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1984 AMENDMENTS TO THE TEXAS RULES OF CIVIL PROCEDURE AFFECTING DISCOVERY

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I. INTRODUCTION

On April 1, 1984, the Texas Rules of Civil Procedure once again were the subject of a major facelift, the goal of which was to modernize the rules in the continuing fight against outmoded methods of procedure. One area of procedure that is the subject of numerous amendments is "discovery."[1]

The 1984 amendments are the result of the combined efforts of the State Bar Committee on Administration of Justice, the Advisory Committee of the Supreme Court of Texas, the Texas Supreme Court itself, and many other interested members of the Texas Bar. The participants in the amendment process sought to clarify the

1. This writing does not include a discussion of the rules affecting sanctions for discovery abuse, as that subject is covered in a separate article authored by Justice William W. Kilgarlin and Don Jackson. Kilgarlin & Jackson, *Sanctions For Discovery Abuse Under New Rule 215,* 15 ST. MARY'S L.J. 767 (1984).

rules and to strengthen the full discovery policy that underlies Texas discovery.[2] Additional goals of discovery are to "augment and facilitate the trial procedure, to narrow the actual issues in dispute, and to change the trial of a lawsuit from a game of chance and surprise . . . to an orderly process of unclouding matters and uncovering the actual facts involved."[3] Many of the amendments include provisions enhancing the discretion of the trial judge to adjudicate discovery controversies.[4]

The individuals who participated in the amendment process also evaluated the analogous provisions in the Federal Rules of Civil Procedure. Historically, the federal rules have provided the basis for many changes in the Texas rules, and the 1984 amendments also look to the federal rules. Therefore, case law and experience in the federal courts are often utilized in the construction and interpretation of the Texas rules. Reliance in this article on federal law, however, is not intended to dictate the construction of Texas rules.[5]

This article will outline the 1984 changes in Texas discovery procedure. Familiar provisions of pre-1984 rules will be cross-referenced to assist in locating them in their new context. An attempt will be made to ascertain the probable interpretation of the new and amended rules and to understand the practical application of the 1984 discovery rules.

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2. *Cf.* West v. Solito, 563 S.W.2d 240, 243 (Tex. 1978) (discovery allows parties to obtain full knowledge of facts and issues prior to trial); Martinez v. Rutledge, 592 S.W.2d 398, 399 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.) (full knowledge of issues and facts is aim of discovery).

3. Pearson Corp. v. Wichita Falls Boys Club Alumni Ass'n, 633 S.W.2d 684, 686 (Tex. App.—Fort Worth 1982, no writ). "The purposes of discovery are to narrow the issues for trial, to obtain evidence for use at trial, and to obtain information that will lead to relevant evidence." Koster v. Chase Manhattan Bank, 93 F.R.D. 471, 474-75 n.10 (S.D.N.Y. 1982).

4. Thus, the already-broad discretion of trial judges has been increased somewhat. *Cf.* Doe v. District of Columbia, 697 F.2d 1115, 1119 (D.C. Cir. 1983) (broad authority of district courts to issue protective orders that restrict discovery); O'Neal v. Riceland Foods, 684 F.2d 577, 581 (8th Cir. 1982) (broad discretion accorded to trial judge in controlling discovery procedures).

5. *See* Clevenger v. Liberty Mut. Ins. Co., 396 S.W.2d 174, 183 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.) (federal decisions interpreting summary judgment proceedings relevant in construing Texas summary judgment rule); Heid Bros. v. Smiley, 166 S.W.2d 181, 182 (Tex. Civ. App.—Texarkana 1942, writ ref'd w.o.m.) (federal case law "persuasive, if not controlling" in construction of Texas rules of civil procedure).

II. RULE 166b: FORMS AND SCOPE OF DISCOVERY; PROTECTIVE ORDERS AND SUPPLEMENTATION OF RESPONSES

One of the most drastic changes in Texas procedure is embodied in new Rule 166b.[6] In the past, rules governing the scope of discovery had been scattered among the various rules.[7] Now, all of the guidelines regarding scope are set forth in Rule 166b. In addition to combining the many provisions covering scope, several major changes were made. Some of these changes are not traceable to any prior rule.[8] Other scope provisions were simply moved from pre-1984 rules into Rule 166b, with no changes made or intended.

A. *Forms of Discovery*

Section 1 of Rule 166b sets forth the permissible forms of discovery.[9] This provision is borrowed from Federal Rule 26(a), and it provides a proper starting point for pretrial discovery.[10] Rule 166b(1) provides that discovery may be had by oral or written depositions,[11] written interrogatories to a party,[12] requests of a party for admission of facts and the genuineness or identity of documents or things,[13] requests and motions for production, examination, and copying of documents or other tangible materials,[14] requests and motions for entry upon and examination of real property,[15] and motions for a mental or physical examination of a party or person under the legal control of a party.[16]

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6. *See* TEX. R. CIV. P. 166b.

7. *See* Tex. R. Civ. P. 167 (Vernon Supp. 1983) (discovery of documents and tangible things); *id.* 186a (Vernon 1976) (scope of discovery); *id.* 186b (Vernon 1976) (protective orders).

8. *See* TEX. R. CIV. P. 166b(2)(a) (objection improper that question involves opinion of fact or application of law to fact).

9. *See id.* 166b(1).

10. *Compare id.* 166b(1) (five permissible forms of discovery) *with* FED. R. CIV. P. 26(a) (five permissible forms of discovery).

11. *See* TEX. R. CIV. P. 166b(1) (procedure of depositions found in TEX. R. CIV. P. 200).

12. *See id.* (interrogatories found in TEX. R. CIV. P. 168).

13. *See id.* (request for admissions in TEX. R. CIV. P. 169).

14. *See id.* (requests for production of documents set forth in TEX. R. CIV. P. 167(1)(a)).

15. *See id.* (Tex. R. Civ. P. 167(1)(b) sets forth procedure for requests for entry upon land).

