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The Rules of Civil Procedure: 1981 Changes in Pre-Trial Discovery 1981 Rules of Civil Procedure: Content and Comments.

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THE RULES OF CIVIL PROCEDURE: 1981 CHANGES IN PRE-TRIAL DISCOVERY

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I. Scope of Article

This article is not intended to be an exhaustive analysis of each of the Rules of Civil Procedure discussed. Rather it attempts to point out changes made in those rules by the Supreme Court of Texas, effective January 1, 1981. When the provision is new, that is stated. When appropriate, the provisions of the new and old rule are compared. Provisions of the old rule that are carried forward without change have been discussed only when considered pertinent to the change being examined. Little notice is given case law in this article, except when considered important to an understanding of the change or conditions necessitating the change, or when the change implies the approval of some cases.

Not all of the amended rules pertaining to trial court procedures have been discussed. For example, important rule changes dealing with service of citation[1] and a new rule governing the recusal or disqualification of trial judges[2] are not covered. The rules discussed are those having a direct relationship to conducting pretrial discovery.[3]

II. Changes in Pre-Trial Rules

A. *Miscellaneous Rule Changes Related to Pre-Trial Procedures*

1. *Rule 12 — Attorney to Show Authority.*[4] Under the previous rule, only the defendant was given the right to require the attorney

1. Tex. R. Civ. P. 103, 106, 107; *see* Pope & McConnico, *Practicing Law With the 1981 Texas Rules*, 32 Baylor L. Rev. 457, 484-87 (1980) (discussing amended rules 103, 106).

2. Tex. R. Civ. P. 18a; *see* Sparks, *Judicial Recusal: Rule 18a — Substance or Procedure*, 12 St. Mary's L.J. 723 (1981).

3. The texts of the rules discussed in this article appear in the Appendices hereto. *See generally* Tex. R. Civ. P., *reprinted in* 599 S.W.2d, *Court Rules*, at XXXIII (Tex. ed. 1980) *and* 43 Tex. B.J., *Rules of Civil Procedure - New Amendments*, at 767 (1980).

4. *See* Appendix I at 655.

filing suit to show what authority that attorney had to act.[5] The challenge had to be made by sworn motion; a plea in abatement was not sufficient.[6] The new rule grants the right to contest authority to any party in the suit or proceeding pending in a court. Thus a plaintiff may now challenge an attorney's right to defend a suit, and a defendant may challenge another defense attorney's authority. The notice requirement, burden of proof, and rules for determining authority are unchanged. The motion must be heard and determined before the parties have announced ready for trial and may not be urged for the first time on appeal.[7]

2. *Rule 21 — Motions and Rule 21a Notice.*[8] New rule 21 is not merely an amended version of the old rule; rather, it is considerably broader in scope. The old rule did not define the term "motion," but merely directed the clerk to enter motions upon the docket with a brief statement reflecting basic information. The new rule defines a motion as "[a]n application to the court for an order, whether in the form of a motion, plea or other form of request."[9] A motion, then, is a generic term and would include a plea in abatement and a plea to the jurisdiction, common procedural devices not mentioned in the rules. A motion must set forth the relief or order sought and the supporting grounds. Unless made

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5. TEX. R. CIV. P. 12 (1978) ("any defendant . . . may . . . cause such attorney to . . . show his authority"); *see* Angelina County v. McFarland, 374 S.W.2d 417, 422-23 (Tex. 1964) (theory behind rule; party sued entitled to know suit authorized); Tire Distribs., Inc. v. General Tire & Rubber Co., 551 S.W.2d 125, 126 (Tex. Civ. App.—Beaumont 1977, no writ) (noting absence of precedent allowing plaintiff to challenge authority).

6. Fulcher v. Texas State Bd. of Pub. Accountancy, 571 S.W.2d 366, 371 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.); Cook v. City of Booker, 167 S.W.2d 232, 234 (Tex. Civ. App.—Amarillo 1942, no writ). As to the propriety of objection by plea in abatement, a distinction was previously made between a challenge to the authority of an attorney and a challenge to the capacity of a party to bring suit. *Compare* Fulcher v. Texas State Bd. of Pub. Accountancy, 571 S.W.2d 366, 371 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) (challenge to authority of attorney to act by sworn motion) *with* Allen v. Wilkerson, 396 S.W.2d 493, 497 (Tex. Civ. App.—Austin 1965, writ ref'd n.r.e.) (challenge to capacity of party to sue by plea in abatement) *and* TEX. R. CIV. P. 93(c) (challenge to capacity on verified plea). *But see* TEX. R. CIV. P. 71 (misnomer of pleading). In light of the broad definition of "motion" under rule 21 of the new rules, the procedure for both now appears essentially the same, i.e., by sworn "motion." *Compare* TEX. R. CIV. P. 12 *and* TEX. R. CIV. P. 21 (as amended) *with* TEX. R. CIV. P. 93(c).

7. Victory v. State, 138 Tex. 285, 295, 158 S.W.2d 760, 766 (1942); Valley Int'l Properties, Inc. v. Brownsville Sav. & Loan Ass'n, 581 S.W.2d 222, 226 (Tex. Civ. App.—Corpus Christi 1979, no writ).

8. *See* Appendix I at 655.

9. TEX. R. CIV. P. 21.

during a hearing or trial, a motion shall be made in writing and shall be served on the adverse party at least three days prior to the hearing date. Rule 21a has been amended to delete the next to last sentence of the old rule, which provided that for required notices not otherwise specifically provided for by the rules, "the adverse party is entitled to three days notice of a motion."[10] Rule 21 now applies the three-day notice requirement to all "motions." The trial court may, in its discretion, shorten the notice requirement, presumably if good cause is shown and the notice is fair under the circumstances.

3. *Rule 57 — Signing of Pleadings.*[11] Rule 57 has been amended to add the requirement that an attorney signing the pleadings list his or her State Bar of Texas identification number and telephone number, in addition to his address. A telephone number and address is also required of an unrepresented party signing his or her own pleading. This amendment drew no opposition when proposed, but has subsequently drawn a lot of fire. Unless some reason for the identification number requirement surfaces, it will probably be reexamined.

4. *Rule 70 — Pleading: Surprise: Cost.*[12] Rule 70 has been completely rewritten to enlarge the sanctions available to the trial court when a party files a supplemental or amended pleading that, because of its lateness, causes surprise to the adverse party. Under the old rule, the trial court could impose "the cost of the term upon, and charg[e] the continuance of the cause (both or either) to the party causing the surprise" if a continuance were necessitated by the late pleading.[13] Since no one knew the meaning of the archaic phrase "the cost of the term" and no real sanction was imposed by "charging the continuance of the cause" to the party at fault, there existed no effective penalty for filing amended or supplemental pleadings on the date of trial or within the seven days required by rule 63.

The new rule gives the trial judge considerable latitude in dealing with "surprise" pleadings.[14] If the late filing causes a continu-

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10. TEX. R. CIV. P. 21a (1978).

11. *See* Appendix I at 657.

12. *See* Appendix I at 657.

