevailing discount rate of interest on 26-week United States Treasury bills at the last auction thereof preceding the last day of September in each year, plus 2 percentage points, rounded to the nearest tenth of a percentage point. On or before the first day of December in each year, the state treasurer shall determine the rate and transmit it to the director of the administrative office of the courts. As established, the rate shall be in effect beginning the first day of the following January through the last day of December in each year.” N.H. Rev. Stat. Ann. § 336:1(II) (2011).

18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

None.

19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

There are no significant areas at this time.

20. Are there legislative efforts under way that address any of the litigation practices in your state?

There are repeated efforts by the plaintiffs' bar to alter issues such as calculation of interest and joint and several liabilities. The most significant effort is one undertaken by the Courts to implement a pilot program in 2 counties that will try some of the recommendations made by the American College's report on jury trials, including limitations on discovery, depositions and experts.



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Question	New Jersey
1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?	No.
2. Are there Standard Form Interrogatories/Document Requests?	Yes. For certain types of personal injury litigation there are form interrogatories. (“In all actions seeking recovery for property damage to automobiles and in all personal injury cases other than wrongful death, toxic torts, cases involving issues of professional malpractice other than medical malpractice, and those products liability cases either involving pharmaceuticals or giving rise to a toxic tort claim, the parties shall be limited to the interrogatories prescribed by Forms A, B and C of Appendix II, as appropriate...” N.J. Ct. R. 4-17:1 (2011)).
3. Are there limits on the number of Interrogatories/Document Requests?	Yes. For litigation in which form interrogatories are applicable, only the form interrogatories plus 10 additional interrogatories may be served. There are no limitations on document requests. (“In all actions seeking recovery for property damage to automobiles and in all personal injury cases other than wrongful death, toxic torts, cases involving issues of professional malpractice other than medical malpractice, and those products liability cases either involving pharmaceuticals or giving rise to a toxic tort claim, the parties shall be limited to the interrogatories prescribed by Forms A, B and C of Appendix II, as appropriate, provided, however, that each party may propound ten supplemental questions, without subparts, without leave of court. Any additional interrogatories shall be permitted only by the court in its discretion on motion.” N.J. Ct. R. 4-17:1 (2011)).
4. Are there time limits on depositions, or limits on the number of depositions?	No.
5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)	Yes. The State rule is virtually identical to the Federal Rule. (“A party may in the notice name as the deponent a public or private corporation or a partnership or association or governmental agency and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth for each person designated the matters on which testimony



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will be given. The persons so designated shall testify as to matters known or reasonably available to the organization.” N.J. Ct. R. 4:14-2(c) (2011)).

6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?

Yes. The party taking the deposition pays for the expert's time in deposition. (“If the expert or treating physician resides or works in New Jersey, but the deposition is taken at a place other than the witness' residence or place of business, the party taking the deposition shall pay for the witness' travel time and expenses, unless otherwise ordered by the court. If the expert or treating physician does not reside or work in New Jersey, the proponent of the witness shall either (A) produce the witness, at the proponent's expense, in the county in which the action is pending or at such other place in New Jersey upon which all parties shall agree, or (B) pay all reasonable travel and lodging expenses incurred by all parties in attending the witness' out-of-state deposition, unless otherwise ordered by the court.” N.J. Ct. R. 4:14-7(b) (2) (2011)).

7. What is the Expert Standard (Frye/Daubert/Hybrid)?

Neither. New Jersey Rule of Evidence 702 governs the admission of expert testimony and provides that “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.” On medical and scientific causation issues there is, in many instances, a relaxed standard that requires acceptance of the theory by at least a substantial minority of the scientific community. Expert opinions that contain only “an expert’s bare conclusions, unsupported by factual evidence, [are] inadmissible.” *Buckelew v. Grossbard*, 87 N.J. 512, 524 (1981). Such bare conclusions are referred to as net opinions and are typically excluded because of “the failure of the expert to explain a causal connection between the act or incident complained of and the injury or damage allegedly resulting therefrom.” *Id.*

8. Are there other notable Discovery Rules?

No.

9. Is there mandatory mediation or arbitration?

Arbitration is mandatory for automobile cases and certain other personal injury cases. Mediation is not mandatory.



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10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial? A very limited number of cases are pre-tried. For most cases pretrial issues, including in limine motions, are exchanged 7 days before trial and then decided by the trial judge when the trial commences.
11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge? For most cases all pretrial submissions (in limine motions, witness lists, exhibit lists, deposition designations, objections to exhibits, etc.) must be exchanged by the parties 7 days prior to trial.
12. Who conducts voir dire (Court/Counsel)? Describe the process. Voir dire is conducted by the court. Proposed questions must be exchanged 7 days before trial and provided to the court on the day of trial.
13. How many jurors are there? How many alternates? How many peremptory challenges? There are 6 jurors. The number of alternates varies but there are usually 2. Six peremptory challenges are allowed per party (unless the parties have a "substantial identity of interest" and then they may have to share the challenges.) Alternates are chosen at the conclusion of the court's charge.
- "Juries in civil cases shall consist of 6 persons unless the court shall order a jury of 12 persons for good cause shown." N.J. Stat. Ann. § 2B:23-1 (2011).
- "The court may direct the impaneling of a jury with additional members having the same qualifications and impaneled and sworn in the same manner as a jury of 12 or 6. All the jurors shall hear the case, but the court for good cause may excuse any of them from service provided the number of jurors is not reduced to less than 12 or 6 in an appropriate civil case. If more than the prescribed number is left on the jury at the conclusion of the court's charge, the clerk of the court in its presence shall, by drawing names, randomly select that number of jurors' names as will reduce the jury to the required number." N.J. Stat. Ann. § 2B:23-3 (2011).
- "Upon the trial of any action in any court of this State, the parties shall be entitled to peremptory challenges as follows: a. In any civil action, each party, 6." N.J. Stat. Ann. § 2B:23-13 (2011).
14. Identify any "unusual" trial procedures. Plaintiff opens first and closes last. There is no rebuttal.



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15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?
- There are mass tort designations. Those cases are handled by designated judges around the state. At present there are three such judges in three different counties. Cases other than mass torts are assigned to discovery tracks which generally correspond to the complexity of the case.
16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?
- Yes, with certain caveats. N.J. Stat. Ann. § 2A:58C-9 (2011).
17. Is there a provision for Prejudgment interest?
- Yes. (“Except where provided by statute with respect to a public entity or employee, and except as otherwise provided by law, the court shall, in tort actions, including products liability actions, include in the judgment simple interest, calculated as hereafter provided, from the date of the institution of the action or from a date 6 months after the cause of action arises, whichever is later, provided that in exceptional cases the court may suspend the running of such prejudgment interest. Prejudgment interest shall not, however, be allowed on any recovery for future economic losses. Prejudgment interest shall be calculated in the same amount and manner provided for by paragraph (a) of this rule except that for all periods prior to January 1, 1988 interest shall be calculated at 12% per annum.” N.J. Ct. R. 4:42-11(b) (2011)).
18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)
- None.
19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?
- The expert testimony admissibility rules discussed above.
20. Are there legislative efforts under way that address any of the litigation practices in your state?
- No, not as of 2011.



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### Question

### New Mexico

1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?

No, except for mandatory disclosures in domestic relations and paternity actions under New Mexico Rule 1-123 (2011) for family court.

2. Are there Standard Form Interrogatories/Document Requests?

No.

3. Are there limits on the number of Interrogatories/Document Requests?

Yes. New Mexico Rule of Civil Procedure 1-033(A) limits the number of written interrogatories to fifty (50), including discrete subparts. New Mexico Rule of Civil Procedure 2-501 provides for an unlimited number of requests for production. (“Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding fifty (50) in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Subparagraph (2) of Paragraph B of Rule 1-026 NMRA.” N. M. Dist. Ct. R. Civ. P. 1-033(A) (2011).

“Unless otherwise ordered by the court, not less than twenty (20) days before trial, the plaintiff or the plaintiff’s attorney shall disclose and make available for inspection, copying and photographing any records, papers, documents or other tangible objects in the plaintiff’s possession, custody and control which the plaintiff intends to introduce in evidence at the trial. The plaintiff shall also disclose to the defendant an itemized list of the damages that the plaintiff claims.” N.M. Magis. Ct. R. Civ. Pro. 2-501(A) (2011). “At any time during the pendency of the action, for good cause shown, the judge may order either party to produce for inspection and copying any records, papers, documents or other tangible evidence in the possession of that party or available to that party.” N.M. Magis. Ct. R. Civ. Pro. 2-501(F) (2011)).

4. Are there time limits on depositions, or limits on the number of depositions?

New Mexico Rule of Civil Procedure 1-30(D) (2) provides that depositions of non-experts are limited to one day (no more than seven hours) on the record, unless otherwise stipulated. There is no limit to the number of depositions. (“Unless otherwise authorized



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by the court or stipulated by the parties, a deposition of a person other than an expert witness is limited to one day and lasting no more than seven (7) **hours** on the record. The court must allow additional time consistent with Subparagraph (2) of Paragraph B of Rule 1-026 NMRA if needed for a fair examination of the deponent or if the deponent or another person, or other circumstance, impedes or delays the examination.” N.M. Dist. Ct. R. Civ. P. 1-030(D) (2) (2011)).

5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)

Yes. New Mexico Rule of Civil Procedure 1-030(B) (6) mirrors the Federal Rule of Civil Procedure for Corporate Designee depositions. (“A party may, in the party’s notice and in a subpoena, name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subparagraph does not preclude taking a deposition by any other procedure authorized in these rules.” N.M. Dist. Ct. R. Civ. P. 1-030(B) (6) (2011)).

6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?

Yes. New Mexico Rule of Civil Procedure 1-026(6) (b) allows a party to depose any person who has been identified as an expert. New Mexico Rule of Civil Procedure 1-026(6) (d) provides that the party seeking discovery shall pay for the reasonable costs of an expert’s time during the deposition.

“A party may depose any person who has been identified as an expert whose opinions may be presented at trial.” N.M. Dist. Ct. R. Civ. Pro. 1-026(6) (b) (2011).

“Unless manifest injustice would result, the party seeking discovery shall pay the expert a reasonable fee related to the deposition or for time spent in responding to discovery under this subparagraph.” N.M. Dist. Ct. R. Civ. Pro. 1-026(6) (d) (2011).



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7. What is the Expert Standard (Frye/Daubert/Hybrid)?

New Mexico uses the *Daubert/Alberico* standard, articulated in *State v. Alberico*, 116 N.M. 156, 164, 861 P.2d 192, 202 (1993), wherein the New Mexico Supreme Court abandoned the *Frye* standard. The *Alberico* holding instructs trial courts to be concerned primarily with whether expert testimony is competent under Rule 11-702. The New Mexico Supreme Court articulated three prerequisites for the admission of expert opinion testimony under Rule 11-702. The first requirement under 11-702 is that the expert be qualified in the particular field in which he or she is testifying. The second consideration is whether the testimony will assist the Trier of fact. Finally, the expert's testimony must be limited to "scientific, technical, or other specialized knowledge" so as to distinguish it from normally inadmissible lay opinion testimony governed by Rule 11-701.

"In considering the interaction between the *Frye* test and Rule 702, the critical issue is whether the *Frye* test is a legitimate means for determining what is and what is not scientific knowledge. We hold that it is not and that the *Frye* test "should be rejected as an independent controlling standard of admissibility. Accordingly, we hold that a particular degree of acceptance of a scientific technique within the scientific community is neither a necessary nor a sufficient condition for admissibility; it is, however, one factor that a district court normally should consider in deciding whether to admit evidence based upon the technique." *United States v. Downing*, 753 F.2d 1224, 1237 (3d Cir.1985). A unanimous United States Supreme Court also recently abandoned the *Frye* test, characterizing it as an "austere standard, absent from and incompatible with the Federal Rules of Evidence . . ." *Daubert*, 113 S.Ct. at 2794. New Mexico's Rule 702 is identical to Rule 702 in the Federal Rules of Evidence." *State v. Alberico*, 861 P.2d 192, 202-203, 116 N.M. 156, 167 (N.M. 1993).

8. Are there other notable Discovery Rules?

No.



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9. Is there mandatory mediation or arbitration?

Local rules govern when mediation and arbitration is mandatory. Some districts remand any civil case with less than \$35,000 in controversy to a court appointed arbitrator. New Mexico Rule of Civil Procedure 1-016 generally grants courts authority to refer cases to mediation. New Mexico also has a Mediation Procedures Act, 1978 N.M. Stat Ann. §44-7B-1 et.seq. that does not state when mediation is mandatory. New Mexico's Arbitration Act, [1978 N.M. Stat Ann. §44-7A-1 et. seq.] identifies when arbitration is mandatory. Statutorily there are two acts, the Public Works Mediation Act, N.M. Stat Ann. §13-4C-1 et.seq. and the Domestic Relations Act, 40-12-1 et.seq. that requires mediation under certain circumstances.

10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?

New Mexico Rule of Civil Procedure 1-016 (2011) governs pretrial conferences. New Mexico Rule 1-016(B) (8) (2011) states that pretrial conferences should be held as soon as practicable but in no event more than 120 days after the filing of the complaint. The pretrial conference is conducted by the trial judge, but is mostly not on the record unless requested. Motions in limine may be addressed at a pretrial conference. District court local rules provide different time requirements for when motions in limine should be heard. Many judges defer ruling on motions in limine until trial.

11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?

It varies by judge.

12. Who conducts voir dire (Court/Counsel)? Describe the process.

New Mexico Rules of Civil Procedure provide that the court may permit the parties or their attorneys to conduct voir dire or the court may conduct it itself. If the court conducts voir dire, it must allow parties to supplement the examination. New Mexico Rule 1-047(A) (2011). Some judges put time limitations on voir dire, and will review and only allow questions that he or she approves. Other judges let the attorneys take as much time as they want and ask almost any question.



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13. How many jurors are there? How many alternates? How many peremptory challenges?

New Mexico Rule of Civil Procedure 1-038 provides that there may either be a jury of 6 or 12 individuals; if 12 jurors are not specifically requested then there is a default of a jury of 6. New Mexico Rule of Civil Procedure 1-047(B) provides that there will be no more than 6 alternate jurors. New Mexico Rule of Civil Procedure 1-038(E) states that with a 6 person jury, each party may challenge 3 jurors peremptorily. Whereas, with a 12 person jury, each party may challenge 5 jurors peremptorily. There are typically an equal amount of alternates as there are jurors.

“B. Jury; twelve-person or six-person juries.

(1) A jury of either six persons or twelve persons may be demanded.

(2) Unless a party, in the party's demand for trial by jury, specifically demands trial by a jury of twelve persons, the party shall be deemed to have consented to trial by a jury of six persons under the conditions and provisions hereinafter set out.

(3) If any party initially demands a six-person jury, any other party may demand a twelve-person jury by serving upon the other party or parties a demand therefore in writing after the commencement of the action and not later than ten (10) days after service of a six-person jury demand or after service of the last pleading directed to such issue, whichever is later.” N.M. Dist. Ct. R. Civ. P. 1-038(B) (2011).

“(B) Alternate jurors. In any civil case, the court may direct that not more than six jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to one peremptory challenge in addition to those otherwise allowed by law if one or two alternate jurors are to be impaneled, two peremptory challenges if three or four alternate jurors are to be impaneled and three peremptory challenges if five or six alternate jurors are to be impaneled. The additional peremptory challenges may be used



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against an alternate juror only, and the other peremptory challenges allowed by law shall not be used against an alternate juror.” N.M. Dist. Ct. R. Civ. P. 1-047(B) (2011).

“E. Challenges in civil cases. The court shall permit the parties to a case to express in the record of trial any challenge to a juror for cause. The court shall rule upon the challenge and may excuse any juror for good cause. Challenges for good cause and peremptory challenges will be made outside the hearing of the jury. The party making a challenge will not be announced or disclosed to the jury panel but each challenge will be recorded by the clerk. The opposing parties will alternately exercise peremptory challenges. In cases tried before a jury of six, each party may challenge three jurors peremptorily. In cases tried before a jury of twelve, each party may challenge five jurors peremptorily. When there is two or more parties’ defendant, or parties’ plaintiff, they will exercise their peremptory challenges jointly and if all cannot agree on a challenge desired by one party on a side, that challenge shall not be permitted. However, if the relief sought by or against the parties on the same side of a civil case differs, or if their interests are diverse, or if cross-claims are to be tried, the court shall allow each such party on that side of the suit three peremptory challenges if the case is to be tried before a jury of six or five peremptory challenges if the case is to be tried before a jury of twelve.” N.M. Dist. Ct. R. Civ. P. 1-038(E) (2011).

14. Identify any “unusual” trial procedures.

New Mexico is unique in that the rules of civil procedure allow (Rule 1-088.1 NMRA 2011) provides that each party has one preremptory excusal of the assigned judge. This is an excusal that is not for cause and it belongs to each party, not each side. The effect is that when a plaintiff files in jurisdiction with few judges, and sues many defendants, you might run out of judges. In that case, the NM supreme court will have to assign a random judge to sit in that jurisdiction. The parties cannot excuse that judge. However, the parties may stipulate to a judge that would agree to hear the case, and the supreme court can designate that judge. In this scenario the case is tried in the original venue, only the judge changes.

New Mexico is struggling with is the question of whether a wrongful death beneficiary is bound by the agreements, say an arbitration agreement, signed by the decedent. The New Mexico appellate courts have not heard this issue, but it’s going to be heading their way after an Albuquerque judge has held that a



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wrongful death heir is not bound by such agreements.

15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?

No.

16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?

New Mexico does not have a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer.

17. Is there a provision for Prejudgment interest?

Courts can award prejudgment interest under New Mexico Rule of Civil Procedure 1-054(D) (2011) and under settlement agreements based on New Mexico Rule of Civil Procedure 1-068(A) (2011).

“The award of prejudgment interest is not barred by law of the case, res judicata, or laches. In awarding prejudgment interest, the trial court found that Taylor had prayed for interest on the sums found to be due for the reasonable value of services rendered, asking that such interest be calculated from December 24, 1985, until the judgment was paid. On appeal Allegretto contends that because Taylor's original complaint did not contain any factual allegations regarding interest, and because Taylor did not raise the issue of prejudgment interest in the first appeal, the award of prejudgment interest is barred by law of the case, res judicata, and laches. In response, Taylor correctly argues that he was not required to plead factual allegations regarding interest; rather, prejudgment interest is an element of damages. See *Foster v. Luce*, 115 N.M. 331, 335, 850 P.2d 1034, 1038 (Ct. App. 1993).

In *Foster* the Court of Appeals specifically addressed the issue whether prejudgment interest may be awarded to a prevailing party absent a specific request for such relief in the pleadings. The Court followed the majority of jurisdictions interpreting rules identical or comparable to SCRA 1986, 1-054(D) (Repl. Pamp. 1992), and Rule 54(c) of the Federal Rules of Civil Procedure, each of which states as follows: "Every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." We agree with the holding in *Foster*, and we will not preclude an award of prejudgment interest merely because a party fails to request specifically such an award.” *Taylor v. Allegretto*, 879 P.2d 86, 89, 118 N.M. 85, 88



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(N.M. 1994). *See also:* “(1) Costs other than attorney fees. Except when express provision therefore is made either in a statute or in these rules, costs, other than attorney fees, shall be allowed to the prevailing party unless the court otherwise directs; but costs against the state, its officers and agencies shall be imposed only to the extent permitted by law.” N.M. Dist. Ct. R. C. P. 1-054(D) (1) (2011).

18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

None.

19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

While not an uneven playing field, recently our rules were amended to allow an offer of settlement as well as offers of judgment.

20. Are there legislative efforts under way that address any of the litigation practices in your state?

None.



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### Question

### New York

1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?

Not under the rules applicable in the state courts.

2. Are there Standard Form Interrogatories/Document Requests?

Not generally, but in specialized litigation—e.g., asbestos—form interrogatories are sometimes used.

3. Are there limits on the number of Interrogatories/Document Requests?

No, other than as may be dictated by an individual Court.

4. Are there time limits on depositions, or limits on the number of depositions?

Not under the rules applicable in the state courts, although some judges may impose their own rules. Federal court cases are subject to the limits set forth in FRCP 33.

5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)

Yes. Under CPLR 3106(d), a party may serve a deposition notice designating another party's officer or director, by identity, description or title. The recipient may opt to substitute and produce a different deponent upon timely notice and explanation for the substitution. If the noticing party insists on deposing the witness it first chose, the burden is on it to demonstrate to the court its entitlement to that witness.

Put simply, in federal court the noticing party notices the company and the company designates the individual witness, whereas in New York state court the noticing party designates the company's witness by name or title, subject to the company's ability to substitute a different witness.

The case law addressing CPLR 3106(d) is much less developed than that addressing FRCP 30(b)(6). Thus, unlike federal practice, in New York there is little reported precedent for sanctioning a company for producing an unqualified or underprepared witness.

6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?

New York does not allow deposing of experts barring certain circumstances, e.g., materials unavailable for inspection by second expert after first expert has inspected.

An exception is in an action for medical, dental or podiatric malpractice. CPLR 3101 (d)(1)(ii) provides that if one party offers to identify and produce for deposition its expert(s), and all other parties accept the offer, all parties will be required to produce their expert(s) for deposition. In practice, this provision is seldom, if ever, utilized.



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7. What is the Expert Standard (Frye/Daubert/Hybrid)?  
The Frye test is used. See *People v. LeGrand*, 8 N.Y.3d 449 (2007) and *Parker v Mobil Oil Corp.* 7 N.Y. 3d 434 (2006).
8. Are there other notable Discovery Rules?  
Most New York Courts work under an Individual Assignment System (IAS) of cases. Many IAS parts have their own rules.
9. Is there mandatory mediation or arbitration?  
No. Alternative dispute resolution is solely by choice of parties, though some trial courts may encourage its use. The Eighth Judicial District (Western New York), for example, has a program whereby court employees serve as mediators or arbitrators upon request and at no cost to the parties.
10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?  
There are no set rules. Some judges hold several pre-trial conferences; others are less involved trying to settle cases. Most motions in limine are addressed at trial.
11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?  
It varies by judge. "Newer" judges may tend to require submissions 2-4 weeks before trial. Veteran judges are less inclined to do so.
12. Who conducts voir dire (Court/Counsel)? Describe the process.  
Although either side can request that the court participate, this is unusual. Voir dire is generally conducted by counsel under specific rules of the individual court and/or the appellate district in which the court is located.
13. How many jurors are there? How many alternates? How many peremptory challenges?  
There are six jurors. Usually there are two alternates, although more alternates may be chosen if trial will be lengthy, e.g. asbestos cases. Each side has three peremptory challenges as a general rule. This can be modified due to special circumstances. Usually 1 additional challenge is allowed for alternates. See CPLR 4104, 4106 and 4109.
14. Identify any "unusual" trial procedures.  
The defense closes first. There is no rebuttal.
15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?  
The Commercial Division handles cases of a commercial nature that meet set criteria including subject matter and monetary thresholds. See Court Rule 202.70. See also <http://www.courts.state.ny.us/courts/comdiv/>. Assignment of a case to the Commercial Division depends upon a party designating it as such on a request for judicial intervention (RJI) form and/or request of a party to the administrative judge.

