AGENDA
JANUARY 21-22, 1994
SCAC MEETING

INDEX

Tommy Jacks Version 1-21-94 LHS Working Copy

RULE 166d. FAILURE TO MAKE OR COOPERATE IN DISCOVERY; REMEDIES

1. Procedure. If a person or entity fails in whole or in part to respond to or supplement discovery, or in seeking or resisting discovery abuses the discovery process in a manner contemplated by this rule, the court may grant relief as set forth below.

(a) Motion. Any person or entity affected by such failure or abuse may file a motion specifically describing same. The motion shall be filed in the court in which the action is pending, except that a motion involving a person or entity who is not a party shall be filed in any district court in the district where the discovery is to take place. Motions and responses made under this rule shall be filed and served in accordance with Rules 21 and 21a. Nonparties affected by the motion shall be served as if parties. The motion shall contain a certificate that the movant (or movant's counsel) has, in person or by telephone, spoken with the opposing party (or, if the opposing party is represented by an attorney, with the opposing party's counsel), or has made diligent attempts to do so, and that in any such conversation a bona fide effort was made to resolve the discovery dispute without the necessity of court intervention, and that such efforts have failed.

(b) Hearing. Oral hearing is required for motions requesting sanctions under paragraph 3, unless waived by those involved. No oral hearing is required for motions that request relief provided by paragraph 2 and that do not request expenses, including attorney's fees, or sanctions provided by paragraph 3. The court shall base its decision upon (i) pleadings, affidavits, stipulations, and discovery results submitted with the motion; (ii) judicial notice taken of the usual and customary expenses including attorney's fees and the contents of the case file; and (iii) testimony if the hearing is oral.

(c) Order. An order under this rule shall be in writing. An order granting relief or imposing sanctions shall be against the party, attorney, law firm, or other person or entity whose actions necessitated the motion. An order imposing sanctions under paragraph 3 of this rule shall contain written findings, or be supported by oral findings on the record, stating specifically (i) the conduct meriting sanctions; (ii) the reasons for the court's decision; (iii) why a lesser sanction would be ineffective; and (iv) if the sanction would preclude a decision on the merits of a party's claim, counterclaim, or defense, the conduct demonstrating that the party or the party's counsel has acted in flagrant bad faith or with callous disregard for the rules.

sworn?

2. Motion to Compel or Quash Discovery.

(a) The court may compel, ~~or quash~~ limit or deny discovery. ~~as provided by Rule 166b.~~

(b) Except in cases involving special circumstances, as set forth in subparagraphs 2(c) and 2(d), a party may not seek, and the court shall not award, expenses, including attorney's fees, or any sanction under paragraph 3, in connection with a motion to compel or ~~quash~~ limit discovery.

(c) A party may seek, and the court may make, an award of expenses, including attorney's fees, in connection with a motion to compel or quash discovery or a written response to such a motion, supported by affidavit, where the court finds that the following special circumstances exist: (1) the amount of expenses, including attorney's fees, incurred in connection with the motion or opposition by the party seeking such relief is unreasonably burdensome, ~~in relation to the resources of that party~~; and (2) the position of the party against whom such relief is sought was not reasonably justified in seeking or resisting the discovery at issue.

(d) A party may seek, and the court may make, an award of sanctions under paragraph 3 in connection with a motion to compel or quash discovery or a written response to such a motion, supported by affidavit, where the court finds that one or more of the following special circumstances exists: (1) a person already subject to an order previously entered under this paragraph has failed to comply with such an order; (2) a party, a person under the control of a party, or an attorney for a party, not acting in good faith, has destroyed evidence or engaged in other conduct related to discovery that cannot effectively be remedied by an order compelling or quashing discovery; (3) a party, attorney or law firm has repeatedly or on a continuing basis: (i) failed to file timely discovery responses; (ii) filed clearly inadequate or incomplete discovery responses; (iii) failed to comply with specific requirements of a discovery rule, subpoena or order; or (iv) propounded discovery requests, or raised objections to discovery, which are not reasonably justified.