13. TEX. R. CIV. P. 70 (1978).

14. The necessity of claiming "surprise" is discussed in the recent decision of *Hardin v. Hardin*, 597 S.W.2d 347 (Tex. 1980). A party need not affirmatively plead "surprise" in an

ance to be granted because "the other party satisfactorily shows that he is not ready for trial because of the allowance of the filing" of the late pleading, the trial court, in its discretion, may require the late pleader to pay to the surprised party reasonable costs and expenses, including attorneys' fees, resulting from the continuance.[15] The trial court also may make such other order "as may be just." Rule 70, as amended, does not alter the existing rules and precedents regarding when amended pleadings should or should not be allowed,[16] and does not affect trial amendments.[17]

5. *Rule 73 — Failure to Furnish Copy of Pleadings to Adverse Party.*[18] Sometimes a party will file a pleading, usually an amended pleading, and not furnish any or all of the adverse parties with a copy, as required under rule 72. Often the failure is not discovered until the case has been called for trial, with the result being that the case must be passed or continued. The inconvenience to the parties and attorneys, along with the waste of the trial court's time, is cumulatively enormous. Under old rule 73 the only recourse of the trial court was to order the clerk to furnish a certified copy of the pleading to the parties not receiving it and charge the "costs thereof" to the party failing to furnish copies. This procedure did not provide a sanction commensurate with the harm done.[19]

The new rule provides that the trial court, in its discretion, may impose more severe penalties for failure to serve copies on other parties to the proceeding. The court may: (1) order all or any part of such pleading stricken; (2) direct that such party shall not be permitted to present grounds for relief or defense contained in the

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objection to the late filing of a trial amendment. *Id.* at 349; *accord,* TEX. R. CIV. P. 63 ("leave [to file amendment] shall be granted unless there is a showing . . . [such] will operate as a surprise"); TEX. R. CIV. P. 70 (objecting party "shall make a satisfactory showing").

15. TEX. R. CIV. P. 70.

16. *See, e.g.,* Bruce v. McAdoo, 531 S.W.2d 354, 356 (Tex. Civ. App.—El Paso 1975, no writ) (refusal to consider amended pleading filed day of summary judgment hearing not error); McHone v. McHone, 449 S.W.2d 488, 490 (Tex. Civ. App.—Waco 1969, writ dism'd) (refusal to allow amendment filed on day of trial not error); Miller v. Wagoner, 356 S.W.2d 363, 367 (Tex. Civ. App.—Austin 1962, no writ) (failure of "unsuccessfully" objecting party to move for continuance waives error). *See generally* 2 R. MCDONALD, TEXAS CIVIL PRACTICE § 8.06 (rev. 1970) (amended pleadings).

17. *See* TEX. R. CIV. P. 66 (unchanged).

18. *See* Appendix I at 657.

19. *See* 2 R. MCDONALD, TEXAS CIVIL PRACTICE § 5.21, at 67 (rev. 1970) (advocating propriety of striking pleading under certain circumstances).

unserved pleading; (3) require the non-complying party to pay the reasonable costs and expenses incurred as a result of the failure, including attorneys' fees; or (4) make such other order as may be just. Since review of the trial court's action would focus on abuse of discretion, a lawyer's failure to comply with the rule requiring service is now very risky.

In the future, attention also should be given to amending rule 72. At present the rule provides that copies be furnished adverse counsel. If, however, there are more than four adverse parties, individual mailing or delivery is not required; rather, only four copies need be deposited with the clerk. This provision, in light of modern day copying methods, is archaic.[20]

6. *Rule 90 — Waiver of Defects in Pleading.*[21] It is well-settled that defects of form or substance in pleadings cannot be attacked by a losing party to a lawsuit after the lawsuit is over.[22] Those deficiencies are properly raised at a time when the pleadings operate to fulfill their intended functions; to give fair notice to the adverse party of one's contentions and to frame the issues to be determined upon trial.[23]

The new rule makes only two changes. First, it eliminates the language of the old rule permitting defects in the pleadings to be attacked by "motion." Under the new rule, the exclusive method of attack is by written exception. In a jury case these exceptions must be brought to the attention of the trial judge before the jury is

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20. *Compare* TEX. R. CIV. P. 72 (unchanged) (maximum of four copies to be delivered to adverse counsel) *with* TEX. R. CIV. P. 168(5) (as amended) (service of interrogatories and answers required on all parties). The rationale favoring delivery of all copies of pleadings to all parties, as presented in support for such requirement under rule 168(5), can be advanced in support of a like amendment to rule 72. See the discussion concerning service of interrogatories on all parties under new rule 168(5), at 646-47, *infra.*

21. *See* Appendix I at 658.

22. Sherman v. Provident Am. Ins. Co., 421 S.W.2d 652, 655 (Tex. 1967); *see* Westchester Fire Ins. Co. v. Alvarez, 576 S.W.2d 771, 773 (Tex. 1978) (waiver doctrine applied to summary judgment pleadings); Neuhaus v. Kain, 557 S.W.2d 125, 133 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.) (waiver doctrine applied to pleading of legal conclusions) *Cf.* Stoner v. Thompson, 578 S.W.2d 679, 683 (Tex. 1979) (general rule of waiver applied to setting aside default judgment). The absence of pleadings that give fair notice, however, is not waived. *Id.* at 683 (citing *Edwards Feed Mill v. Johnson*, 158 Tex. 313, 317, 311 S.W.2d 232, 234 (1958)).

23. *See* Stoner v. Thompson, 578 S.W.2d 679, 683 (Tex. 1979) ("fair notice" requirement); Texas Osage Co-op. Royalty Pool v. Kemper, 170 S.W.2d 849, 852 (Tex. Civ. App.—Galveston 1943, writ ref'd) (legislative intent in simplification of trial procedure).

charged. Secondly, the rule now provides that in a non-jury case these exceptions must be brought to the attention of the trial judge before "the judgment is signed." Under the old rule, this had to be done before "the rendition of judgment," which could be when the judgment was orally pronounced from the bench.[24] Thus, in a non-jury trial exceptions to the pleadings can be heard after the case is tried.

The reason for the latter change is not clear. Perhaps it would be appropriate in a default judgment, but it is of dubious value after a full non-jury trial. The new procedure will likely cause a flood of exceptions from a losing party between the rendition of judgment from the bench and the subsequent submission of the judgment for signing by the trial judge. This rule change, however, should not prevent application of the rule of trial by consent as provided by rule 67, nor should it prevent the allowance of rule 66 trial amendments under present practice.

7. *Rule 166-A — Summary Judgment.*[25] Only three minor changes were made to this rule, all contained in paragraph (c). First, when leave of court is sought to shorten the requirement that the motion for summary judgment be filed and served on the adverse party at least twenty-one days before the time specified for the hearing, notice of the leave sought must be given to opposing counsel. The provision of rule 21a that notice not elsewhere prescribed shall be given three days in advance of the hearing has been repealed by new rule 21, however, and no specific notice is mandated in the amendment to rule 166-A. The broad definition of motion in the new rule 21 should apply in this instance, and that rule requires three days' notice.

Second, a motion for summary judgment, and any responses, must not only be *served* on the adverse party within the time limits prescribed in the rule, but must also be *filed* with the clerk of the court within those time limits. The act of filing the motions and responses was undoubtedly contemplated by the old rule, but the amendment makes the requirement clear.[26]

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24. *See* Knox v. Long, 152 Tex. 291, 296-97, 257 S.W.2d 289, 292 (1953) (rendition of judgment).

25. *See* Appendix I at 658.

26. *See* Clevenger v. Liberty Mut. Ins. Co., 396 S.W.2d 174, 183 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.) (timeliness of filing); 4 R. McDONALD, TEXAS CIVIL PRACTICE § 17.26(4) (rev. 1971) (summary judgment procedure; motion; time).

Third, under the old rule a motion for summary judgment had to be served on the adverse party, but it was not necessary that supporting affidavits be served with the motion. Rule 166-A now provides that both "the motion and any supporting affidavits shall be filed and served." This amendment is explicit and should clarify the intention of the rule, if indeed there was any doubt.