The largest "special division" is the asbestos calendar in New York



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- County (<http://www.nycal.net/>) which has its own specific rules, many of which run contrary to CPLR rules of practice. Other divisions may be created on an “as needed basis.”
16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?
- No.
17. Is there a provision for Prejudgment interest?
- Personal injury cases (other than wrongful death) do not allow interest until there is a finding of liability. Property damage and wrongful death claims earn interest at 9 percent per annum from date of loss. See CPLR 5001 - 5004.
18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)
- Under CPLR 3221 a defendant may submit an offer to compromise prior to trial and if the plaintiff refuses and obtains a judgment at trial for a lesser amount, the defendant may be entitled to costs from the plaintiff. Costs are not the same as attorneys’ fees, however, under New York state court practice. Costs are effectively nominal and CPLR 3221 is therefore seldom used.
19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?
- This depends on the individual judge. Some New York State judges are known to lean pro-plaintiff...
20. Are there legislative efforts under way that address any of the litigation practices in your state?
- None with any real chance of passage as of 2012. Substantial tort reform measures generally face long odds in the New York State Legislature as presently constituted.



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Question	North Carolina
1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?	No.
2. Are there Standard Form Interrogatories/Document Requests?	No.
3. Are there limits on the number of Interrogatories/Document Requests?	Yes as to Interrogatories. No as to Document Requests. N.C.G.S. §1A-1, Rule 33(a) directs that there can be no more than 50 interrogatories except upon leave of the court for good cause shown or by agreement of the other party. N.C.G.S. §1A-1, Rule 34 provides no such limit on the number of document requests.
4. Are there time limits on depositions, or limits on the number of depositions?	No. Depositions in North Carolina are covered by G.S. §1A-1, Rules 30-32. There are no time limits on depositions in North Carolina and unlike Federal Rule 30(c) (2) (A), there is no limit on the number of depositions that may be taken by each side. However, pursuant to [N.C. Business Court Rule 18.2] North Carolina's Business Court presumptively limits depositions to 12 for each party, not including depositions by testifying experts.
5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)	No.
6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?	The parties are not entitled to expert depositions, but in day to day practice usually obtain them cooperatively. Further, upon motion, the court may order depositions of experts expected to testify at trial (G.S. §1A-1, Rule 26(b) (4) (2)). The party seeking the deposition must pay the expert "a reasonable fee" (Rule 26(b) (4) (b)).
7. What is the Expert Standard (Frye/Daubert/Hybrid)?	North Carolina was considered a <i>Daubert</i> state pursuant to N.C. Gen Stat. §8C-1, Rules 101-1103, until the case of <i>Howerton v. Arai Helmet, Ltd.</i> 597 S.E. 2d 674 (N.C. 2004). However, the General Assembly revised N.C.G.S. §8C-702(a) (Rule of Evidence 702(a)) in June 2011 to track the language of the federal rule. This change became effective October 1, 2011. No court has ruled on the significance of the change, but the very nature of the change suggests that it was the intent of the legislature to make North Carolina once again a <i>Daubert</i> state.



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8. Are there other notable Discovery Rules? No.
9. Is there mandatory mediation or arbitration? Yes. Mediation is mandatory pursuant to N.C. Gen. Stat. §7A-38.1
10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial? The Pretrial Conference is held not later than seven days before the trial date. (General Rules of Practice, Rule 7, adopted pursuant to N.C. Gen. Stat. §7A-34). The trial judge does not participate in the pretrial conference. Motions in limine are typically addressed before trial, on the morning of the first date of trial.
11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge? It varies by judge.
12. Who conducts voir dire (Court/Counsel)? Describe the process. Counsel conducts voir dire.
13. How many jurors are there? How many alternates? How many peremptory challenges? The parties may stipulate that the jury may consist of any number less than 12. N.C. Gen. Stat. § 1A-1, Rule 48. At the trial judge's discretion, one or more alternate jurors may be selected in the same manner as the regular panel of the jurors in the case, and each party is entitled to two additional peremptory challenges for each alternate juror seat. N.C. Gen. Stat. §9-18. Each side receives 8 peremptory challenges for the regular jury panel, pursuant to N.C.G.S. §9-19.
14. Identify any "unusual" trial procedures. The most unusual trial procedure in North Carolina is that the trial lawyers are required to sit at counsel table when they are questioning witnesses. They can stand only to approach the witness to hand the witness an exhibit, and then they must return to counsel table and sit down before resuming their questioning. This procedure applies in both state and federal court.
15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions? North Carolina has its own Business Court. The Business Court has three judges: one sits in Charlotte, one in Greensboro, and one in Raleigh. The Business Court hears most business cases and many complex cases such as class actions. The plaintiff can file its case directly in the Business Court or a defendant can have a case transferred to the Business Court, if the case qualifies. The North Carolina Business Court has its own rules, such as requiring discovery to be completed within 9 months from the issuance of the scheduling order.



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16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?

Not specifically in those terms. However, N.C. Gen. Stat. § 99B-2(a) provides distributors with a sealed container defense unless the manufacturer is insolvent or beyond the jurisdiction of the Court.

17. Is there a provision for Prejudgment interest?

N.C. Gen Stat. §24-5(a) requires the trial court to include prejudgment interest. Interest in North Carolina is 8% per annum:

18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

Superior Court is divided into eight divisions and 46 districts across the state. Every six months, Superior Court judges rotate among the districts within their division and there may be two judges hearing cases set for trial on any given calendar. These factors limit the ability of counsel to be certain of which judge will preside over their case at trial but there is some level of predictability for motion hearings.

19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

No. However, out of state practitioners should be aware that North Carolina retains a pure contributory negligence system. In practice, this means if a plaintiff's own negligence is one proximate cause of his or her own injury, he or she is precluded from recovery in a negligence action, irrespective of the acts of others. *See, e.g., Cobo v. Raba*, 495 S.E.2d 362 (N.C. 1998). Also, North Carolina has expressly rejected strict liability in product liability actions pursuant N.C.G.S.A. § 99B-1.1 (2012).

20. Are there legislative efforts under way that address any of the litigation practices in your state?

There were several legislative changes in the summer of 2011 that altered litigation practices in the state. The changes went into effect on October 1, 2011. Highlights of the changes include the following: (1) N.C.G.S. §1A-1, Rule 42(b) was revised to allow either party in a tort action in which the plaintiff seeks damages in excess of \$150,000 to move for a mandatory bifurcation of trials for the issues of liability and damages, and to exclude evidence that is purely relevant to the question of damages until after liability has been determined; (2) N.C.G.S. §8C-702(a) was revised to track and language of Federal Rule of Evidence 702(a), and return North Carolina to its status as a Daubert jurisdiction; (3) N.C.G.S. §1A-1, Rule 9(j) was revised to require that any medical malpractice claim allege that the "medical care and all medical records pertaining to the alleged negligence" that are available to, or reasonably attainable by, the plaintiff have been reviewed by an expert who is expected to qualify under Rule 702; (4) N.C.G.S. §90-21.19 was enacted, which places a cap (with exceptions) of \$500,000 on noneconomic damages in medical malpractice actions.



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### Question

### North Dakota

1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?  
No.
2. Are there Standard Form Interrogatories/Document Requests?  
No.
3. Are there limits on the number of Interrogatories/Document Requests?  
No. (“An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.” N.D. R. Civ. P. 33(a) (2) (2011)).
4. Are there time limits on depositions, or limits on the number of depositions?  
No.
5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)  
Yes. The state rule is similar to FRCP 30(b)(6) (“In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.” N.D. R. Civ. P. 30(b) (6) (2011)).
6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?  
Yes. The deposing party pays for the expert’s time.  
“A party may depose any person who has been identified as an expert witness whose opinions may be presented at trial unless the court finds, on motion, that the deposition is unnecessary, overly burdensome, or unfairly oppressive.” N.D. R. Civ. P. 26(b) (4) (A) (ii) (2011).  
  
“Unless manifest injustice would result, the court must require that the party seeking discovery:(i) pay the expert a reasonable fee for



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time spent in responding to discovery under Rule 26(b)(4)(A) or (B); and (ii) for discovery under (b)(4)(A) the court may require, and for discovery under (b)(4)(B) the court must require the party seeking discovery to pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.” N.D. R. Civ. P. 26(b) (4) (C) (2011).

7. What is the Expert Standard (Frye/Daubert/Hybrid)?

N.D.R. Evid. 702 “envision generous allowance of the use of expert testimony if the witness is shown to have some degree of expertise in the field in which the expert is to testify.” *State v. Hernandez*, 2005 ND 214, ¶ 8, 707 N.W.2d 449, 453 (declining to adopt *Daubert*).

“This Court has never explicitly adopted *Daubert* and *Kumho Tire*. See *Howe v. Microsoft Corp.*, 2003 ND 12, P27 n.1, 656 N.W.2d 285. Contrary to Hernandez's assertion, this Court is not required to follow *Daubert* and *Kumho Tire*, which involved admissibility of expert testimony in federal courts under the federal rules of evidence. This Court has a formal process for adopting procedural rules after appropriate study and recommendation by the Joint Procedure Committee, and we decline Hernandez's invitation to adopt *Daubert* by judicial decision. See *State v. Osier*, 1997 ND 170, P5 n.1, 569 N.W.2d 441 (refusing to adopt procedural rule by opinion in litigated appeal).

Under North Dakota law, the admission of expert testimony is governed by N.D.R. Evid. 702, which provides:

If scientific, technical, or other specialized knowledge will assist the Trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

8. Are there other notable Discovery Rules?

No.

9. Is there mandatory mediation or arbitration?

No.

10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?

Whether a pretrial conference is held is in the trial court's discretion, except when a "triggering event" occurs, in which case a conference is required. N.D.R. Civ. P. 16(a) and (b) (2011). Motions in limine are within the trial court's discretion to be addressed at the pretrial conference or at trial.



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11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?

It varies by judge.

12. Who conducts voir dire (Court/Counsel)? Describe the process.

Counsel generally conducts voir dire but the court can conduct part of it. N.D.R. Civ. P. 47(a) (2011).

13. How many jurors are there? How many alternates? How many peremptory challenges?

There are 6 jurors unless 9 are demanded. N.D.R. Civ. P. 38(2011). Parties may stipulate to less than 9 or for a majority (non-unanimous) verdict. N.D.R. Civ. P. 48(a) (2011). There can be 1-2 alternate jurors. N.D.R. Civ. P. 47(d) (2011). Each side gets 4 peremptory challenges regardless of whether it is a 6 or 9 member jury. N.D.R. Civ. P. 47(b) (2011). Regardless of whether there are 1 or 2 alternate jurors, each side gets one additional peremptory challenge to be used only on the alternate jurors. N.D.R. Civ. P. 47(d) (2011).

“(A) Examination of prospective jurors.

(1) Prospective jurors.

The court must call for examination not more than the number of prospective jurors that equals the number of jurors necessary for the jury plus the number of peremptory challenges available to the parties, unless otherwise stipulated by the parties and approved by the court. If, after the parties have exercised their challenges, there are more jurors than required by Rule 48, the excess jurors must be excused in the inverse order in which they were called.

(2) Examination.

The court may examine prospective jurors itself and it must permit the parties or their attorneys to make their own examination. The court may allow individual examination of prospective jurors in chambers.

(b) Challenges for cause.

If the court, after examination of any prospective juror, finds grounds for challenge for cause, the court must excuse that prospective juror. If the court does not excuse a prospective juror for cause, any party may make a challenge for cause.

(c) Peremptory challenges.



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(1) Number.

Regardless of the size of the jury or the number of parties on a side, each side is entitled to four peremptory challenges. If the parties on a side have adverse or antagonistic interests, the court may grant them additional peremptory challenges.

(2) Procedure.

All parties on a side must join in the challenge before it can be made unless the court, for good cause, permits otherwise. Peremptory challenges must be taken by the parties alternately, commencing with the plaintiff.

(d) Alternate jurors.

(1) In general.

The court may direct that one or two jurors in addition to the regular panel be called and impaneled to sit as alternate jurors. Alternate jurors in the order they are called replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties.

(2) Procedure.

Alternate jurors must be drawn in the same manner, have the same qualifications, be subject to the same examination and challenges, take the same oath, and have the same functions, powers, facilities, and privileges as the principal jurors. An alternate juror who does not replace a principal juror must be discharged after the jury retires to consider its verdict, unless the parties otherwise agree.

(3) Peremptory challenges.

If one or two alternate jurors are called each side is entitled to one peremptory challenge in addition to those otherwise allowed by this rule. The additional peremptory challenge may be used only against an alternate juror and the other peremptory challenges allowed by this rule may not be used against the alternates. *N.D.R. Civ. P. Rule 48 (2011).*

(a) Stipulation.



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The parties may stipulate that the jury will consist of any number fewer than nine or that a verdict or finding of a stated majority of the jurors will be taken as the verdict or finding of the jury.

(b) Jury of six.

In all civil actions in which a jury is impaneled, the jury must consist of six qualified jurors, unless any party entitled to do so make a written demand for a jury of nine in accordance with Rule 38.

(c) Polling.

After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity or lack of assent by the number of jurors that the parties stipulated to, the court may direct the jury to deliberate further or may order a new trial." N.D. R. Civ. P. 47 (2011).

14. Identify any "unusual" trial procedures.

None.

15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?

No.

16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?

Yes. N.D. Cent. C. § 28-01.3-04 (2011).

17. Is there a provision for Prejudgment interest?

Yes. N.D. Cent. C. § 28-20-34: Interest is payable on judgments entered in the courts of this state at the same rate as is provided in the original instrument upon which the action resulting in the judgment is based, which rate may not exceed the maximum rate provided in section 47-14-09. If such original instrument contains no provision as to an interest rate, or if the action resulting in the judgment was not based upon an instrument, interest is payable at the rate of twelve percent per annum through December 31, 2005. Beginning January 1, 2006, the interest is payable at a rate equal to



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the prime rate published in the Wall Street Journal on the first Monday in December of each year plus three percentage points rounded up to the next one-half percentage point and may not be compounded in any manner or form. On or before the twentieth day of December each year, the state court administrator shall determine the rate and shall transmit notice of that rate to all clerks of court and to the state bar association of North Dakota. As established, the rate shall be in effect beginning the first day of the following January through the last day of December in each year. Except as otherwise provided in this section, interest on all judgments entered in the courts of this state before January 1, 2006, must remain at the rate per annum which was legally prescribed at the time the judgments were entered, and such interest may not be compounded in any manner or form. Interest on unpaid child support obligations must be calculated under section 14-09-25 according to the rate currently in effect under this section regardless of the date the obligations first became due and unpaid (2011).

18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

None.

19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

No.

20. Are there legislative efforts under way that address any of the litigation practices in your state?

No.



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Question	Ohio
1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?	No.
2. Are there Standard Form Interrogatories/Document Requests?	No.
3. Are there limits on the number of Interrogatories/Document Requests?	Ohio Civ. R. 33(A) limits a party to forty interrogatories. (“Any party, without leave of court, may serve upon any other party up to forty written interrogatories to be answered by the party served. A party serving interrogatories shall serve the party with an electronic copy of the interrogatories. The electronic copy shall be reasonably useable for word processing and provided on computer disk, by electronic mail, or by other means agreed to by the parties. A party who is unable to provide an electronic copy of the interrogatories may seek leave of court to be relieved of this requirement. A party shall not propound more than forty interrogatories to any other party without leave of court. Upon motion, and for good cause shown, the court may extend the number of interrogatories that a party may serve upon another party. For purposes of this rule, any subpart propounded under an interrogatory shall be considered a separate interrogatory.” Ohio Civ. R. 33(A) (2012)). There are no limits on the number of document requests.
4. Are there time limits on depositions, or limits on the number of depositions?	The Ohio Rules of Civil Procedure do not place any limits on the time for depositions or their number.
5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)	Ohio Civ. R. 30(B) (5) governs the depositions of corporate designees and it is substantively similar to Fed. R. Civ. P. 30(B) (6). (“A party, in the party's notice, may name as the deponent a public or private corporation, a partnership, or an association and designate with reasonable particularity the matters on which examination is requested. The organization so named shall choose one or more of its proper employees, officers, agents, or other persons duly authorized to testify on its behalf. The persons so designated shall testify as to matters known or available to the organization. Division (B) (5) does not preclude taking a deposition by any other procedure authorized in these rules.” Ohio Civ. R. 30(B) (5) (2012)).



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6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?

Parties may depose opposing experts by agreement, although there is no automatic right to do so. Pursuant to Ohio Civ. R. 26, the requesting party pays the expert reasonable fees for time spent.

“As an alternative or in addition to obtaining discovery under subdivision (B) (5) (a) of this rule, a party by means of interrogatories may require any other party (i) to identify each person whom the other party expects to call as an expert witness at trial, and (ii) to state the subject matter on which the expert is expected to testify. Thereafter, any party may discover from the expert or the other party facts known or opinions held by the expert which is relevant to the stated subject matter. Discovery of the expert's opinions and the grounds therefore is restricted to those previously given to the other party or those to be given on direct examination at trial.” Ohio Civ. R. 26(B) (5) (b) (2012).

“The court may require that the party seeking discovery under subdivision (B) (5) (b) of this rule pay the expert a reasonable fee for time spent in responding to discovery, and, with respect to discovery permitted under subdivision (B) (5) (a) of this rule, may require a party to pay another party a fair portion of the fees and expenses incurred by the latter party in obtaining facts and opinions from the expert.” Ohio Civ. R. 26(B) (5) (e) (2012).

7. What is the Expert Standard (Frye/Daubert/Hybrid)?

The *Daubert* standard is used. See *Terry v. Caputo*, 115 Ohio St. 3d 351 875 N.E.2d 72(2007):

“The United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469, interpreted Fed.R.Evid. 702, the federal version of Evid.R. 702, as vesting the trial court with the role of gatekeeper. See, also, *Kumho, [Tire Co., Ltd. V. Carmichael]*, 526 U.S. 137, 152, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1997). This gate keeping function imposes an obligation upon a trial court to assess both the reliability of an expert's methodology and the relevance of any testimony offered before permitting the expert to testify. We adopted this role for Ohio trial judges in *Miller v. Bike Athletic Co.* (1998), 80 Ohio St.3d 607, 1998 Ohio 178, 687 N.E.2d 735.

The test for reliability requires an assessment of the validity of the expert's methodology, by applying with flexibility several factors set forth in *Daubert*. 509 U.S. at 592-593, 113 S.Ct. 2786, 125 L.Ed.2d 469. The trial court should first assess whether the method or theory relied upon has been tested. *Id.* at 593, 113 S.Ct. 2786,



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125 L.Ed.2d 469. Next, it should consider whether the theory has been the subject of peer review, and then whether the method has a known or potential error rate. *Id.* at 593-594, 113 S.Ct. 2786, 125 L.Ed.2d 469. Finally, Daubert instructs trial courts to look at whether the theory has gained general acceptance in the scientific community. *Id.* at 594, 113 S.Ct. 2786, 125 L.Ed.2d 469. None of these factors, of course, is dispositive of the inquiry, and when gauging the reliability of a given expert's testimony, trial courts should focus "solely on principles and methodology, not on the conclusions" generated. *Id.* at 595, 113 S.Ct. 2786, 125 L.Ed.2d 469.

The trial court's Daubert responsibilities, however, do not end with reliability, because the trial court's gate keeping function also requires it to judge whether an expert's testimony is 'relevant to the task at hand' in that it logically advances a material aspect of the proposing party's case.' *Valentine v. PPG Industries, Inc.* (2004), 158 Ohio App.3d 615, 2004 Ohio 4521, 821 N.E.2d 580, quoting Daubert, 509 U.S. at 597, 113 S.Ct. 2786, 125 L.Ed.2d 469. This aspect, which courts have colloquially labeled "fit," requires a "connection between the scientific research or test result \* \* \* and particular disputed factual issues in the case.' *U.S. v. Downing* [(C.A.3, 1985), 753 F.2d 1224, 1237]." *In re Paoli RR Yard PCB Litigation* (C.A.3, 1994), 35 F.3d 717, 743. Reliability and relevance are not mutually exclusive findings, and they may overlap in some instances. As one federal court stated, '[A] determination regarding the scientific validity of a particular theory requires not only an examination of the trustworthiness of the tested principles on which the expert opinion rests, but also an analysis of the reliability of an expert's application of the tested principals [sic] to the particular set of facts at issue.' (Emphasis sic.) *Cavallo v. Star Ent.* (E.D.Va.1995), 892 F.Supp. 756, 762-763."

*Terry v. Caputo*, 115 Ohio St. 3d at 356-357, 875 N.E.2d at 77-78 (2007).

8. Are there other notable Discovery Rules?

There are 88 counties in Ohio, and many have their own local rules that govern discovery, including provisions for conferences among counsel before a motion to compel may be filed, required affidavits, etc. Pursuant to Ohio Civ. R. 33(A), "A party serving interrogatories shall serve the party with an electronic copy of the interrogatories. The electronic copy shall be reasonably useable for word processing and provided on computer disk, by electronic



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mail or by other means agreed to by the parties.”

The time period for responding to complaints and discovery requests is Twenty-Eight (28) days. Ohio Civ. R. 12(A) (1), 33(A) (3), 34(B) (1), and 36(A) (1).

9. Is there mandatory mediation or arbitration?

No, however, mediation may be ordered at the discretion of the court.

10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?

It varies. Some courts do not conduct pretrial conferences. Some have them conducted by staff attorneys. Rarely does a Common Pleas judge preside at an initial pretrial, and not always at the final pretrial. The timing of hearing of motions in limine varies by county.

11. What are the court’s practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?

It varies by county and by individual judge. Some judges require jury instructions at a set time before trial begins. Some allow instructions to be proffered during trial. It is very individualized.