(e) A motion to compel or quash discovery, or a written opposition to such a motion, that also seeks either recovery of expenses, including attorney's fees, or imposition of sanctions shall so state and shall ~~be supported by affidavit evidence~~ describing specifically the acts or omissions constituting ~~special~~ circumstances ~~under subparagraph 2(c) or (d)~~ requesting such award.

TASK FORCE VERSION No sanctions for frivolous motions 1-21-94

RULE 166d. ~~DISCOVERY VIOLATIONS~~ FAILURE TO MAKE OR COOPERATE IN DISCOVERY; REMEDIES

1. **Procedure.** If a person or entity fails in whole or in part to respond to or supplement discovery, or abuses the discovery process in seeking or resisting discovery, the court may grant relief as set forth below.

(a) Motion. Any person or entity affected by such failure or abuse may file a motion specifically describing the violation~~, and may attach any necessary exhibits including affidavits, discovery, pleadings, or other documents~~. The motion shall be filed in the court in which the action is pending, except that a motion involving a person or entity who is not a party shall be filed in any district court in the district where the discovery is to take place. ~~Motions or responses made under this rule shall be filed and served in accordance with Rules 21 and 21a.~~ Nonparties affected by the motion shall be served as if parties. ~~The motion shall contain the certificate required by Rule 166b(7).~~ The motion shall contain a certificate that the movant (or the movant's counsel) has spoken with the opposing party (or the opposing party's counsel if represented by counsel) in person or by telephone to try to resolve the discovery dispute ~~without the necessity of court intervention~~, or has made diligent attempts to do so, and that such efforts have failed.

(b) Hearing. Oral hearing is required for motions requesting sanctions under paragraph 3, unless waived by those involved. No oral hearing is required for motions requesting relief provided by paragraph 2. ~~The court shall base its decision upon (i) pleadings, affidavits, stipulations, and discovery results submitted with the motion, (ii) judicial notice taken of the usual and customary expenses including attorney's fees, and the contents of the case file, and (iii) testimony if the hearing is oral.~~

(c) Order. An order under this rule shall be in writing. An order granting relief or imposing sanctions shall be against the party, attorney, law firm, or other person or entity whose actions necessitated the motion. An order imposing sanctions under paragraph 3 of this rule shall contain written findings, or be supported by oral findings on the record, stating specifically (i) the conduct meriting sanctions, (ii) the reasons for the court's decision, (iii) why a lesser sanction would be ineffective, and (iv) if the sanction would preclude a decision on the merits of a party's claim, counterclaim, or defense, the conduct demonstrating that the party or the party's counsel has acted in flagrant bad faith or with callous disregard for the rules.

2. **~~Relief~~ Motion to Compel or Quash Discovery.** The court may compel or quash discovery as provided by Rule 166b. In addition, so long as the amount involved is not substantial, the court may award the prevailing person or entity reasonable expenses necessary in connection with the motion, including attorney's fees. The court may presume the usual and customary fee in connection with the motion is not substantial, unless circumstances or an objection suggests such award may

preclude access to the courts. An award of expenses that is substantial is governed by paragraph 3(c). If a motion is granted in part and denied in part, the court may apportion expenses in a just manner. The court may ~~enter~~ these orders without any finding of bad faith or negligence, ~~but~~ shall not award expenses if the unsuccessful motion or opposition was ~~substantially justified~~ reasonably justified ~~in fact or law~~, or other circumstances make an award of expenses unjust.

3. Sanctions. In addition to or in lieu of the relief provided above, the court may ~~enter~~ an order imposing one or more of the sanctions set forth below. Any sanction imposed must be just and must be directed to remedying the particular violations involved. A sanction should be no more severe than necessary to satisfy its legitimate purposes.