16. *See id.* (TEX. R. CIV. P. 167a provides for mental or physical examination of party).

B. *Scope of Discovery*

Rule 166b maintains exemptions as exceptions to the scope provisions.[17] Moreover, as in former Rule 186a, the court may order limits on the scope of discovery.[18] Rule 166b contains the admonition formerly in Rule 186a that requested discovery must be relevant to the subject matter of the lawsuit. Inadmissibility at trial is irrelevant, however, as long as the information sought "appears reasonably calculated to lead to discovery of admissible evidence."[19]

1. General

A new provision was inserted that provides that no objection will be entertained, in response to an interrogatory or request for admissions, on the ground that the question involves an opinion or contention that relates to fact or the application of law to fact.[20] The rule thus sanctions the propounding of mixed questions of law and fact.[21] This is contrary to prior Texas law, which concluded that questions of law[22] and mixed questions of law and fact[23] were not permitted. Although Rule 166b(2)(a) permits mixed questions of law and fact, the admissibility of the evidence obtained is in no way affected by the change in the rule; admissibility is controlled by the rules of evidence.[24]

Federal Rule 33 has permitted legal inquiries since the 1970 amendments; therefore, some clarification may be gained from an examination of the construction of this rule in the federal courts.[25]

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17. *See id.* 166b(3).

18. *Compare id.* 166b(2) (discovery may be limited by order of court) *with* TEX. R. CIV. P. 186a (Vernon 1976) (court may raise protective orders to limit discovery).

19. TEX. R. CIV. P. 166b(2)(a).

20. *See id.*

21. *See id.*

22. *See* Eskew v. Johnston Printing Co., 615 S.W.2d 287, 289 (Tex. Civ. App.—Dallas 1981, no writ) (request for admission calling for legal conclusion improper); American Title Co. v. Smith, 445 S.W.2d 807, 809-10 (Tex. Civ. App.—Houston [1st Dist.] 1969, no writ) (requests for legal conclusions improper).

23. *See* International Sec. Life Ins. Co. v. Maas, 458 S.W.2d 484, 489 (Tex. Civ. App.—Houston [1st Dist.] 1970, writ ref'd n.r.e.) (mixed questions of law and fact improper subject for requests for admissions).

24. *See* TEX. R. EVID. 701-05.

25. *See* FED. R. CIV. P. 33. Rule 33 provides in pertinent part:

> An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not

The comment to Federal Rule 33 states:

> Efforts to draw sharp lines between facts and opinions have invariably been unsuccessful, and the clear trend of the cases is to permit "factual" opinions. As to requests for opinions or contentions that call for the application of law to fact, they can be most useful in narrowing and sharpening the issues, which is a major purpose of discovery [cites omitted]. On the other hand, under the new language interrogatories may not extend to issues of "pure law," i.e., legal issues unrelated to the facts of the case.[26]

This comment recognizes the difficult task to be confronted by the courts in delineating between proper and improper inquiries.

In determining whether a propounded interrogatory or request for admissions asks a permissible or impermissible question, the court must look at each question on its merits and attempt to ascertain the purpose and intent of the question.[27] The federal rule has been interpreted to "allow a litigant to require an opponent to answer interrogatories asking for a delineation of legal theories so long as the question is calculated to serve a 'substantial purpose' in prosecution of the suit, such as narrowing of issues."[28] Thus, the scope of permissible inquiry is broad in the federal courts.[29]

Limitations, however, do exist. A question of law that is unrelated to the facts of the case has been held to be improper and

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be answered until after designated discovery has been completed or until a pretrial conference or other later time.

FED. R. CIV. P. 33.

26. FED. R. CIV. P. 33(b) advisory committee note to 1970 amendment; *see* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2167 (1970).

27. *See* Roberson v. Great Am. Ins. Co., 48 F.R.D. 404, 414 (N.D. Ga. 1969) (courts should consider merits of question and weigh need for information against prejudice to interrogated party).

28. Hockley v. Zent, Inc., 89 F.R.D. 26, 31 (M.D. Pa. 1980) (interpretation of FED. R. CIV. P. 33(b)); *see* Empire Scientific Corp. v. Pickering & Co., 44 F.R.D. 5, 6 (E.D.N.Y. 1968) (courts liberal in allowing interrogatories when trial could be expedited).

29. *See* Dollar v. Long Mfg., N.C., Inc., 561 F.2d 613, 616-17 (5th Cir. 1977) (interrogatories broadly interpreted to allow questions "reasonably calculated to lead to discovery of admissible evidence"), *cert. denied,* 435 U.S. 996 (1978); *cf.* Schlagenhauf v. Holder, 379 U.S. 104, 114-15 (1964) (Rule 35 liberally construed to permit mental and physical examination of party defendant). In *Scovill Mfg. Co. v. Sunbean Corp.,* the court broadly stated that discovery is proper if it might be expected to help the plaintiff know the extent of proof required and save him labor and expense in producing evidence for which there would be no actual need. *See* Scovill Mfg. Co. v. Sunbean Corp., 357 F. Supp. 943, 948-49 (D. Del. 1973).

outside the scope of the rule.[30] Similarly, an inquiry into a matter properly addressed to the court, such as the admissibility or credibility of evidence or testimony, is improper.[31] An interrogatory calling for an opinion based upon an hypothetical question is not allowed.[32] In addition, an interrogatory is improper if the question concerns a "pure conclusion of law."[33] Finally, one federal court has held that, as a matter of fairness, a party may not propound a question of law based upon an abstract statement of facts.[34]

A reading of the federal cases ruling on questions of law versus fact aptly depicts the amorphous nature of this concept.[35] For instance, it is not proper to inquire into a party's perception of the legislative purpose of an act, this being a "pure" question of law.[36] A plaintiff, however, may inqure of an airline defendant whether it was required to maintain two-way radio communications with the Federal Aviation Agency.[37] Both inquiries concern the interpretation of a law or administrative rule, but one is permissible and the other is not. In a related area of concern, one federal court has held that even though a question is primarily one of law, it will be per-

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30. *See* O'Brien v. International Bhd. of Elec. Workers, 443 F. Supp. 1182, 1187-88 (N.D. Ga. 1977) (unrelated pure legal question improper).