B. *Pre-Trial Discovery*

1. *General.* Substantial changes have been made in rules 167, relating to the production of documents, and 168, governing interrogatories to parties. Moreover, these rules have been completely rewritten with numbered and titled sub-paragraphs for better organization and easier readability. These new rules focus on the procedures of discovery, omitting the scope of discovery allowed. Both, however, specifically refer to rule 186a for the scope of permissible discovery; rule 186a, therefore, must be read in conjunction with rules 167 and 168 to determine what evidence is discoverable and what is not.

Rule 186a, Scope of Examination, has not been changed. Under this rule, any witness or party may be examined "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action."[27] The remainder of the rule sets forth certain inclusions and exclusions concerning discoverable evidence. Rule 186b, providing for protective orders against harassment and threatened violation of the privilege or work product exclusions, is also unchanged. Rule 201, relating to compelling appearance of any person to take his deposition, has been reorganized with some substantive changes.

2. *Rule 167 — Discovery and Production of Documents and Things for Inspection, Copying or Photographing.*[28]

a. *Procedure.* The new rule eliminates the necessity of filing a motion with the court to require the production of documents and other items sought to be examined or copied. The prior procedure was cumbersome and time-consuming for lawyers and trial courts and was unnecessary ninety percent of the time. Under the amended rule any party may serve a *request* on any other party to

27. TEX. R. CIV. P. 186b.
28. *See* Appendix II at 660.

produce these items. The request cannot be served on another party until that party has filed a pleading or the time for filing a pleading has elapsed. The request must specify a reasonable time, place, and manner for production/examination and must be filed with the clerk contemporaneously with service in accordance with rule 21. All parties to the action must be provided copies. New rule 167 is expressly made subject to rule 186a, relating to scope of discovery, and rule 186b, providing for protective orders. Generally, the rule is based upon the procedures of rule 34(b) of the Federal Rules of Civil Procedure.[29]

The party upon whom a request is served must respond within thirty days unless the time period is shortened or lengthened by the court upon a showing of good cause. The response must state with respect to each item or category of items that inspection or other requested action will be permitted or must state objections to the request. The rule requires that the respondent "shall thereafter comply with the request, except only to the extent that he makes objections in writing to particular items, or categories of items, stating specific reasons why such discovery should not be allowed."[30] As in the case of the request, all parties must be provided with a copy of the response. Although the rule fails to specify that the response shall be filed with the clerk as well as served on the other parties, it is apparent from the purposes and procedures of the rule that a response must be filed in the same manner

29. *See generally* FED. R. CIV. P. 34(b). Rule 34(b) provides:

> The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.
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> The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objections shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Id.

30. TEX. R. CIV. P. 167(1)(d).

as a request. If objections are made to a request, either party may move for a hearing for the court to resolve the dispute.

Rule 167 has a new provision designed to discourage patently improper requests and responses:

> If the court finds that a request is not within the scope of this rule or is unreasonably frivolous or a harassment or that a response is unreasonably frivolous or made for purpose of delay, then the court may tax the costs of the hearing, including a reasonable attorney's fee against the offending party.[31]

Although a literal reading of this provision would permit sanctions if the requester merely sought an item "not within the scope of th[e] rule," a more sensible interpretation would require the provision to be read in conjunction with the accompanying language — that the request was frivolous, harassing, or unreasonable. The mere fact that an objection was sustained, without a finding that the request was obviously improper or that it took on some quality of harassment, should not, under the intent of the rule, justify imposition of sanctions.

b. *Items Subject to Discovery.* The new rule makes several additions to the items subject to discovery. The term "letters" is deleted, but "writings, drawings, graphs, [and] charts" are added. Letters would still be included under "writings" but the term writings is broader, encompassing such items as notes, memoranda, and circulars. Another addition to the list of discoverable items is designed to cover information contained in computer storage and data processing equipment: "recordings and other data compilations from which information can be obtained, translated, if necessary, by the respondent through appropriate devices into reasonably usable form."[32] A request for such information would require the respondent to retrieve the information from data banks and print it out in "reasonably usable form" so that the requester actually could discern what has been furnished.

Paragraph 1(f) of the rule is also new and is added to increase the efficacy of the discovery process. Rather than furnishing requested documents thrown together in a big box, without any organization, order, or explanation, a respondent must now produce

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31. TEX. R. CIV. P. 167(3).
32. TEX. R. CIV. P. 167(1)(a).

these documents "as they are kept in the usual course of business, or shall organize and label them to correspond with the categories in the request."[33]

A third addition to rule 167 allows the requester to "sample" or "test" documents or things furnished for inspection. This same addition is made in connection with entering land or other property; that is, the property or any designated object or operation thereon may be sampled or tested under the new rule. There is, however, an important limitation on this right; "testing or examination," and presumably sampling, shall not extend to "destruction or material alteration" of the article without notice, hearing, and prior approval by the court.[34] This provision eliminates the possibility that a party furnishing an exhibit to the adverse party would receive back a bucket of bolts and scraps.

The elimination of the provisions of the old rule protecting privileged information, statements of witnesses, and work product is not important. Nor is there any significance in the elimination of the phrases in the old rule permitting the production of documents which are "reasonably calculated to lead to the discovery of [material] evidence," and permitting the entry on land or other property to inspect things "which may be material to any matter involved in the action." These subjects are covered in rule 186a, Scope of Examination, which rule 167 incorporates by reference. Rule 186a permits discovery of "any matter . . . which is relevant to the subject matter involved in the pending action" and further provides that it is not a valid objection that testimony is not admissible if that testimony "appears reasonably calculated to relate to the discovery of" admissible evidence.[35] Reading these two rules *in pari materia* would indicate that the same rationale applies to documents and things as well as testimony.

Significant, however, is the elimination of the requirement under the old rule 167 that the movant show "good cause" for his motion to produce.[36] The burden on the requester is now solely that of demonstrating relevance; good cause is no longer required.[37] Again,

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33. TEX. R. CIV. P. 167(1)(f).

34. TEX. R. CIV. P. 167(1)(g).

35. TEX. R. CIV. P. 186a.

36. Good cause has also been eliminated as a requirement under the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 34.

37. Deletion of good cause, i.e., that the information sought was otherwise available, as

"relevance" would include those documents and things "which constitute or contain, or are reasonably calculated to lead to the discovery of, evidence material to any matter involved in the action," even those things which might not be admissible themselves.[38] Those documents and things protected under rule 186a, such as privileged communications, statements of witnesses, and work product, however, would still be excluded from the scope of discovery.[39]

Retained from the old rule is the provision entitling any person to obtain from any party, upon request, his own statement previously made concerning the subject matter of the lawsuit. In accordance with the general scheme of reorganization presented in the new rule, provisions pertaining to the recourse available should such request be refused are now contained in the "objections" section of rule 167.

Rule 167 sets forth new procedures for obtaining medical records when any party alleges physical or mental injury and damages. The injured party, upon request, must furnish an authorization permitting disclosure of all medical records not previously furnished which reasonably relate to the injury or damages claimed. Upon receiving the records, the party who requested them shall furnish copies without charge to every other party in the suit. To be admissible in evidence, the copies must have been furnished at least fourteen days prior to trial unless good cause is shown. No party may disseminate any information in the medical records so

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a requisite to production under rule 167 eliminates the necessity of development of multiple standards as to availability and proof. *See, e.g., Ex Parte* Shepperd, 513 S.W.2d 813, 817 (Tex. 1974) ("especially rigorous showing of good cause" on production of non-testifying expert reports); Bryan v. General Elec. Credit Corp., 553 S.W.2d 415, 419 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ) (demonstration of necessity for production of corporate documents insufficient when good cause not plead); Irwin v. Basham, 507 S.W.2d 621, 625-26 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.) (allegation of necessity for production of sales schedules and tax returns for trial preparation insufficient when materials previously available). *See generally* Sales, *Pre-Trial Discovery in Texas*, 31 Sw. L.J. 1017, 1018-20 (1977). Logically, a showing of need or that information is unavailable from any other source is no longer necessary. *See* Allen v. Humphreys, 559 S.W.2d 798, 803 (Tex. 1977) (materiality and unavailability requisites to production); Texhoma Stores, Inc. v. American Cent. Ins. Co., 424 S.W.2d 466, 472 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.) (good cause explicit under federal and state rules).