(a) Reprimanding the offender; ~~in writing, either publicly or privately;~~

~~(b) Disallowing further discovery in whole or in part;~~

(c) Assessing a substantial amount in expenses, including attorney's fees, ~~of~~ discovery or trial;

(d) Deeming certain facts or matters to be established for the purposes of the action;

(e) Barring introduction of evidence supporting or opposing designated claims or defenses;

(f) Striking pleadings or portions thereof, staying further proceedings until an order is obeyed, dismissing with or without prejudice the action or any part thereof, or rendering a default judgment;

(g) Granting the movant a monetary award in addition to or in lieu of actual expenses or;

~~(h) Requiring community service, pro bono legal services, continuing legal education, or other services; or~~

~~(i)~~ (h) ~~Entering~~ such other orders as are just.

4. Compliance. Monetary awards pursuant to paragraphs 2, 3(c), or 3(g) shall not be payable prior to final judgment, unless the court makes written findings or oral findings on the record stating why an earlier assessment of the award will not preclude access to the court. ~~Sanctions pursuant to paragraph 3(h) shall be deferred until after an opportunity for appeal after final judgment. Otherwise,~~ Orders under this rule shall be operative at such time as directed by the court.

5. Review. An order under this rule shall be ~~deemed to be part of the final judgment, and shall be~~ subject to review on appeal ~~therefrom~~. Any person or entity affected by the order may appeal in the same manner as a party to the underlying judgment.

ADDITION TO COMMENT TO PARAGRAPH 5

This paragraph does not change or address the availability of mandamus relief in sanctions proceedings. See, e.g., Walker v. Packer, 827 S.W.2d 833 (Tex. 1992).

ADDITION TO COMMENT

Parties and counsel should exercise caution before filing motions for sanctions, which may have serious, unintended consequences. Thus, a litigant should file a motion for sanctions only after exhausting other reasonable measures to resolve pretrial disputes.

ADDITION TO COMMENT

Although subparagraph 1(a) deletes the reference to the types of exhibits that may be filed with a motion, ~~subparagraph 1(b) makes clear that the parties may file, and the court may consider, such materials.~~

Suggested changes to Rule 166d

Rule 166d(1)(a): In the new language regarding the certificate of conference, delete the words "without the necessity of court intervention."

Reason: These words are unnecessary because the filing of the motion is a request for court intervention, and the certificate shows that the parties tried to resolve the dispute before filing the motion.

Rule 166d(1)(b): Change subsection (ii) to read "judicial notice taken of the contents of the case file and the usual and customary expenses, including attorneys fees."

Reason: To clarify that the word "including" does not modify "contents of the case file."

Rule 166d(3)(c): Change (c) to read "Assessing a substantial amount in discovery or trial expenses, including attorneys fees"

Reason: To clarify what "of discovery or trial" modifies.

Rule 166d(4): Change title to "Time for compliance"

Reason: To more clearly indicate the contents of the subsection.

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January 1994 Meeting

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November 18, 1993

Via Telecopy (210) 224-7073

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Re: Discovery Task Force

Dear Luke:

Enclosed please find a brief "thumbnail sketch" of the work done by the Discovery Task Force. I hope it will be helpful for the meeting this weekend. Naturally, I would be delighted to make a more in-depth report at the next meeting.

Sincerely yours,

David E. Keltner

DEK:c
Enclosure
f-0012834.01

TO: THE SUPREME COURT ADVISORY COMMITTEE

FROM: David Keltner

RE: Discovery Task Force Update

Introduction

The Discovery Task Force, which is nearing the end of its assignment, has been meeting on a regular basis for over two years. By and large, the Task Force has operated on a consensus basis. We have analyzed all of the criticisms and problems with the current discovery rules which have been brought to our attention and have considered all of the suggestions for changes which have been made by others. Additionally, we have reviewed and studied the discovery rules of the other 49 states and the District of Columbia in order to glean ideas and suggestions regarding how to deal with certain matters.

Our work product will be finalized at the last two meetings, where we will attempt to reach a consensus regarding proposed changes. Minority viewpoints will be memorialized in the final report. We hope to present to the Supreme Court as our finished product three separate documents: a set of proposed amendments to the discovery rules (Rules 166-215); a commentary which will discuss the rationale behind certain changes and, in some cases, the operation of several of the proposed rules; and the rules, as we propose they be amended, rearranged into a new format -- the Texas Rules of Civil Discovery. Discussed below are the more important changes which we have approved to date.