31. *See* Spector Freight Sys., Inc. v. Home Indem. Co., 58 F.R.D. 162, 164 (N.D. Ill. 1973) (competency of witness to testify improper subject of interrogatory); *cf.* Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co., 490 S.W.2d 818, 825 (Tex. 1972) (requests for admission of truth or falsity of witness' testimony in another trial improper).

32. *See* Union Carbide Corp. v. Travelers Indem. Co., 61 F.R.D. 411, 413 (W.D. Pa. 1973) (discovery rules directed at opinions of facts in controversy, not opinions based on hypothetical facts).

33. *See* Roberson v. Great Am. Ins. Co., 48 F.R.D. 404, 414 (N.D. Ga. 1969) (interrogatory asking plaintiff to state each question of law common to class action suit improperly calls for conclusion of law).

34. *See* Williams v. Thomas Jefferson Univ., 343 F. Supp. 1131, 1132 (E.D. Pa. 1972).

35. *See* Roberson v. Great Am. Ins. Co., 48 F.R.D. 404, 415 (N.D. Ga. 1969) (form of interrogatory appeared to call for legal conclusion, but in substance called for opinion of facts). In close cases of questions of law and fact, the trend in federal courts is to allow "factual" opinions. *See* Kerr-McGee Corp. v. Texas Okla. Express, Inc., 43 F.R.D. 336, 337 (W.D. Okla. 1967); Diversified Prods. Corp. v. Sports Center Co., 42 F.R.D. 3, 5 (D. Md. 1967); *see also* Zinsky v. New York Cent. Ry. Co., 36 F.R.D. 680, 681 (N.D. Ohio 1964) (interrogatory inquiring about plaintiff's conduct at time of injury proper because calls for "factual" inference).

36. *See* Muzquiz v. City of San Antonio, 520 F.2d 993, 1002 n.8 (5th Cir. 1975).

37. *See* Anderson v. United Air Lines, Inc., 49 F.R.D. 144, 149 (S.D.N.Y. 1969) (interrogatory proper because did not require interpretation of administrative rule). *But see* Reed v. Pennsylvania R.R. Co., 28 F.R.D. 26, 27-28 (E.D. Pa. 1961) (defendant not required to answer whether brake system that it maintained was permissible under Air Brake Act).

mitted if it relates to the routine business practice of a party; an objection that the discovery involves questions of law and opinions may be insufficient in such cases.[38]

Permissible forms of inquiry are numerous under a rule of discovery that allows questions based on the application of law to fact. For example, the federal rules have been interpreted as allowing inquiry into how an accident occurred, even though the question invades the province of the jury and calls for a legal conclusion.[39] Further, a party may ask the manner in which he was allegedly negligent[40] or the theory of negligence asserted by his opponent.[41] Similarly, it is permissible to ask a party if he followed the usual customs, rules, and practices in performing work and, if not, what customs and rules were disregarded.[42]

Another construction given Federal Rule 33 allows a party to inquire into whether an employee was acting within the course and scope of employment at the time of an accident.[43] A party may also be asked if he was under a duty to take action under a given set of facts, thus possibly eliminating the need for proof on this issue.[44] In addition, it is proper to inquire whether a party or his agent was acting under any disability at the time of an accident.[45] Also, one may seek to ascertain how a machine or product malfunctioned, in what way it was defective, or how the negligence in a given case

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38. *See* Union Carbide Corp. v. Travelers Indem. Co., 61 F.R.D. 411, 413-14 (W.D. Pa. 1973) (interrogatory seeking legal theories of insurance company's discharge of policy liability proper).

39. *See* Goodman v. International Business Machs. Corp., 59 F.R.D. 278, 279 (N.D. Ill. 1973).

40. *See* Hartsfield v. Gulf Oil Corp., 29 F.R.D. 163, 164 (E.D. Pa. 1962) (details of negligence proper scope of interrogatory); B & S Drilling Co. v. Halliburton Oil Well Cementing Co., 24 F.R.D. 1, 2-3 (S.D. Tex. 1959) (manner of negligence includes names of defendant's employees and acts which form basis of negligence).

41. *See* Kerr-McGee Corp. v. Texas Okla. Express, Inc., 43 F.R.D. 336, 338 (W.D. Okla. 1967) (interrogatory seeking plaintiff's opinion as to relationship between damages and defendant's loading procedures proper).

42. *See* Zinsky v. New York Cent. Ry. Co., 36 F.R.D. 680, 681 (N.D. Ohio 1964).

43. *See* B & S Drilling Co. v. Halliburton Oil Well Cementing Co., 24 F.R.D. 1, 6-7 (S.D. Tex. 1959) (interpretation of proper scope of interrogatories under FED. R. CIV. P. 33).

44. *See* Reynolds v. Southern Ry. Co., 45 F.R.D. 526, 528 (N.D. Ga. 1968) (interrogatory inquiring whether defendant had responsibility to maintain collapsed wall proper).