12. Who conducts voir dire (Court/Counsel)? Describe the process.

Ohio Civ. R. 47(B) (2012) provides that the court may permit the parties or their attorneys to conduct the examination of the prospective jurors or may itself conduct the examination. In the event the court conducts the examination, the parties or their attorneys will be allowed to supplement the examination by further inquiry.

13. How many jurors are there? How many alternates? How many peremptory challenges?

Ohio Civ. R. 38(B) provides that:

“In an action for appropriation of a right of way brought by a corporation . . . the jury shall be composed of twelve members unless the demand specifies a lesser number [.] . . In all other civil actions the jury shall be composed of eight members unless the demand specifies a lesser number; and in the event of timely demand by more than one party in such actions the jury shall be composed of the greater number not to exceed eight.” Pursuant to Ohio Civ. R. 47(D) (2012), the court may direct that no more than four jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. (“The court may direct that no more than four jurors in addition to the regular jury be called and impaneled to sit as alternate jurors.”) Pursuant to Ohio R. Civ. P. 47(C) (2012), each party shall have three peremptory challenges. (Each party is entitled to one peremptory challenge in addition to those otherwise allowed by law if one or two alternate jurors are to be impaneled, and two peremptory challenges if three or four alternate



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jurors are to be impaneled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed shall not be used against an alternate juror.”) Ohio Civ. R. 47(D).

(“In addition to challenges for cause provided by law, each party peremptorily may challenge three prospective jurors. If the interests of multiple litigants are essentially the same, "each party" shall mean "each side.")

14. Identify any “unusual” trial procedures.

None.

15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?

Ohio has instituted a "business docket" in its five largest counties where a specially trained judge will handle complex business litigation. Ohio also has complex litigation dockets to handle matters pertaining to asbestos, silica, and welding rods.

16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?

Under Ohio law, a supplier is subject to liability if the plaintiff establishes, by a preponderance of the evidence, that the supplier was negligent and such negligence caused harm to the plaintiff or that the product did not conform, when it left the supplier's control, to the seller's representations and such representation and non-conformance caused the harm for which the plaintiff seeks recovery (recovery may be had even if the supplier did not act fraudulently, recklessly, or negligently in making the representations.) Additionally, a supplier is subject to liability, as if it were the manufacturer, if (1) the manufacturer is not subject to judicial process in Ohio; (2) a judgment against the manufacturer would be unenforceable due to actual or asserted insolvency; (3) the supplier owns or, when it supplied the product, owned, in whole or in part, the manufacturer; (4) the supplier is owned or, when it supplied the product, was owned, in whole or in part, by the manufacturer; (5) the supplier created or furnished the manufacturer with the design or formulation that was used to produce, create, make, construct, assemble, or rebuild the product or a component of the product; (6) the supplier altered, modified, or failed to maintain the product and the alteration, modification, or failure to maintain the product rendered it defective; (7) the supplier marketed the product under its own label or trade name; or (8) the supplier failed to respond timely and reasonably to a written request by or on behalf of the plaintiff or disclose the manufacturer's name and address. See Ohio Rev. Code Ann. § 2307.78 (2012).



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17. Is there a provision for Prejudgment interest?

Prejudgment interest is awarded in tort cases if the prevailing plaintiff establishes, during a hearing, that he or she made a good faith effort to settle the matter and that the defendant failed to do so. Ohio Rev. Code. Ann. § 1343.03(2012).

“(A) In cases other than those provided for in sections 1343.01 and 1343.02 of the Revised Code, when money becomes due and payable upon any bond, bill, note, or other instrument of writing, upon any book account, upon any settlement between parties, upon all verbal contracts entered into, and upon all judgments, decrees, and orders of any judicial tribunal for the payment of money arising out of tortious conduct or a contract or other transaction, the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code, unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract. Notification of the interest rate per annum shall be provided pursuant to sections 319.19, 1901.313 [1901.31.3], 1907.202 [1907.20.2], 2303.25, and 5703.47 of the Revised Code.

(B) Except as provided in divisions (C) and (D) of this section and subject to section 2325.18 of the Revised Code, interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct or a contract or other transaction, including, but not limited to a civil action based on tortious conduct or a contract or other transaction that has been settled by agreement of the parties, shall be computed from the date the judgment, decree, or order is rendered to the date on which the money is paid and shall be at the rate determined pursuant to section 5703.47 of the Revised Code that is in effect on the date the judgment, decree, or order is rendered. That rate shall remain in effect until the judgment, decree, or order is satisfied.

(C) (1) If, upon motion of any party to a civil action that is based on tortious conduct, that has not been settled by agreement of the parties, and in which the court has rendered a judgment, decree, or order for the payment of money, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case, interest on the judgment, decree, or order shall be computed as follows:



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(a) In an action in which the party required to pay the money has admitted liability in a pleading, from the date the cause of action accrued to the date on which the order, judgment, or decree was rendered;

(b) In an action in which the party required to pay the money engaged in the conduct resulting in liability with the deliberate purpose of causing harm to the party to whom the money is to be paid, from the date the cause of action accrued to the date on which the order, judgment, or decree was rendered;

(c) In all other actions, for the longer of the following periods:

(i) From the date on which the party to whom the money is to be paid gave the first notice described in division (C)(1)(c)(i) of this section to the date on which the judgment, order, or decree was rendered. The period described in division (C) (1) (c) (i) of this section shall apply only if the party to whom the money is to be paid made a reasonable attempt to determine if the party required to pay had insurance coverage for liability for the tortious conduct and gave to the party required to pay and to any identified insurer, as nearly simultaneously as practicable, written notice in person or by certified mail that the cause of action had accrued.

(ii) From the date on which the party to whom the money is to be paid filed the pleading on which the judgment, decree, or order was based to the date on which the judgment, decree, or order was rendered.

(2) No court shall award interest under division (C) (1) of this section on future damages, as defined in section 2323.56 of the Revised Code, that are found by the Trier of fact.

(D) Division (B) of this section does not apply to a judgment, decree, or order rendered in a civil action based on tortious conduct or a contract or other transaction, and division (C) of this section does not apply to a judgment, decree, or order rendered in a civil action based on tortious conduct, if a different period for computing interest on it is specified by law, or if it is rendered in an action against the state in the court of claims, or in an action under Chapter 4123. of the Revised Code.”

Ohio Rev. Code § 1343.03 (2012).



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Prejudgment interest will not be awarded on future damages. The rate of prejudgment interest will be the federal short term interest rate, rounded to a whole number, plus 3%, as determined by the tax commissioner each October for the following year. Ohio Rev. Code Ann. § 5703.47.

18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

Practices vary by court and by judge, particularly with respect to jury practices, including the use of notes by jurors, questions proffered by jurors and intermediate explanations by counsel.

19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

Ohio has adopted caps on damages, (Ohio Rev. Code Ann. § 2323.43) uses comparative negligence, and has eliminated exemptions from jury service. It is a fairly defense oriented state.

20. Are there legislative efforts under way that address any of the litigation practices in your state?

The Ohio Rules of Civil Procedure were amended in 2012. Among the changes, Rule 26(B) (5) was amended to make expert discovery practice in Ohio more consistent with the 2010 amendments to Federal Rule of Civil Procedure 26. In addition, changes were made to several rules, including but not limited to Rules 33 and 36, with respect to service by electronic means.



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Question	Oklahoma
1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?	No, except in professional liability cases after November 1, 2009.
2. Are there Standard Form Interrogatories/Document Requests?	No.
3. Are there limits on the number of Interrogatories/Document Requests?	Yes. Interrogatories and document requests are each limited to 30.  “The number of interrogatories to a party shall not exceed thirty in number. Interrogatories inquiring as to the names and locations of witnesses, or the existence, location and custodian of documents or physical evidence shall be construed as one interrogatory. All other interrogatories, including subdivisions of one numbered interrogatory, shall be construed as separate interrogatories. No further interrogatories will be served unless authorized by the court. If counsel for a party believes that more than thirty interrogatories are necessary, he shall consult with opposing counsel promptly and attempt to reach a written stipulation as to a reasonable number of additional interrogatories.” Okla. Stat. Ann. tit. 12, § 3233(A) (2011).
4. Are there time limits on depositions, or limits on the number of depositions?	Yes. Depositions are limited to 6 hours. There is no limit on the number of depositions.  “Unless otherwise agreed by the parties or ordered by the court, a deposition upon oral examination shall not last more than six (6) hours and shall be taken only between the hours of 8:00 a.m. and 5:00 p.m. on a day other than a Saturday or Sunday and on a date other than a holiday designated in Section 82.1 of Title 25 of the Oklahoma Statutes. The court may grant an extension of these time limits if the court finds that the witness or counsel has been obstructive or uncooperative or if the court finds it to be in the interest of justice.” Okla. Stat. Ann. tit. 12, § 3230(A) (3) (2011).
5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)	Yes. The state rule is similar to the federal rule.  “A party may in the notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the



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organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which that person will testify. Such designation of persons to testify and the subject of the testimony shall be delivered to the other party or parties prior to or at the commencement of the taking of the deposition of the organization. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization.” Okla. Stat. Ann. tit. 12, § 3230(B) (5) (2011).

6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?

Yes. Generally, the party requesting the deposition pays for the expert's time to give the deposition.

“After disclosure of the names and addresses of the expert witnesses, the other party expects to call as witnesses, the party, who has requested disclosure, may depose any such expert witnesses subject to scope of this section. Prior to taking the deposition the party must give notice as required in subsections A and C of 3230 of this title. If any documents are provided to such disclosed expert witnesses, the documents shall not be protected from disclosure by privilege or work product protection and they may be obtained through discovery.” Okla. Stat. Ann. tit. 12, § 3226(B) (4) (a) (2) (2011).

7. What is the Expert Standard (*Frye*/*Daubert*/Hybrid)?

The *Daubert* standard is used.

“We on the other hand believe the time is right for this Court to abandon the *Frye* test and adopt the more structured and yet flexible admissibility standard set forth in *Daubert*.

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Our adoption of the *Daubert* approach will provide structure and guidance to what has until now been a potentially confusing and sparsely defined area of legal analysis in our state jurisprudence. Adherence to *Daubert* will also ensure that relevant sections of the Evidence Code are properly considered in the admission decision.” *Taylor v. State*, 1995 Okla. Crim. App. 10, 21, 889 P.2d 319, 328-29 (1995).

8. Are there other notable Discovery Rules?

No.



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9. Is there mandatory mediation or arbitration?

No. Mediation is usually encouraged. Some judges do require mediation or judicial settlement conferences.

10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?

The pretrial conferences are conducted by the trial judge. Motions in limine may or may not be addressed at the conference, depending on the judge. There is no set time for the pretrial conference. It varies by judge but is usually done after the close of discovery.

11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?

It varies by judge.

12. Who conducts voir dire (Court/Counsel)? Describe the process.

Both Court and counsel participate in voir dire.

13. How many jurors are there? How many alternates? How many peremptory challenges?

There are 12 jurors typically with 1-2 alternates, but there can be more, depending on the judge and the case. Generally, there are 3 peremptory challenges per side. Oklahoma requires 3/4 of the jury to render a verdict. In a 12 person jury, a party needs 9 jurors signing the verdict.

“ Notwithstanding other methods authorized by law, the trial judge may direct in his discretion that a jury in a civil case be selected in the following manner:

(a) if the case be triable to a twelve-man jury, eighteen prospective jurors shall be called and seated in the box and then examined on voir dire; when eighteen such prospective jurors have been passed for cause, each side of the lawsuit shall exercise its peremptory challenges out of the hearing of the jury by alternately striking three names from the list of those so passed for cause, and the remaining twelve persons shall be sworn to try the case;

(b) if the case be triable to a six-man jury, twelve prospective jurors shall be called and seated in the box and then examined on voir dire; when twelve such prospective jurors have been passed for cause, each side of the lawsuit shall exercise its peremptory challenges out of the hearing of the jury by alternately striking three names from the list of those so passed for cause, and the remaining six persons shall be sworn to try the case.

If there be more than one defendant in the case, and the trial judge determines on motion that there is a serious conflict of interest



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between them, he may, in his discretion, allow each defendant to strike three names from the list of jurors seated and passed for cause. In such case he shall appropriately increase the number of jurors initially called and seated in the box for voir dire examination.” Okla. Stat. tit. 12, § 575.1 (2011).

14. Identify any “unusual” trial procedures. None.

15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions? No.

16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)? No.

17. Is there a provision for Prejudgment interest? Yes.

“E. Except as provided by subsection F of this section, if a verdict for damages by reason of personal injuries or injury to personal rights including, but not limited to, injury resulting from bodily restraint, personal insult, defamation, invasion of privacy, injury to personal relations, or detriment due to an act or omission of another is accepted by the trial court, the court in rendering judgment shall add interest on the verdict at a rate prescribed pursuant to subsection I of this section from the date the suit resulting in the judgment was commenced to the earlier of the date the verdict is accepted by the trial court as expressly stated in the judgment, or the date the judgment is filed with the court clerk. The interest rate for computation of prejudgment interest shall begin with the rate prescribed by subsection I of this section which is in effect for the calendar year in which the suit resulting in the judgment is commenced. This rate shall be in effect until the end of the calendar year in which the suit resulting in judgment was filed or until the date judgment is filed, whichever first occurs. Beginning on the first day of January of the next succeeding calendar year until the end of that calendar year, or until the date the judgment is filed, whichever first occurs, and for each succeeding calendar year thereafter, the prejudgment interest rate



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shall be the rate in effect for judgments rendered during each calendar year as certified by the Administrative Director of the Courts pursuant to subsection I of this section. After the computation of all prejudgment interest has been completed, the total amount of prejudgment interest shall be added to the amount of the judgment rendered pursuant to the trial of the action, and the total amount of the resulting judgment shall become the amount upon which post judgment interest is computed pursuant to subsection A of this section.

F. If a verdict of the type described by subsection E of this section is rendered against this state or its political subdivisions, including counties, municipalities, school districts, and public trusts of which this state or a political subdivision of this state is a beneficiary, the judgment shall bear interest at the rate prescribed pursuant to subsection I of this section, but not to exceed ten percent (10%) from the date the suit was commenced to the earlier of the date the verdict is accepted by the trial court as expressly stated in the judgment or the date the judgment is filed with the court clerk. The interest rate for computation of prejudgment interest shall begin with the rate prescribed by subsection I of this section which is in effect for the calendar year in which the suit resulting in the judgment is commenced. This rate shall be in effect until the end of the calendar year in which the suit resulting in judgment was filed or until the date the judgment is rendered as expressly stated in the judgment, whichever first occurs. Beginning on the first day of January of the next succeeding calendar year until the end of that calendar year, or until the date judgment is rendered, whichever first occurs, and for each succeeding calendar year thereafter, the prejudgment interest rate shall be the rate in effect for judgments rendered during each calendar year as certified by the Administrative Director of the Courts pursuant to subsection I of this section. After the computation of prejudgment interest has been completed, the amount shall be added to the amount of the judgment rendered pursuant to the trial of the action, and the total amount of the resulting judgment shall become the amount upon which post judgment interest is computed pursuant to subsection B of this section. No award of prejudgment interest against this state or its political subdivisions, including counties, municipalities, school districts, and public trusts of which this state or a political subdivision of this state is a beneficiary, including the amount of the judgment awarded pursuant to trial of the action, shall exceed the total amount of liability of the governmental entity pursuant to the Governmental Tort Claims Act.



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G. If exemplary or punitive damages are awarded in an action for personal injury or injury to personal rights including, but not limited to, injury resulting from bodily restraint, personal insult, defamation, invasion of privacy, injury to personal relations, or detriment due to an act or omission of another, the interest on that award shall begin to accrue from the earlier of the date the judgment is rendered as expressly stated in the judgment, or the date the judgment is filed with the court clerk.

H. If a judgment is rendered establishing the existence of a lien against property and no rate of interest exists, the court shall allow prejudgment interest at a rate prescribed pursuant to subsection I of this section from the date the lien is filed to the date of verdict.

I. For purposes of computing either post judgment interest or prejudgment interest as authorized by this section, interest shall be determined using a rate equal to the average United States Treasury Bill rate of the preceding calendar year as certified to the Administrative Director of the Courts by the State Treasurer on the first regular business day in January of each year, plus four percentage points.

J. For purposes of computing post judgment interest, the provisions of this section, including the amendments prescribed by Chapter 320, O.S.L. 1997, shall be applicable to all judgments of the district courts rendered on or after January 1, 2000 but before January 1, 2005. Until January 1, 2005, the method for computing post judgment interest prescribed by this section shall be applicable to all judgments remaining unpaid rendered prior to January 1, 2000.

K. For purposes of computing prejudgment interest, the provisions of this section, including the amendments prescribed by Chapter 320, O.S.L. 1997, shall be applicable to all actions which are filed in the district courts on or after January 1, 2000, but before January 1, 2005, for which an award of prejudgment interest is authorized by the provisions of this section.” Okla. Stat. tit. 12, § 727 (2011).

18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

Jurors may take notes and submit questions in most courts.



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19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed? No.

20. Are there legislative efforts under way that address any of the litigation practices in your state? New tort reform legislation went into effect on November 1, 2011. It set caps on non-economic damages and abolished joint and several liabilities.



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### Question

### Oregon

1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?

No.

2. Are there Standard Form Interrogatories/Document Requests?

No, but see No. 8 below regarding interrogatories.

3. Are there limits on the number of Interrogatories/Document Requests?

Interrogatories are not allowed in Oregon (see 8 below). There are no limits on the number of documents requests. Oregon limits the number of requests for admission to 30 (unless the court for good cause allows additional request). *Oreg. R. Civ. P. 45F.* (“A party may serve more than one set of requested admissions upon an adverse party, but the total number of requests shall not exceed 30, unless the court otherwise orders for good cause shown after the proposed additional requests have been filed. In determining what constitutes a request for admission for the purpose of applying this limitation in number, it is intended that each request be counted separately, whether or not it is subsidiary or incidental to or dependent upon or included in another request, and however the requests may be grouped, combined, or arranged.”)

4. Are there time limits on depositions, or limits on the number of depositions?

There are no rules specifically limiting the time for a deposition or the number of depositions. “The court may for cause shown enlarge or shorten the time for taking the deposition.” *Oreg. R. Civ. P. 39(C) (3) (2011).*

5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)

*Oreg. R. Civ. P. 39C (6)* corresponds to *FRCP 30(b) (6)*, with slight modifications to the language. (“A party may in the notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf, and shall set forth, for each person designated, the matters on which such person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection does not preclude taking a deposition by any other procedure authorized in these rules.” *Oreg. R. Civ. P. 39(c) (6) (2011).*)



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6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?
- Pretrial discovery of experts is not permitted - either their identity or the substance of their testimony. *Oreg. R. Civ. P.36* (2011); *Stevens v. Czerniak*, 336 Or. 392, 404, 84 P.3d 140 (2004). This information is considered to be covered by attorney-client privilege and therefore not discoverable. *Brink v. Multnomah County*, 224 Or. 507, 516-17, 356 P.2d 536 (1960). Although Oregon courts have consistently held that *Oreg. R. Civ. P. 36B* does not permit depositions of expert witnesses (*see, e.g., Stevens v. Czerniak*, 336 Or.392, 404, 84 P.3d 140 (2004)), an expert witness may nonetheless be deposed as a fact witness if the expert has personal knowledge of events relevant to the case. In *Gwin v. Lynn*, 344 Or 65, 72-75, 176 P.3d 1249 (2008), the Oregon Supreme Court held that a person may be both an expert witness and a fact witness - and thus be deposed concerning facts pertaining to the witness's direct knowledge of relevant events that were not emphasized that *Oreg. R. Civ. P. 39 D (3)* provided adequate protection for questions that trespassed on the witness's expertise or were otherwise impermissible and that the parties could always obtain a ruling from the trial court under *Oreg. R. Civ. P. 39 E (1)* on any objection that may arise during the deposition.

7. What is the Expert Standard (Frye/Daubert/Hybrid)?

The Oregon standard for the admissibility of scientific evidence is reflected in *State v. Brown*, 297 Or. 404, 687 P.2d 751 (1984) and *State v. O'Key*, 321 Or 285, 899 P.2d 663 (1995) and Oregon Evidence Code sections 401, 403 and 702. *State v. Brown, supra*, requires the court to make findings that address seven factors: (1) The technique's general acceptance in the field. (2) The expert's qualification and stature. (3) The use which has been made of the technique. (4) The potential rate of error. (5) The existence of specialized literature. (6) The novelty of the invention. (7) The extent to which the technique relies on the subjective interpretation of the expert. The court in *State v. O'Key, supra*, reaffirmed the *Brown* standard and adopted the four factors under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed. 2d 269 (1993) in considering the admissibility of scientific evidence. (1) Whether the theory or technique has been subject to peer review and publication. (3) The known or potential rate of error and the existence of operational standards controlling the techniques operation. (4) The degree of acceptance in the relevant scientific community.

“Given the degree of congruence of *Brown* and *Daubert*, we find the aspects of the *Daubert* decision discussed above to be persuasive, and we adopt them. Faced with a proffer of expert



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scientific testimony, an Oregon trial court, in performing its vital role as ‘gatekeeper’ pursuant to OEC 104(1), should, therefore, find *Daubert* instructive.” *State v. O’Key*, 321 Or. 285, 306-07, 899 P.2d 663, 680 (1995).

“The Supreme Court did, however, list four factors (somewhat overlapping the factors mentioned in *Brown*) that may be relevant to the inquiry, but also noted that none of them is decisive, nor is the list exhaustive . . . One factor under *Daubert* is whether the theory or technique in question ‘can be (and has been) tested.’ 509 U.S. at , 113 S. Ct. at 2796-97, 125 L. Ed. 2d at 482-83. (Although *Brown* does not specifically list this factor, one of the factors mentioned in *Brown* is ‘the availability of other experts to test and evaluate the technique.’ 297 Ore. at 418 n 5.) . . . A second factor is whether the theory or technique has been subject to peer review and publication (*Brown* refers to this as the existence of specialized literature, 297 Ore. at 417). . . A third factor is the ‘known or potential rate of error’ and the existence of operational standards controlling the technique’s operation (mentioned in *Brown*, 297 Ore. at 417 n 5). . . A fourth factor is the degree of acceptance in the relevant scientific community (mentioned in *Brown*, 297 Ore. at 417 n 5).” *State v. O’Key*, 321 Or. 285, 303-04, 899 P.2d 663, 678-79 (1995)

“To determine the relevance or probative value of proffered scientific evidence under OEC 401 and OEC 702, the following seven factors are to be considered as guidelines: (1) The technique’s general acceptance in the field; (2) The expert’s qualifications and stature; (3) The use which has been made of the technique; (4) The potential rate of error; (5) The existence of specialized literature; (6) The novelty of the invention; and (7) The extent to which the technique relies on the subjective interpretation of the expert.” *State v. Brown*, 297 Ore. 404, 417, 687 P.2d 751, 759 (1984).