38. *See* Allen v. Humphreys, 559 S.W.2d 798, 802 (Tex. 1977) (court seems to equate the quoted phrase with relevance).

39. *See* Sales, *Pre-Trial Discovery in Texas*, 31 Sw. L.J. 1017, 1023-31 (1977).

obtained "except as may be reasonably required for the purposes of such litigation."[40] This is an apparent reference to the necessity of sharing the information contained in the medical records with expert witnesses or consulting experts. These new provisions should expedite the exchange of medical information with a minimum of haggling, requests, and court intervention.

c. *Non-Parties.* Paragraph four of the new rule contains a provision that allows compelling the production of things and documents from "a person, organizational entity, government agency, or corporation not a party to the suit." A request, however, will not suffice; a motion, notice to all parties and the non-party respondent, and a hearing are required. The movant must assume the added burden of showing the "necessity therefor," which appears to be synonymous with showing "good cause." Any parties, as well as the non-party respondent, may assert their objections at the hearing. This new remedy should obviate the common practice of joining as parties to an action those persons whose only connection to the litigation is the possession of documents or information that they will not voluntarily release.

d. *Expert Reports.* Paragraph five of the new rule contains a provision intended to facilitate the discovery of an adversary's expert witness' testimony. Often a party will disclose the name of its expert, but will state that he has no written report (sometimes called "narrative" reports) from that expert. The new provision permits the court, upon motion, hearing, and a showing of good cause, to order the expert's factual observations, tests, supporting data, calculations, photographs, or opinions be reduced to "tangible form" and produced. This data should be produced in a readable and understandable form. The rule refers only to "discoverable" matters which are set out in rule 186a. The prior distinction made between those experts who will be witnesses and those who will not be witnesses but will be used solely for consultation in the case is not changed.[41]

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40. TEX. R. CIV. P. 167(7).

41. *See* Werner v. Miller, 579 S.W.2d 455, 456 (Tex. 1979); Allen v. Humphreys, 559 S.W.2d 798, 802 (Tex. 1977); Barker v. Dunham, 551 S.W.2d 41, 44 (Tex. 1977); *Ex Parte* Shepperd, 513 S.W.2d 813, 817 (Tex. 1974). *See generally* Sales, *Pre-Trial Discovery in Texas*, 31 SW. L.J. 1017, 1022 (1977); Sales, *Discovery Under the Texas Rules of Civil Procedure*, 37 TEX. B.J. 39, 41-42 (1974); Walker, *1973 Amendments to Texas Rules*, 38 TEX. B.J. 27, 30-31 (1975).

e. *Constructive Possession.* With the addition of a new paragraph eight to the rule, the requirement that a respondent have possession, custody, or control of documents sought to be produced has been broadened in scope by a liberal definition. Those terms now include the situation in which the respondent "has a right to compel the production of a matter or entrance [to the land or other property] from a third party (including an agency, authority or representative)."[42] In other words, even though a respondent does not have the document, article, or information or possession of the thing or premises, he can be compelled to demand and produce it for the requesting party if he has the right to compel its availability from any third party, such as a doctor, hospital, corporation, or governmental agency. This requirement expands the prior rule which extended only to articles within the respondent's control even though possessed by an agency, attorney, or some other person holding them for respondent.[43]

3. *Rule 168 — Interrogatories to Parties.*[44] This rule has not only been rewritten completely for better organization and readability; it has also been changed substantively. Although a number of the changes are merely procedural, important changes have been made establishing a limit on the number of interrogatories and strengthening the duty to supplement answers. As in the case of rule 167, the permissible scope of the interrogatories is governed by rule 186a.

a. *Procedure.* No change is made in the provision that interrogatories may not be served on parties until they have answered or time for answering has elapsed, in requiring copies of interrogatories and answers to be filed with the clerk, or in permitting service of interrogatories on a party's attorney. The requirement that four copies shall be filed with the clerk when there are more than four parties has been changed, however, to require service on all parties, regardless of number, of all interrogatories, answers, and objections. Modern copying machines enable parties to reproduce sufficient copies to make service by the parties themselves more feasi-

42. TEX. R. CIV. P. 167(8).

43. *See* Martinez v. Rutledge, 592 S.W.2d 398, 401 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e); Hopkins v. Hopkins, 540 S.W.2d 783, 789 (Tex. Civ. App.—Corpus Christi 1976, no writ); Cutler v. Gulf State Utils. Co., 361 S.W.2d 221, 224 (Tex. Civ. App.—Beaumont 1962, writ ref'd n.r.e.).

44. *See* Appendix II at 662.

ble than depositing four copies with the clerk. This procedure also ensures that all parties are aware of the interrogatories and responses at practically the same time and lightens the work of the clerk.

Another change is the elimination of the requirement of spaces for answers at the end of the interrogatories. The spaces were rarely the right length for the answers. The new rule provides that "[a]nswers to interrogatories shall be preceded by the question or interrogatory to which the answer pertains."[45] This procedure makes the answers more intelligible to the questioner upon receiving them, and to the trial and appellate judge when reading the case file. It should also cut down on the usual fumbling about by counsel in the course of a hearing or trial when some or all of the interrogatories are offered into evidence by reading the interrogatories and then the answers into the record.

An additional requirement has been imposed regarding interrogatory answers. A party must now sign *and* verify his answers. Specific exemption of rule 14, "Affidavit by Agent," is retained from the old rule, making it clear that a party's attorney is not permitted to sign or verify answers to interrogatories.

b. *Number of Interrogatories.* Probably the most significant and controversial change in the new rule is the limitation of paragraph five, which provides:

> The number of questions including subsections in a set of interrogatories shall be limited so as not to require more than thirty answers. No more than two sets of interrogatories may be served by a party to any other party, except by agreement or as may be permitted by the court after hearing upon a showing of good cause. The court may, after hearing, reduce or enlarge the number of interrogatories or sets of interrogatories if justice so requires.[46]

This change was brought about by a growing chorus of critics who pointed to widespread abuses of the discovery process.[47] With

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45. TEX. R. CIV. P. 168(5).

46. *Id.*

47. *See, e.g.*, Lundquist, *In Search of Discovery Reform*, 66 A.B.A.J. 1071 (1980); Pollack, *Discovery - Its Abuse and Correction*, 80 F.R.D. 219 (1979); Stafford, *Our Tottering Legal System*, 43 TEX. B.J. 207 (1980). Dissatisfaction with "the great loss of time and judicial resources" arising out of abusive practice has been noted by appellate courts as well. *See* Werner v. Miller, 579 S.W.2d 455, 455-57 (Tex. 1979); Bottinelli v. Robinson, 594 S.W.2d 112, 118 (Tex.Civ. App.—Houston [1st Dist.] 1979, no writ). *See also* Pope & Mc-

today's copying machines and memory typewriters, lengthy sets of interrogatories containing several hundred questions had become common, even for claims involving only a few hundred dollars. So lengthy, repetitive, and irrelevant were the voluminous questions that literally dozens of man-hours were necessary if they were to be answered. The time and effort required to answer the questions was clearly oppressive and interrogatories often became, by design, principally harassing. Most of these interrogatories were not really intended to get needed information but to encourage the adversary to capitulate rather than cope with the time-consuming legwork and paperwork involved in the formulation of answers.