45. *See* Hughes v. Groves, 47 F.R.D. 52, 55 (W.D. Mo. 1969) (interrogatory inquiring whether defendant was under physical disability affecting operation of car proper).

occurred.[46]

In the field of commercial litigation, a party may ask the opponent whether he had ever assumed the status of an assignee of certain notes.[47] The federal rule also allows an inquiry into what interpretation a party's opponent has given to a contract, contract clause, or other agreement.[48]

Prior to the 1984 amendments, the customary method by which one would obtain more specific allegations from his opponent was through the use of special exceptions.[49] In addition to special exceptions, a party may now serve interrogatories to discover his opponent's legal contentions.[50] If the response is inadequate, a motion for a more particular response by a certain time may be filed. If the opponent continues to refuse to disclose his true contentions, the court would be justified in utilizing the many discovery sanctions available for dealing with recalcitrant litigants.[51] A party may also be required to disclose the basis of affirmative defenses intended to be asserted at trial.[52]

Having amended the rules to allow the use of mixed questions of law and fact, it was necessary to adopt a provision for the protection of the respondent.[53] Under Rule 166b(4), the court has the authority to issue orders to protect a responding party from "undue burden, unnecessary expense, harassment or annoyance, or invasion of

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46. *See* Anderson v. United Air Lines, Inc., 49 F.R.D. 144, 147-48 (S.D.N.Y. 1969) (interrogatory requesting information about malfunction of airplane proper).

47. *See* Joseph v. Norman's Health Club, Inc., 336 F. Supp. 307, 319 (E.D. Mo. 1971) (interrogatory inquiring whether defendant was assignee of promissory note proper and does not call for legal conclusion).

48. *See* Atlanta Coca-Cola Bottling Co. v. Transamerica Ins. Co., 61 F.R.D. 115, 118-19 (N.D. Ga. 1972). This interpretation of Federal Rule 33 may by analogy affect prior Texas case law that held that the question of whether a person made a promise to pay was an impermissible legal inquiry. *See* Eskew v. Johnston Printing Co., 615 S.W.2d 287, 289 (Tex. Civ. App.—Dallas 1981, no writ).

49. *See* TEX. R. CIV. P. 91.

50. *See id.* 166b(2)(a). Rule 166b(2)(a)'s federal counterpart has been construed to permit parties to use various discovery tactics to ascertain the facts that form the basis of their opponent's legal contentions. *See* Wright v. Firestone Tire & Rubber Co., 93 F.R.D. 491, 493 (W.D. Ky. 1982); *In re* Trantex Corp., 10 Bankr. 235, 239 (Bankr. D. Mass. 1981).

51. *See* TEX. R. CIV. P. 215 (sanctions for abuse of discovery). *See generally* Kilgarlin & Jackson, *Sanctions for Discovery Abuse Under New Rule 215,* 15 ST. MARY'S L.J. 767, 793-808 (1984) (general discussion of available discovery sanctions).

52. *See* Westhemeco Ltd. v. New Hampshire Ins. Co., 82 F.R.D. 702, 709-10 (S.D.N.Y. 1979).

53. *See* TEX. R. CIV. P. 166b(4).

personal, constitutional, or property rights."[54] A protective order may be proper when the proffered legal question could prejudice the respondent by requiring him to limit his theory of recovery before he is ready to do so.[55] Rule 166b(2)(a) also allows a party who is asked to respond to a legal inquiry to move the court for permission not to answer the discovery until after designated discovery has been completed or until a pretrial conference or other later time.[56]

In deciding how to rule on a motion for protection, the federal courts have weighed many factors, including the nature of the case, the knowledge of the respondent, the amount of discovery completed and to be attempted, and the "proximity of the issue to be narrowed to the central issues in the case."[57] When it appeared that requiring an answer would unduly prejudice the party,[58] one federal court held that it was proper to order that no answer was required until some specified time prior to trial or at trial.[59]

2. Documents and Tangible Things

Rule 166b(2)(b) now includes a major portion of former Rule 167 and, to a lesser extent, Rule 186a, dealing with requests for discovery.[60] The old rules' language has been rearranged, but the general guidelines remain the same.[61] One major change is that now "possession, custody or control" is defined by whether the party upon

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54. *Id.*

55. *See* Leumi Fin. Corp. v. Hartford Accident & Indem. Co., 295 F. Supp. 539, 543 (S.D.N.Y. 1969) (interrogatory seeking opinion improper if answering party required to select legal theory before ready to do so); Berkley v. Newman Realty Co., 33 F.R.D. 516, 517 (W.D. Mo. 1963) ("maneuver[ing] adverse party into unfavorable tactical position" improper use of interrogatories).

56. *See* TEX. R. CIV. P. 166b(2)(a).

57. Leumi Fin. Corp. v. Hartford Accident & Indem. Co., 295 F. Supp. 539, 543 (S.D.N.Y. 1969).

58. The court must find "undue" prejudice. A simple showing of some prejudice will not suffice. *See* Federal Cartridge Corp. v. Olin Mathieson Chem. Corp., 41 F.R.D. 531, 533-34 (D. Minn. 1967).

59. *See* Mid-America Facilities, Inc. v. Argonaut Ins. Co., 78 F.R.D. 497, 498 (E.D. Wis. 1978). A court is more justified in postponing discovery than in denying it altogether. *See* Marrese v. American Academy of Orthopaedic Surgeons, 706 F.2d 1488, 1493 (7th Cir. 1983) (less hardship on discovering party when discovery postponed and not denied).

60. *Compare* TEX. R. CIV. P. 166b(2)(b) (discovery of documents within person's possession and relevant to case) *with* Tex. R. Civ. P. 167 (Vernon Supp. 1983) (discovery and production of documents in person's possession) *and* Tex. R. Civ. P. 186a (Vernon 1976) (scope of discovery limited to matters relevant to subject matter of case).

61. *See* Tex. R. Civ. P. 167 (Vernon Supp. 1983); Tex. R. Civ. P. 186a (Vernon 1976).

whom the request is served has "a superior right to compel the production from a third party."[62] Thus, constructive possession has been redefined.[63]

A major consideration in defining "a superior right to compel" is to ascertain the legal status of the party from whom discovery is sought with respect to the items in question, i.e., does the respondent have the legal right to obtain the items sought.[64] This necessarily will depend on the facts of each case, and the burden is on the party seeking discovery to show that the requested items are in the possession of his opponent.[65] For example, discovery may be sought of a party's bank records that are in the custody of the bank.[66] If the party may compel the bank to release the records to him, such information must be made available to the movant.[67] A similar rule governed discovery of tax records under prior practice[68] and should continue under the new rule.

