

AGENDA
JANUARY 21-22, 1994
SCAC MEETING

INDEX

1. Sanctions Task Force Report - Rule 166d (Jacks Version)
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Tommy Jacks
Vulition

1-21-94

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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, ^{limit, or deny} or ~~quash~~ 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 ^{limit} quash 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).

qualifying conduct

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stop describing

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[scribbles]

TASK FORCE
VERSION

No sanction for pre-motion motion

1-21-94

~~filed at least seven days before the hearing~~

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

~~substantial coverage to the case cause to access of a party to the court~~

make The court

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~~ *make* 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.~~

Take for

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.

Ordered

Making

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

Luther H. Soules III
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Via Telecopy (210) 224-7073

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
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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