Major Changes

1. Limited Mandatory Disclosure. One of the most frequent and serious complaints we received was that basic discovery was becoming difficult to obtain. For example, no one would deny that a party has the right to discover the names and locations of persons with knowledge of relevant facts. However, some lawyers have started objecting to the use of an interrogatory which tracks the language of the rule ("Please state the name and location of all persons with knowledge of relevant facts"). Thus, we drafted a Mandatory Disclosure Rule which we hope will make it virtually impossible to get into disputes over the form of basic discovery. The intent was to create a procedure which, if followed, made the acquisition of basic information into a nearly dispute-free exercise. The Mandatory Disclosure Rule covers the following matters: (1) the identity and location of persons with knowledge of relevant facts; (2) the identity and location of expert witnesses, the subject matter of the expert's testimony, the mental impressions and opinions of the expert, and a general summary of the bases for the mental impressions and opinions; (3) the matters specified in Rule 166b(2)(f) regarding indemnity, insuring and settlement

agreements; (4) the matters specified in Rule 166b(2)(h) regarding medical records; (5) a statement of the correct names of the parties to the lawsuit; and (6) in a suit based on a written obligation, copies of the written instruments on which the suit is based. We are considering whether to add additional basic categories of information to the Mandatory Discovery Rule. We have not yet decided whether mandatory disclosure will be the exclusive means of obtaining this information. We may allow this information to be obtained by deposition.

The operation of the proposed rule is simple: "Please disclose the matters specified in Rule _____, subsection 1, 2, 3, 4, 5 or 6." No objection can be interposed. The disclosures are due in 30 days. The new Supplementation Rule will apply to mandatory disclosure (see no. 8 below). Note that we are not proposing a broad form of mandatory disclosure. Instead, we are proposing limited mandatory disclosure of basic information about which there should be little or no dispute. Mandatory disclosure is similar to form discovery, except that with mandatory disclosure it is not possible for lawyers to accidentally or intentionally "change" the form of the discovery request. Parties will not be allowed to add clauses to the basic questions ("Please state the name and location of all persons with knowledge of relevant facts and state the facts known to each such person"). Also, there can be no dispute as to whether the word "you" includes attorneys, etc. This will streamline discovery and make it much easier to get basic information in every lawsuit.

2. Expert Witness Rule. We have also made substantial changes to the Expert Witness Rule. As noted above, the basic information regarding experts will be discoverable by Request for Mandatory Disclosure and maybe by depositions. We propose that additional, more detailed discovery of mental impressions, opinions, facts, etc. will occur only by oral deposition of the expert. This will preclude parties from sending interrogatories which call for detailed, narrative answers regarding experts ("State all facts known to and all opinions and mental impressions of each expert."). We deleted the report provision. It was becoming a practice of many attorneys to ask by interrogatory and/or by a request for a report, for "all facts known to" and "all opinions of" the expert. If a lawyer failed to provide all facts or all opinions, he/she would be subject to having testimony excluded at trial for failing to put it in the interrogatory answer or report. On the other hand, if the lawyer did disclose "all facts known to" the expert, or "all opinions and mental impressions", then the lawyer would be forced to prepare an extremely detailed answer (or a report) which would be very time consuming and very costly. The "report" provision has become more of a trap or ploy, and less of a legitimate method of discovery. Also, most attorneys now take the depositions of experts and can discover during the deposition what the expert is going to say. Allowing a party to obtain a report and take a deposition imposes unnecessary expense. Accordingly, we deleted the report requirement, disallowed the interrogatory practice of asking for "all facts known to" or "all opinions of" experts, and required more detailed discovery to go forward through deposition practice. Remember, it is now very easy (mandatory disclosure) to compel the disclosure of certain basic information (name, address, telephone number, subject matter, mental impressions and

opinions of the expert and a general summary of the bases for each mental impression and opinion). Attorneys may still enter into a Rule 11 agreement to exchange reports.

3. Privileges. We have deleted the witness statement privilege from Rule 166b(3)(c). Thus, under the new rule, witness statements would be discoverable. The party communications and consulting expert privileges have been retained. The good cause exception applies only to party communications.