While examining the legal rights of the respondent, the court concurrently should inquire into whether the respondent has the practical ability to meet the discovery request.[69] Rule 166b specifically provides that one need not have "actual" possession of the documents or tangible things "[a]s long as the person has a superior right to compel the production from a third party . . . ."[70] A reasonable

62. TEX. R. CIV. P. 166b(2)(b).

63. *Compare id.* (defines constructive possession in terms of "superior right to compel production") *with* Tex. R. Civ. P. 167(8) (Vernon Supp. 1983) (defines constructive possession in terms of "a right to compel production").

64. *See* Stewart v. Bank of Pontotoc, Miss., 74 F.R.D. 552, 554 (N.D. Miss. 1977) (plaintiff required to respond to interrogatories regarding her law school application as fully as she could obtain information from the school); Firemen's Mut. Ins. Co. v. Erie-Lackawanna R.R. Co., 35 F.R.D. 297, 298-99 (N.D. Ohio 1964) (in answering interrogatories, insurer required to obtain information from insured).

65. *See* Wharton v. Lybrand, Ross Bros. & Montgomery, 41 F.R.D. 177, 180 (E.D. N.Y. 1966) (burden on movant to show that opponent has custody of items). A business, however, is presumed to have custody of the records kept in the normal course of business. *See* Norman v. Young, 422 F.2d 470, 472 (10th Cir. 1970).

66. *See* Hopkins v. Hopkins, 540 S.W.2d 783, 789 (Tex. Civ. App.—Corpus Christi 1976, no writ).

67. *See id.* at 789.

68. *See* Maresca v. Marks, 362 S.W.2d 299, 300-01 (Tex. 1962) (tax returns discoverable when relevant to controversy).

69. *See* Martinez v. Rutledge, 592 S.W.2d 398, 401 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.). The ability to respond is implicit in all discovery actions. The respondent, however, must use reasonable diligence in seeking to obtain the requested information. *See id.* at 401.

70. TEX. R. CIV. P. 166b(2)(b).

construction of this language would require that the respondent have a right to access superior to that of the third person before production may justifiably be demanded. To construe the rule otherwise would result in cases in which the respondent would be considered to have violated the rule when, though having a right of possession superior to that of the movant, he in fact has little or no actual ability to produce the requested materials. Therefore, if the court finds that the respondent has either no legal right or no practical ability to obtain the items sought, the requisite constructive possession does not exist.

One area that has been the subject of some degree of confusion concerns discovery of information held by sister or parent corporations of the party corporation.[71] The majority of federal courts hold that non-party status of a related corporation is no excuse, implying that each corporation may compel production from each other corporation.[72] On the other hand, there is not total agreement with this view, and one federal court found no right to compel production in this scenario.[73]

3. Land

Rule 166b now controls requests for entry upon land.[74] As with requests for discovery, this portion of the rule is controlled by whether the party[75] upon whom the request is served has a superior right to compel a third person to permit entry.[76]

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71. *See* Annot., 19 A.L.R. 3d 1134, 1138-42 (1968) (discussion of discovery of information from affiliated or subsidiary corporation).

72. *See, e.g., In re* Richardson-Merrell, Inc., 97 F.R.D. 481, 483 (S.D. Ohio 1983) (plaintiff entitled to discovery of documents in custody of defendant's foreign subsidiaries); Brunswick Corp. v. Suzuki Motor Co., 96 F.R.D. 684, 686 (E.D. Wis. 1983) (defendant parent corporation required to disclose information concerning subsidiaries); Hubbard v. Rubbermaid, Inc., 78 F.R.D. 631, 636-37 (D. Md. 1978) (documents not shielded from production merely because records were in possession of subsidiaries).

73. *See* Westinghouse Credit Corp. v. Mountain States Mining & Milling Co., 37 F.R.D. 348, 349 (D. Colo. 1965) (subsidiary corporation not required to disclose information concerning sales of parent corporation).

74. TEX. R. CIV. P. 166b(2)(c).

75. *Id.* Of course, the general rule is that the court may not order a nonparty to permit entry on his land. *See* Pollitt v. Mobay Chem. Corp., 95 F.R.D. 101, 106 (S.D. Ohio 1982) (court without authority to require nonparty corporation to permit plaintiff's entry on land); Huynh v. Werke, 90 F.R.D. 447, 450 (S.D. Ohio 1981) (rule allowing entry on land applies only to parties).

76. *See* Santa Fe Int'l Corp. v. Potashnick, 83 F.R.D. 299, 300-01 (E.D. La. 1979). The Louisiana court held that a contractor's right to enter the premises of a subcontractor to

4. Potential Parties and Witnesses

Subsection 2(d) of Rule 166b concerns potential parties and witnesses, and it is taken primarily from former Rule 186a.[77] The new rule sets forth a definition of persons having knowledge of relevant facts as one who "has or may have knowledge of any discoverable matter."[78] This definition is taken from Federal Rule 26.[79]

A major problem under the former rule was whether a party could obtain a list of persons who had witnessed an accident or event.[80] Federal Rule 26(b)(1) has been interpreted to permit discovery of a list of fact witnesses,[81] and Texas courts may be inclined to adopt this interpretation for Rule 166b(2)(d). A proposal was made that the Texas rule should require the disclosure of persons that a party expected to call to testify;[82] however, the Texas Supreme Court did not include this provision in the final draft of the rules, making it clear that no such list is discoverable.[83]

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inspect the final work product was not control such that the contractor could be required to allow the movant access to the work area. *See id.* at 300-01.

77. *Compare* TEX. R. CIV. P. 166b(2)(d) (discovery of identity and location of potential parties and witnesses) *with* Tex. R. Civ. P. 186a (Vernon 1976) (identity and location of potential parties and persons having knowledge of relevant facts discoverable).

