

DISCOVERY TACTICS: THE GOOD, THE BAD AND THE OUTRAGEOUS

ABUSIVE DISCOVERY – MOTIONS AND SANCTIONS

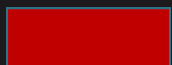


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Overview of Motions and Sanctions



Motions to Compel Discovery



Protective Orders



ABUSIVE DISCOVERY – MOTIONS AND SANCTIONS

Compelling Discovery

Pennsylvania Rule of Civil Procedure 4019 Sanctions

- Motions to Compel Discovery
- Pre-Trial Sanctions
- Sanctions at Time of Trial



ABUSIVE DISCOVERY – MOTIONS AND SANCTIONS

Compelling Discovery

The big picture

- Discovery served
- “Good Faith” efforts do not resolve problem
- Motion to Compel filed
- Trial Court orders production
- Order disobeyed
- Motion for Sanctions filed
- Sanctions Imposed



ABUSIVE DISCOVERY – MOTIONS AND SANCTIONS

Compelling Discovery

Pennsylvania Rule of Civil Procedure 239.3(c) “Good Faith” Prerequisite to Filing a Motion to Compel Discovery

“A court may require any motion relating to discovery to include a certification signed by counsel... certifying that counsel has conferred or attempted to confer with all interested parties in order to resolve the matter without court action.”

Any such requirement will be Local Rule 208.2(e)



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Compelling Discovery

Local Rule 208.2(e) – “Good Faith” Requirements

Philadelphia

- Certification Form
- List contacts made/attempted with opposition

Bucks

- “Specifically allege” the good faith efforts
- Attach “copies of any and all writings...which evidence such efforts”

Dauphin

- No particular format
- Moving party shall certify that efforts were made to resolve dispute, and identify parties who have not concurred with motion.



ABUSIVE DISCOVERY – MOTIONS AND SANCTIONS

Compelling Discovery

Complying with “Good Faith” Requirements

General Issues for Consideration

- Relationship with opposing counsel
- Likelihood of Obtaining Compliance
- Intentional vs. Oversight
- Deadline vs. Open-Ended
- Calls vs. Written Communications

“Did you pick up the telephone and try to call?” - A Judge



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Compelling Discovery

Complying with “Good Faith” Requirements

Written Communications Tips

- Assume the writing will later be read by a Judge
- Exclusively discuss discovery issue
- Recite prior history:
 - Efforts to resolve issue (especially verbal ones)
 - Of discovery problems in case if repeat offender
- Clarity in deadlines
 - “within 15 days of receipt” vs. “August 31”
- Send multiple ways if problems are expected
- Send another copy of discovery to *pro se* parties



ABUSIVE DISCOVERY – MOTIONS AND SANCTIONS

Compelling Discovery

Preparing a Motion to Compel Discovery

- Recite history of good faith efforts
- Attach:
 - Good Faith communications
 - Outstanding discovery
- Explain the need for discovery
- Proposed Order – How much time?

Failure to file objections within 30 days of service of discovery does not result in automatic waiver of objections.

McGovern v. Hospital Service Assoc. of Northeastern PA, 785 A.2d 1012, 2001 Pa. Super. 304 (2001).



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Seeking Discovery Sanctions

Issues for Consideration

- No “good faith” requirement ... but Judge may appreciate another letter
- Can send a “reminder” letter prior to deadline ... avoiding further delays
- Pro se litigants:
 - Consider re-sending discovery
 - Do you discuss nature of sanctions?



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Seeking Discovery Sanctions

Pennsylvania Rule of Civil Procedure Number 4019(c) Types of Sanctions

Court can order:

- Fact taken to be established
- Refusing to allow claims/defenses
- Exclusion of evidence
- Striking of pleadings
- Stay of proceedings
- Punishment for contempt
- "such order with regard to the failure to make discovery as is just"



ABUSIVE DISCOVERY – MOTIONS AND SANCTIONS

Seeking Discovery Sanctions

Trial Court's Considerations

- (1) the nature and severity of the discovery violation;
- (2) the defaulting party's willfulness or bad faith;
- (3) prejudice to the opposing party; and
- (4) the ability to cure the prejudice.

Stewart v. Rossi, 452 Pa. Super. 120, 681 A.2d 214 (1996)



ABUSIVE DISCOVERY – MOTIONS AND SANCTIONS

Types of Discovery Sanctions

Pennsylvania Rule of Civil Procedure Number 4019(c) Facts taken to be established

The court, when acting under subdivision (a) of this rule, may make
(1) an order that the matters regarding which the questions were asked,
or the character or description of the thing or land,
or the contents of the paper, or any other designated fact
shall be taken to be established for the purposes of the action in accordance with
the claim of the party obtaining the order;



ABUSIVE DISCOVERY – MOTIONS AND SANCTIONS

Types of Discovery Sanctions

Pennsylvania Rule of Civil Procedure Number 4019(c) Preclusion of Evidence / Testimony

The court, when acting under subdivision (a) of this rule, may make...
(2) an order refusing to allow the disobedient party to support or oppose
designated claims or defenses, or prohibiting such party from introducing in
evidence designated documents, things or testimony, or from introducing
evidence of physical or mental condition;



ABUSIVE DISCOVERY – MOTIONS AND SANCTIONS

Types of Discovery Sanctions

Pennsylvania Rule of Civil Procedure Number 4019(c) Striking Pleadings / Staying Proceedings / Judgment

The court, when acting under subdivision (a) of this rule, may make...