### 8. Are there other notable Discovery Rules?

Interrogatories are not allowed in Oregon state court. In Oregon, although we can gain access to medical records, and in some cases written reports, pretrial contact with treating physicians, including depositions, is considered to be violative of the physician/patient privilege and as such is strictly prohibited. Expert discovery is not allowed in Oregon. Parties are not required to disclose the names of the trial witnesses.

In Oregon, there is no expert discovery.



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ORCP 36, pertaining to general discovery, requires a party, upon the request of an adverse party, to disclose “the existence and contents of any insurance policy under which a person transacting insurance may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.” Effective January 1, 2012, the party, upon the request of an adverse party, will also have to produce “the existence of any coverage denial or reservation of rights, and identify the provisions in any insurance agreement or policy upon which such coverage denial or reservation of rights is based.

ORCP 43 pertaining to production of documents, now contains a provision pertaining to electronic discovery. If electronic discovery is requested, the request may specify the “form in which the information is to be produced by the responding party but, if no such specification is made, the responding party must produce the information in either the form in which it is ordinarily maintained or in a reasonably useful form.

9. Is there mandatory mediation or arbitration?

Mandatory arbitration is governed by Oreg. Rev. Stat. § 36.400 to 36.425. Arbitration is mandatory for matters involving \$50,000 or less and domestic relations suits. Oreg. Rev. Stat. § 36.400, 36.405. Mediation programs differ by county and are not mandated by state law. Oreg. Rev. Stat. § 36.100-36.270. Some counties require mediation for certain disputes while others do not. See Supplementary Local Rules.



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10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?

Pretrial hearings are required only on application of a party. *Oreg. R. Civ. P. 21C (2011)*; see also *Burden v. Copco Refrigeration, Inc.*, 192 Or. App. 378, 381, 86 P.3d 59, 61 *modified on other grounds*, 193 Or. App. 476, 89 P.3d 1286 (Or. Ct. App. 2004), *rev'd on other grounds*, 339 Or. 388, 121 P.3d 1133 (2005) (rule requires a pretrial hearing only if a party applies for such a hearing). The timing and occurrence of pretrial conferences are county, judge and party dependent.

The content of pre-trial conferences varies depending on the county. See Supplementary Local Rules, often Local Rule 6.012.

Motions in limine are typically heard by the trial judge in advance of trial (i.e., immediately prior to selecting a jury or a few days before the scheduled start of trial).

11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?

Trial court submissions vary by county. Consequently, reference must be made to the Supplementary Local Rules.

12. Who conducts voir dire (Court/Counsel)? Describe the process.

*Oreg. R. Civ. P. 57 C* states: "When the full number of jurors has been called, they shall be examined as to their qualifications, first by the court, then by the plaintiff, and then by the defendant. The court shall regulate the examination in such a way as to avoid unnecessary delay." (2011) Typically, the judge will explain to the jurors the nature of the case and the purpose of voir dire. The judge may ask each juror to give a biographical sketch, including name, age, occupation, occupation of spouse, prior legal experience, area of residence, hobbies, with whom the juror resides, whether the juror drives, and whether the juror knows any party, lawyer, or witness in the case.

Some judges ask the lawyers to submit a pretrial list of witnesses, which the judge will read to the jury during voir dire. Among other things, this practice has the effect of circumventing Oregon's system of "trial by ambush," which does not allow for discovery of names of experts.

Pursuant to Uniform Trial Court Rule 3.050(3), lawyers may move freely about the courtroom during trial unless otherwise directed by the court. Most trial judges allow lawyers to move about the courtroom during voir dire or to stand at a podium in front of the panel.



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Before trial, the lawyer should check with the court clerk regarding the judge's time limit on voir dire. Depending on the jurisdiction, time limits range from 30 minutes to unlimited time. Some local bar associations, such as the Multnomah County Bar Association, publish information on how the judge conducts voir dire. The court can limit the substantive material introduced by the lawyers during voir dire. *State v. Walton*, 311 Or 223, 243–244, 809 P2d 81 (1991).

13. How many jurors are there? How many alternates? How many peremptory challenges?

“A trial jury in the circuit court is a body of 12 persons drawn as provided in Rule 57 Oreg. R. Civ. P. (2011). The parties may stipulate that a jury shall consist of any number less than 12 or that a verdict or finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.” Oreg. R. Civ. P. 56A (2011). “Notwithstanding section A of this rule, a jury in circuit court shall consist of six persons if the amount in controversy is less than \$10,000.” Oreg. R. Civ. P. 56B (2011).

Either party is entitled to no more than three peremptory challenges if the jury consists of more than 6 jurors and no more than 2 peremptory challenges if the jury consists of six jurors. Oreg. R. Civ. P. 57D (2) (2011).

The court can direct that as many as 6 alternate jurors be called and impaneled. Alternate jurors who do not replace regular jurors are discharged as the jury retires to consider the verdict. Oreg. R. Civ. P. 57 F (2011). Additional peremptory challenges are available if alternate jurors are impaneled. Oreg. R. Civ. P. 57 F (2011).

If a civil case has been designated as expedited according to the Uniform Trial Court Rules, jury trials will use six jurors, plus alternate(s), if any.

14. Identify any “unusual” trial procedures.

We practice “trial by ambush” in Oregon. In Oregon state court, not only is there no expert discovery, there is absolutely no requirement that the identities of experts be disclosed at all. In addition, under the Oregon rules, there is no mandatory witness disclosure, and surprise witnesses are a fact of life at trial. The first clue that a party has of who the other party's witnesses may be at trial is when names of potential witnesses are revealed to the jury during voir dire. In addition, a court may require the parties to disclose their witnesses to the other parties 24 hours in advance. This is left to the discretion of the court however, and typically will



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not be ordered unless requested by a party.

15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?

No, with the exception of the Tax Court, this is located in Salem, Oregon and has exclusive, statewide jurisdiction to hear only cases that involve Oregon's tax laws.

16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?

Under the Oregon products liability statutes, a manufacturer or distributor can be strictly liable in a product liability civil action if considered a "seller or lessor... engaged in the business of selling or leasing" of the product. *Oreg. R. Stat. § 30.900-30.928. See also Mason v. Mt. St. Joseph, Inc.*, 226 *Oreg. App.* 392, 404, 203 P.3d 329, 336 (*Oreg. Ct. App.* 2009), review allowed, 347 *Or.* 42, 217 P.3d 688 (2009) and review dismissed, 347 *Or.* 349, 222 P.3d 30 (2009) (holding that "the text of *Oreg. R. Stat. § 30.920* limits its reach to 'sellers' and 'lessors,' and that the legislature 'did not extend the remedy to non-seller distributors of defective products.'").

17. Is there a provision for Prejudgment interest?

*Oreg. R. Stat. § 82.010(1)* provides for prejudgment interest at 9%, unless agreed otherwise, on "[a]ll moneys after they become due; but open accounts bear interest from the date of the last item thereof."

"(1) The rate of interest for the following transactions, if the parties have not otherwise agreed to a rate of interest, is nine percent per annum and is payable on:

(a) All moneys after they become due; but open accounts bear interest from the date of the last item thereof.

(b) Money received to the use of another and retained beyond a reasonable time without the owner's express or implied consent.

(c) Money due or to become due where there is a contract to pay interest and no rate specified.

(2) Except as provided in this subsection, the rate of interest on judgments for the payment of money is nine percent per annum. The following apply as described:

(a) Interest on a judgment under this subsection accrues from the date of the entry of the judgment unless the judgment specifies



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another date.

(b) Interest on a judgment under this subsection is simple interest, unless otherwise provided by contract.

(c) Interest accruing from the date of the entry of a judgment shall also accrue on interest that accrued before the date of entry of a judgment.

(d) Interest under this subsection shall also accrue on attorney fees and costs entered as part of the judgment.

(e) A judgment on a contract bearing more than nine percent interest shall bear interest at the same rate provided in the contract as of the date of entry of the judgment.

(f) The rate of interest on a judgment rendered in favor of a plaintiff in a civil action to recover damages for injuries resulting from the professional negligence of a person licensed by the Oregon Medical Board under ORS chapter 677 or the Oregon State Board of Nursing under ORS 678.010 to 678.410 is the lesser of five percent per annum or three percent in excess of the discount rate in effect at the Federal Reserve Bank in the Federal Reserve district where the injuries occurred.

Or. Rev. Stat. § 82.010 (20). “Where pre-judgment interest is awarded, it should be made a part of the judgment so that post-judgment interest will apply to it.” *Meskimen v. Larry Angell Salvage Co.*, 286 Or. 87, 98, 592 P.2d 1014, 1021 (1979).

18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

(1) Oregon state courts have not adopted notice pleading practices. The complaint must contain a “statement of the ultimate facts” forming a claim, which is code pleading, rather than a simple “statement of the claim.” The semantic difference is significant. If you do not plead ultimate facts – and rely instead on the tried and true notice pleading format – you will likely be hit with seemingly endless motions to dismiss or to make the claims more definite and certain.

(2) The Oregon rules provide that “if recovery of money or damages is demanded, the amount thereof shall be stated.” This rule therefore requires a plain statement of damages as an element of a claim, a prayer for damages, and the amount of monetary damages sought. The maximum damages must be stated. For special damages such as lost profits, ultimate facts must be pleaded



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as the basis for the alleged loss.

(3) Oregon court rules require the pleader to state in the complaint, answer or other pleading the entitlement to recover attorney's fees, whether it is by statute, contract or rule. If no pleading is filed, but instead a motion to dismiss or motion for summary judgment prior to pleading, the basis for recovering attorney's fees must be stated in the motion. The court has no basis to award fees to the prevailing party without it.

(4) Punitive damages are recoverable in Oregon under appropriate circumstances. Plaintiffs cannot, however, request an award of punitive damages in an initial complaint filed in state court. The plaintiff can, nevertheless, include a "notice" provision in the complaint by stating the intent to file a motion for leave of court to amend the complaint to assert a claim for punitive damages. The motion must be supported by affidavits and other evidence adequate to avoid a motion for directed verdict. Discovery of the defendant's ability to pay is not permitted unless and until this motion is granted.

(5) If you file a case in Oregon Circuit Court, chances are you won't know the identity of the trial judge until the day before trial, at the daily trial calendar call. The presiding judge will at that time assign the trial judge for the next day. The only way to avoid this uncertainty is to file a motion for a "complex case" designation. This designation is reserved for unusual cases, though, so don't expect the court to grant your motion simply because you filed it.

(6) There is no requirement for a unanimous verdict in civil cases in Oregon Circuit Court. Three-fourths, or 9 out of 12, of the jurors may render a verdict. This requirement prompts some defendants to remove cases to federal district court, if at all possible, because there the verdict must be unanimous.

19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

Oreg. R. Civ. P. 47 (2011) governs summary judgment motions in Oregon state courts. In contrast to federal court, where a motion for summary judgment may raise issues requiring an expert to respond, Oregon has a special rule to avoid this circumstance. Under state practice, the attorney for the party responding to the motion may submit an affidavit stating that an unnamed qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact. An attorney affidavit to this effect is sufficient for the court to deny a motion for summary judgment. This rule is intended to prevent a defendant from discovering plaintiff's expert by filing a motion for summary judgment. It allows a plaintiff, however, to easily defeat motions for summary judgment.



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20. Are there legislative efforts under way that address any of the litigation practices in your state?      No.



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### Question

### Pennsylvania

1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?

No.

2. Are there Standard Form Interrogatories/Document Requests?

No. However, some local jurisdictions recommend the use of certain Standard Form Interrogatories/Document Requests. See, e.g., Phila. Civ. R. 4005 (2012) (Philadelphia County Court of Common Pleas).

3. Are there limits on the number of Interrogatories/Document Requests?

No. However: “The number of interrogatories or of sets of interrogatories to be served may be limited as justice requires to protect the party from unreasonable annoyance, embarrassment, oppression, burden or expense.” Pa. R. Civ. P. 4005(c) (2011).

4. Are there time limits on depositions, or limits on the number of depositions?

No.

5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)

Yes. Corporate Designee depositions are governed by Pa.R.C.P. 4007.1(e), which is similar to F.R.C.P. 30(b) (6).

6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?

Only by agreement. The deposing party pays for the opposing expert's time.

“A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, except a medical expert as provided in Rule 4010(b) or except on order of court as to any other expert upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means, subject to such restrictions as to scope and such provisions concerning fees and expenses as to the court may deem appropriate.” Pa. R. Civ. P. 4003.5(a) (3) (2011).

7. What is the Expert Standard (*Frye*/*Daubert*/Hybrid)?

The expert standard in Pennsylvania is the *Frye* standard. Notably, the Pennsylvania Supreme Court in *Betz v. Pneumo Abex*, 44 A.3d 27 (Pa. 2012) recently provided clarification as to what it deemed to



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be “novel scientific evidence.” The court held that “a reasonably broad meaning should be ascribed to the term ‘novel.’” Id. at 74. The court concluded that “a *Frye* hearing is warranted when a trial judge has articulable grounds to believe that an expert witness has not applied accepted scientific methodology in a conventional fashion in reaching his or her conclusions.” Id.

8. Are there other notable Discovery Rules?

The Pennsylvania Supreme Court recently amended Pa.R.C.P. 4009.1, 4009.11, 4009.12, 4009.23 and 4011 to include provisions addressing electronic discovery. The amendments went into effect on August 1, 2012.

9. Is there mandatory mediation or arbitration?

There is compulsory arbitration for cases under a certain amount in controversy, exclusive of interests and costs. The amount in controversy varies by local jurisdiction but does not exceed \$50,000.

10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?

Pretrial Conference is conducted by the trial judge, shortly before trial.

11. What are the court’s practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?

It varies by judge.

12. Who conducts voir dire (Court/Counsel)? Describe the process.

It depends on the judge. There is wide variance.

13. How many jurors are there? How many alternates? How many peremptory challenges?

The number of jurors and alternates varies between local jurisdictions. A number of local jurisdictions provide that a demand for a jury trial shall be deemed a demand for a jury of anywhere from 6 to 8 depending on the jurisdiction, with the requirement that a specific request must be made for a jury of 12. See, e.g., C.C.R.C.P. 1007.1 (2012) (Chester County Court of Common Pleas) and Phila. Civ. R. 4005 (2012) (Philadelphia County Court of Common Pleas).

Each party is entitled to four peremptory challenges. Pa.R.C.P. 221 (2012). The court may permit additional peremptory challenges or,



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where there are multiple plaintiffs or defendants, consider such groups as a single party. Id.

14. Identify any “unusual” trial procedures.

None.

15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?

Certain local jurisdictions have special trial court divisions. For example, the Philadelphia County Court of Common Pleas and the Allegheny County Court of Common Pleas have special trial court divisions for certain civil matters, including certain mass torts, commerce matters and class actions. The discovery timetables for different trial divisions vary based on the rules of the local jurisdiction.

16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?

No.

17. Is there a provision for Prejudgment interest?

Yes. (Delay damages)

“Except as otherwise provided by another statute, a judgment for a specific sum of money shall bear interest at the lawful rate from the date of the verdict or award, or from the date of the judgment, if the judgment is not entered upon a verdict or award.” 42 Pa. Cons. Stat. § 8101 (1976).

18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

None.

19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

No.

20. Are there legislative efforts under way that address any of the litigation practices in your state?

The law of Joint and Several Liability changed. On June 28, 2011, Pennsylvania Gov. Tom Corbett signed into law Senate Bill 1131; and in doing so, the future of joint and several liabilities in Pennsylvania was reduced to a list of exceptions. The new law provides that "where liability is attributed to more than one



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defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of that defendant's liability to the amount of liability attributed to all defendants and other persons to whom liability is apportioned."

This is a distinct change from prior Pennsylvania law, in which each defendant could be held responsible for the total verdict, not based upon the proportion of liability attributed to each defendant. The change may be more noticeable in strict liability matters involving asbestos actions and similar mass tort cases, where previously plaintiffs could hold a defendant whose products were a minor portion of the plaintiffs' overall exposures liable for a per-capita share of liability.<sup>1</sup> The new law also requires the courts to "enter a separate and several judgment in favor of the plaintiff and against each defendant for the apportioned amount of that defendant's liability." Previously, a judgment could be entered against one defendant for the entire verdict, with that defendant's only remedy to seek contribution from the joint tortfeasors. With this new legislation, separate judgments for defendants found less than 60-percent liable eliminates this practice.



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Question	Puerto Rico
1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?	Yes. Rule 37.1 of the Puerto Rico Rules of Civil Procedure of 2009 provides for Mandatory Disclosures patterned after Fed. R. Civ. P. 26. Unfortunately, the Puerto Rico Rules of Civil Procedure of 2009 are in Spanish and an official English translation is not currently available.
2. Are there Standard Form Interrogatories/Document Requests?	No.
3. Are there limits on the number of Interrogatories/Document Requests?	No.
4. Are there time limits on depositions, or limits on the number of depositions?	No, except that Rule 27.1 of the Puerto Rico Rules of Civil Procedure of 2009 provides that the plaintiff may not take any deposition without the court's permission until the period for the defendant to answer the complaint has elapsed, unless the notice of deposition expresses that the deponent intends to leave the jurisdiction and will not be available later for oral examination.
5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)	Yes. Rule 27.6 of the Puerto Rico Rules of Civil Procedure of 2009 is similar to Fed. R. Civ. P. 30(b) (6).
6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?	Yes. Rule 23.1(c)(1) of the Puerto Rico Rules of Civil Procedure of 2009 allows a party to seek expert discovery through interrogatories and the court may order further discovery by other means subject to the conditions and limitations the court may deem appropriate. However, general custom is for experts to be deposed by agreement and the party seeking discovery pays a reasonable fee for time spent in deposition.
7. What is the Expert Standard (Frye/Daubert/Hybrid)?	Under Rule 702 of the Puerto Rico Rules of Evidence of 2009, the admissibility of expert testimony is left to the discretion of the court, who weighs its probative value following criteria from both Frye and Daubert.
8. Are there other notable Discovery Rules?	None.
9. Is there mandatory mediation or arbitration?	No.



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10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial? The pretrial conference is held at least 30 days before the trial and it is conducted by the Trial Judge. Motions in limine are generally addressed at the Pretrial Conference but may be heard at other times at the judge's discretion.
11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge? This is a matter of judicial discretion and varies from court to court.
12. Who conducts voir dire (Court/Counsel)? Describe the process. There are no jury trials in civil cases before the Court of First Instance of the Commonwealth of Puerto Rico.
13. How many jurors are there? How many alternates? How many peremptory challenges? There are no jury trials in civil cases before the Court of First Instance of the Commonwealth of Puerto Rico.
14. Identify any "unusual" trial procedures. In Puerto Rico there are bench trials in civil cases.
15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions? There are no special trial court divisions for civil matters. There are no different discovery timetables for different cases.
16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)? No.
17. Is there a provision for Prejudgment interest? Yes. Rule 44.3 of the Puerto Rico Rules of Civil Procedure of 2009 provides for the imposition of prejudgment interest by the court if a party is found to have been obstinate in the litigation.
18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.) None.
19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed? No.
20. Are there legislative efforts under way that address any of the litigation practices in your state? No.



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Question	Rhode Island
1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?	No.
2. Are there Standard Form Interrogatories/Document Requests?	No.
3. Are there limits on the number of Interrogatories/Document Requests?	Yes. Pursuant to Rule 33(b), the total number of interrogatories may not exceed 30 unless the court otherwise orders, for good cause shown. There is no limitation on the number of document requests under Rule 34. (“A party may serve more than one set of interrogatories upon another party provided the total number of interrogatories shall not exceed 30 unless the court otherwise orders for good cause shown.” R.I. Super. Ct. R. Civ. P. 33(b) (2011)).
4. Are there time limits on depositions, or limits on the number of depositions?	No. There are no limits on time or number of depositions, unless otherwise ordered by court.
5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)	Yes. RI RCC.P. 30(b) (6) substantially tracks the federal rule. (“A party may in the witness' notice or in a subpoena name as the deponent a public, private or governmental organization and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall serve and file, prior to the deposition, a written designation which identifies one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf and shall set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non- party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b) (6) does not preclude taking a deposition by any other procedure authorized in these rules.” R. I. Super. Ct. R. Civ. P. 30(b) (6) (2011)).
6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?	Yes. A party may depose experts who have been identified for trial testimony. There is qualified immunity from deposition for a consulting expert. Generally, the party taking the expert's deposition pays the expert's deposition fees/costs, absent court order.  “A party may depose any person who has been identified as an expert expected to testify when the expert interrogatory has been



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responded to by the other party. Unless otherwise ordered by the court, the party seeking to depose the expert shall pay the expert the reasonable fee for the time spent attending the deposition and the reasonable expenses incurred in attending the deposition.” R.I. 26(b) (4) (A) (2011).

If a party seeks to introduce opinion evidence on medical or property damage issues by affidavit, pursuant to RIGL 9-19-27 and 9-19-28, the opposing attorney is entitled to take the deposition of the affiant expert. The party who sought to introduce the testimony of the expert by affidavit must pay for 1 hour opportunity to cross-examine at the deposition. The party cross-examining (and noticing such deposition) bears the burden of any expense after an hour. Gerstein v. Scotti, 626 A.2d 236 (RI 1993).

7. What is the Expert Standard (Frye/Daubert/Hybrid)?

In *DiPetrillo v. Dow Chemical Co.*, 729 A.2d 677 (R.I. 1999) the RI Supreme Court essentially adopted the *Daubert/Kumho* tire approval to expert testimony, as distinguished from the earlier *Frye* standard:

(“Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a) whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the Trier of fact to understand or determine the fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether the reasoning or methodology properly can be applied to the facts in issue.”)

8. Are there other notable Discovery Rules?

In medical malpractice cases an administrative order of the Presiding Justice of the Superior Court (2009-26) sets forth provisions for scheduling conferences, discovery and expert disclosures.