The transcript of the hearings of the Supreme Court Advisory Committee reflects the committee's belief that the limitation of the number of questions to thirty per set, and accompanying restriction on the number of sets to two will suffice in over ninety percent of the cases litigated.[48] For cases in which more than thirty questions per set or more than two sets are appropriate, the rule allows the number to be expanded by agreement or by order of the trial court upon a showing of good cause. These expressed exceptions wisely recognize that there are cases too complex and difficult to be subjected to the rule's thirty questions and two-set limit. Enlargement of the limits should be freely granted in such cases.

Some critics of the new rule's limitation correctly point out that rule 168 is the cheapest, most convenient discovery tool available, and that the limit severely constricts the use of that tool, especially in complex and involved suits. Although these cases can be handled through proper application by trial courts of the stated exceptions to the limitations, the Committee on the Administration of Justice of the State Bar presently is studying a special rule to apply to large complex litigation. It is further argued that enterprising lawyers will attempt to avoid the limitation of thirty questions by asking paragraph-long questions connected by "and," semicolons, or commas. Similarly, it is said that attorneys, in answering the questions, can simply break their answers into separate parts to thwart the intent of the rule. For example, in answering a question asking for one's name, address and telephone number, the answerer would list three answers instead of one. Both illustrations

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Connico, *Practicing Law With the 1981 Texas Rules*, 31 BAYLOR L. REV. 457, 460-63 (1980).

48. *See* SUPREME COURT ADVISORY COMM., MINUTES 104-05 (May 4-5, 1979).

would seem to be an obvious evasion of the true spirit and intent of the rule and should be treated as such by the trial court.[49]

The solution to problems of attempted evasion must be left in large measure to the common sense of trial judges. Some paragraph-long questions might truly be asking but one question while other interrogatories might constitute several different inquiries, though contained in the same sentence. Under paragraph eight, attorneys who attempt to abuse the discovery process and circumvent the rule are subject to the sanctions of rules 170 and 215a.

c. *Answers and Objections.* Under the old rule, answers to interrogatories had to be served on the adverse party within thirty days, but objections had to be served within fifteen days, "together with a notice of hearing the objections at the earliest practicable time."[50] The new rule allows the objecting party to serve written objections to interrogatories with the answers to those not objected to. Time for answering the interrogatories objected to is deferred until a ruling has been made on the objections. Either party may request a hearing on the objections. The court may, and should, tax the cost of the hearing, including a reasonable attorney's fee, against the losing party at the hearing upon a finding that the interrogatories are "unreasonable, frivolous, or a harassment" or upon a finding that the objections are "unreasonable, frivolous, made for purpose of delay, or that a good faith effort to answer the interrogatories has not been made."[51] The rules provide the trial court with sufficient authority to make the discovery process efficacious; the trial court should exercise this authority.

d. *Duty to Supplement Answers.* The duty to supplement answers to interrogatories after they are served on the adverse party has been made stronger and more direct. Retained from the old rule is the duty to supplement answers when a party knows the answer was incorrect when made or when a party knows the answer, though correct when made, is no longer true and the circumstances are such that a failure to amend the answer is in substance a knowing concealment or misrepresentation. These supplementa-

49. *See generally* Pope & McConnico, *Practicing Law With the 1981 Texas Rules*, 32 BAYLOR L. REV. 457, 457 & n.80 (1980) (ABA Special Committee recommendations; construing basic inquiries as one interrogatory).

50. TEX. R. CIV. P. 168 (1978).

51. TEX. R. CIV. P. 168(6).

tions now must be made not less than fourteen days prior to the beginning of trial unless the trial court finds that good cause exists for permitting or requiring later supplementation. Added to these provisions is a third instance creating the duty:

> [I]f the party expects to call an expert witness whose name and the subject matter of such witness' testimony has not been previously disclosed in response to an appropriate interrogatory, such answer *must* be amended to include the name, address, and telephone number of the witness and the *substance* of the testimony concerning which the witness is expected to testify, as soon as is practical, but in no event less than *fourteen (14) days* prior to the beginning of trial except on leave of court. If such amendment is not timely made, the testimony of the witness shall not be admitted in evidence unless the trial court finds that *good cause* sufficient to *require* its admission exists.[52]

Several provisions should be noted. First, not only must the name of any new expert witness be disclosed fourteen days prior to trial, but the *substance* of the witness' testimony must be given. This requirement should be distinguished from the initial disclosure required concerning experts who will be witnesses, i.e., the identity and location of the expert witness and his reports, factual observations, and opinions.[53] Because of the nearness of trial, the duty to supplement under rule 168 goes further than rule 186a by requiring the *substance* of the expert's testimony be given *in addition to* furnishing any written reports or other information, when previous orders to produce the reports of experts to be used as witnesses have been granted. In addition, a request or motion to produce reports may be made and the time for responding shortened by the court. Second, if the information is not furnished at least fourteen days prior to the beginning of trial, the expert testimony will not be admitted in evidence unless the trial court finds "good cause sufficient to *require* its admission."[54] This provision seems to say that not only must there be a good reason, but one that compels the admission of the testimony. This language is stronger than

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52. TEX. R. CIV. P. 168(7)(a)(3) (emphasis added).

53. *See* TEX. R. CIV. P. 186a. Rule 186a reads in pertinent part: "[I]nformation relating to the identity and location of any potential party and of persons, including experts, having knowledge of relevant facts, and the reports, factual observations and opinions of an expert who will be called as a witness, are discoverable." *Id.*

54. TEX. R. CIV. P. 168(7)(a)(3) (emphasis added).

merely requiring good cause. In those counties where a setting does not necessarily mean the case will go to trial, the non-complying attorney runs a serious risk if his assumption that the case will not go to trial at the designated time proves untrue.

e. *Sanctions.* The new rule broadens the possibility of sanctions by providing that when a court finds a party is abusing the discovery process in "seeking, making or resisting discovery" under rule 168, the court may, in addition to assessing costs and attorneys' fees, invoke sanctions which include contempt, dismissal, and judgment by default. A more liberal use of these sanctions by trial judges would make pre-trial discovery more efficient and effective.[55] While language in some cases indicates that the purpose of the sanctions is not to punish the disobeying party, but to secure compliance,[56] it is difficult to separate the two concepts realistically.[57] Logically, more frequent punishment for failure to comply would ensure better compliance. This would even include periodic monetary penalties for a party's continuing disobedience.[58] Sanctions will only be set aside on appeal for an abuse of discretion.[59]

4. *Post-Judgment Bill of Discovery.* Rule 737, providing for suits in the nature of bills of discovery after judgment, was not amended. Actually, it is in post-judgment discovery that a great deal of abuse has occurred, especially that of propounding lengthy, oppressive, and often irrelevant interrogatories to collect judgments for small amounts of money. The rule provides in part:

> All trial courts shall entertain suits in the nature of bills of discovery, and grant relief therein in accordance with the usages of courts of equity. Such remedy shall be cumulative of all other remedies.[60]

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55. *See generally*, Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033 (1978).

