

SUMMARY OF DISCOVERY RULE CHANGES

(Amended September 13, 1995)

The Discovery Subcommittee, of the Court Rules Committee, of the State Bar of Texas has for the last three years been working on proposed rule changes, which would hopefully cut down on the costs of litigation, and reduce discovery disputes and satellite litigation resulting therefrom, without doing violence to our notions of what constitutes a just, fair and impartial trial.

One of the problems which was discussed initially, was the concept that the scope of discovery was too broad, because the scope of the pleading was too broad in the initial stages of the litigation. Some plaintiffs were not pleading a claim specific enough to allow the parties to narrowly focus on the issues involved in the case, but instead were filing broad general pleadings, and defendants were filing broad general responses. Thus, the scope of discovery was unlimited, and the time and expense was also unlimited. The Subcommittee, therefore, first considered rules to require parties to plead more specifically. The Court Rules Committee generally rejected this approach based on the argument that plaintiffs do not often know the extent of the lawsuit when it is initially filed, and broad discovery is needed. The Court Rules Committee also rejected a proposed rule change patterned after the Federal Rules, which would require the defendant to specifically admit or deny each allegation in the Petition.

The Court Rules Committee did however, agree that amending the pleading seven days before trial, and having exceptions heard just prior trial did cause delays in trials so, the Committee recommended a change to Rule 63 and Rule 90, requiring amended pleadings to be filed within 30 days prior to the trial date, and requiring exceptions to be heard at least 30 days prior to the trial date. It was believed by the Committee that 30 days was far better than seven days for last minute preparation needed as a result of new or different pleadings. In some instances, however, the nature of the claims or defenses are so dramatically changed just before trial that even 30 days may not be sufficient for the parties to prepare for the litigation based on new claims or defenses.

The Discovery Subcommittee then worked for some time on standard Interrogatories and standard Definitions based upon the concept that, if the rules provided for standard Interrogatories and standard Definitions, these would be non-objectional and hence, would eliminate hearings on objections to such Interrogatories and Definitions.

The Court Rules Committee however, finally decided that certain basic information needed to be disclosed by both sides early on in the litigation which disclosure would be initiated by the request of the lawyers, rather than automatically as in the Federal Rules. With the Request by the Supreme Court to draft some Interrogatories in response to Article 4590 i VATS, the Rules Committee then incorporated into disclosures upon written request provisions that would also apply in health care provider suits. It is believed by the Committee that the disclosures upon written request, together with standard definitions, will provide enough information to the parties that in many cases additional

discovery may not be necessary. In other cases, a minimal amount of discovery may be needed but in complex cases, a great amount of additional discovery will be needed.

It is, in the complex cases, that the Committee felt that a Court Intervention early in the litigation was necessary to head off discovery disputes that are both time consuming, and expense for the litigants.

Over a period of the last two years, the Committee has approved the following proposed rule changes, (some of the rules approved have already been sent to the Supreme Court) copies of which are attached, and which are discussed in more detail below.

1. Rule 63. **Amendments and Responsive Pleadings** which changes the seven day rule for pleading amendments to a 30 day rule.
2. Rule 90. **Waiver of Defects and Pleadings** provides for exceptions to be heard not less than 30 days before trial.
3. Rule 166f. **Pre-Trial and Motion Dockets**. This was to correct a situation where some many courts do not provide for pre-trial and motion dockets and hence, it is difficult to get pre-trial hearings.
4. Rule (unnumbered) **Purpose of Pre-Trial and Discovery Rules**. This rule attempts to describe the policy of pre-trial and discovery rules.
5. Rule 166g. **Standard Definitions**. This rule contains standard definitions for all written discovery, and eliminates the need for parties to draft their own definitions.
6. Rule 166d. **Disclosure Upon Written Request**. This rule provides for disclosure of certain information which is essentially non-objectionable.
7. Rule 166b. **Duty to Supplement**. This rule rearranges the old Rule 166b(6) and contains an additional provisions. For example, expert's testimony has to be supplemented if the opinions or supporting basis for the opinions change and all supplementation must be done 75 days prior to the trial date except in cases filed under the Texas Family Code where the time will be pursuant to court order. The rule also provides

for exclusion of evidence not properly supplemented and for additional discovery when supplemental responses are filed.

8. Rule 167. **Discovery and Production of Documents and Things for Inspection, Copying or Photographing.**

This rule contains a proposed change requiring parties to state that certain documents or things are being withheld. If all documents or things requested are not being produced, a party will sometimes respond to a request for production by general objections, and then a listing of documents subject to the objections. The opposite party cannot tell whether the objection is made out of an abundance of caution and all documents responsive to the request are being produced, or whether some documents are not being produced because of the objection. The party does not know whether to request a hearing on that objection. Thus, the requirement that a party be required to state if documents or things are being withheld.

9. Rule 200. **Depositions Upon Oral Examination.** This proposed rule contains a limitation of six hours for oral depositions. The rule also contains a paragraph on deposition conduct.