4. Work Product. We reaffirmed (strongly) the concept that relevant facts are always discoverable, and never privileged (except perhaps by the Fifth Amendment). We also adopted the Supreme Court's holding in National Tank regarding the definition of work product. Because the definition of work product is narrow, we chose not to create a good cause exception to the privilege. We may make additional suggestions regarding the scope of the "work product" privilege (not regarding what it is, but when it arises) and the control group test for attorney-client communications (change the rule).

5. Work Product and Attorney-Client Matters are Outside the Scope of Discovery. One of the biggest problems in current discovery practice involves implied or subtle waiver of nonasserted objections. We need to retain the concept that an objection is waived if not made at or before the time a response is due. Otherwise, there will be no finality to the discovery process. On the other hand, this created a situation where lawyers felt constrained to object even if they had no privileged documents, because such matters might be acquired or created in the future. This problem was exacerbated by the drafter's dilemma of choosing between requests which call for "all documents" and the laundry list of categories of documents ("memos, letters, correspondence, reports, notes...."). The "all documents" request almost always asks for privileged materials, but the laundry list allows the responding party to arbitrarily interpret a request in order to avoid the production of relevant documents (Is the document a "report" or a "memo"?). Hence, the requesting party had to decide whether to use a general request, and run the risk of receiving objections, or the laundry list, and run the risk that the responding party would arbitrarily exclude a document from discovery based on an arbitrary interpretation of the list. The solution to this problem is quite simple -- "define out" of the discovery process matters which are privileged by the attorney work product (which is narrowly defined) and attorney-client privileges. Interrogatories, requests for production and requests for admission will be construed to not ask for matters which are privileged by the attorney-client or attorney work product privileges, unless the words "attorney-client" and "attorney work product" are actually used in the discovery request. There will be no implied or subtle waiver of any privilege by responding to requests which call for "all documents". If a party wants to attempt to discover attorney-client communications and work product matters (insurance bad faith cases, Ginsberg situations or where waiver has occurred), then the party can do so by simply asking directly. There will be no more guess work as to whether a particular

request calls for attorney-client or work product and, correspondingly, there should be no contingent or prophylactic objections ("to the extent that the request calls for", etc.). This should drastically reduce the number of objections which attorneys make to protect against unintended, subtle or strained constructions of discovery requests. We felt it wise to limit this to attorney work product and attorney-client communications.

6. Duty to Respond. We have also imposed a duty to respond to a discovery request. There is currently no duty to respond in the rules; there are only consequences for failing to respond. There will now be an affirmative duty to file a complete response, based upon all information reasonably available to the responding party at the time the response is made. This was done to require timely disclosure of relevant information. Hopefully, this standard will help encourage parties to exchange discovery more than 30 days before trial.

We also added to the Response Rule a provision which states that definitions and instructions inconsistent with the rules do not bind the responding party -- hence, there will be no need to object to definitions and instructions. Additionally, there is a provision in the new Response Rule which provides that an objection to a discovery request does not relieve a party of the duty to comply with the request. The responding party must produce any information, matter or thing not subject to the objection. For example, if a request for production asks for true and correct copies of all documents in a party's possession, custody or control which describe the accident made the basis of the lawsuit, an objection might be interposed because the request might inadvertently have called for party communications -- letters to a client or insurance company setting forth the attorney's understanding of the facts surrounding the accident. On the other hand, the responding party might have an accident report in his/her/its possession in which a police officer sets forth his/her understanding of how the accident happened. Under the current practice, the responding party could object and produce nothing. Now, the duty to respond requires that the responding party produce those matters not subject to the objection -- the police report. The purpose of this new provision is to postpone some disputes (especially unintended disputes) and allow discovery to go forward while real disputes are being resolved. Obviously, some objections (vagueness, ambiguity, relevance), may suspend the obligation to provide anything because the objection is directed at the totality of the request.