56. *See, e.g.*, Illinois Employers Ins. Co. v. Lewis, 582 S.W.2d 242, 244-45 (Tex. Civ. App.—Beaumont), *writ ref'd n.r.e. per curiam*, 590 S.W.2d 119 (Tex. 1979); Phillips v. Vinson Supply Co., 581 S.W.2d 789, 792 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ); Rodebaugh v. Beachum, 576 S.W.2d 143, 146 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.).

57. *Cf.* Lloyd A. Fry Roofing Co. v. State, 524 S.W.2d 313, 320 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.) ("sanctions should not be used solely to punish").

58. Firestone Photographs, Inc. v. Lamaster, 567 S.W.2d 273, 277 (Tex. Civ. App.—Texarkana 1978, no writ); *see* Pope & McConnico, *Practicing Law With the 1981 Texas Rules*, 32 BAYLOR L. REV. 457, 462 n.10 (1980) (local rules authorizing monetary penalty).

59. Firestone Photographs, Inc. v. Lamaster, 567 S.W.2d 273, 277 (Tex. Civ. App.—Texarkana 1978, no writ).

60. TEX. R. CIV. P. 737.

It is logical that the provisions of the new rule 168 governing the propounding of interrogatories in a pre-trial setting would likewise govern post-judgment procedure. The phrase "in accordance with the usages of courts of equity" indicates that the usual and normal pre-trial usages of the Rules of Civil Procedure will be adhered to in post-judgment procedures as well. Rule 168 limitations on numbers of questions and sets of interrogatories, the imposition of the duty to supplement, and the sanctions for abuse of the process should be held by the courts to apply to post-judgment discovery in the same manner as they apply to pre-trial discovery, inasmuch as the rationale for both situations is the same.

5. *Rule 201 — Compelling Appearance.*[61] This rule, too, has been completely rewritten for better organization and readability. The changes are minor in nature and, for the most part, reflect actual practice.

a. *Subpoenas.* The new rule specifically authorizes the clerk of the court and any shorthand reporter certified under article 2324(b)[62] to issue subpoenas and cause them to be served on any deponent. The old rule conferred subpoena power only on any officer authorized to take a deposition as provided by statute.[63] The new rule repeats the authority given persons authorized to take a deposition, without citing specific statutes. Thus, subpoenas may now be issued by three classes of persons: the clerk, any officer authorized to take depositions, and any statutorily certified court reporter.

b. *Items To Be Produced.* If a subpoena duces tecum is issued to a witness, a listing of the items which may be ordered produced now reads like the enumeration in rule 167, i.e., the deletion of "letters" and the inclusion of "writings, drawings, graphs, charts" and computer data in reasonably usable form. Similarly, the permissible scope of the items to be produced is governed by rule 186a. The provision concerning the availability of protective orders authorized by rules 177a and 186b has been retained from the old rule.

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61. *See* Appendix II at 665.

62. TEX. REV. CIV. STAT. ANN. art. 2324b (Vernon Supp. 1980) ("Regulation and certification of court reporters").

63. Statutory authorization is found at TEX. REV. CIV. STAT. ANN. art. 2324a (Vernon 1971) & art. 3746 (Vernon Supp. 1980).

c. *Agents and Employees of a Party.* The provision of the old rule that service of notice on the attorney of record of another party compels that party's appearance without the necessity of a subpoena has been retained. The new rule, however, has added a provision in paragraph three including in that procedure a witness who is an agent or employee and subject to the control of a party. Notice to take such a witness' deposition need only be served on the party's attorney of record and has the same effect as a subpoena served on the witness. This rule also applies to a subpoena duces tecum.

d. *Time and Place.* A new sentence appearing in paragraph five of the new rule merely reflects present practice: "The time and place designated [for the taking of the deposition] shall be reasonable."[64] The trial court has always had the power under rule 186b to regulate discovery and prevent unfair or oppressive conditions under which a deposition is to be taken, but the new provision makes that common sense rule explicit.

The new rule retains the provision allowing the subpoena to be directed to a public or private corporation, partnership, association, or governmental entity which must then designate the witness or witnesses who will testify in its behalf. Application of this provision, however, is no longer limited to non-parties. Further, a clause has been added to paragraph five allowing the deposition of a party or of a witness designated by an organization to be taken in the county where the suit is pending, subject to the protective orders of rule 186b.

III. Conclusion

Apart from the substantive changes made in the new rules, the most beneficial aspect of the revised rules is that they are much more readable and understandable. Reorganization of the provisions and their arrangement into topical sub-paragraphs should greatly assist the lawyer, judge, and scholar in locating the controlling procedural rule in a given situation. It should further assist one in understanding the overall purposes and interrelationships of the rules. The result hopefully will be to contribute to a more effective and efficient product of our judicial system. Other rules

64. Tex. R. Civ. P. 201(5).

could benefit from the same type of reorganization made to rules 167, 168, and 201; notably rules 169, 186a, and 186b.[65] Long rules, punctuated by semicolons and verbose language, lack the clarity and readability that would encourage lawyers and judges to follow them.

The most controversial rule change discussed will undoubtedly be the limitation of interrogatories under rule 168. The purpose of discovery is to promote "the administration of justice by allowing the parties to obtain the fullest knowledge of issues and facts prior to trial."[66] If ninety percent of the cases filed can be afforded adequate discovery under the limitations *and* the courts are cognizant of the more complex cases that call for additional in-depth discovery, the efficient administration of justice will have been advanced without any loss of fairness.

65. Several rules previously had been reorganized along these lines. *E.g.*, TEX. R. CIV. P. 166-A, 167(1)(a), 187 (1978).

66. West v. Solito, 563 S.W.2d 240, 243 (Tex. 1978).

APPENDIX I

Miscellaneous Rule Changes Related to Pre-Trial Procedures[1]

Rule 12. Attorney to Show Authority

[~~Any defendant in any~~] A party in a suit or proceeding pending in [~~any~~] a court of this state may, by sworn written motion stating that [~~such defendant~~] he believes [~~that such~~] the suit or proceeding [~~was instituted against him or~~] is being prosecuted [~~against him~~] or defended without authority [~~on the part of the plaintiff's attorney~~], cause [~~such~~] the attorney to be cited to appear before [~~such~~] the court and show his authority [~~for same, notice of which motion shall be served upon such attorney at least ten days before the trial of such motion.~~] to act. The notice of the motion shall be served upon the challenged attorney at least ten days before the hearing on the motion. [~~Upon~~] At the hearing [~~of such~~] on the motion, the burden of proof shall be upon the challenged attorney [~~appearing for the plaintiff~~] to show sufficient authority [~~from the plaintiff in such suit or proceeding to institute or prosecute the same.~~] to prosecute or defend the suit on behalf of the other party. Upon his failure to show such authority, the court shall refuse to permit [~~such~~] the attorney to appear in [~~said~~] the cause, and shall [~~dismiss the same~~] strike the pleadings if no person who is authorized to prosecute or defend [~~said cause~~] appears. [~~Such~~] The motion may be heard and determined at any time before the parties have announced ready for trial, but the trial shall not be unnecessarily continued or delayed for the hearing [~~thereof~~].

Rule 21. Motions

[~~The clerk shall enter upon the docket every motion filed in his court, with a brief statement of the nature of the motion and the number of the suit in which it is made. The docket notation shall further show the names of the parties and the name of the attorney filing the motion.~~]

An application to the court for an order, whether in the form of

1. The full text of the amended rules discussed under *Miscellaneous Rule Changes Related to Pre-Trial Procedures* are set forth, showing additions and deletions. Deletions in the rules are lined through; additions are underscored.

a motion, plea or other form of request, unless presented during a hearing or trial, shall be made in writing, shall state the grounds therefor, shall set forth the relief or order sought, and shall be filed and noted on the docket.

