

LEGAL MOJO

The Use of Motions to Compel in Discovery Disputes

By Roxie Williams Cluck

Gathering discovery is essential to winning at settlement or at trial.¹ Sometimes you have exhausted your discovery dispute-resolution arsenal, and you just have to pull out the big gun.

Motions to compel are frequently used to settle discovery disputes

- a. when a responding party fails or refuses to turn over requested information or documentation,
- b. when responses are inadequate,
- c. when numerous inappropriate objections or claims of privilege are believed to be unfounded, and
- d. as a tool to preserve error on an opposing party's failure to properly respond to discovery.

Rule 215

Rule 215 of the Texas Rules of Civil Procedure ("TRCP") is the controlling authority and provides the procedure for compelling discovery and seeking sanctions.

In matters of discovery disputes or abuses, a party, upon reasonable notice to the other parties and all other persons affected thereby, may apply for an order compelling discovery or for sanctions.

Except with respect to depositions, a Rule 215 motion or application must be filed in and heard by the court in which the action is pending.

Motions to compel are evidentiary hearings. The party making the objection or asserting the privilege must present evidence necessary to support the objection or privilege, including testimony presented at the hearing or affidavits served at least seven days before the hearing or at such other reasonable time as the court permits.

Compelling Discovery

The conditions under which relief can be requested are set forth in the rule, which include failure to answer and/or respond to discovery requests, failure to designate, failure to appear or cooperate in deposition. For purposes of the rule, an evasive or incomplete answer is to be treated as a failure to answer.

If the motion to compel is granted, the court can order the party whose conduct necessitated the motion and/or the attorney to pay the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that the circumstances make an award of expenses unjust.

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If the motion is denied, the court may require the moving party or attorney advising such motion to pay the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

Note that attorney's fee awards are relatively uncommon in the absence of egregious circumstances; however, the TRCP encourages the award of costs and fees.

If the court denies the motion in whole or in part, it may make a protective order such as it would have been empowered to make on a motion pursuant to TRCP Rule 192.6.

Seeking Sanctions

Rule 215 gives broad grants of authority to trial courts to impose a myriad of discovery sanctions, including but not limited to the following:

- a. disallowing any further discovery;
- b. charging expenses of discovery or taxable court costs against the disobedient party or the attorney advising him;
- c. ordering that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
- d. entering an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
- e. striking pleadings or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action, or rendering a judgment by default; and
- f. requiring the party failing to obey the order or the attorney advising him, or both, to pay the reasonable expenses, including attorney fees, caused by the failure.

Rule 215 also provides for sanctions against non-parties which can include contempt of court.²

Caveat: Case law materially limits the trial court's authority to order severe sanctions. Despite the broad language of Rule 215, the Texas Supreme Court has placed stringent limitations upon "death penalty sanctions."³ The definition of death penalty sanction is broad and includes "exclusion of essential evidence, striking pleadings, dismissal, and default."⁴ The Texas Supreme Court has held, "Sanctions which are so severe as to preclude presentation of the merits of the case should not be assessed absent a party's flagrant bad faith or counsel's callous disregard for the responsibilities of discovery under the rules."⁵

Certificate of Conference

In the event you decide to pursue a motion to compel, with or without a request for sanctions, it is imperative that you include a certificate of conference. Parties and their attorneys are expected to cooperate in discovery and to make any agreements reasonably necessary for the efficient disposition of the case. "All discovery motions or requests for hearings relating to discovery must contain a certificate by the party filing the motion or request that a reasonable effort has been made to resolve the dispute without the necessity of court intervention and the effort failed."⁶

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The fundamental purpose of the certificate of conference “is to ensure that parties cooperate . . . and make reasonable efforts to resolve . . . disputes without the necessity of court intervention.”⁷ The best practice may be to make the certificate meaningful by describing in some detail the attempts made to resolve the disputes.

In conclusion, the motion to compel can be a helpful tool for uncovering facts and litigating effectively for your clients.

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¹ This article stems from a previous publication. See Roxie W. Cluck, “You Keep Me Hangin’ On: Compelling Discovery,” State Bar of Texas 46th Annual Advanced Family Law Course (Aug. 3-6, 2020), Ch. 64 (2020) (available at <https://www.texasbarcle.com/CLE/HOME.ASP> (paywall)) (last visited May 25, 2021).

² See Tex. R. Civ. P. 215.2.

³ *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 920 (Tex. 1991) (Gonzalez, J., concurring).

⁴ *Braden v. Downey*, 811 S.W.2d 922, 929 (Tex. 1991).

⁵ *TransAmerican* at 918.

⁶ Tex. R. Civ. P. 191.2.

⁷ *Union Carbide Corp. v. Martin*, 349 S.W.3d 137, 146 (Tex. App. -- Dallas 2011).