9. Is there mandatory mediation or arbitration?

Yes. All civil actions in which the claim is \$100,000 or less must proceed through non-binding court-annexed arbitration pursuant to Superior Court Arbitration Rules before assignment to trial by jury. Mediation is elective except in medical malpractice cases (Administrative Order 2009-25) and on appeals in the RI Supreme Court where mediation is mandatory.



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10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?

Pretrial (control calendar and trial calendar) notices are issued randomly by the case assignment offices. Conferences are held en-masse by the Providence Superior Court Assignment Judge (or Magistrate) or by the County Court Civil Judge. Motions in Limine are addressed to the trial judge when the case is reached for trial.

11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?

It varies by judge. Generally they are required only in complex cases that have been specifically assigned by the Presiding Justice to the trial judge for pretrial management.

12. Who conducts voir dire (Court/Counsel)? Describe the process.

The judge asks a few preliminary questions then very liberal voir dire is conducted by the attorneys. Voir dire is conducted by plaintiff's counsel and then by each defense counsel.

13. How many jurors are there? How many alternates? How many peremptory challenges?

In civil cases there are generally 6 jurors and 2 alternates, with 1 peremptory challenge for each 3 jurors.

*R.I. Code § 9-10-11.1 (2011) (number of jurors)* (“Juries in civil cases shall be composed of six (6) persons and such alternate jurors as may be called pursuant to § 9-10-13.”)

*R.I. Code § 9-10-13 (2011) (alternate jurors)* (“Whenever in the opinion of the court the trial of a civil case before a jury is likely to be a protracted one, the court may, immediately after the jury is impaneled and sworn, direct the calling of one or two (2) additional jurors, to be known as alternate jurors. Alternate jurors shall be drawn from the same source, and in the same manner, and have the same qualifications, as regular jurors, and be subject to examination and challenge as such jurors, except that each party shall be allowed one peremptory challenge for each alternate juror. The alternate jurors shall take the proper oath or affirmation and shall be seated near the regular jurors with equal facilities for seeing and hearing the proceedings in the cause and shall attend at all times upon the trial of the cause in company with the regular jurors. They shall obey all orders and admonitions of the court, and if the regular jurors are ordered to be kept in the custody of an officer during the trial of the cause, the alternate jurors shall also be kept with the other jurors and, except as hereinafter provided, shall be discharged upon the final submission of the cause to the jury. If, before the final submission of the cause, a regular juror dies or is discharged, the court shall order the alternate juror, if there is but one, to take his or her place in the jury box. If there are two (2) alternate jurors, the court shall select one by lot, who shall then take his or her place in the jury box. After an alternate juror is in the jury box he or she shall be subject to the same rules as a



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regular juror.”)

*R.I. Code § 9-10-18 (2011) (peremptory challenges)* (“Either party in a civil action may, before the opening of the action or proceeding to the jury, challenge in writing, addressed to the clerk of the court, any qualified jurors called for the trial of the cause or proceeding, not exceeding one in three (3), without alleging or showing any cause therefore; and after the objection the challenged jurors shall not sit in the trial of the cause, but other jurors shall be called to take the place of the challenged jurors for the trial of the cause.”)

14. Identify any “unusual” trial procedures

Plaintiff gives opening statements first. Defendant gives closing argument first. Rebuttal is generally not allowed. Some judges allow jurors to take notes. Some judges give opening instructions to the jury.

Medical testimony may be introduced by affidavit pursuant to RI Gen Law §9-19-27. New amendments to the law have broadened the type of medical testimony that may be introduced this way; records, bills, notes, and statements made by physician, whether contemporaneous or not, are included. Counsel opposing the affidavit must object within ten (10) days of being served.

15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?

Not generally. However, Associate Justice Silverstein is the "Business Calendar" judge, for receiverships and business-related jurisdiction. The judge assigned to the "Formal and Special Cause Calendar" handles TRO's, injunctions, restraining orders and other equity litigation.

16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?

No.

17. Is there a provision for Prejudgment interest?

Yes. Statutory interest (R.I.Code §9-21-10(2011)) is 12% per annum from the date the cause of action accrues. The jury is not instructed on interest and cannot be told about it.

“(a) In any civil action in which a verdict is rendered or a decision made for pecuniary damages, there shall be added by the clerk of the court to the amount of damages interest at the rate of twelve percent (12%) per annum thereon from the date the cause of action accrued, which shall be included in the judgment entered therein. Post-judgment interest shall be calculated at the rate of twelve percent (12%) per annum and accrue on both the principal amount



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of the judgment and the prejudgment interest entered therein. This section shall not apply until entry of judgment or to any contractual obligation where interest is already provided.

(b) Subsection (a) shall not apply in any action filed on or after January 1, 1987, for personal injury or wrongful death filed against a licensed physician, hospital, clinic, health maintenance organization, professional service corporation providing health care services, dentist, or dental hygienist based on professional negligence. In all such medical malpractice actions in which a verdict is rendered or a decision made for pecuniary damages, there shall be added by the clerk of the court to the amount of damages interest at the rate of twelve percent (12%) per annum thereon from the date of written notice of the claim by the claimant or his or her representative to the malpractice liability insurer, or to the medical or dental health care provider or the filing of the civil action, whichever first occurs.”

18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

In complex cases the parties may ask the Presiding Justice to appoint a judge to manage the case from filing through trial. In punitive damages cases, the defendant is entitled to an evidentiary hearing (non-jury) to determine if there is a prima facie case, if plaintiff is seeking discovery of defendant's financial information. *Palmisano v. Toth*, 624 A.2d 314 (1993).

*Asermely v. Allstate Ins. Co.* provides that in RI an insurer assumes the risk of judgment in excess of policy limits after declining to settle with a third party claimant. Recent case of *DeMarco v. Travelers Ins. Co.* extends this so that it also applies to cases involving multiple claimants.

19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

The 12% prejudgment interest rate; joint and several liability; admissibility of subsequent remedial measures to prove negligence (contra federal rule); order of trial (plaintiff closes after defendant)

20. Are there legislative efforts under way that address any of the litigation practices in your state?

Each year business interests, medical society, chambers of commerce and defense bar (DCRI) file or support bills to revise prejudgment interest, joint and several liability, etc.



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Question	South Carolina
1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?	No.
2. Are there Standard Form Interrogatories/Document Requests?	Yes. Rule 33(b) of the South Carolina Rules of Civil Procedure sets forth Standard Interrogatories.
3. Are there limits on the number of Interrogatories/Document Requests?	Yes. In actions with an amount in controversy exceeding \$25,000, interrogatories are limited to 50, not including the standard interrogatories. There are no limits on document requests.
4. Are there time limits on depositions, or limits on the number of depositions?	No.
5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)	Yes. SCRCP 30(b) (6) is not materially different than FRCP 30(b) (6).
6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?	Yes. Parties are free to depose opposing experts without agreement or court order. The cost of the deposition is borne by the party noticing.
7. What is the Expert Standard ( <i>Frye/Daubert/Hybrid</i> )?	South Carolina has not adopted <i>Frye</i> or <i>Daubert</i> . See <i>State v. Council</i> , 335 S.C. 1, 515 S.E.2d 515 (1999). Admissibility is determined under SCRE 702.
8. Are there other notable Discovery Rules?	No.
9. Is there mandatory mediation or arbitration?	Mediation is mandatory in certain counties (Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Richland, Sumter, Union, Williamsburg, and York—mediation is mandatory in Oconee and Pickens for only family court). Pre-suit mediation is mandatory in all medical malpractice cases in all counties.
10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?	A pretrial conference may be conducted by the trial judge any time prior to trial. Motions in limine are addressed at trial.
11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?	There is no set practice in SC state courts regarding trial submissions. Typically, it will vary by judge and county.



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12. Who conducts voir dire (Court/Counsel)? Describe the process.      Voir dire can be conducted by the court or by counsel, depending on the judge. The court usually conducts voir dire. Counsel may submit proposed questions and may supplement.
13. How many jurors are there? How many alternates? How many peremptory challenges?      There are usually 12 jurors, but parties can stipulate to less. Up to 6 alternates are selected. Peremptory challenges: Start with a list of 20, plaintiff has first strike and then the parties' alternate strikes until 12 jurors remain.
14. Identify any "unusual" trial procedures.      None.
15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?      Complex Case designation, Multi-Week Docket (Beaufort, Charleston, Horry, established January 1, 2009 and expired December 1, 2009). Business Court Pilot Program (Charleston, Greenville, and Richland Counties, established September 2, 2007 and extended until December 1, 2012).
16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?      No.
17. Is there a provision for Prejudgment interest?      Prejudgment interest is allowed.
18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)      None.
19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?      None.
20. Are there legislative efforts under way that address any of the litigation practices in your state?      No.



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Question	South Dakota
1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?	No.
2. Are there Standard Form Interrogatories/Document Requests?	No.
3. Are there limits on the number of Interrogatories/Document Requests?	No.
4. Are there time limits on depositions, or limits on the number of depositions?	No.
5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)	Yes. The State rule is similar to F.R.C.P. 30(b) (6). (“A party may in the notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision does not preclude taking a deposition by any other procedure authorized in these rules.” S.D. Codified Laws § 15-6-30(b) (2011)).
6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?	Yes. The party deposing the expert pays for the expert's time. (“Trial preparation protection for communication between a party's attorney and expert witnesses. SDCL § 15-6-26(b)(3) protects communications between the party's attorney and any witness who is retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony, regardless of the form of the communications, except to the extent that the communications: (i) relate to compensation for the expert's study or testimony; (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinion to be expressed; or (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed” S.D. Codified Laws § 15-6-26(b)(4)(C) (2011); “Unless manifest injustice would result, (i) the court shall require that the party



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seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (4) (A) (ii) and (4) (B) of this section; and (ii) with respect to discovery obtained under subdivision (4) (A) (ii) of this section the court may require, and with respect to discovery obtained under subdivision (4)(B) of this section the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.” S.D. Codified Laws § 15-6-26(b) (4) (E) (2011)).

7. What is the Expert Standard (Frye/Daubert/Hybrid)?

The *Daubert* standard is used.

*State v. Hofer*, 512 N.W.2d 482 (S.D. 1994) (holding that general acceptance in the scientific community is no longer required; the trial judge has the task of ensuring that an expert’s testimony rests on a reliable foundation and is relevant to the task at hand; and that “pertinent evidence based on scientifically valid principles will satisfy those demands.”)

*State v. Guthrie*, 627 N.W.2d 401 (S.D. 2001) (“The standards set forth in *Daubert* are not limited to what has traditionally been perceived as scientific evidence. These standards must be satisfied whenever scientific, technical, or other specialized knowledge is offered.”)

8. Are there other notable Discovery Rules?

No.

9. Is there mandatory mediation or arbitration?

No.

10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?

The timing of the pretrial conference is up to the trial judge and depending on the length of the trial and issues to be decided it is normally held two weeks to one month prior to trial. It is conducted by the trial judge. The timing for addressing motions in limine is up to the judge however routine motions in limine are usually addressed at the pretrial conference.

11. What are the court’s practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?

It varies by judge.

12. Who conducts voir dire (Court/Counsel)? Describe the process.

Generally, counsel for the parties conducts voir dire, although occasionally the trial judge will conduct all or part of voir dire.



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13. How many jurors are there? How many alternates? How many peremptory challenges?

There are usually 12 jurors. However, the parties may stipulate that the jury shall consist of any number less than 12 or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury, S.D. Code. § 15-6-48 (2011). The court may direct that not more than 6 jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. S.D. Code § 15-6-47(b) (2011). Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impaneled, 2 peremptory challenges if 3 or 4 alternate jurors are to be impaneled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impaneled. The additional peremptory challenges allowed by law shall not be used against an alternate juror. The court may for good cause excuse a juror from service during trial or deliberation. *Id.* Each party is entitled to 3 peremptory challenges. S.D. Code § 15-14-7 (2011).

*S.D. Code § 15-6-48 (2011) (number of jurors)*

The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

*S.D. Code § 15-6-47(b) (2011) (alternates and peremptory challenges)*

The court may direct that not more than six jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to one peremptory challenge in addition to those otherwise allowed by law if one or two alternate jurors are to be impaneled, two peremptory challenges if three or four alternate jurors are to be impaneled, and three peremptory challenges if five or six alternate jurors are to be impaneled. The additional peremptory challenges may be used against an alternate juror only and the other peremptory challenges allowed by law shall not be used against an alternate juror. The court may for good



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cause excuse a juror from service during trial or deliberation.

*S.D. Code § 15-14-7 (2011) (peremptory challenges)*

The challenges are to individual jurors, and are either peremptory or for cause. Each party is entitled to three peremptory challenges. If no peremptory challenges are taken until the panel is full, they must be taken by the parties alternately, commencing with the plaintiff.

*S.D. Code § 15-14-10 (2011) (peremptory challenge procedure)*

After the panel is filled the parties shall exercise their peremptory challenges. A list of the jurors in the panel shall be made by the clerk and passed first to the plaintiff and then to the defendant, or their respective counsel, and the parties shall exercise their peremptory challenges by crossing out the name of the juror they desire to challenge and noting thereafter that such challenge has been exercised by the plaintiff or defendant, as the case may be. When a peremptory challenge is exercised it shall be announced by the party or attorney exercising it; but the name of the juror challenged need not be announced. Thereupon and before further challenges are exercised, the clerk shall draw another juror and he may be examined for cause and challenges for cause made. The parties shall proceed alternately, exercising their peremptory challenges until the same are exhausted and the jurors then remaining in the box shall be sworn as jurors to try the case.

*S.D. Code § 15-14-10.5 (2011) (peremptory challenge; no waiver)*

Following examination of the jurors called for examination pursuant to § 15-14-10.2, the parties, commencing with the plaintiff, shall alternatively exercise their peremptory challenges on the clerk's list. A peremptory challenge may not be waived.

14. Identify any "unusual" trial procedures.

None.

15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?

No.



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16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?

No.

17. Is there a provision for Prejudgment interest?

Yes.

*S.D. Code § 21-1-11 (2011)*

Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt.

*S.D. Code § 21-1-13.1 (2011)*

Any person who is entitled to recover damages, whether in the principal action or by counterclaim, cross claim, or third-party claim, is entitled to recover interest thereon from the day that the loss or damage occurred, except during such time as the debtor is prevented by law, or by act of the creditor, from paying the debt. Prejudgment interest is not recoverable on future damages, punitive damages, or intangible damages such as pain and suffering, emotional distress, loss of consortium, injury to credit, reputation or financial standing, loss of enjoyment of life, or loss of society and companionship. If there is a question of fact as to when the loss or damage occurred, prejudgment interest shall commence on the date specified in the verdict or decision and shall run to, and include, the date of the verdict or, if there is no verdict, the date the judgment is entered. If necessary, special interrogatories shall be submitted to the jury. Prejudgment interest on damages arising from a contract shall be at the contract rate, if so provided in the contract; otherwise, if prejudgment interest is awarded, it shall be at the Category B rate of interest specified in § 54-3-16. Prejudgment interest on damages arising from inverse condemnation actions shall be at the Category A rate of interest as specified by § 54-3-16 on the day judgment is entered. This section shall apply retroactively to the day the loss or damage occurred in any pending action for inverse condemnation. The court shall compute and award the interest provided in this section and shall include such interest in the judgment in the same manner as it taxes costs.



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18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)      None.
19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?      None.
20. Are there legislative efforts under way that address any of the litigation practices in your state?      No, not as of 2012.



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Question	Tennessee
1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?	No.
2. Are there Standard Form Interrogatories/Document Requests?	No.
3. Are there limits on the number of Interrogatories/Document Requests?	Not by state rule, but usually by local rule.
4. Are there time limits on depositions, or limits on the number of depositions?	No.
5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)	Yes. The State rule is similar to the Federal rule. (“A party may in the party’s notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (6) does not preclude taking a deposition by any other procedure authorized in these rules.” Tenn. R. Civ. P. 30.02(6) (2012)).
6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?	Yes. The deposing party pays the experts deposition costs/fees.  “A party may also depose any other party’s expert witness expected to testify at trial.” Tenn. R. Civ. P. 26.02(4) (A) (ii) (2012).  “Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (4)(A)(ii) and (4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (4)(B) of this



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rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.” Tenn. R. Civ. P. 26.02(4) (C) (2012).

7. What is the Expert Standard (Frye/Daubert/Hybrid)?

A limited form of *Daubert* has been adopted.

“In our view, determining the standard for the admissibility of scientific evidence requires an analysis of the unique language found in Rules 702 and 703 of the Tennessee Rules of Evidence. For instance, Tenn. R. Evid. 702 requires that the scientific evidence “*substantially* assist the Trier of fact,” while its federal counterpart requires only that the evidence “assist the Trier of fact.” Fed. R. Evid. 702. This distinction indicates that the probative force of the testimony must be stronger before it is admitted in Tennessee. *See, e.g., Weinstein, Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 636 (1991).

Similarly, Tenn. R. Evid. 703 states that “the court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.” There is no similar restriction in the federal rule. Fed. R. Evid. 703. Thus, as one writer has observed, “the additional language . . . [in the Tennessee rule] is obviously designed to encourage trial courts to take a more active role in evaluating the reasonableness of the expert’s reliance upon the particular basis for his or her testimony.” R. Banks, *Some Comparisons Between the New Tennessee Rules of Evidence and the Federal Rules of Evidence, Part II*, 20 Mem.S.U. L. Rev. 499, 559 (1990). In sum, even though the facts and data need not be admissible, they must be reviewed and found to be trustworthy by the trial court.

Based on the foregoing analysis, we conclude that Tennessee’s adoption of Rules 702 and 703 in 1991 as part of the Rules of Evidence supersede the general acceptance test of *Frye*. In Tennessee, under the recent rules, a trial court must determine whether the evidence will substantially assist the Trier of fact to determine a fact in issue and whether the facts and data underlying the evidence indicate a lack of trustworthiness. The rules together necessarily require a determination as to the scientific validity or reliability of the evidence. Simply put, unless the scientific evidence is valid, it will not substantially assist the Trier of fact,



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nor will its underlying facts and data appear to be trustworthy, but there is no requirement in the rule that it be generally accepted.

Although we do not expressly adopt *Daubert*, the non-exclusive list of factors to determine reliability is useful in applying our Rules 702 and 703. A Tennessee trial court may consider in determining reliability: (1) whether scientific evidence has been tested and the methodology with which it has been tested; (2) whether the evidence has been subjected to peer review or publication; (3) whether a potential rate of error is known; (4) whether, as formerly required by *Frye*, the evidence is generally accepted in the scientific community; and (5) whether the expert's research in the field has been conducted independent of litigation.” *McDaniel v. CSX Transp.*, 955 S.W.2d 257, 264-65 (Tenn. 1997).

8. Are there other notable Discovery Rules?

No.

9. Is there mandatory mediation or arbitration?

No. Mediation is usually encouraged. Some judges do require mediation or judicial settlement conferences.

10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?

A pretrial conference is conducted by the trial judge if one is ordered. In addition, either party may request a pre-trial conference. Pre-trial conference scheduling varies by local rule of the court or by chamber rules depending on the judge. It is usually scheduled within a week of the trial. Motions in limine may or may not be addressed at the conference depending on the judge. *See Tenn. R. Civ. P. 16 (2012).*

11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?

It varies by local rule of court.

12. Who conducts voir dire (Court/Counsel)? Describe the process.

Counsel conducts voir dire. It is a very open process and is only limited by the judge's preference.

13. How many jurors are there? How many alternates? How many peremptory challenges?

There are 12 jurors if demanded in the initial pleadings. Some local court rules provide for 6 jurors unless a party specifically requests 12. The court has the discretion to pick one or more alternate jurors and usually there are only two chosen. There are usually 4 peremptory challenges for each party.

14. Identify any “unusual” trial procedures.

None.



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15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?

Tennessee has a chancery court for matters of equity. In some counties, domestic matters are heard by the same judge. In some counties, probate matters may be assigned to one court. Local Rules in some jurisdictions have longer tracks to trial for "complex" cases.

16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?

The TN Products Liability Act limits when sellers/distributors can be sued in a products liability action.

"No product liability action, as defined in § 29-28-102, shall be commenced or maintained against any seller, other than the manufacturer, unless: (1) The seller exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the alleged harm for which recovery of damages is sought; (2) Altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought; (3) The seller gave an express warranty as defined by title 47, chapter 2; (4) The manufacturer or distributor of the product or part in question is not subject to service of process in this state and the long-arm statutes of Tennessee do not serve as the basis for obtaining service of process; or (5) The manufacturer has been judicially declared insolvent." Tenn. Code Ann. § 29-28-106 (2012).

17. Is there a provision for Prejudgment interest?

There are statutory provisions for some types of damages. *See, e.g.*, Tenn. Code Ann. § 47-14-123 (2012) (providing for prejudgment interest in commercial transactions). Generally, there is no provision for prejudgment interest.

"If a judgment for money in a civil case is affirmed or the appeal is dismissed, whatever interest is allowed by law shall be payable computed from the date of the verdict of the jury or the equivalent determined by the court in a non-jury case, which date shall be set forth in the judgment entered in the trial court. If a judgment is modified or reversed with a direction that a judgment for money be entered in the trial court, the mandate shall contain instructions with respect to allowance of interest." Tenn. R. App. P., R. 41 (2012).

18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

Local rules of practice vary by judicial district. Tennessee has recently adopted rules dealing with electronically stored information.



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19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

No, except in the area of medical malpractice. Those issues come before the legislature each year.

20. Are there legislative efforts under way that address any of the litigation practices in your state?

No, except in the area of medical malpractice. Those issues come before the legislature each year.