78. TEX. R. CIV. P. 166b(2)(d).

79. *Compare id.* (knowledge of relevant facts defined as knowledge of discoverable matter) *with* FED. R. CIV. P. 26(b)(1) (parties may discover identity of persons "having knowledge of any discoverable matters").

80. *Compare* Lopresti v. Wells, 515 S.W.2d 933, 936-37 (Tex. Civ. App.—Fort Worth 1974, no writ) (identity of witnesses to car wreck discoverable) *with* Dallas Ry. & Terminal Co. v. Oehler, 156 Tex. 488, 491, 296 S.W.2d 757, 759 (1956) (disclosure of names of passengers in street car at time of accident not required).

81. *Compare* TEX. R. CIV. P. 166b(2)(d) (discovery of identity of witnesses) *with* FED. R. CIV. P. 26(b)(1) (discovery of identity and location of witnesses). One concern in allowing discovery of a list of fact witnesses is that such a list may constitute work product. Also, this information may, in some instances, be protected by the exemption in Rule 166b(3)(d), concerning communications made subsequent to the occurrence giving rise to the cause of action. *See generally* Bell v. Swift & Co., 283 F.2d 407, 409 (5th Cir. 1960) (defendant required to disclose names of persons "having knowledge of relevant facts"); Anderson v. United Air Lines, Inc., 49 F.R.D. 144, 147 (S.D.N.Y. 1969) (interrogatory requesting identity of witnesses to airplane crash proper); St. Paul Fire & Marine Ins. Co. v. King, 45 F.R.D. 521, 523 (W.D. Okla. 1968) (discovery of identity of witnesses allowed during pretrial discovery but not prior to such time).

82. This provision would have overruled Employer's Mut. Liab. Ins. Co. of Wisconsin v. Butler, 511 S.W.2d 323, 325 (Tex. Civ. App.—Texarkana 1974, writ ref'd n.r.e.), which held that discovery rules do not require a party to disclose potential trial witness.

83. *See* TEX. R. CIV. P. 166b(2)(d). There is a conflict on this point in the federal courts. *Compare* St. Paul Fire & Marine Ins. Co. v. King, 45 F.R.D. 521, 523 (W.D. Okla. 1968) (plaintiff's objection to discovery of potential trial witnesses sustained) *with* Lloyd v.

Rule 166b(2)(d) also provides that information sought from potential parties or persons having knowledge of relevant facts need not be based on personal knowledge.[84] Under the new rule, the respondent should refuse to answer a question or make available the requested information only if he is unable to obtain the requested information after a diligent search and inquiry.[85]

5. Experts and Reports of Experts

Subsection 2(e) of Rule 166b sets forth all provisions governing the discovery of experts and expert reports.[86] As in the former rules, the information sought from the expert must be relevant to the pending action.[87] Also, the information must have been acquired in anticipation of the subject litigation in order to be subjected to the more rigorous standards of Rule 166b(2)(e).[88]

Instances do arise in which information is sought from an expert, but that information was not acquired in anticipation of litigation. For instance, in *Barkwell v. Sturm Ruger Co.,*[89] the plaintiff sought to depose a non-testifying expert who was employed by the defendant concerning research previously conducted by the expert.[90] The court held that since the information sought was not obtained in anticipation of litigation, the plaintiff was entitled to discover it.[91]

Cessna Aircraft Co., 434 F. Supp. 4, 8 (E.D. Tenn. 1976) (party required to disclose name and location of trial witnesses) *and* United States Equal Employment Opportunity Comm'n v. Metropolitan Museum of Art, 80 F.R.D. 317, 318 (S.D.N.Y. 1978) (interrogatory requesting names of all lay and expert trial witnesses proper).

84. *See* TEX. R. CIV. P. 166b(2)(d); *cf.* Olmert v. Nelson, 60 F.R.D. 369, 370 (D.D.C. 1973) (Federal Rule 26 does not allow answering party to limit responses to interrogatories only to personal knowledge).

85. *Cf.* Ballard v. Allegheny Airlines, Inc., 54 F.R.D. 67, 69 (E.D. Pa. 1972) (if answer to interrogatory not available after reasonable inquiry, interrogated party may so state); United States v. Grinnell Corp., 30 F.R.D. 358, 362 (D.R.I. 1962) (if answer unknown after reasonably diligent search responding party should so state). If a party has no knowledge of the information sought, he should so state in his response. *See* McKnight v. Blanchard, 667 F.2d 477, 481 (5th Cir. 1982); United States v. Nysco Laboratories, Inc., 26 F.R.D. 159, 162 (E.D.N.Y. 1960). Moreover, one should state the efforts made to obtain the requested information. *See* Miller v. Doctor's Gen. Hosp., 76 F.R.D. 136, 140 (W.D. Okla. 1977).

86. TEX. R. CIV. P. 166b(2)(e).

87. *Compare id. with* Tex. R. Civ. P. 186a (Vernon 1976).

88. *See* TEX. R. CIV. P. 166b(2)(e).

89. 79 F.R.D. 444 (D. Alaska 1978).

90. *See id.* at 445.

91. *See id.* at 446; *see also* Wright v. Jeep Corp., 547 F. Supp. 871, 874 (E.D. Mich. 1982) (discovery allowed because expert's study not developed in anticipation of trial and

Neither the holding in *Barkwell* nor the new rule restrict the ability to discover an expert's prior testifying and consulting experience in other cases.[92]

Rule 166b provides for three types of experts. One is the traditional testifying expert, an expert "who may be called as a witness."[93] A second type is the non-testifying consultant whose "work product forms a basis either in whole or in part of the opinions of an expert who is to be called as a witness."[94] The third type of expert is the true consultant, one who has been "informally consulted" or "retained or specially employed . . . in anticipation of litigation."[95] The redrafted rules allow discovery of the first two types of experts, the testifying expert and the "contributing" expert; however, no discovery is allowed of a "non-contributing" expert.[96] Placing these three divisions into a rule codifies existing Texas case law.[97]