7. Objections. The proposed new rule regarding objections requires that there be a good faith factual and legal basis for making the objection at the time the objection is made. This means there will be no more prophylactic or contingent objections. On the other hand, there will be a provision in the new Supplementation Rule which allows parties to make additional objections with respect to matters which were not in existence or which were not reasonably available to the responding party at the time the initial response was made (see no. 8 below). That way, there is no need to file an objection to protect documents which are created after the response to the request is served. Lawyers will have the ability to make additional objections to protect newly created matters. For example,

assume that a medical malpractice suit is filed against a hospital and a doctor immediately after an unfortunate incident in a hospital. Discovery is served when suit is filed. Four or five months later, the hospital review committee thoroughly reviews the matter and creates certain documents memorializing its findings, opinions and conclusions. The defendant hospital did not have any peer review or review committee documents in its possession at the time it made its responses to the initial discovery request. Under the new rule, the hospital cannot (and need not) object to the initial discovery request in order to assert prophylactic or contingent objections applicable to documents which are not yet in existence -- but which may be created later. If the matter is in existence, the hospital can object, if not, no objection can be made. Later, after the time for filing initial objections has expired, documents are created which fall within the scope of the hospital peer review privilege. Supplementation is eventually requested by the plaintiff's lawyer; and, therefore, the defendant hospital must file true, correct and complete supplemental responses within 30 days after receiving the request for supplementation. The hospital will now be able to file additional objections to cover matters which were not reasonably available (not even in existence) when the initial responses were made. Nothing is waived with respect to the previous response, and everything which should be protected is protected by the additional objection. No one is confused or misled by contingent or prophylactic objections. Also, keep in mind that in order to obtain discovery of matters which are allegedly privileged by attorney-client or work product privileges, the party seeking discovery must specifically ask for such matters. Thus, much of the uncertainty (and gamesmanship) should be removed from the discovery process. The time for serving objections has not changed and the rules regarding hearings on objections have not changed.

8. Supplementation. As noted above, we have imposed a duty to initially respond, fully and completely, based upon information available at the time the response is made. We have also instituted a duty to completely and fully supplement previous written answers and responses as of 30 days before trial. This may be changed to 45 or 60 days. In order to deal with supplementation between the initial response date and 30 days before trial (which maybe years apart), we have also instituted a procedure which will allow a party to periodically request supplementation. There is some precedent for this procedure. Rule 166b(6)(c) allows a party to request supplementation. However, there is little or no case law interpreting this provision, or defining what obligation the responding party has to respond to a request for supplementation.

This was thought to be preferable to the situation where little or no information is received with the initial discovery responses, and everything is delayed until 30 days before trial. It was also thought to be better than having no duty to supplement or an absolute and continuing duty to supplement, which, if violated, might lead to the exclusion of evidence. No one wants to supplement each time a new fact, or the identity of a new witness, or some similar matter, is discovered. This would be very expensive and time consuming. On the other hand, if a responding party waits three, four or five months in order to gather a meaningful amount of material before supplementing, the responding party might be

accused of not "reasonably" or "seasonably" supplementing discovery responses. Oftentimes, such an accusation might not even be made until the evidence is offered at trial. To avoid these problems (and the gamesmanship which arose as a result) we devised a system which imposes periodic but absolute duties to supplement. We will limit the right of a party to request supplementation so that, in most situations, it can be exercised only once every six months for all forms of discovery. In other words, a party cannot ask for supplementation of interrogatories in one week and requests for production the next week and requests for admissions in the third week. The requesting party has one chance every six months to ask for supplementation of any and all outstanding discovery requests. The responding party is then required to respond within 30 days, and the response must be complete, full and accurate -- just like the initial response. New objections may be made only if the document or information was not reasonably available (or in existence) at the time the previous response was made. As a practical matter, only objections based on privilege will be made in a supplemental response. A request which has already been responded to will not suddenly become vague or overbroad, etc.