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Question	Texas
1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?	Yes. Tex. R. Civ. P. 194.
2. Are there Standard Form Interrogatories/Document Requests?	No.
3. Are there limits on the number of Interrogatories/Document Requests?	Yes. There are limits on interrogatories (25, excluding interrogatories asking only to identify or authenticate specific documents). Tex. R. Civ. P. 190.2(c) (3); 190.3(b) (3); 190.4(b). There are no limits on document requests. (“Any party may serve on any other party no more than 25 written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents. Each discrete subpart of an interrogatory is considered a separate interrogatory.” Tex. R. Civ. P. 190.2(c) (3); 190. 3(b) (3). (2011)).
4. Are there time limits on depositions, or limits on the number of depositions?	Each “side” is limited to six hours of examination per witness not counting breaks. Tex. R. Civ. P. 199.5(c). Limitation may be modified by the agreement of the parties or by court order for good cause. Tex. R. Civ. P. 191.1. Further limitations on total deposition time for the case per party may apply in Level 1 (6 hours) or Level 2 (50 hours) cases. See Tex. R. Civ. P. 190.2(c) (2); 190.3(b) (2) (2011)).
5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)	Yes. (“If a subpoena commanding testimony is directed to a corporation, partnership, association, governmental agency, or other organization, and the matters on which examination is requested are described with reasonable particularity, the organization must designate one or more persons to testify on its behalf as to matters known or reasonably available to the organization.” Tex. R. Civ. P. 176.6(b) (2011)).
6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?	Yes.  “A party seeking affirmative relief must make an expert retained by, employed by, or otherwise in the control of the party available for deposition as follows: (1) <i>If No Report Furnished</i> . --If a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions is not produced when the expert is designated, then the party must make the expert available



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for deposition reasonably promptly after the expert is designated. If the deposition cannot - due to the actions of the tendering party - reasonably be concluded more than 15 days before the deadline for designating other experts, that deadline must be extended for other experts testifying on the same subject. (2) *If Report Furnished.* -- If a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions is produced when the expert is designated, then the party need not make the expert available for deposition until reasonably promptly after all other experts have been designated." Tex. R. Civ. P. 195.3(a) (1)-(2) (2011).

"A party not seeking affirmative relief must make an expert retained by, employed by, or otherwise in the control of the party available for deposition reasonably promptly after the expert is designated and the experts testifying on the same subject for the party seeking affirmative relief have been deposed." Tex. R. Civ. P. 195.3(b) (2011).

"When a party takes the oral deposition of an expert witness retained by the opposing party, all reasonable fees charged by the expert for time spent in preparing for, giving, reviewing, and correcting the deposition must be paid by the party that retained the expert." Tex. R. Civ. P. 195.7 (2011).

7. What is the Expert Standard (Frye/Daubert/Hybrid)?

Texas has adopted its own standard, but it is much more akin to *Daubert* than *Frye*. *E.I. du Pont de Nemours and Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995).

8. Are there other notable Discovery Rules?

N/A

9. Is there mandatory mediation or arbitration?

No. but mediation is routinely ordered by trial courts prior to trial as a matter of practice.

10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?

Unless specifically set by scheduling order or local rule, the Pretrial Conference is held immediately before trial and is typically conducted by the trial judge although there are certain exceptions depending on the county requiring local procedures and rules to be consulted. Motions in limine are addressed at that time.

11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?

It varies by judge.



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12. Who conducts voir dire (Court/Counsel)? Describe the process. Counsel conducts voir dire. Voir dire is consulted with the entire panel. Most trial judges impose time limitations of around one (1) hour per side.

13. How many jurors are there? How many alternates? How many peremptory challenges? In district courts there are 12 jurors. Each party is entitled to six peremptory challenges. In county courts and County Courts at Law, there are six jurors and each party is entitled to three peremptory challenges. The number of peremptory challenges may be equalized in multi-party cases.

Alternate jurors may be selected at the discretion of the trial judge but do not participate in deliberations.

“Tex. Gov’t Code §62.020. Alternate Jurors: (a) In district court, the judge may direct that not more than four jurors in addition to the regular jury be called and impaneled to sit as alternate jurors.

(b) In county court, the judge may direct that not more than two jurors in addition to the regular jury be called and impaneled to sit as alternate jurors.

...

(e) Each side is entitled to one peremptory challenge in addition to those otherwise allowed by law or by rule if one or two alternate jurors are to be impaneled. Each side is entitled to two peremptory challenges in addition to those otherwise allowed by law or by rule if three or four alternate jurors are to be impaneled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by law or by rule may not be used against an alternate juror.” Tex. Gov’t. Code § 62.020 (2011).

*Alignment of the Parties.* --In multiple party cases, it shall be the duty of the trial judge to decide whether any of the litigants aligned on the same side of the docket are antagonistic with respect to any issue to be submitted to the jury, before the exercise of peremptory challenges.

*Definition of Side.* --The term "side" as used in this rule is not synonymous with "party," "litigant," or "person." Rather, "side" mean one or more litigants who have common interests on the matters with which the jury is concerned.

*Motion to Equalize.* --In multiple party cases, upon motion of any



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litigant made prior to the exercise of peremptory challenges, it shall be the duty of the trial judge to equalize the number of peremptory challenges so that no litigant or side is given unfair advantage as a result of the alignment of the litigants and the award of peremptory challenges to each litigant or side. In determining how the challenges should be allocated the court shall consider any matter brought to the attention of the trial judge concerning the ends of justice and the elimination of an unfair advantage.” Texas R. Civ. P. 233 (2011).

14. Identify any “unusual” trial procedures.      None.
15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?      Texas has now adopted multi-district litigation procedures similar to those in Federal Court.
16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?      Yes, with limited exceptions. Tex. Civ. Prac. & Rem. Code §82.003.
17. Is there a provision for Prejudgment interest?      Yes, in certain cases. See Tex. Fin. Code §304.101 *et. seq.*
18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)      There is liberal use of case specific Docket Control Orders to address limitation and default deadlines set forth in Tex. R. Civ. P. 190.
19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?      N/A
20. Are there legislative efforts under way that address any of the litigation practices in your state?      The state legislature meets every other year (odd numbered) from January – May. There are litigation practices issues before the legislature each time it meets.



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### Question

### Utah

1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?

Yes. Utah has Mandatory Disclosure requirements. Pursuant to Utah Rule of Civil Procedure 26(a) (Nov. 1, 2011) a party must disclose, among other things: the individuals likely to have discoverable information; disclosure of each fact witness the party may call in its case in chief and a summary of the expected testimony; a description by category of discoverable documents supporting the party's claims or defenses; a copy of all documents, data compilations, electronically stored information, and tangible things that the party may offer in its case in chief; a computation of damages; a copy of all documents on which the damages computation is based; a copy of all documents referred to in the pleadings; and applicable insurance agreements.

2. Are there Standard Form Interrogatories/Document Requests?

No.

3. Are there limits on the number of Interrogatories/Document Requests/Requests for Admission?

Yes. Pursuant to Utah Rule of Civil Procedure 26(c) (3)-(5) (Nov. 1, 2011) the number of allowed interrogatories and document requests is dependent on the "tier" of standard discovery which is determined by the amount of damages pled in the complaint. Under tier 1 (claims of \$50,000 or less) parties are not entitled to any interrogatories and are limited to 5 document requests and 5 requests for admission. Under tier 2 (claims of more than \$50,000 and less than \$300,000) parties are limited to 10 interrogatories, 10 document requests, and 10 requests for admission. Under tier 3 (claims of \$300,000 or more) parties are limited to 20 interrogatories, 20 document requests, and 20 requests for admission. Additional discovery via interrogatories, document requests, and requests for admission can be had only after the parties have exhausted the standard discovery and upon stipulation or motion brought before the close of standard discovery demonstrating that additional discovery is "necessary and proportional" and that the party or parties have "reviewed and approved a discovery budget." Utah R. Civ. P. 26(c) (6) (Nov. 1, 2011).



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4. Are there time limits on depositions, or limits on the number of depositions?

Yes. Under Utah Rule of Civil Procedure 26(c) (3)-(5) (Nov. 1, 2011), the number of hours of fact deposition is dependent on the “tier” of standard discovery which is determined by the amount of damages pled in the complaint. Under tier 1 (claims of \$50,000 or less) parties are limited to only 3 hours of depositions. Under tier 2 (claims of more than \$50,000 and less than \$300,000) parties are limited to 15 hours of depositions. Under tier 3 (claims of \$300,000 or more) parties are limited to 30 hours of depositions. “During standard discovery, oral questioning of a nonparty shall not exceed four hours, and oral questioning of a party shall not exceed seven hours.” Utah R. Civ. P. 30(d) (Nov. 1, 2011).

Additional discovery via depositions can be had only after the parties have exhausted the number of hours for depositions under standard discovery and upon stipulation or motion brought before the close of standard discovery demonstrating that additional discovery is “necessary and proportional” and that the party or parties have “reviewed and approved a discovery budget.” Utah R. Civ. P. 26(c) (6) (Nov. 1, 2011).

5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)

Yes. Utah Rule of Civil Procedure 30(b) (6) is similar to the federal rule governing corporate designee depositions. (“A party may name as the witness a corporation, a partnership, an association, or a governmental agency, describe with reasonable particularity the matters on which questioning is requested, and direct the organization to designate one or more officers, directors, managing agents, or other persons to testify on its behalf. The organization shall state, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The person so designated shall testify as to matters known or reasonably available to the organization.” Utah R. Civ. P. 30(b) (6) (Nov. 1, 2011)).

6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?

Yes and No. Under Utah Rule of Civil Procedure 26(a) (4) (B) (Nov. 1, 2011), an opposing party is limited to either an expert report or a deposition of the expert, but not both. *See also* Advisory Committee Notes to Utah R. Civ. P. 26 (indicating a party may choose “either a deposition of the expert or a written report, but not both”). If a party elects to depose an expert the deposition is limited to 4 hours and the opposing party must pay the expert’s fees for attending the deposition. *See id.* In a multiparty action, all parties opposing an expert must agree on either a report or a deposition. *See* Utah R. Civ. P. 26(a) (4) (D). If all parties opposing an expert cannot agree, then further



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discovery may be obtained only by deposition. *See id.* Additionally, the party bearing the burden of proof must provide expert disclosures within 7 days after the close of fact discovery. *See* Utah R. Civ. P. 26(a) (4) (C) (i). Within 7 days after receiving the expert disclosure, the opposing party must elect either a deposition of the expert or an expert report. If no election is made, no further discovery of the expert will be permitted. *See id.* If an election is made, a report must be provided or the deposition must be conducted within 28 days after the election. *See id.*

A proposed addition to the expert discovery rule has been issued for public comment. The new language offers the party who bears the burden of proof on an issue, and who wants to designate a rebuttal expert witness, a similar report/deposition dichotomy as discussed above. Identical timelines apply: seven days after the initial election in Rule 26(a) (4) (C) (i) or receipt of the initial expert report or the taking of the initial deposition, whichever is later, the party with the burden must disclose the rebuttal expert. The party opposing the rebuttal expert must then, within seven days of the disclosure, elect to depose or receive a report from the rebuttal expert. As above, the deposition must take place or the report must be served within 28 days after that election.

7. What is the Expert Standard (Frye/Daubert/Hybrid)?

A hybrid approach is used.

"In *Rimmasch*, we rejected exclusive use of the general acceptance test set forth in *Frye v. United States*, 54 U.S. App. D.C. 46, 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923). *Rimmasch*, 775 P.2d at 396-99. Instead, we adopted the reasoning of *Phillips v. Jackson*, 615 P.2d 1228 (Utah 1980), HN14 approving inherent reliability rather than general acceptance as "the touchstone of admissibility." *Rimmasch*, 775 P.2d at 396. Although "a showing of general acceptance would generally be sufficient' to show inherent reliability and to justify the admission of scientific evidence," general acceptance was no longer the "sine qua non of admission." *Id.* at 396-97 (quoting *Phillips*, 615 P.2d at 1234). In the absence of general acceptance, other proofs of reliability could also suffice. We expressed confidence that "the more flexible test articulated in *Phillips* seems fully capable of performing the necessary screening function without unduly impeding the flow of reliable scientific evidence to the fact finder." *Id.* 775 P.2d at 397 n.6.

*Rimmasch* also set the limits of its own application. Historically,



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“where expert testimony is based upon novel scientific principles or techniques, courts have long imposed additional tests of admissibility” beyond the standard rules of evidence. *Id.* at 396 (emphasis added). Thus, “however the test is formulated . . . a foundation establishing the reliability of new scientific evidence must be established for it to be admissible.” *Id.* at 397 (emphasis added) (quoting *Kofford v. Flora*, 744 P.2d 1343, 1347 (Utah 1987)).

We reconfirmed in *State v. Adams*, 2000 UT 42, 5 P.3d 642, that “the *Rimmasch* test was not intended to apply to all expert testimony. Rather, *Rimmasch* is implicated only when the expert testimony is “based on newly discovered principles.” *Id.* 2000 UT 42 at P16 (quoting *Rimmasch*, 775 P.2d at 396). In *State v. Kelley*, 2000 UT 41, 1 P.3d 546, we confirmed that *Rimmasch* is inapplicable where “there is no plausible claim that the type of expert testimony offered by the prosecution was based on novel scientific principles or techniques.” *Id.* In *Patey v. Lainhart*, 1999 UT 31, 977 P.2d 1193, we refused to apply *Rimmasch* after noting that “in this case, [the] type of expert testimony which was offered . . . was [not] based upon novel scientific principles or techniques.” *Id.* 1999 UT 31 at P16. Again, in *Green v. Louder*, 2001 UT 62, 29 P.3d 638, we limited application of the *Rimmasch* inherent reliability test to “expert testimony based on novel scientific principles or techniques.” *Id.* 2001 UT 62 at P27. Furthermore, disagreement among experts, and even between the experts and the judge, is not a valid basis for exclusion of testimony. The Ninth Circuit Court of Appeals made this clear in *Kennedy v. Collagen Corp.*, 161 F.3d 1226 (9th Cir. 1998), stating: “Judges in jury trials should not exclude expert testimony simply because they disagree with the conclusions of the expert. . . . The test is whether or not the reasoning is scientific and will assist the jury. If it satisfies these two requirements, then it is a matter for the finder of fact to decide what weight to accord the expert’s testimony. In arriving at a conclusion, the fact finder may be confronted with opposing experts, additional tests, experiments, and publications, all of which may increase or lessen the value of the expert’s testimony. But their presence should not preclude admission of the expert’s testimony--they go to the weight, not the admissibility.” *Id.* at 1230-31 (emphasis added). Therefore, we reaffirm our previous holdings that the *Rimmasch* test applies only to novel scientific methods and techniques. Other scientific testimony is to be evaluated under rule 702 without heightened tests of “inherent reliability.” *Alder v. Bayer Corp.*, 2002 UT 115, P57-P60



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8. Are there other notable Discovery Rules? Yes. Pursuant to Utah Rule of Civil Procedure 26(c) (3)-(5) (Nov. 1, 2011) the days to complete standard fact discovery is dependent on the “tier” of standard discovery which is determined by the amount of damages pled in the complaint. Under tier 1 (claims of \$50,000 or less) standard fact discovery must be completed within 120 days. Under tier 2 (claims of more than \$50,000 and less than \$300,000) standard fact discovery must be completed within 180 days. Under tier 3 (claims of \$300,000 or more) standard fact discovery must be completed within 210 days. Additional time to complete fact discovery can be had upon stipulation or motion brought before the end of standard discovery demonstrating that additional time is “necessary and proportional” and that the party or parties have “reviewed and approved a discovery budget.” Utah R. Civ. P. 26(c) (6) (Nov. 1, 2011).
9. Is there mandatory mediation or arbitration? No.
10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial? The court determines when a pretrial conference is held. There is no particular timeframe. The pretrial conference is conducted by the trial judge. With respect to motions in limine, some judges address them before trial and other judges address them as the evidence is introduced at trial. It varies with the judge.
11. What are the court’s practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge? It varies by judge.
12. Who conducts voir dire (Court/Counsel)? Describe the process. It depends on the judge. However, as a general rule, lawyers conduct most of the voir dire in state court.
13. How many jurors are there? How many alternates? How many peremptory challenges? Pursuant to Utah Code Ann. § 78B-1-104(1) (e) (2011) there are 8 jurors in a civil case. However, a jury can consist of 4 people if the damages sought are less than \$20,000, exclusive of costs, interest, and attorney’s fees. Under § 78B-1-104(2) (2011), except in the trial of a capital felony, the parties can stipulate to a jury of a lesser number. Under § 78B-1-104(3) (b) (2011), the verdict in a civil case shall be by not less than 3/4 of the jurors. However, the parties may stipulate that a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury. The statute defining the number of jurors has no provision for alternate jurors; however, the rules of civil procedure provide for the appointment of alternate jurors at the direction of the trial court without specifying a number. Another provision of the same rule, Rule 47 Utah R. Civ.



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P. (2011), provides that one or two alternate jurors may be impaneled. The customary practice is to have one or two alternates appointed, particularly for longer trials. Finally, pursuant to Utah R. Civ. P.47 (e) (2011), each party shall be entitled to 3 peremptory challenges but in the event that one or two alternates are impaneled, each party is entitled to one additional peremptory challenge.

“Utah Code Ann. § 78B-1-104. Jury composition: (1) A trial jury consists of:

(e) Eight persons in a civil case at law except that the jury shall be four persons in a civil case for damages of less than \$ 20,000, exclusive of costs, interest, and attorney fees.” Utah Code Ann. § 78B-1-104(1)(e) (2011);

“*Alternate jurors.* -- The court may direct that alternate jurors be impaneled. Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be selected at the same time and in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, and privileges as principal jurors. An alternate juror who does not replace a principal juror shall be discharged when the jury retires to consider its verdict unless the parties stipulate otherwise and the court approves the stipulation. The court may withhold from the jurors the identity of the alternate jurors until the jurors begin deliberations.” Utah R. Civ. P. 47(b) (2011).

“*Challenges to individual jurors; number of peremptory challenges.* -- The challenges to individual jurors are either peremptory or for cause. Each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs shall be considered as a single party for the purposes of making peremptory challenges unless there is a substantial controversy between them, in which case the court shall allow as many additional peremptory challenges as is just. If one or two alternate jurors are called, each party is entitled to one peremptory challenge in addition to those otherwise allowed.” Utah R. Civ. P. 47(e) (2011).

14. Identify any “unusual” trial procedures. None.



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15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?

There are no separate trial court divisions for certain civil matters. However, mass tort, asbestos, and other similar matters may be consolidated before a single judge.

16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?

Utah does not have a statute that allows a distributor to escape liability if it identifies the manufacturer. However, in *Sanns v. Butterfield Ford*, 94 P.3d 301 (Ut. App. 2004) the court held that a passive retailer is not subject to a strict liability claim under the Product Liability Act where the manufacturer is a named party to the action.

17. Is there a provision for Prejudgment interest?

Yes. Utah allows prejudgment interest.

“Under Utah law, prejudgment interest represents an amount awarded as damages due to the defendants' delay in tendering an amount clearly owing under an agreement or other obligation. *L & A Drywall, Inc. v. Whitmore Constr. Co.*, 608 P.2d 626, 629 (Utah 1980); *Vasels v. Lo Guidice*, 740 P.2d 1375, 1378 (Utah Ct. App. 1987). A court may award prejudgment interest where the loss is fixed as of a particular time and the amount of the loss can be calculated with mathematical accuracy. *Jorgensen v. John Clay and Co.*, 660 P.2d 229, 233 (Utah 1983); *Smith v. Linmar Energy Corp.*, 790 P.2d 1222, 1225 (Utah Ct. App. 1990).” *Baker v. Dataphase*, 781 F.Supp. 724, 731 (U.S. District ct. Utah, Central Division, 1992).

18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

None.

19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

Yes. First, in Utah, plaintiffs are given unfettered access to health care providers, but defendants are forbidden from contacting such providers. Second, the expert witness disclosure standard is vague, resulting in a significant benefit to plaintiffs' marginal expert witnesses. Third, Utah's rule of apportionment of fault to immune employers favors plaintiffs to the detriment of defendants.



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20. Are there legislative efforts under way that address any of the litigation practices in your state?      No, not as of 2011.



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Question	Vermont
1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?	No.
2. Are there Standard Form Interrogatories/Document Requests?	No.
3. Are there limits on the number of Interrogatories/Document Requests?	No.
4. Are there time limits on depositions, or limits on the number of depositions?	No.
5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)	<p>Yes. State Rule 30(b) (6) is essentially the same as the federal rule.</p> <p>(“A party may in the party's notice name as the deponent a public or private corporation or a partnership or association or governmental agency and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. The persons so designated shall testify as to matters known or reasonably available to the organization. This paragraph (b) (6) does not preclude taking a deposition by any other procedure authorized in these rules.” Vt. R. Civ. P. 30(b) (6) (2011)).</p>
6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?	<p>Yes, parties may depose an opposing (testifying) expert. In Vermont practice, the party taking the expert's deposition pays for the deposition. However, payment only includes the time spent in deposition, and the expert's travel time. “Deposition preparation time” is generally considered to be the responsibility of the party disclosing the expert, although there is one recent unpublished superior court decision in which the court ordered a party to pay a <i>portion</i> of the opposing expert's depo prep time. Note also, treating physicians generally do not have to be “disclosed” as experts.</p>



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7. What is the Expert Standard (Frye/Daubert/Hybrid)?  
The standard is Daubert. Note, however, that the Vermont Supreme Court has interpreted Daubert to *allow* questionable expert testimony, rather than to exclude it.
8. Are there other notable Discovery Rules?  
Insurance policies that cover the defendant are discoverable. V.R.C.P. 26(b) (2).
9. Is there mandatory mediation or arbitration?  
Yes, there is mandatory ADR. The parties can choose their ADR method. V.R.C.P. 16.3. Note: this is a relatively new requirement in state court, so it is not uniformly enforced.
10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?  
The pre-trial conference may be held at any time after discovery is completed (in Vermont state courts, cases may linger on the pre-trial docket for 3 years). Generally, anticipated motions in limine may be flagged at the pre-trial conference, but they are not typically addressed at that time. At the pre-trial the court will typically set a date for the trial and set deadlines for the submission of in limine motions, jury instructions, etc.
11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?  
It is much less formal than the federal pre-trial order. Anticipated submissions are usually addressed at the pre-trial conference. The requirements do vary by judge.
12. Who conducts voir dire (Court/Counsel)? Describe the process.  
Voir dire is conducted by counsel, and is generally very free-flowing, although the leeway does vary by judge. (Note, in Vermont federal court voir dire is also conducted by counsel.)
13. How many jurors are there? How many alternates? How many peremptory challenges?  
There are 12 jurors with 2 alternates, although most judges will ask defendant to agree to a jury of less than 12. Each side has 6 peremptory challenges.
- “The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.” Vt. R. Civ. P. Rule 48.
- “Upon the trial of a cause in any court each party, including the state, may peremptorily challenge six jurors and any further number for cause.” 12 Vt. Stat. Ann. § 1941; Vt. R. Civ. P. Rule 47(c)(3) (“Each party shall be entitled to six peremptory challenges.”)
- “The court may direct that not more than two jurors in addition to the regular jury be called and impaneled to sit as alternate jurors.” Vt. R. Civ. P. Rule 47(d).