If the expert may be called as a witness or if the expert is a consultant whose work product forms the basis either in whole or in part of the opinions of an expert who is to be called as a witness, a party may discover the expert's

> identity and location (name, address, and telephone number), . . . the subject matter on which the witness is expected to testify, the mental impressions and opinions held by the expert and the facts known to

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expert not retained by either party); Grinnell Corp. v. Hackett, 70 F.R.D. 326, 330-31 (D.R.I. 1976) (Federal Rule restricts discovery of facts and opinions of experts acquired in anticipation of trial); Allen v. Humphreys, 559 S.W.2d 798, 804 (Tex. 1977) (scientific reports not made in connection with investigation of plaintiff's worker's compensation claim discoverable). In *Ex parte Shepperd,* the Texas Supreme Court held that "an especially rigorous showing of good cause would be required before a party to one pending action could obtain reports immune from discovery in another pending action to which they primarily relate." *Ex parte* Shepperd, 513 S.W.2d 813, 817 (Tex. 1974). Even though the good cause requirement has since been deleted from the rules, a more demanding standard of need may apply in contexts covered by *Shepperd.*

92. *See* Barkwell v. Sturm Ruger Co., 79 F.R.D. 444, 445 (D. Alaska 1978); TEX. R. CIV. P. 166b(2)(e).

93. TEX. R. CIV. P. 166b(2)(e)(1).

94. *Id.*

95. *Id.* 166b(3)(c). A true consultant's work product does not contribute to the basis of the testifying expert's opinion or conclusions.

96. *Id.* 166b(2)(e)(1), (3)(c).

97. *See, e.g.,* Werner v. Miller, 579 S.W.2d 455, 456 (Tex. 1979) (name of testifying expert discoverable; opinions of consulting non-testifying experts not discoverable); Allen v. Humphreys, 559 S.W.2d 798, 804 (Tex. 1977) (reports of consulting experts immune from discovery); Houdaille Indus., Inc. v. Cunningham, 502 S.W.2d 544, 548 (Tex. 1973) (reports of non-testifying experts not discoverable).

> the expert (regardless of when the factual information was acquired) which relate to or form the basis of the mental impressions and opinions held by the expert.[98]

Subsection 2(e) of Rule 166b must be read in conjunction with subsection 3(c), which exempts experts who have been "informally consulted" and those "retained or specially employed by another party in anticipation of litigation and preparation for trial."[99] To distinguish between a protected consultant and a non-protected consultant, the court must inquire into whether the expert's work product forms the basis, either in whole or in part, of the opinions of an expert who may be called as a witness. If the work product is to be used, the consultant necessarily was not "informally consulted"; otherwise, no discovery should be allowed.[100]

The new rule embodies the holdings in *Houdaille Industries, Inc. v. Cunningham,*[101] *Allen v. Humphreys,*[102] and *Werner v. Miller*[103] that a party may not discover the identity of a consulting expert if the expert is one "used solely for consultation and who will not be called as a witness." The ability to discover employee-experts, as pronounced in *Barker v. Dunham,*[104] is in no way affected by the 1984 amendments. Therein, the court held that employee-experts were subject to discovery in the same manner as other experts unless the party-employer "positively avers" that the employee will not be called as a witness.[105] Implicit in these holdings is the fact that an expert who contributes to the basis of the testimony of the testifying

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98. TEX. R. CIV. P. 166b(2)(e)(1).

99. *Id.* 166b(3)(c).

100. *Id.* Federal Rule 26(b)(4)(B) permits a party to discover the identity of experts retained or specially employed, though non-testifying, under the general rule allowing discovery of persons having knowledge of relevant facts. FED. R. CIV. P. 26(b)(4)(B). One may not discover, however, the identity of experts who are informally consulted, but not specially employed. *See* Arco Pipeline Co. v. S/S Trade Star, 81 F.R.D. 416, 417 (E.D. Pa. 1978); Baki v. B.F. Diamond Constr. Co., 71 F.R.D. 179, 182 (D. Md. 1976). This construction of the rule should not be adopted in Texas, considering the action of the supreme court with regard to this rule.

101. 502 S.W.2d 544, 548 (Tex. 1973).

102. 559 S.W.2d 798, 804 (Tex. 1977).

103. 579 S.W.2d 455, 456 (Tex. 1979). These cases were based on the wording of Rule 186a, which protected experts "who will not be witnesses." Tex. R. Civ. P. 186a (Vernon 1976). These holdings remain intact even though the language of the rule has been reworded from the negative to the affirmative, so that you may discover experts "who may be called as a witness." *See* TEX. R. CIV. P. 166b(2)(e)(1).

104. 551 S.W.2d 41, 43-44 (Tex. 1977).

105. *See id.* at 44.

expert is not used "solely" for consultation and, thus, must be disclosed.

One aspect of the expert rules that will require court construction concerns the proper classification of a consultant who, although not providing the sole basis for the testifying expert's testimony, contributes to the basis relied upon by the testifying expert. This problem would arise when the expert has reached his conclusion, but the litigant seeks out other experts who subsequently conduct an investigation and contribute findings or data to be used by the testifying expert. These experts do not supply the sole basis of the testifying expert, but they may contribute to the basis of the testifying expert's opinions. If the work product of such a consultant does not form at least a partial basis of the opinions or conclusions of a testifying expert, the consultant would, under the rule, be non-discoverable.[106]

An interesting point that has not been addressed thoroughly by Texas courts concerns what have been denominated "fact experts." These are experts from whom information is sought concerning the facts of the case, not expert opinion information. Many instances arise in which only the inventors or developers of a product or idea know the true facts of what has happened in a case. The federal courts consistently have held that such experts do not fall within the scope of the rules regarding experts, but rather that they are to be treated as ordinary fact witnesses who may be discovered because they have knowledge of relevant facts.[107] The rule, however, should not extend to consulting experts who will not testify or contribute to the basis of the testimony of the testifying expert and whose only source of factual information was the consultation.