In a case which is pending for only five months, the result would be that supplementation can be requested at least once (even though less than six months would have elapsed since the initial response). For example, assume discovery is served with the petition, and answers are served at the end of month one. Trial is set for the end of month five. Under the new rule, the responding party will have to completely and fully supplement as of the end of month four (30 days before trial). Between the end of month one and month four, the requesting party can make one request for discovery responses to be supplemented, and it is applicable to those discovery requests specified by the requesting party. If the case is continued, the requesting party cannot ask for another supplementation until six months after the previous request. In cases which remain on the docket for a year or two years or three years, the six month rule will allow parties to periodically compel complete and full responses. The new Supplementation Rule is probably the most complex rule change which we have approved. We also propose at this time that non-parties will not have a duty to supplement discovery and that parties will not have a duty to supplement depositions.

9. Exclusionary Rule. We have drafted a rule which provides for the automatic exclusion at trial of the testimony of fact witnesses and experts whose identities were requested, but not disclosed, and of documents or tangible things which were requested, but not produced. We have further created several narrow exceptions to the automatic exclusion rule (named parties, persons who have already been deposed). In addition, we have worked on a rule which will allow the trial court to create remedies which are not outcome determinative when the trial court finds that a party has withheld or delayed in disclosing material information or documents which the party was under a duty to disclose. There are three versions of this rule currently under consideration.

10. Vehicle Rules. We are now in the process of working on Rules 167, 167a, 168, 169 and the deposition rules. There are a variety of matters which are being considered with respect to these rules, including limitations on the number of requests, whether a two or three "track" system should be implemented (with discovery expanded or limited depending on the "track") and a non-substantive reworking of Rules 167-169, so that these three rules are similar in terms of structure and operation. We have also included a provision in Rule 167 which provides that if documents are not produced at the time the response is filed, the responding party is required to state a date by which the documents will be produced. This simply means that the responding party will have to produce the documents or state by what time the responding party can or will produce the documents. The responding party must then produce the documents within the time period stated in the response. If the requesting party disagrees with the amount of time necessary to produce the documents, the requesting party can file a motion to compel. This will reverse the current practice, where the requesting party is allowed to state in the request a reasonable time and place for production. Apparently, very few (if any) lawyers honor the requesting party's choice of time and place and, as a result, discovery is delayed.

We have moved the inspection of land provisions from Rule 167 to new Rule 167c and have moved the rule regarding requests for production to nonparties from Rule 167 to new Rule 167b. No one uses Rule 167 to obtain documents from nonparties because it is costly, time-consuming and because the same documents can be obtained by deposition on written questions. The rule regarding requests to nonparties has been changed to allow a party to subpoena records from a nonparty without the necessity of a motion and hearing or a deposition. However, the nonparty and all other parties will receive at least 10 days advance notice of what is being requested. If the nonparty or any other party objects, the obligation to produce is suspended and the requesting party may file a motion to compel. We thought it better to have court involvement as the exception, rather than the rule.

We are currently considering proposals regarding interrogatories and requests for admission. We will either eliminate "contention" interrogatories or restrict their use. We are also considering how best to deal with interrogatories which call for narrative answers ("State all facts which form the basis for your claim that the market value of the property was X."). With respect to requests for admission, we are also considering whether to make denials into substantive evidence.

We may make other minor changes to Rules 168 and 169, but I do not foresee any other major changes at this time.

11. Depositions, etc. Before our work is complete, we will also review the deposition rules (where few serious problems have been reported) and several other matters of form/procedure (verification issues, other discovery sanction-related matters, discovery agreements, etc.). We will probably define what is a "reasonable" time for purposes of deposition notices and we will consider making changes to the duces tecum rules.

Conclusion

Our primary concern has been to try, through the proposed rule changes, to make parties readily exchange discoverable matters (while protecting truly privileged matters) and to make parties focus on legitimate disputes and eliminate, or at least defer, costly and time consuming disputes over what should be non-issues. We want to craft rules which will, when applied, reduce the frequency of discovery hearings and promote the full, complete and timely exchange of relevant information without the necessity of court intervention (or even supervision). Trial courts should not (and do not want to) be forced to "micro-manage" the discovery process. The rules will not eliminate all disputes, but hopefully the disputes which do make their way to the courthouse will be legitimate disputes over important issues.