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14. Identify any “unusual” trial procedures.      None.
15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?      No.
16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?      No.
17. Is there a provision for Prejudgment interest?      Yes. Interest accrues at the rate of 12% per annum, simple.
- “Prejudgment interest is available as of right “when the principal sum recovered is liquidated or capable of ready ascertainment” at the time of the breach or default giving rise to the obligation to pay. *Newport Sand & Gravel Co. v. Miller Concrete Constr., Inc.*, 159 Vt. 66, 71, 614 A.2d 395, 398 (1992). “The principal rationale for an award of prejudgment interest as of right is that, where damages are liquidated or determinable by a reasonably certain standard of measurement, the defendant can avoid the accrual of interest by simply tendering to the plaintiff a sum equal to the amount of damages.” *Agency of Natural Res. v. Glens Falls Ins. Co.*, 169 Vt. 426, 435, 736 A.2d 768, 774 (1999) (quotation omitted). A court may also award prejudgment interest in its discretion where a reasonable method can be used to calculate the prejudgment interest. *Estate of Fleming v. Nicholson*, 168 Vt. 495, 503, 724 A.2d 1026, 1032 (1998).” *B & F Land Dev., LLC v. Steinfeld*, 2008 VT 109, P17 (Vt. 2008); See, also, 9 Vt. Stat. Ann. § 41a(a) (“Except as specifically provided by law, the rate of interest or the sum allowed for forbearance or use of money shall be twelve percent per annum computed by the actuarial method.”)(2011).
18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)      The state legislature recently enacted a major court reform and unification process whereby the state took over the county courts and integrated the courts previously known as “superior” (civil) and “district” (criminal). Practice and procedures should become more uniform in the civil courts. The reform includes the adoption of an electronic filing system. However, electronic filing is not currently available in all courts and is still a work in progress.



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19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

No, although the media/political climate in Vermont is growing increasingly anti-corporate/anti-business. If that trend continues, it may be more difficult for business defendants to get an unbiased jury.

20. Are there legislative efforts under way that address any of the litigation practices in your state?

Periodically, a legislator who is also a plaintiff's attorney will introduce a bill to allow for non-unanimity in civil verdicts. Such measures have not passed so far, but I expect it will be reintroduced again in the future.



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### Question

### Virginia

1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?  
Yes, Va. Sup. Ct. R. 4:1(2012) provides for Mandatory Disclosures similar to F.R.C.P. 26.
2. Are there Standard Form Interrogatories/Document Requests?  
No. However, Va. Sup. Ct. R. 4:8(b) (2012) states that for each Interrogatory, “the party answering the interrogatories shall restate each question, by photocopying it or otherwise, then insert the word “Answer” and immediately thereafter state the response to that question. The answering party shall attach the necessary oath and certificate of service to the answers.”
3. Are there limits on the number of Interrogatories/Document Requests?  
Yes. Interrogatories are limited to 30, including all parts and subparts. There are no limits on document requests. (“No party shall serve upon any other party, at any one time or cumulatively, more than thirty written interrogatories, including all parts and subparts without leave of court for good cause shown.” Va. Sup. Ct. R. 4:8(g) (2012)).
4. Are there time limits on depositions, or limits on the number of depositions?  
No. There are no limitations except by order of the court for good cause shown. (“There shall be no limit on the number of witnesses whose depositions may be taken by a party except by order of the court for good cause shown.” Va. Sup. Ct. R. 4:6A (2012)).
5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)  
Yes. The State rules are similar to the federal rules. (“A party may in his notice name as the deponent a public or private corporation or a partnership or association or governmental agency and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b) (6) does not preclude taking a deposition by any other procedure authorized in these Rules.” Va. Sup. Ct. R. 4:5(b) (6) (2012)).
6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?  
Yes. The party taking the deposition pays for it. (“A party may depose any person who has been identified as an expert whose opinion may be presented at trial, subject to the provisions of subdivision (b) (4) (C) of this Rule concerning fees and expenses.”) Va. Sup. Ct. R. 4:1(b)(4)(A)(ii) (2012); “Unless



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### 7. What is the Expert Standard (Frye/Daubert/Hybrid)?

manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent and expenses incurred in responding to discovery under subdivisions (b)(4)(A)(ii)...” Va. Sup. Ct. R. 4:1(b)(4)(C) (2012)

Neither *Frye* nor *Daubert* have been adopted by the Supreme Court of Virginia. Case law dictates that expert testimony must be reliable and not speculative.

*John v. Im*, 263 Va. 322 (Va. 2002) (“We note . . . that we have not previously considered the question whether the *Daubert* analysis employed by the federal courts should be applied in our trial courts to determine the scientific reliability of expert testimony. [W]e leave this question open for future consideration.”); *Spencer v. Commonwealth*, 240 Va. 78, 97 (Va. 1990) (“We have declined to adopt the “*Frye* test” in Virginia.”)

“When scientific evidence is offered, the court must make a threshold finding of fact with respect to the reliability of the scientific method offered, unless it is of a kind so familiar and accepted as to require no foundation to establish the fundamental reliability of the system, such as fingerprint analysis; or unless it is so unreliable that the considerations requiring its exclusion have ripened into rules of law, such as ‘lie-detector’ tests.” *Spencer v. Commonwealth*, 240 Va. 78, 97, 393 S.E.2d 609, 621, 6 Va. Law Rep. 2596 (1990). However, admissibility of scientific evidence is not to be ‘conditioned upon universal acceptance’ within the scientific community. *Id.* at 98, 393 S.E.2d at 621. Although ‘[w]ide discretion must be vested in the trial court to determine, when unfamiliar scientific evidence is offered, whether the evidence is so inherently unreliable that a lay jury must be shielded from it, or whether it is of such character that the jury may safely be left to determine credibility for itself,’ the court ought not exclude such evidence where a sufficient foundation for its admission has been presented by the party proffering the evidence. *Id.*” *Odaris v. Morton G. Thalhimer, Inc.*, 2008 Va. LEXIS 148, 3-4 (Va. Sept. 12, 2008).

“In civil cases, expert testimony generally is admissible if it will assist the Trier of fact in understanding the evidence. *See* Code §§ 8.01-401.1 and 401.3; *Keese v. Donigan*, 259 Va. 157, 161, 524 S.E.2d 645, 647 (2000); *Tittsworth*, 252 Va. at 154, 475 S.E.2d at 263. However, the admission of expert testimony is subject to certain basic requirements, including the requirement that the



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evidence be based on an adequate foundation. *Id.*; *Tarmac Mid-Atlantic, Inc. v. Smiley Block Co.*, 250 Va. 161, 166, 458 S.E.2d 462, 465 (1995). The decision whether to admit such testimony is a matter committed to the trial judge's sound discretion, and we will reverse a trial court's determination in this regard only when the court has abused its discretion. *Lockheed Info. Mgmt. Sys. Co. v. Maximus, Inc.*, 259 Va. 92, 111, 524 S.E.2d 420, 430 (2000); *Virginia Power v. Dungee*, 258 Va. 235, 258, 520 S.E.2d 164, 177 (1999); *Tarmac*, 250 Va. at 166, 458 S.E.2d at 465.

Expert testimony is inadmissible if it is speculative or founded on assumptions that have an insufficient factual basis. *Keesee*, 259 Va. at 161, 524 S.E.2d at 648; *Tittsworth*, 252 Va. at 154, 475 S.E.2d at 263; *Tarmac*, 250 Va. at 166, 458 S.E.2d at 466. Such testimony is also inadmissible when an expert has failed to consider all variables bearing on the inferences to be drawn from the facts observed. *ITT Hartford v. Virginia Financial Assoc.*, 258 Va. 193, 201, 520 S.E.2d 355, 359 (1999); *Tittsworth*, 252 Va. at 154, 475 S.E.2d at 263; *Tarmac*, 250 Va. at 166, 458 S.E.2d at 466." *John v. Im*, 263 Va. 315, 319-320 (Va. 2002).

"When scientific evidence is offered, the court must make a threshold finding of fact with respect to the reliability of the scientific method offered, unless it is of a kind so familiar and accepted as to require no foundation to establish the fundamental reliability of the system, such as fingerprint analysis." *Spencer*, 240 Va. at 97, 393 S.E.2d at 621 (citing *Avent v. Commonwealth*, 209 Va. 474, 478, 164 S.E.2d 655, 658 (1968)) ("The accuracy of fingerprint identification is a matter of common knowledge and no case has been cited, and we have found none, where identification so established has been rejected."); accord *Billips v. Commonwealth*, 274 Va. 805, 808-09, 652 S.E.2d 99, 101 (2007). When the scientific method has been found reliable, either by its familiarity or a specific finding, a trial court must then find that the "expert testimony [is] based on an adequate foundation; 'expert testimony is inadmissible if it is founded on assumptions that have an insufficient factual basis.'" *Payne*, 277 Va. at 542-43, 674 S.E.2d at 841 (citation omitted)." *Dowdy v. Commonwealth*, 278 Va. 577, 600-601 (Va. 2009).

8. Are there other notable Discovery Rules? No.



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9. Is there mandatory mediation or arbitration?

Mediation is encouraged, though rarely is mandatory. Most circuit courts encourage parties to go to private mediation and some circuit courts routinely offer, and sometimes order, mediation by another judge in the circuit. (e.g. fairly common in Norfolk)

10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?

The pretrial conference is governed by Va. Sup. Ct. R 1:19(2012) and conducted by the trial judge. Motions *in limine* shall be addressed at that time. Va. Sup. Ct. R. 1:19 (2012); *See also* the Uniform Scheduling Order set forth in Section 3 of the Appendix of Forms at the end of Part 1 of the Rules of the Supreme Court of Virginia.

11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?

Trial submissions are governed by Va. Sup. Ct. R. 1:18(2012), which states that the parties may "agree and submit for approval and entry by a court a pretrial scheduling order." If the court rejects this proposed order or none is submitted, then the court may enter the pretrial scheduling order set forth in Section 3 of the Appendix of Forms at the end of Part 1 of the Rules of the Supreme Court of Virginia (Uniform Scheduling Order). The Uniform Scheduling Order is similar, but not identical to, the Federal Pretrial Order.

12. Who conducts voir dire (Court/Counsel)? Describe the process.

Voir dire is limited in Virginia, and the circuit courts are careful to control the scope and duration of voir dire. Most voir dire is limited to 30 minutes for both parties with additional time allowed for lengthy or unusually complex trials.

13. How many jurors are there? How many alternates? How many peremptory challenges?

There are 7 jurors, with 1 or 2 alternates. Each side is allowed 3 peremptory challenges.

*See* Va. Code Ann. § 8.01-359:

"A. Five persons from a panel of not less than 11 shall constitute a jury in a civil case when the amount involved exclusive of interest and costs does not exceed the maximum jurisdictional limits as provided in § 16.1-77 (1). Seven persons from a panel of not less than 13 shall constitute a jury in all other civil cases except that when a special jury is allowed, 12 persons from a panel of not less than 20 shall constitute the jury.

B. The parties or their counsel, beginning with the plaintiff, shall alternately strike off one name from the panel until the number remaining shall be reduced to the number required for a jury. Where there are more than two parties, all plaintiffs shall share three strikes between them and all defendants and third-party



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defendants shall share three strikes between them.

...

D. In any civil case in which the consent of the plaintiff and defendant shall be entered of record, it shall be lawful for the plaintiff to select one person who is eligible as a juror and for the defendant to select another, and for the two so selected to select a third of like qualifications, and the three so selected shall constitute a jury in the case. They shall take the oath required of jurors, and hear and determine the issue, and any two concurring shall render a verdict in like manner and with like effect as a jury of seven.” (2011).

*See, also, Va. Code Ann. § 8.01-360:*

“Whenever in the opinion of the court the trial of any criminal or civil case is likely to be a protracted one, the court may direct the selection of additional jurors who shall be drawn from the same source, in the same manner and at the same time as the regular jurors. These additional jurors shall have the same qualifications, and be considered and treated in every respect as regular jurors and be subject to examination and challenge as such jurors. When one additional juror is desired, there shall be drawn three veniremen, and the plaintiff and defendant in a civil case or the Commonwealth and accused in a criminal case shall each be allowed one peremptory challenge. When two or more additional jurors are desired there shall be drawn twice as many venire man as the number of additional jurors desired. The plaintiff and defendant in a civil case or the Commonwealth and accused in a criminal case shall each be allowed one additional peremptory challenge for every two additional jurors. The court shall select, by lot, those jurors to be designated additional jurors.” (2012).

14. Identify any “unusual” trial procedures. None.

15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions? No.



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16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?

No.

17. Is there a provision for Prejudgment interest?

Prejudgment interest is allowed per the Code, but it is not mandatory. Prejudgment interest is rarely awarded. Va. Code Ann. § 6.2-302 provides:

“(A) The judgment rate of interest shall be an annual rate of six percent, except that a money judgment entered in an action arising from a contract shall carry interest at the rate lawfully charged on such contract, or at six percent annually, whichever is higher.

(B) If the contract or other instrument does not fix an interest rate, the court shall apply the judgment rate of six percent to calculate prejudgment interest pursuant to § [8.01-382](#) and to calculate post-judgment interest.

(C) The rate of interest for a judgment shall be the judgment rate of interest in effect at the time of entry of the judgment on any amounts for which judgment is entered and shall not be affected by any subsequent changes to the rate of interest stated in this section.”

“The justification for the award of interest on damages - whether pre-judgment, post-judgment, or both - in a civil lawsuit, has been recognized since the earliest days of this Commonwealth:

“[N]atural justice [requires] that he who has the use of another's money should pay interest for it.” *Jones v. Williams*, 6 Va. (2 Call) 102, 106 (1799); see also *J.W. Creech, Inc. v. Norfolk Air Conditioning Corp.*, 237 Va. 320, 325, 377 S.E.2d 605, 608, 5 Va. Law Rep. 1859 (1989) (quoting *Jones* with approval).

The terms “pre-judgment interest” and “post-judgment interest” are not defined in the Code or in our case law. Nonetheless, the principal distinction between pre-judgment and post-judgment interest is that the decision whether to award pre-judgment interest is discretionary with the Trier of fact, while the application of post-judgment interest for all money judgments is mandatory. Code § 8.01-382; *Dairyland Ins. Co. v. Douthat*, 248 Va. 627, 631, 449 S.E.2d 799, 801 (1994). As we stated in *Dairyland Ins.*, “[u]nderlying this distinction is the principle that [p]rejudgment interest is normally designed to make the plaintiff whole and is part of the actual damages sought to be recovered. In contrast, post judgment interest is not an element of damages, but is a statutory award for delay in the payment of money actually due.” *Id.* at 631-



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632, 449 S.E.2d at 801 (internal citations and quotation marks omitted).” *Upper Occoquan Sewage Auth. v. Blake Constr. Co.*, 275 Va. 41, 63-64 (Va. 2008).

18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

None.

19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

Virginia has a “nonsuit.” A nonsuit is a right given only to Plaintiffs in which they may nonsuit, or dismiss, their case without prejudice at any time up and until a verdict is rendered, and have 6 months to refile without penalty. Good cause or a reason need not be given. It is of right. In addition to the nonsuit or voluntary dismissal that plaintiffs may take any time before the case is submitted to the jury (ie a nonsuit may be taken by plaintiff after a particularly effective closing argument by defense counsel), the plaintiff’s bar in Virginia maintains a second significant litigation advantage in Virginia: the virtual impossibility of summary judgment. By prohibiting the use of depositions or affidavits to support a motion for summary judgment absent the consent of the nonmoving party, the General Assembly has created a high barrier to summary judgment in Virginia state courts.

20. Are there legislative efforts under way that address any of the litigation practices in your state?

No.



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### Question

### Washington

1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?

Some, but not all, counties have mandatory disclosures. For example, King County requires Disclosure of Possible Primary Witnesses and Disclosure of Possible Additional Witnesses.

2. Are there Standard Form Interrogatories/Document Requests?

In some counties. For example, King County allows Pattern Interrogatories in discrete practice areas.

3. Are there limits on the number of Interrogatories/Document Requests?

Not by statewide rule. However, in King County, where pattern interrogatories are used, no more than 15 additional interrogatories may be used. Where pattern interrogatories are not used, no more than 40 interrogatories are allowed. A few other counties similarly limit the number of interrogatories.

4. Are there time limits on depositions, or limits on the number of depositions?

In some counties. For example, in King County a party may take no more than 10 depositions, and each deposition is limited to one day of seven hours. However, each party may take one deposition limited to two days and seven hours per day.

5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)

Yes. Civil Rule 30(b) (6) is nearly identical to the federal rule. (“A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and designate with reasonable particularity the matters on which examination is requested. In that event the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters known on which he will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to the matters known or reasonably available to the organization. This subsection (b) (6) does not preclude taking a deposition by any other procedure authorized in these rules.” Wash. Sup. Ct. R. 30(b) (6) (2011)).

6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?

Yes. The deposing party pays for the expert's deposition costs/fees. (“A party may, subject to the provisions of this rule and of rules 30 and 31, depose each person whom any other party expects to call as an expert witness at trial.” Wash. Sup. Ct. R. 26(b)(5)(A)(ii) (2011); “Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable



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- fee for time spent in responding to discovery under subsections (b)(5)(A)(ii) and (b)(5)(B) of this rule...” Wash. Sup. Ct. R. 26(b)(5)(C) (2011)).
7. What is the Expert Standard (Frye/Daubert/Hybrid)?
- The *Frye* standard is used.
- “Washington courts, at least in criminal cases, have long adopted the Frye “general acceptance” standard. In [*State v. Copeland*, 130 Wn.2d 244, 255, 922 P.2d 1304 (1996)], we were asked to reject the Frye test in favor of *Daubert*. Despite the national trend toward *Daubert*, we declared our continued adherence to the more stringent *Frye* test. Id. at 251; see also ARONSON, supra, at § 702.04. [9][c][ii]. In civil cases, we have neither expressly adopted Frye nor expressly rejected Daubert.” *Anderson v. Akzo Nobel Coatings, Inc.*, 2011 Wash. LEXIS 669, 9-10 (Wash. Sept. 8, 2011).
8. Are there other notable Discovery Rules?
- No.
9. Is there mandatory mediation or arbitration?
- Arbitration is mandatory for claims under \$50,000 in counties with a population of more than 1,000. Settlement conferences, conducted by neutral third parties, are mandatory in all counties.
10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?
- It varies by county and judge.
11. What are the court’s practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?
- It varies by county and judge.
12. Who conducts voir dire (Court/Counsel)? Describe the process.
- Usually, voir dire is conducted by both the court and counsel in what is known as the “Donahue” style. The court asks questions of the entire venire; counsel ask questions of just a portion of the venire but more than required to fill the jury box.
13. How many jurors are there? How many alternates? How many peremptory challenges?
- There are 6 or 12 jurors. Usually; the parties may stipulate to any number less than 12, but not less than 3. Not more than 6 alternate jurors are seated. Three peremptory challenges are allowed per party.
- “The jury shall consist of six persons, unless the parties in their written demand for jury demand that the jury be twelve in number or consent to a less number. The parties may consent to a jury less



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than six in number but not less than three and such consent shall be entered in the record.” Wash. Rev. Code § 4.44.120. (2011).

“Each party shall be entitled to three peremptory challenges.” Wash. Rev. Code § 4.44.130. (2011).

“The court may direct that not more than six jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. . . Each side is entitled to one peremptory challenge in addition to those otherwise allowed by law if one or two alternate jurors are to be impaneled, two peremptory challenges if three or four alternate jurors are to be impaneled, and three peremptory challenges if five or six alternate jurors are to be impaneled.” Wash. Sup. Ct. R. 47(b). (2011)

14. Identify any “unusual” trial procedures.

None.

15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?

Usually not, though at least some counties have different divisions, such as family law, and at least one county (Pierce) imposes different discovery timetables for different cases (expedited, standard, complex, and dissolution).

16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?

A product seller may be held liable for its own negligence, breach of an express warranty or intentional misrepresentation. It may have the liability of a manufacturer if the manufacturer is insolvent, or a judgment may not be enforceable against the manufacturer. Wash. Rev. Code§ 7.72.040 (2011).

17. Is there a provision for Prejudgment interest?

It depends upon the action/type of claim.

“A court may award a party prejudgment interest when the claimed amount is “liquidated” or when an unliquidated claim is otherwise determinable by reference to a fixed contractual standard, without reliance on opinion or discretion. A claim is liquidated when the amount of prejudgment interest can be computed with exactness from the evidence, without reliance on opinion or discretion. The fact that an amount is disputed does not render the amount unliquidated.” *Forbes v. Am. Bldg. Maint. Co. W.*, 170 Wn.2d 157, 166 (Wash. 2010)

18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

Jurors are allowed to take notes and ask questions.



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19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed? No.

20. Are there legislative efforts under way that address any of the litigation practices in your state?

Every year there are numerous efforts. In 2011, for example, there was proposed legislation regarding residential construction liability; and a state version of the False Claims Act. Both of them failed.



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### Question

### West Virginia

1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?

No, except in medical malpractice cases, provision of medical records are required by statute. W. Va. Code § 55-7B-6a(a) (2012) (“Within thirty days of the filing of an answer by a defendant in a medical professional liability action or, if there are multiple defendants, within thirty days following the filing of the last answer, the plaintiff shall provide each defendant and each defendant shall provide the plaintiff with access, as if a request had been made for production of documents pursuant to Rule 34 of the Rules of Civil Procedure, to all medical records pertaining to the alleged act or acts of medical professional liability which: (1) Are reasonably related to the plaintiff’s claim; and (2) are in the party’s control. The plaintiff shall also provide releases for such other medical records known to the plaintiff but not under his or her control but which relate to the plaintiff’s claim. If the action is one alleging wrongful death, the records shall be for the deceased except inasmuch as the plaintiff alleges injury to himself or herself.”)

2. Are there Standard Form Interrogatories/Document Requests?

No.

3. Are there limits on the number of Interrogatories/Document Requests?

Yes, W.Va. R. Civ. P. 33 provides that a party may serve 40 interrogatories, including all discrete subparts. (“Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 40 in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b).” W.Va. R. Civ. P. 33(a) (2012)).

4. Are there time limits on depositions, or limits on the number of depositions?

Generally No. However a court may limit the time for conducting a deposition. W. Va. R. Civ. P. 30(d)(2) (2012) (“By order or local rule, the court may limit the time permitted for the conduct of a deposition, but shall allow additional time consistent with Rules 26(b)(1) if needed for a fair examination of the deponent or if the deponent to another party impedes or delays the examination. If the court finds such an impediment, delay, or other conduct that



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has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.”)