An application to the court for an order and notice of any hearing thereon, not presented during a hearing or trial, shall be served upon the adverse party not less than three days before the time specified for the hearing, unless otherwise provided by these rules or shortened by the court.

Rule 21a. Notice

Every notice required by these rules, other than the citation to be served upon the filing of a cause of action and except as otherwise expressly provided in these rules, may be served by delivering a copy of the notice or of the document to be served, as the case may be, to the party to be served, or his duly authorized agent, or his attorney of record, either in person or by registered mail to his last known address, or it may be given in such other manner as the court in its discretion may direct. Service by mail shall be complete upon deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period. It may be served by a party to the suit or his attorney of record, or by the proper sheriff, or constable, or by any other person competent to testify. A written statement by an attorney of record, or the return of the officer, or the affidavit of any other person showing service of a notice shall be prima facie evidence of the fact of service. Nothing herein shall preclude any party from offering proof that the notice or document was not received, or, if service was by mail, that it was not received within three days from the date of deposit in a post office or official depository under the care and custody of the United States Postal Service, and upon so finding, the court may extend the time for taking the action required of such party or grant such other relief as it deems just. [~~If the time of service is not elsewhere prescribed, the adverse party is entitled to three days' notice of a motion.~~] The provisions hereof relating to the

method of service of notice are cumulative of all other methods of service prescribed by these rules.

Rule 57. Signing of Pleadings

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, [~~whose address shall be stated.~~] with his State Bar of Texas identification number, address and telephone number. A party [~~who is~~] not represented by an attorney shall sign his pleading[s], [~~and~~] state his address and telephone number.

Rule 70. Pleading: Surprise: Cost

When either a supplemental or amended pleading is of such character and is presented at such time as to take the opposite party by surprise, [~~(to be judged by the court) it shall be cause for imposing the cost of the term upon, and charging the continuance of the cause (both or either)~~] the court may charge the continuance of the cause, if granted, to the party causing the surprise if the other party [~~demand it, and shall make a satisfactory showing, or if otherwise be apparent,~~] satisfactorily shows that he is not ready for trial [~~on account of said supplemental or amended pleading being allowed to be filed by the court~~] because of the allowance of the filing of such supplemental or amended pleading, and the court may, in such event, in its discretion require the party filing such pleading to pay to the surprised party the amount of reasonable costs and expenses incurred by the other party as a result of the continuance, including attorney fees, or make such other order with respect thereto as may be just.

Rule 73. Failure to Furnish Copy of Pleadings to Adverse Party

If any party fails to furnish the adverse party with a copy of any pleading in accordance with the preceding rule, [~~a certified copy may be ordered to be furnished by the clerk and the costs thereof charged to the party who had failed to comply with the order to furnish the same~~] the court may in its discretion, on motion, order all or any part of such pleading stricken, direct that such party shall not be permitted to present grounds for relief or defense contained therein, require such party to pay to the adverse party the amount of reasonable costs and expenses incurred as a result of the

failure, including attorney fees, or make such other order with respect to the failure as may be just.

Rule 90. Waiver of Defects in Pleading

General demurrers shall not be used. Every defect, omission or fault in a pleading either of form or of substance, which is not specifically pointed out by [~~motion or~~] exception in writing and brought to the attention of the judge in the trial court before the instruction or charge to the jury or, in a non-jury case, before [~~the rendition of judgment~~] the judgment is signed, shall be deemed to have been waived by the party seeking reversal on such account; provided that this rule shall not apply as to any party against whom default judgment is rendered.

Rule 166-A. Summary Judgment

(a) Unchanged.

(b) Unchanged.

(c) Motion and Proceedings Thereon. The motion for summary judgment shall state the specific grounds therefor. Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing. Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response. No oral testimony shall be received at the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, admissions and affidavits, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues as expressly set out in the motion or in an answer or any other response. Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal. A summary judgment may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise cred-

ible and free from contradictions and inconsistencies, and could have been readily controverted.

(Remainder of rule unchanged).

APPENDIX II

Rule Changes Related to Pre-Trial Discovery[1]

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

The scope of discovery permitted herein is as provided by Rule 186a and subject to the protections of Rule 186b:

1. PROCEDURE: Any party may serve on any other party a REQUEST:

a) to produce and permit the party making the REQUEST, or somone acting on his behalf, to inspect, sample, test, photograph and/or copy, any designated documents (including papers, books, accounts, writings, drawings, graphs, charts, photographs, any insurance agreement under which any person or entity carrying on an insurance business may be liable to satisfy part or all of a judgment which may be rendered in the action or to indemnify or reimburse for payments made to satisfy the judgment), recordings and other data compilations from which information can be obtained, translated, if necessary, by the respondent through appropriate devices into reasonably usable form, and to inspect, sample, test, photograph, or copy any tangible things which constitute or contain matters which are in the possession, custody or control of the party upon whom the request is served;

b) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon.

c) The REQUEST shall specify a reasonable time, place and manner for making the inspection and performing the related acts.

d) The party upon whom the REQUEST is served shall serve a written RESPONSE which shall state, with respect to each item or category of items, that inspection or other requested action will be permitted as requested, and he shall thereafter comply with the REQUEST, except only to the extent that he makes objections in writing to particular items, or categories of items, stating specific

1. The amended version of the rules discussed in text under *Pre-Trial Discovery* are set forth. The pertinent rules have been completely rewritten; thus, only the new rules, without interlineation or deletion indicating changes, are presented.

reasons why such discovery should not be allowed.

e) All parties to the action shall be provided with copies of each REQUEST and RESPONSE.

f) A party who produces documents for inspection shall produce them as they are kept in the usual course of business, or shall organize and label them to correspond with the categories in the request.

g) Testing or examination shall not extend to destruction or material alteration of an article without notice, hearing, and prior approval by the court.

2. TIME: No REQUEST may be served on a party until that party has filed a pleading or time therefor has elapsed. Thereafter, the REQUEST shall be filed with the Clerk and served upon every party to the action. The RESPONSE to any REQUEST made under this rule and objections, if any, shall be served within thirty days after receipt of the REQUEST. The time for making a RESPONSE may be shortened or lengthened by the court upon a showing of good cause.

3. OBJECTION: If objection is made to a REQUEST or to a RESPONSE, either party may request a hearing. The court may order or deny production within the scope of this rule. If granted, the order shall specify the time, place, manner and other conditions for making the inspection, measurement or survey, and taking copies and photographs and may prescribe such terms and conditions as are just. If the court finds that a REQUEST is not within the scope of this rule or is unreasonably frivolous or a harassment or that a RESPONSE is unreasonably frivolous or made for purpose of delay, then the court may tax the costs of the hearing, including a reasonable attorney's fee against the offending party.

4. NONPARTIES: The court may order a person, organizational entity, government agency or corporation not a party to the suit to produce in accordance with this rule. However, such order shall be made only after the filing of a motion setting forth with specific particularity the request, necessity therefor and after notice and hearing. All parties and the nonparty shall have the opportunity to assert objections at the hearing.

5. EXPERT REPORTS: If the discoverable factual observations, tests, supporting data, calculations, photographs or opinions of an expert witness have not been recorded or reduced to a tangi-

ble form, then the court, upon motion, hearing and for good cause may order such matters reduced to tangible form and produced.

6. STATEMENTS: Any person, whether or not a party, shall be entitled to obtain, upon written request, his own statement previously made concerning the subject matter of a lawsuit, which is in the possession, custody, or control of any party. For the purpose of this paragraph, a statement previously made is (a) a written statement signed or otherwise adopted or approved by the person making it, and (b) a stenographic, mechanical, electrical or other type of recording, or any transcription thereof which is a substantial verbatim recital of a statement made by the person and contemporaneously recorded.