10. Rule 204. **Examination, Cross-Examination and Objections.**

The proposed changes to this rule deal with objections to testimony and together with the comment, contemplate that "objection as to form" is sufficient without further explanation unless the objecting party, upon request, is asked to explain the grounds for the objection in which event the explanation shall be in a non-argumentative, non-suggestive manner.

11. Rule 166. **Scheduling, Status Conference and Joint Pre-Trial Statements.** This contains new proposals for the Court in scheduling, conducting a status conference, and the filing of a Joint Pre-Trial statement.

12. Rule 169. **Request for Admissions.** This incorporates the deemed admissions portions of Rule 215 with slight grammatical modifications. The Court Rules Committee is of the opinion that this provision ought to properly be with Rule 169 rather than Rule 215.

CONCEPT

There has been much criticism directed at the expense of litigation consumed by discovery disputes. There have been comments to the effect that the system we now have is lawyer driven, and because the lawyers have caused the litigation costs to escalate to the point where the courthouse door is closed to some litigants, radical changes need to be made.

The Court Rules Committee agrees that changes need to be made however, the philosophy of the Court Rules Committee is that the system still needs to be largely lawyer driven, but with brakes put on what the lawyers can do. The concept also includes early participation in the case by the judge, so that each case can be designed by the judge and the lawyers to provide adequate, but not unnecessarily expensive, and burdensome discovery to fit the needs of that particular case. As to those cases which need no design, the lawyers can waive the requirements of unnecessary hearings with the Court.

HOW THE CONCEPT SHOULD WORK

Plaintiff files a suit containing broad and general allegations of liability and damages. Defendant would generally respond with a general denial. Parties would then, serve upon each other, a request for disclosures of information to be made in accordance with Rule 166d. These disclosures are essentially non-objectionable and should not be offensive to any case regardless of how complex, or how small the case is. It should provide to each party certain basic information that each side needs to know to evaluate the case at that point, and determine how much additional discovery needs to be done in order to get the case prepared for trial. If the initial pleading did not provide sufficient information to put the parties on fair notice of the claims and defenses, disclosures A 6 and A 7 should provide such information, eliminate the need for special exceptions, and should narrow the areas of discovery. Discovery should be directed to obtaining facts and other evidence that related to the claims and defenses articulated in the disclosure responses.

The disclosure on request rule allows the party forty-five (45) days to answer the disclosure on request unless the request is served with a citation in which event, the defendant gets forty-five (45) days from the day the citation requires an answer to the suit. The reason for these time periods is that it is the consensus of the Committee that a party needs forty-five (45) days to respond to the request for disclosures. Under the current practice of thirty (30) days to answer interrogatories, the parties are frequently asked for extensions of time because the schedule of the lawyers and the clients does

not permit interrogatories to be answered within thirty (30) days. The Committee was of the opinion that forty-five (45) days would provide a more realistic time for answers to be filed.

It is also contemplated by the Committee that some gamesmanship will be practiced in answering the disclosures just as in answering interrogatories and some parties will state they "do not have sufficient knowledge or information to be able to answer the disclosure at this time, but will supplement their answers later." These types of responses must be dealt with by the court at the status conference and the court should order the complete disclosures to be made. Ideally, the court should order full and complete answers to the requests for disclosures by a certain date failing which evidence would be barred regarding information not disclosed. The disclosures require the parties to "outline" their claims, defenses and some evidence early in the litigation so that additional discovery can be narrowly focused on the factual basis and legal theories for the claims and defenses.

If additional discovery needs to be done by oral depositions, Rule 200 would limit such depositions to six hours each, except by agreement or order of the court. It is believed that in most instances six hours should be adequate for an oral deposition. There will be cases however, such as document intensive cases, where a witness may need to be interrogated about hundreds of documents and transactions which cannot be done in six hours. In that event, if the parties cannot agree to extend the deposition, then Motions will have to be filed with the Court to obtain such an extension.

In many cases, the disclosures, and one or two depositions may suffice to prepare the case for trial. In more complex litigation, there will probably be additional requests for discovery in the form of Interrogatories, Request for Production of Documents and other oral depositions.

Within the first 120 days after the defendants have appeared in the case, Rule 166 will require a Scheduling Order to be entered by the Court. The Scheduling Order can be prepared by the lawyers if they can agree, and if not, by the Court. The Scheduling Order should provide for such things as deadlines for amending pleadings, hearing special exceptions and Motions, designating experts, taking of the experts' depositions, completion of discovery, the status conference and a trial date. All cases, regardless of how simple or how complex, must contain a Scheduling Order.

One of the expense problems in litigation is that lawyers have to prepare for trial more than once because the initial trial setting is rarely ever reached by the Court. It is hoped that the parties and/or the Court will try to set the case for trial at a time that is realistic enough to give the parties ample time for discovery, and realistic enough from the Court's standpoint so that the trial can be reached at the time set without having to

reset it, and without having to have the parties prepare more than once for the trial. Discovery and trial preparation is, in most cases, controlled by the trial setting. Most lawyers faced with a trial setting begin to prepare the case for trial and do the necessary discovery several months before the trial setting. However, it is not likely that if a trial setting is two years down the road that a lawyer's going to get real excited about discovery two years ahead of time. Thus, it is important to try to have trials set as soon as can reasonably be set by the Court, but the trial setting should be realistic.