5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)

Yes, W.Va. R. Civ. P. 30(b)(7), which is substantively identical to FRCP 30(b)(6) (“A party may in a notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision does not preclude taking a deposition by any other procedure authorized in these rules.” W.Va. R. Civ. P. 30(b) (7) (2012)).

6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?

Yes, pursuant to W.Va. R. Civ. P. 26(b) (4) (A) (ii). The deposing party shall pay the expert a reasonable fee for appearing at the deposition. (“A party may depose any person who has been identified as an expert whose opinions may be presented at trial.” W.Va. R. Civ. P. 26(b)(4)(A)(ii) (2011); “Unless manifest injustice would result: (i) The court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) With respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.” W.Va. R. Civ. P. 26(b) (4) (C) (2012)).



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7. What is the Expert Standard (Frye/Daubert/Hybrid)?

The W.Va. Supreme Court of Appeals adopted the *Daubert* standard. *Wilt v. Buracker*, 191 W. Va. 39, 443 S.E.2d 196 (1993); *Gentry v. Mangum*, 195 W. Va. 512, 466 S.E.2d 171 (1995). However, the Court declined to adopt the *Kumho Tires* standard, as set forth by the U.S. Supreme Court. *W.Va. Div. of Highways v. Butler*, 205 W.Va. 146, 516 S.E.2d 769 (1999).

“When assessing the reliability of an expert’s opinion, a trial court’s role as a ‘gatekeeper’ is to determine whether the reasoning or methodology underlying the testimony is scientifically valid. ‘Evaluating the reliability of scientific methodologies and data does not generally involve assessing the truthfulness of the expert witnesses [.]’ *Gentry*, 195 W.Va. at 519, 466 S.E.2d at 178, quoting in part, *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 749 (3rd Cir. 1994). Instead, under *Daubert/Wilt* and *Gentry* a trial court conducts an inquiry into the validity of the underlying science, looking at the soundness of the principles or theories and the reliability of the process or method as applied to the case. The problem is not to decide whether the proffered evidence is right, but whether the science is valid enough to be reliable. *Gentry*, 195 W.Va. at 523, 466 S.E.2d at 182. Put simply, a trial court acting as a gatekeeper should take care to not invade the province of the jury, whose job it is to decide issues of credibility and persuasiveness, and to determine the weight that should be given to the expert’s opinion.” *San Francisco v. Wendy’s Int’l, Inc.*, 221 W. Va. 734, 742-43, 656 S.E.2d 485, 493-494 (2007).

8. Are there other notable Discovery Rules?

Yes. Rule 31 provides for Depositions upon written questions. W. Va. R. Civ. P. 31 (2012).

9. Is there mandatory mediation or arbitration?

W. Va. T.C.R. 25.03 (2012) provides that a court may, on its own motion, upon motion of any party, or by stipulation of the parties, refer a case to mediation. In medical malpractice actions, defendants are entitled to pre-litigation mediation. W. Va. Code § 55-7B-6(f) (2012) (“Upon receipt of the notice of claim or of the screening certificate of merit, if the claimant is proceeding pursuant to the provisions of subsection (d) of this section, the health care provider is entitled to pre-litigation mediation before a qualified mediator upon written demand to the claimant.”) Arbitration is not mandatory.



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10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?

Pretrial Conferences are conducted by the trial judge. The timing of the pretrial conference varies by judge and a majority of the time, pretrial motions are handled at the conference. *See* W. Va. R. Civ. P. 16 (2012).

11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?

It varies by judge.

12. Who conducts voir dire (Court/Counsel)? Describe the process.

W. Va. T.C.R. 23.03 (2012) provides that the attorneys conducting the case shall be permitted to ask voir dire questions of the prospective jury panel members unless the presiding judicial officer finds that there are justifiable reasons to deny such attorney voir dire. Attorneys must advise the judicial officer of the subject matter of the voir dire questions at such prior to the actual questioning of the prospective jury panel as the judicial officer may designate. *See also*, W. Va. R. Civ. P. 47(a) (2012).

13. How many jurors are there? How many alternates? How many peremptory challenges?

W. Va. R. Civ. P. 47(b) (2011) states that a jury shall consist of six persons unless the court directs a greater number. The plaintiff and the defendant shall each have two peremptory challenges which shall be exercised one at a time, alternately, beginning with the plaintiff. According to W.Va. R. Civ. P. 47(c) (2012), the court may direct that not more than six jurors in addition to the regular jury be called and impaneled to sit as alternate jurors.

“(b) Jury selection.

Unless the court directs that a jury shall consist of a greater number, a jury shall consist of six persons. The plaintiff and the defendant shall each have two preemptory challenges which shall be exercised one at a time, alternately, beginning with the plaintiff. Several defendants or several plaintiffs may be considered as a single party for the purpose of exercising challenges, may allow additional preemptory challenges and permit them to be exercised separately or jointly.

(c) Alternate jurors.

The court may direct that not more than six jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the



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same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. Each side is entitled to 1 additional peremptory challenge if 1 to 3 alternate jurors are to be impaneled and 2 additional peremptory challenges if 4 to 6 alternate jurors are to be impaneled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by law shall not be used against an alternate juror.” W.Va. R. Civ. P. 47(b)-(c) (2012).

14. Identify any “unusual” trial procedures.

None.

15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions?

With the adoption of Trial Court Rule 26, the W. Va. Supreme Court of Appeals created the Mass Litigation Panel to preside over the types of actions set forth in W. Va. T.C.R. 26.04 (2012). There are no designated discovery timetables for different types of actions.

16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)?

No, West Virginia has not enacted a specific distributorship statute.

17. Is there a provision for Prejudgment interest?

Yes, W.Va. Code §56-6-31(2012) provides for prejudgment interest, the rate of which is currently set for the year 2012 at 7%.

“[I]f the judgment or decree, or any part thereof, is for special damages, as defined below, or for liquidated damages, the amount of special or liquidated damages shall bear interest at the rate in effect for the calendar year in which the right to bring the same shall have accrued, as determined by the court and that established rate shall remain constant from that date until the date of the judgment or decree, notwithstanding changes in the federal reserve district discount rate in effect in subsequent years prior to the date of the judgment or decree. Special damages include lost wages and income, medical expenses, damages to tangible personal property and similar out-of-pocket expenditures, as determined by the court. If an obligation is based upon a written agreement, the obligation shall bear a prejudgment interest at the rate set forth in the written agreement until the date the judgment or decree is entered and, thereafter, the judgment interest rate shall be the same rate as provided for in this section.



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(b) Notwithstanding the provisions of section five, article six, chapter forty-seven of this code, the rate of interest on judgments and decrees for the payment of money, including prejudgment interest, is three percentage points above the Fifth Federal Reserve District secondary discount rate in effect on the second day of January of the year in which the judgment or decree is entered: Provided, That the rate of prejudgment and post-judgment interest shall not exceed eleven percent per annum or be less than seven percent per annum. The administrative office of the Supreme Court of Appeals shall annually determine the interest rate to be paid upon judgments or decrees for the payment of money and shall take appropriate measures to promptly notify the courts and members of the West Virginia State Bar of the rate of interest in effect for the calendar year in question. Once the rate of interest is established by a judgment or decree as provided in this section, that established rate shall thereafter remain constant for that particular judgment or decree, notwithstanding changes in the Federal Reserve District discount rate in effect in subsequent years.”  
W.Va. Code §56-6-31(a)-(b) (2012).

18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.)

Medical practice litigation in the State of West Virginia is governed by the Medical Professional Liability Act, W. Va. Code §55-7B-1, *et seq.* and should be consulted in any action involving healthcare providers.

19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed?

Currently there are none that need to be addressed.

20. Are there legislative efforts under way that address any of the litigation practices in your state?

On September 11, 2012, the West Virginia Supreme Court of Appeals added Rule 29 to the W.Va. Trial Court Rules, which authorized the creation of a Business Court, which is located in Martinsburg, W.Va. and consists of up to 7 active or senior status Circuit Court judges.

In 2011, the West Virginia Supreme Court of Appeals upheld the constitutionality of damages caps set forth in W.Va. Code §55-7B-1, *et seq.*, the Medical Professional Liability Act. *See MacDonald v. City Hosp., Inc.*, 227 W. Va. 707; 715 S.E.2d 405 (2011).



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Question	Wisconsin
1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?	No.
2. Are there Standard Form Interrogatories/Document Requests?	No.
3. Are there limits on the number of Interrogatories/Document Requests?	No. Wis. Stat. § 804.01 (1) ("Unless the court orders otherwise . . . the frequency of use of [interrogatories/document requests] is not limited.") However, <i>see</i> Wis. Stat. § 804.015(4) ("If a prisoner commences an action or special proceeding, the court shall limit the number of requests for interrogatories, production of documents or admissions to 15, unless good cause is shown for any additional requests.")
4. Are there time limits on depositions, or limits on the number of depositions?	No. Neither the number nor duration of depositions is limited, unless the court orders otherwise. Wis. Stat. § 804.1(1) ("Unless the court orders otherwise . . . the frequency of [depositions] is not limited.")
5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)	Yes. <i>See</i> Wis. Stat. § 804.05(2) (e). ("A party may in the notice name as the deponent a public or private corporation or a limited liability company or a partnership or an association or a governmental agency or a state officer in an action arising out of the officer's performance of employment and designate with reasonable particularity the matters on which examination is requested. The organization or state officer so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. The persons so designated shall testify as to matters known or reasonably available to the organization. This paragraph does not preclude taking a deposition by any other procedure authorized by statute or rule." Wis. Stat. § 804.05(2) (e)).
6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?	Yes. <i>See</i> Wis. Stat. § 804.01(2) (d) (1)-(2). The deposing party pays. ("A party may through written interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial. A party may depose any person who has been identified as an expert whose opinions may be



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presented at trial. Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subd. 3. Concerning fees and expenses as the court considers appropriate.” Wis. Stat. § 804.01(2)(d)(1); “A party may, through written interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only upon motion showing that exceptional circumstances exist under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.” Wis. Stat. § 804.01(2)(d)(2); “Unless manifest injustice would result, the court shall require that the party seeking discovery pay the expert a reasonable fee for the time spent in responding to discovery under the last sentence of subds. 1. and 2.; and with respect to discovery obtained under the last sentence of subd. 1. the court may require, and with respect to discovery obtained under subd. 2., the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.” Wis. Stat. § 804(2) (d) (3)).

7. What is the Expert Standard (Frye/Daubert/Hybrid)?

Wisconsin adopted the *Daubert* standard by legislation passed in early 2011.

Wis. Stat. § 907.02; Testimony by experts.

“(1) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

(2) Notwithstanding sub. (1), the testimony of an expert witness may not be admitted if the expert witness is entitled to receive any compensation contingent on the outcome of any claim or case with respect to which the testimony is being offered.” Wis. Stat. § 907.02.

8. Are there other notable Discovery Rules?

No.



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9. Is there mandatory mediation or arbitration? Not by state law. Some judges will require it, though.
10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial? The timing of the Pretrial Conference is generally determined by the Court's Scheduling Order. Wis. Stat. § 802.10(5). Motions in limine may be, but are not necessarily, addressed at the Pretrial Conference. Wis. Stat. § 802.10(5) (d) and (h).
11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge? It varies by judge.
12. Who conducts voir dire (Court/Counsel)? Describe the process. Generally, voir dire is conducted by the court with additional questions posed by counsel. Wis. Stat. § 805.08(1) ("The court shall examine on oath each person who is called a juror to discover whether the juror is related by blood, marriage or adoption to any party or to any attorney appearing in the case, or has any financial interest in the case, or has expressed or formed any opinion, or is aware of any bias or prejudice in the case. . . This section shall not be construed as abridging in any manner the right of either party to supplement the court's examination of any person as to qualifications, but such examination shall not be repetitious or based upon hypothetical questions.")
13. How many jurors are there? How many alternates? How many peremptory challenges? Generally, "a jury in a civil case shall consist of 6 persons unless a party requests a greater number, not to exceed 12." Wis. Stat. § 756.06(2) (b). "The court may order that additional jurors be selected" to serve as alternates. Wis. Stat. § 805.08(2). The number of alternates to be selected is not specified by rule. Each party is entitled to 3 peremptory challenges. Multiple plaintiffs and multiple defendants are deemed to be single parties, except that the court may, in its discretion, allow multiple defendants separate peremptory challenges where they have "adverse interest". Wis. Stat. § 805.08(3). Each side is allowed 1 additional peremptory challenge if alternate jurors are selected. Wis. Stat. § 805.08(3).
14. Identify any "unusual" trial procedures. Under Wis. Stat. § 805.02(1), "[i]n all actions not triable of right by a jury, the court upon motion or on its own initiative may try any issue with an advisory jury."



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15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions? No.

16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)? Yes.

17. Is there a provision for Prejudgment interest? There is an offer of Judgment provision. Under Wis. Stat. § 807.01, a plaintiff may, “after issue is joined but at least 20 days before trial,” serve upon the defendant a written offer of settlement, with costs. If the defendant declines the offer of settlement and the plaintiff recovers an amount greater than or equal to the amount specified in the offer, the plaintiff is entitled to interest on the amount recovered from the date of the offer of settlement until the amount is paid. Wis. Stat. § 807.01(4). Interest is calculated based upon “an annual rate equal to 1 percent plus the prime rate in effect on January 1 of the year in which the judgment is entered if the judgment is entered on or before June 30 of that year or in effect on July 1 of the year in which the judgment is entered if the judgment is entered after June 30 of that year, as reported by the federal reserve board in federal reserve statistical release H. 15.” *Id.*; see also Wis. Stat. § 628.46, which provides for recovery of simple interest, at the rate of 12% per year, on untimely paid insurance claims.

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18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.) Wisconsin state court practice is relatively straightforward and not very different from most other jurisdictions.

19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed? No.



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20. Are there legislative efforts under way that address any of the litigation practices in your state?

Early in 2011 Wisconsin enacted an Omnibus Tort Reform Act. There are no other significant legislative efforts underway at the moment.



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### Question

### Wyoming

1. Are there provisions for Mandatory Disclosures (like F.R.C.P. 26)?

Yes. See Wyo. R. Civ. Proc., Rule 26(a) (2012).

2. Are there Standard Form Interrogatories/Document Requests?

No.

3. Are there limits on the number of Interrogatories/Document Requests?

Interrogatories are limited to 30 in number, including discrete subparts. Wyo. R. Civ. Proc., Rule 33(a) (2012). There is no limit on the number of document requests that may be served. (“Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 30 in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b) (2).” Wyo. R. Civ. P. 33(a) (2012)).

4. Are there time limits on depositions, or limits on the number of depositions?

Yes. Absent leave of court or stipulation, a deposition is limited to one (1) day of seven (7) hours. Wyo. R. Civ. Proc., Rule 30(d) (2) (2012). Absent stipulation, leave of court is required if the proposed deposition would result in more than 10 depositions being taken or if the person to be examined already has been deposed in the case. Wyo. R. Civ. Proc., Rule 30(a) (2) (2012). (“Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours. The court must allow additional time consistent with Rule 26(b) (2) if needed for a fair examination of the deponent or if the deponent or another person, or other circumstance, impedes or delays the examination.” Wyo. R. Civ. P. 30(d) (2) (2012)).

5. Are there rules governing Corporate Designee depositions? (Similar or different from F.R.C.P. 30(b) 6.)

Yes. See Wyo. R. Civ. Proc., Rule 30(b) (6) (2012). (“A party may in the party’s notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so



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- designated shall testify as to matters known or reasonably available to the organization. This subdivision (b) (6) does not preclude taking a deposition by any other procedure authorized in these rules.” Wyo. R. Civ. Pro. 30(b) (6) (2012)).
6. Are the parties entitled to depose opposing experts (or by agreement only, and who pays)?
- Yes (as to those experts whose opinions may be presented at trial). Wyo. R. Civ. Proc., Rule 26(b) (4) (A) (2012). The opinions of those not expected to be called at trial can only be discovered upon a showing of exceptional circumstances. The party seeking discovery pays.
- “A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a) (2) (B), the deposition shall not be conducted until after the report is provided.” Wyo. R. Civ. P. 26(b) (4) (A) (2012).
- “A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.” Wyo. R. Civ. P. 26(b) (4) (B) (2012).
- “Unless manifest injustice would result: (i) The court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) With respect to discovery obtained under subdivision (b) (4) (B) of this rule, the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.” Wyo. R. Civ. P. 26(b) (4) (C) (2012).
7. What is the Expert Standard (Frye/Daubert/Hybrid)?
- The *Daubert* standard is used. See *Bunting v. Jamieson*, 984 P.2d 467 (Wyo. 1999).
- “The trial court correctly anticipated our adoption of the analysis set forth in *Daubert* to a trial judge's determination to admit or exclude expert testimony. The admissibility of expert testimony is derived directly from W.R.E. 702, which states: “If scientific, technical, or other specialized knowledge will assist the Trier of



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fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.”” *Bunting v. Jamieson*, 984 P.2d 467, 470 (Wyo. 1999).

8. Are there other notable Discovery Rules?

No.

9. Is there mandatory mediation or arbitration?

Per Wyo. R. Civ. Proc., Rule 40(b)(2012), "The court may, or at the request of any party shall, assign the case to another active judge or to a retired judge, retired justice, or other qualified person on limited assignment for the purpose of invoking nonbinding alternative dispute resolution methods, including settlement conference and mediation."

10. When is the Pretrial Conference held, is it conducted by the Trial Judge, and are motions in limine addressed then or at trial?

Per Wyo. R. Civ. Proc., Rule 16(d) (2012), "Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances."

11. What are the court's practices regarding trial submissions? Is it similar to the Federal Pretrial Order; does it vary by judge?

It varies with each judge.

12. Who conducts voir dire (Court/Counsel)? Describe the process.

Per Wyo. R. Civ. Proc., Rule 47 (c)(2012), "After the jury panel is qualified, the attorneys, or a pro se party, shall be entitled to conduct the examination of prospective jurors, but such examination shall be under the supervision and control of the judge, and the judge may conduct such further examination as the judge deems proper. The judge may assume the examination if counsel or a *pro se* party fail to follow this rule. If the judge assumes the examination, the judge may permit counsel or a *pro se* party to submit questions in writing."

13. How many jurors are there? How many alternates? How many peremptory challenges?

There are 6 or 12 jurors. Wyo. R. Civ. Proc., Rule 38(b) (2) (2012). The court may seat up to 6 alternates. Wyo. R. Civ. Proc., Rule 47(d) (2012). Each party is entitled to 3 peremptory challenges. (Multiple defendants or plaintiffs may be considered a single party). Wyo. R. Civ. Proc., Rule 47(e) (2012). Each side is entitled to 1 additional peremptory challenge if 1 or 2 alternates are impaneled; 2 additional peremptory challenges if 3 or 4 alternates are impaneled; and 3 additional peremptory challenges if 5 or 6 alternate jurors are impaneled. Wyo. R. Civ. Proc., Rule 47(d) (2012).

“All demands for trial by jury in district courts shall be accompanied by a deposit of \$ 50.00, if a six person jury is



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demanded, or \$ 150.00, if a twelve person jury is demanded. The jury fees in cases where jury trials are demanded shall be paid to the clerk of the court, and paid by the clerk into the county treasury at the close of each month, and the clerk shall tax as costs in each such case, and in all other cases in which a jury trial is had, a jury fee of \$ 50.00, if a six person jury trial is held, or \$ 150.00, if a twelve person jury trial is held, to be recovered of the unsuccessful party, as other costs, and in case the party making such deposit is successful, that party shall recover such deposit from the opposite party, as part of the costs in the case.” Wyo. R. Civ. P. 38(b) (2) (A) (2012).

“(d) Alternate jurors. -- The court may direct that not more than six jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged when the jury retires to consider its verdict. Each side is entitled to one peremptory challenge in addition to those otherwise allowed by law if one or two alternate jurors are to be impaneled, two peremptory challenges if three or four alternate jurors are to be impaneled, and three peremptory challenges if five or six alternate jurors are to be impaneled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by law shall not be used against an alternate juror.

(e) Peremptory challenges. -- Each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the making of challenges or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.” Wyo. R. Civ. Proc. Rule 47(d)-(e) (2012).



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14. Identify any “unusual” trial procedures. Jurors are permitted to take notes; at the court's discretion, jurors may be provided notebooks for organization of materials received at trial (which may include blank paper for note taking, stipulations of the parties, lists or seating charts identifying counsel and their respective clients, jury instructions, copies of important exhibits (which may be highlighted), glossaries of key technical terms, pictures of witnesses, and a copy of the court's juror handbook, if one is available); and jurors may submit written questions for witnesses, which "shall" be read to the witness by the court or counsel if the court determines that the question is not improper or unfairly prejudicial. Wyo. R. Civ. Proc., Rules 39.1 and 39.4(2012).
15. Are there special trial court divisions for certain civil matters, such as mass tort, class action, commerce court, etc.? Are there different discovery timetables for different trial divisions? No.
16. Is there a distributorship statute that allows a distributor to escape liability if it identifies the manufacturer (in product liability matters)? No.
17. Is there a provision for Prejudgment interest? "Prejudgment interest is an accepted form of relief in Wyoming where the claim is 'liquidated,' which is defined as one that is readily computable by basic mathematical calculation." *Pennant Serv. Co. v. True Oil Co., LLC*, 2011 WY 40, \_\_\_, 249 P.3d 698, 711 (Wyo. 2011) (citing *Stewart Title Guar. Co. v. Tilden*, 2008 WY 46, 181 P.3d 94, 101-102 (Wyo. 2008)).
18. Miscellaneous. (Please point out any litigation Best Practices employed by your state court but not yet referenced in this survey.) None.
19. Are there any significant areas in which you believe the playing field between Plaintiff and Defendant is not level that you think need to be addressed? No.
20. Are there legislative efforts under way that address any of the litigation practices in your state? WY H.B. 14, enacted on March 5, 2012 (eff. July 1, 2012), modifies civil procedure relating to wrongful death actions (provides for appointment of a wrongful death representative; sets forth the factors to be considered in appointing a wrongful death representative; specifies on whose behalf a wrongful death action



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is brought; and provides for notice of an action to appoint a wrongful death representative). Wyo. Stat. §§ 1-38-103 through 1-38-105.

WY H.B. 24, introduced on January 17, 2012, would have authorized the admissibility of collateral source payments in a civil action after a plaintiff's verdict and would have required reduction of awards for certain collateral source payments. The bill was withdrawn from further consideration on February 14, 2012.