7. INJURY DAMAGES: Any party alleging physical or mental injury and damages arising from the occurrence which is the subject of the case shall be required, upon request, to produce, or furnish an authorization permitting the full disclosure of, medical records not theretofore furnished the movant and reasonably related to the injury or damages asserted. Copies of all medical records, reports, X-rays or other documentation so obtained shall be furnished without charge to all parties to the action as soon as possible after receipt by the movant, and if such information is to be used or offered in evidence upon trial, it shall be furnished not less than fourteen days prior to trial, except as may be excused by a showing of good cause. Information so obtained is for use in the pending litigation and may not be disseminated except as may be reasonably required for the purposes of such litigation.

8. CONSTRUCTIVE POSSESSION: Possession, custody or control includes constructive possession whereby the Respondent has a right to compel the production of a matter or entrance from a third party (including an agency, authority or representative).

Rule 168. Interrogatories to Parties

At any time after a party has made appearance in the cause, or time therefor has elapsed, any other party may serve upon such party written interrogatories to be answered by the party served, or, if the party served is a public or private corporation or a partnership or association, or governmental agency, by any officer or agent who shall furnish such information as is available to the party.

1. SERVICE: When a party is represented by an attorney, ser-

vice of interrogatories and answers to interrogatories shall be made on the attorney unless delivery to the party himself is ordered by the court.

2. SCOPE: Interrogatories may relate to any matters which can be inquired into under Rule 186a, but the answers, subject to any objections as to admissibility, may be used only against the party answering the interrogatories. Where the answer to an interrogatory may be derived or ascertained from:

a) public records; or

b) from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served; it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained, and, if applicable, to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. The specification of records provided shall include sufficient detail to permit the interrogating party to readily identify the individual documents from which the answers may be ascertained.

3. PROCEDURE: Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice requires.

4. TIME TO SERVE: The party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within the time specified by the party serving the interrogatories, which specified time shall not be less than thirty days after the service of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time.

5. NUMBER OF INTERROGATORIES: The number of questions including subsections in a set of interrogatories shall be limited so as not to require more than thirty answers. No more than two sets of interrogatories may be served by a party to any other party, except by agreement or as may be permitted by the court after hearing upon a showing of good cause. The court may, after

hearing, reduce or enlarge the number of interrogatories or sets of interrogatories if justice so requires. The provisions of Rule 186b are applicable for the protection of the party from whom answers to interrogatories are sought under this rule.

The interrogatories shall be answered separately and fully in writing under oath. Answers to interrogatories shall be preceded by the question or interrogatory to which the answer pertains. The answers shall be signed and verified by the person making them and the provisions of Rule 14 shall not apply. True copies of the interrogatories, and objections thereto, and answers shall be served on all parties or their attorneys at the time that any interrogatories, objections, or answers are served, and a true copy of each shall be promptly filed in the clerk's office together with proof of service.

6. OBJECTIONS: At the time answers to interrogatories are served, a party may serve written objections to specific interrogatories or portions thereof. Answers only to those interrogatories or portions thereof, to which specific objection is made, shall be deferred until the objections are ruled upon and for such additional time thereafter as the court may direct. Either party may request a hearing as to such objections at the earliest possible time. Upon hearing, the court, if it finds that the interrogatories are unreasonable, frivolous or a harassment or if it finds the objections unreasonable, frivolous, made for the purpose of delay, or that a good faith effort to answer the interrogatories has not been made, may tax the costs of the hearing as well as a reasonable attorney's fee against the losing party at such hearing.

7. DUTY TO SUPPLEMENT: A party whose answers to interrogatories were complete when made is under no duty to supplement his answers to include information thereafter acquired, except the following shall be supplemented not less than fourteen days prior to the beginning of trial unless the court finds that good cause exists for permitting or requiring later supplementation.

a) A party is under a duty seasonably to amend his answer if he obtains information upon the basis of which:

(1) he knows that the answer was incorrect when made;

(2) he knows that the answer though correct when made is no longer true and the circumstances are such that a failure to amend the answer is in substance a knowing concealment or misrepresentation; or

(3) if the party expects to call an expert witness whose name and

the subject matter of such witness' testimony has not been previously disclosed in response to an appropriate interrogatory, such answer must be amended to include the name, address, and telephone number of the witness and the substance of the testimony concerning which the witness is expected to testify, as soon as is practical, but in no event less than fourteen (14) days prior to the beginning of trial except on leave of court. If such amendment is not timely made, the testimony of the witness shall not be admitted in evidence unless the trial court finds that good cause sufficient to require its admission exists; and

b) A duty to supplement answers may be imposed by order of the court or agreement of the parties, at any time prior to trial through new requests for supplementation of prior answers.

8. SANCTIONS: After notice and hearing, if the court finds a party is abusing the discovery process in seeking, making or resisting discovery under this Rule, in addition to costs and a reasonable attorney's fee the court may invoke the sanctions of Rules 170 and 215a.

Rule 201. Compelling Appearance

Any person may be compelled to appear and give testimony by deposition in a civil action.

1. SUBPOENA: Upon proof of service of a notice to take a deposition, written or oral, the clerk or any officer authorized to take depositions and any shorthand reporter certified pursuant to Article 2324(b), TEX. REV. CIV. STAT. ANN., shall immediately issue and cause to be served upon the witness a subpoena directing him to appear before said officer at the time and place stated in the notice for the purpose of giving his deposition.

2. PRODUCTION: A witness may be compelled by subpoena duces tecum to produce items or things within his care, custody or control. The subpoena duces tecum shall direct with particularity the witness to produce, at such time and place designated, documents (including writings, papers, books, accounts, drawings, graphs, charts, photographs, recordings and other data compilations from which information can be obtained, translated, if necessary, by the Respondent through appropriate devices into reasonably usable form) and tangible things which constitute or contain evidence or information relating to any of the matters within the scope of the examination permitted by Rule 186a; but in that event

the subpoena will be subject to the provisions of Rules 177a and 186b.

3. PARTY: Where the witness is a party to the suit, and after filing of a pleading in the party's behalf by an attorney of record, service of the notice upon such attorney shall suffice and have the same effect as a subpoena served on the party. If the witness is an agent or employee and subject to the control of a party, notice to take the witness' deposition may be served on such party's attorney of record and shall have the same effect as a subpoena served on the witness. A party or a party's agents or employees or persons subject to that party's control, may be compelled to produce, as in Paragraph 2 hereof, if the notice sets forth the items or things to be produced with the same particularity as required for a subpoena duces tecum.

4. ORGANIZATIONS: Where the witness named in the subpoena or notice is a public or private corporation, a partnership, association or governmental entity, the subpoena or notice shall direct the organization named to designate the person or persons to testify in its behalf, and, if it so desires, the matters on which each person will testify, and shall further direct that the person or persons so designated appear before the officer at the time and place stated in the subpoena or notice for the purpose of giving their testimony.

5. TIME AND PLACE: The time and place designated shall be reasonable. The place of taking a deposition shall be in the county of the witness' residence or, where he is employed or regularly transacts business in person or at such other convenient place as may be directed by the court in which the suit is pending; provided, however, the deposition of a party or the person or persons designated under Paragraph 4 above may be taken in the county of suit subject to the provisions of Rule 186b. A nonresident or transient person may be required to attend in the county where he is served with a subpoena, or within one hundred miles from the place of service, or at such other convenient place as the court may direct. The witness shall remain in attendance from day to day until such deposition is begun and completed.