After the parties are reasonably knowledgeable about the case, presumably through the disclosure or other discovery, or both, the parties are required to have a status conference pursuant to Rule 166, unless the parties waived the status conference. It is anticipated that in some cases, such as simple fender bender cases, suits on notes, or collection suits, and some domestic relations cases, that the status conference will not be necessary and the parties can waive the status conference. In those types of cases, the parties can also waive the filing of a Joint Pre-Trial Statement. However, in the more complex cases, the status conference is in the opinion of the Court Rules Committee, the most important conference in the case. By the time of the status conference the parties should have done some discovery, and probably have some idea about the discovery problems that will be encountered. The status conference is the time to bring up discovery problems. The litigants, together with the Court, should at that time design a discovery plan for the case which hopefully will eliminate further disputes, and further satellite litigation regarding discovery. Granted, the trial judge will have to devote some time to this status conference, but it is believed that time devoted at this stage of the litigation will save much more time later on in the elimination of other disputes, and satellite litigation.

Rule 166 gives the Court broad powers in the discovery plan, and it is believed after some experience with the application of the rule, that lawyers will, in many cases, be able to draft their own discovery plans and present them to the Court for approval.

By the time the status conference is held, the parties through the Disclosures Upon Request should have already articulated their specific claims and defenses, so that the parties and the Court can narrow the scope of the discovery as defined by the particular claims and defenses articulated in response to such disclosures. Such disclosures essentially take the place of pleadings, and should virtually eliminate the need for filing special exceptions. If adequate disclosures are not made, the trial court should order the disclosures made and should abate further proceedings until the disclosures are made so that a proper assessment of the case can be made and a discovery plan can be designed. The Court also has the power to limit discovery upon motion and hearing.

The concept of the Discovery Subcommittee of the Supreme Court Advisory Committee, (SCAC) has taken another approach to the problem. Its approach is to write

rules that severely restrict discovery, for example, discovery must be had within a 9 month window, 50 hours of discovery per side, etc. The Court Rules Committee rejected that concept and approach. The Court Rules Committee and its Discovery Subcommittee are of the opinion that if the Supreme Court writes rules that are unduly restrictive insofar as discovery is concerned, then lawyers in complex litigation will be forced to go to the Court to get relief from the rules as written. There may be many suits where the judges may refuse to deviate from the rules and hence, prevent full and adequate discovery from being performed in some cases. So long as we have judges who are elected and substantially supported by some lawyers, some lawyers may have the ability to prevent full and complete discovery in a case by encouraging the judge to "simply follow the rules." On the other hand, if such lawyers together with the judge, and opposing counsel design a discovery plan for the case, there is less likelihood that the judge would be as restrictive in the discovery plan, as he would be with Rules already written severely restricting discovery. Thus, in an appropriate case with discovery designed for that case, neither party would unreasonably be precluded from full discovery.

The Court Rules Committee is of the opinion that if after hearing, the Court limits a party in discovery, then the lawyer is at less risk than under the proposed plan by the Subcommittee of the SCAC. Under the SCAC Subcommittee proposal parties would be limited to 50 hours of discovery. If a lawyer did not properly utilize the 50 hours, or failed to take the deposition of a witness because he used the 50 hours on other witnesses, the lawyer may be subject to a malpractice claim.

In most cases under the current rules, the Court does hold a pre-trial conference prior to the trial of the case. Under the proposed Rule 166, there would be no pre-trial conference held, but only a pre-trial statement filed by the parties. Thus, the Court would not have to spend its time on a pre-trial conference, but could instead spend its time on the status conference, and try to design the case and enter orders regarding discovery which would head off discovery disputes and satellite litigation.

CONCLUSION

The Court Rules Committee is of the opinion that its suggested rule changes, will have the effect of:

1. Narrowing the scope of discovery if the parties in response to request for disclosures articulate the essential facts that form the basis of all claims and defenses, and the legal theories upon which the claims or defenses rest. If the parties, for some reason, fail to make full disclosures regarding claims and defenses, then the trial Court should, at the status conference, order such disclosures made and should abate the suit until such disclosures are made.

2. Reducing the amount of discovery needed in many cases after the required disclosures are made pursuant to request.

3. Scheduling events in the litigation depending on the type and complexity of the case with emphasis on a realistic trial date.

4. Designing the discovery aspect of the case and dealing with potential disputes early in the litigation. The Court should deal with such matters as the number of experts, a schedule for the designating and deposing of experts, inherent problems encountered in document intensive cases, attempting to identify the issues in the case so that discovery can be focused on those issues, and unnecessary time and expense eliminated in discovery which is more in the nature of a "fishing expedition" than an attempt to discover information relating to the issues in the case.

The Rules Committee is of the opinion that this approach will reduce discovery disputes and acrimony among lawyers, but will preserve the rights of parties to full and complete discovery.