(3) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or entering a judgment of non pros or by default against the disobedient party or party advising the disobedience;

Severe sanction, but appropriate for egregious discovery violations.

See Luszczyński v. Bradley, 729 A.2d 83 (Pa. Super. 1999), upholding six-figure default judgment in bad faith claim.



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Types of Discovery Sanctions

Pennsylvania Rule of Civil Procedure Number 4019(c) Punishment for Contempt

The court, when acting under subdivision (a) of this rule, may make...

(4) An order imposing punishment for contempt, except that a party may not be punished for contempt for a refusal to submit to a physical or mental examination under Rule 4010;



ABUSIVE DISCOVERY – MOTIONS AND SANCTIONS

Types of Discovery Sanctions

Pennsylvania Rule of Civil Procedure Number 4019(c) The “Catch All”

The court, when acting under subdivision (a) of this rule, may make...
(5) Such order with regard to the failure to make discovery as is just.



ABUSIVE DISCOVERY – MOTIONS AND SANCTIONS

Types of Discovery Sanctions

Pennsylvania Rule of Civil Procedure Number 4019 Monetary Sanctions

Authorized under several sub-sections of the rule, including:

- Pa. R.C.P. No. 4019(d) – costs taxed for proving requests for admissions
- Pa. R.C.P. No. 4019(e) & (f) – attendance issues regarding depositions
- Pa. R.C.P. No. 4019(g)
 - (1) – Disobeying prior order regarding discovery
 - (2) – If motion denied, moving party to pay costs/fees
 - (3) – If partially granted/denied, court to apportion as is just
- Pa. R.C.P. No. 4019(h) – Court can impose costs if motion filed in bad faith



ABUSIVE DISCOVERY – MOTIONS AND SANCTIONS

Contempt Process / Bench Warrants

Pennsylvania Rule of Civil Procedure Number 4019(c)(4) Contempt Procedure

- Rule to Show Cause re: Contempt
- Hearing
- Finding of Contempt
- Opportunity to Purge / Punishment
 - Daily Fine
 - Bench Warrant



ABUSIVE DISCOVERY – MOTIONS AND SANCTIONS

Contempt Process / Bench Warrants

Obtaining a Bench Warrant

Practical tips:

- Ensure “good faith” well-documented
- FOIA requests to confirm addresses
- Aim for broad enforcement
 - “any sheriff, constable, or law enforcement official”
- Get warrant into databases (JNET / NCIC)



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Contempt Process / Bench Warrants

Representing a Client Detained Upon a Bench Warrant

Practical tips:

- Most Judges don't want to put people in Jail
 - Immediate hearings common
 - Taxpayer \$\$\$
 - Hard to produce documents from a jail cell
- If in different county, transfers may take time.
- Contact opposing counsel re: discovery issue / negotiate
- Bond?



ABUSIVE DISCOVERY – MOTIONS AND SANCTIONS

Appeals of Discovery Orders

Can the Order Be Appealed Now?

Pennsylvania Rule of Appellate Procedure Number 313

Pa.R.A.P. No. 313(a) – “an appeal may be taken as of right from a collateral order of an administrative agency or lower court...”

Pa.R.A.P. No. 313(b) – collateral orders are separable from and collateral to the main cause of action where:

- the right involved is too important to be denied review and
- the question presented is such that if review is postponed until final judgment, the claim will irreparably be lost.



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Appeals of Discovery Orders

Pennsylvania Rule of Appellate Procedure Number 313(b)

- **Non-final discovery order presenting “colorable claim” of attorney-client privilege is appealable.** *St. Luke’s Hosp. of Bethlehem v. Vivian*, 99 A.3d 534, 2014 Pa. Super. 171 (2014)
- **If Court has ordered production of documents over which privilege is asserted, such Order is immediately appealable.** *Yocabet v. UPMC Prebyterian*, 2015 WL 3533851, ___ A.3d ___ (Pa. Super. 2015)
- **Entry of default judgment issued as sanction for discovery violation not a final, appealable order.** *Angelichio v. Myers*, 110 A.3d 1046, 2015 Pa. Super. 37 (2015).



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PANEL CONTRIBUTIONS AND PRACTICE TIPS

