

**STATE BAR OF TEXAS**

**COMMITTEE ON COURT RULES**

**REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE**

**TEXAS RULES OF CIVIL PROCEDURE**

- I. Existing Rule is present Rule 215.
- II. Proposed New Rule: Rule 215 has been rewritten in its entirety and is as follows:

**Rule Number 215. DISCOVERY VIOLATIONS, MOTIONS, ORDERS AND SANCTIONS.** If a person or entity violates any court order relating to discovery or any discovery rule or abuses the discovery process in seeking or resisting discovery, the provisions of this rule may be invoked. Evasive or incomplete disclosures, answers or responses are to be treated as a failure to disclose, answer or respond.

1. **PRE-TRIAL PROCEDURE.** Anyone seeking relief under this rule, prior to trial, must do so through the filing of a motion which states specifically the matters for which movant seeks relief under this rule, the relief sought, and why that relief is no more severe than necessary to remedy the violations or conduct complained of in the motion. The motion may be accompanied by affidavit(s) and must contain the certificate required by Rule 166b, 7. The motion shall be filed in the court in which the suit is pending, except that a non-party may file a motion in a court of competent jurisdiction in the county where the non-party resides. No order may be entered under this rule unless the motion and notice of hearing have been filed and served upon the respondent and, all other parties in the suit pursuant to Rules 21 and 21a and a hearing is had on the motion.

2. **HEARING, RELIEF, LIMITATIONS.**

A. At the hearing, the court shall render a decision based only on the allegation in the motion, the response, if any, the evidence received, and any written or oral argument of the participants and shall determine whether there has been any violation of the discovery rules or abuse of the discovery process.

(1) If the court finds a discovery violation which was substantially justified or warranted by a non-frivolous argument for the extension, modification or reversal of existing law or the establishment of new law, no sanctions shall be imposed on the person whose conduct necessitated the motion and the court shall enter an appropriate order which will remedy the discovery violation.

- (2) If, however, the court finds that any discovery violation was committed by a person without substantial justification; was not warranted by existing law or a non-frivolous argument for extension, modification or reversal of existing law or the establishment of new law; or that there has been an abuse of the discovery process; the discovery conduct is in bad faith, constitutes harassment, is frivolous or made for reason of delay or a discovery order has been violated, the court shall enter an appropriate order to remedy the discovery violation and may impose sanctions which shall be no more severe than necessary to address the violation and shall be imposed on the person or persons whose conduct necessitated the motion, including the party or attorney or both. The court should not impose sanctions which are so severe as to preclude presentation of the merits of the case unless the person whose conduct is at issue was in bad faith or has demonstrated a callous disregard for responsibility under the rules of discovery or has violated an order issued by the court pursuant to this rule.

3. **PRE-TRIAL SANCTIONS.** Sanctions available to the court under this rule include the following:

- A. Reprimanding the person publicly or privately;
- B. Assessing costs, expenses, attorney's fees, or any of them, incurred in connection with the motion and/or any discovery proceedings;
- C. Deeming certain facts or matters to be established for the purposes of the action;
- D. Striking pleadings or portions thereof;
- E. Dismissing with or without prejudice the action or any part thereof, or rendering a default judgment;
- F. Staying further proceeding until an order is obeyed;
- G. Disallowing further discovery in whole or in part;
- H. Precluding the litigation of certain issues, claims or defenses;
- I. Granting the movant a monetary award in addition to or in lieu of

costs, expenses and attorney's fees.

4. **TRIAL SANCTIONS.** The following trial sanctions may be imposed by the court upon motion or objection by a party.

- A. Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter requested under Rule 169 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may move the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall grant the motion unless it finds that the request was held objectionable pursuant to Rule 169(1), the admission sought was of no substantial importance, the party failing to admit had a reasonable ground to believe that he might prevail on the matter, or there was other good reason for the failure to admit.
  
- B. Barring introduction of evidence. A party who has failed to disclose or provide information or documents requested, failed to permit examination of a person or inspection of property, in violation of a court order or pursuant to a discovery request without having filed any objection to such request, or having objected to such request had such objection overruled, shall not be permitted to introduce any evidence which was not disclosed or made available to the party requesting same, such as:
  - (1) introduction of evidence of any non-disclosed facts or opinions;
  - (2) introduction of documents or other tangible things not provided for inspection and/or copying;
  - (3) calling as a witness any person not disclosed as a person with knowledge of relevant facts;
  - (4) calling as a witness any person not disclosed as an expert;
  - (5) introduction of evidence of the physical or mental condition of any person not submitted for examination;
  - (6) introduction of evidence relating to lands or other property where entry or inspection was not permitted;

provided, however, that such evidence may be allowed if the trial

court finds good cause for failing to comply with the discovery request. The burden of establishing good cause is on the party offering the evidence and good cause must be shown in the record. If the court determines the exclusion of evidence will work an injustice, the court may continue the trial, enter orders relating to the disclosure of the evidence in question and shall impose such appropriate sanctions so as to not prejudice the non-offending party, including but not limited to, compensating the non-offending party for any reasonable and necessary expense and attorney's fees in preparing for trial.

5. **ORDERS.** After the pre-trial motion hearing, the court shall sign an order which recites the findings and rulings of the court in connection with such motion. All orders which impose sanctions shall contain written findings specifying the conduct which, in the opinion of the court, warrants the sanctions imposed. The court order shall also specify the time for compliance and shall include findings of the ability of the person or persons, whose conduct necessitated the motion, of complying with an award for monetary sanctions.

6. **TIME FOR COMPLIANCE.** Orders entered pursuant to this Rule shall state a time for compliance and failure to timely comply with the court's order may subject the offending party to further sanctions. If the court finds that payment of a monetary award would preclude the sanctioned party from continued access to the court, the judge shall order that the monetary award be entered as a part of the trial court's final judgment. If the court finds otherwise, however, the court may order the monetary sanction paid within a reasonable time.

7. **FINDINGS OF FACT AND CONCLUSIONS OF LAW.** Upon written request by an attorney or party filed not later than ten (10) days after the signing of the pre-trial order of sanction, the court shall file findings of fact and conclusions of law not later than thirty (30) days after the signing of such order. If the court fails to file timely findings of fact and conclusions of law, the person making the request shall follow the procedure set forth in Rule 297. Notice of the filing of the request shall be served as provided by Rule 21a.

8. **APPELLATE REVIEW.** Any pre-trial order imposing a sanction shall be subject to review on appeal from final judgment except where,

- A. review by appeal is inadequate to cure the trial court's discovery error; or
- B. the order adversely affects a party's ability to present a viable claim or defense at trial; or

- C. the order disallowed discovery of evidence which, because of such disallowance, cannot be a part of the appellate record;

in which event, review of the order is by mandamus. Failure of a party to seek mandamus does not preclude review by appeal.

**III.** Brief statement of reasons for requested change and advantages to be served by the proposed new rule:

The purpose of this new rule is to codify in rule form the Supreme Court's rulings in Transamerica Natural Gas Corp. v. Powell, 811 S.W.2d 913 and Braden v. Downey, 811 S.W.2d 922 and their progeny and to decrease the satellite litigation occasioned by attorneys seeking to recover sanctions for every infraction of the discovery rules. The concept of the proposed rule is that if there is a good faith dispute over discovery requested the Court hears the dispute, and either grants the objections or overrules the objections and orders discovery but without any sanctions being imposed. Sanctions are only imposed in the special circumstances set out in the rule and the court is given guidance as to sanctions that can be imposed.