Rule 166b sets forth guidelines controlling reports of experts that are the same as those governing discovery of other information from experts, i.e., all such information may be discovered if "it forms the basis either in whole or in part of the opinions of an expert who is to be called as a witness."[108] The provision in former Rule 167(5) pro-

106. *See* TEX. R. CIV. P. 166b(3)(c).

107. *See, e.g.,* Marine Petroleum Co. v. Champlin Petroleum Co., 641 F.2d 984, 992 (D.C. Cir. 1979) (plaintiff entitled to discovery of facts known to energy consultant prior to time he began preparation for defendant's trial); Keith v. Van Dorn Plastic Mach. Co., 86 F.R.D. 458, 460 (E.D. Pa. 1980) ("actor or viewer" of subject matter of lawsuit considered fact witness); Nelco Corp. v. Slater Elec. Co., 80 F.R.D. 411, 414 (E.D.N.Y. 1978) (information acquired by expert as "actor" in transactions that concern lawsuit discoverable).

108. TEX. R. CIV. P. 166b(2)(e)(2); *accord* Allen v. Humphreys, 559 S.W.2d 798, 804

viding for the reduction of experts' reports to tangible form is included in Rule 166b(2)(e)(4); however, the new rule omits the good cause and hearing requirements.[109] The fourteen-day limit of Rule 168(7)(3) has been replaced by a provision giving the trial judge discretion to compel a party to make the determination and disclosure of whether an expert may be called to testify within a reasonable and specific time before the date of trial.[110] This provision will help eliminate delay and surprise by allowing parties to ascertain prior to trial what additional discovery is required to prepare adequately for the case.[111]

The purpose of the new provisions governing the discoverability of consulting experts and their work product is to make known to all parties information necessary for them to adequately prepare for trial and to avoid surprise and delay in trials.[112] It is contrary to the spirit of the rule for a party to shield information from discovery by having it developed through a consultant who will not testify, but then making it available to the expert who will testify. While maintaining a policy of full disclosure, the rule continues to protect those consultants whose work product actually does not form the basis of another's testimony.[113] The test is: If the work product of the expert

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(Tex. 1977) (legal duty to disclose reports of testifying expert witnesses). The trial court has ample discretion to determine if adequate disclosure has been made and to order more if it would facilitate the trial. *See* Carter-Wallace, Inc. v. Hartz Mountain Indus., Inc., 553 F. Supp. 45, 52 (S.D.N.Y. 1982).

109. *Compare* Tex. R. Civ. P. 167(5) (Vernon Supp. 1983) (upon showing of good cause, court may order expert data reduced to tangible form) *with* TEX. R. CIV. P.166b(2)(e)(4) (reduction of expert report to tangible form; no good cause requirement).

110. *Compare* Tex. R. Civ. P. 168(7)(3) (Vernon Supp. 1983) (duty to supplement names of testifying experts 14 days prior to trial) *with* TEX. R. CIV. P. 166b(2)(e)(3) (status of expert disclosed within reasonable time before trial).

111. *Accord* Werner v. Miller, 579 S.W.2d 455, 456 (Tex. 1979). The *Werner* court stated:

> This declaration obviously should be made in sufficient time to permit the opposing party to discover the reports, factual observations, and opinions of the potential expert witness. On the other hand, the party employing the witness must be given sufficient time to develop his case so that an intelligent decision can be made regarding the use of the expert.

Id. at 456.

112. *See* Hockley v. Zent, Inc., 89 F.R.D. 26, 30 (M.D. Pa. 1980). Inquiries regarding experts are "designated to afford the questioner notice of the basic arguments the responding litigant intends to press at trial." *Id.* at 30; *see also* Weiss v. Chrysler Motors Corp., 515 F.2d 449, 456-57 (2d Cir. 1975) (mutual knowledge of expert testimony essential to preparation of trial).

113. *See* TEX. R. CIV. P. 166b(3)(c).

in question forms a basis either in whole or in part of the opinions of an expert who is to be called as a witness then you may discover the identity, mental impressions, and opinions of the expert.[114]

6. Indemnity, Insurance and Settlement Agreements

The contents of former Rule 167(1)(a) allowing discovery of insurance agreements is retained in Rule 166b(f)(1).[115] The new rule additionally provides for the disclosure of the existence of settlement agreements.[116] This new subsection is consistent with the practice in the federal courts.[117] The admissibility of such information, however, is controlled by the rules of evidence.[118]

7. Statements

Subsection 2(g) of Rule 166b is a verbatim recitation of former Rule 167(6).[119] This rule allows a person to obtain a copy of a state-

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114. *See id.* Under the Federal Rule regarding consulting experts, the rule is that "discovery can take place only upon a showing of 'exceptional circumstances' under which it is 'impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means'." Mantolete v. Bolger, 96 F.R.D. 179, 181 (D. Ariz. 1982) (citing Maine Petroleum Co. v. Champlin Petroleum Co., 641 F.2d 984, 990 (D.C. Cir. 1980)); *see also* Hoover v. United States Dep't of Interior, 611 F.2d 1132, 1142 (5th Cir. 1980) (landowner not entitled to discovery of government's appraisal right without showing of "exceptional circumstances"); Benton v. Dixie Shamrock Oil & Gas, Inc., 95 F.R.D. 296, 297 (E.D. Tenn. 1981) (deposition of non-testifying expert not allowed because no "exceptional circumstances"). A consulting expert remains protected if he is specially employed in anticipation of numerous future lawsuits. And, such an expert also may be used for product improvement and not lose his protection. *See* Hermsdorfer v. American Motors Corp., 96 F.R.D. 13, 15 (W.D.N.Y. 1982).

115. *Compare* Tex. R. Civ. P. 167(1)(a) (Vernon Supp. 1983) (production of insurance agreement under which insurer may be liable for part of judgment) *with* TEX. R. CIV. P. 166b(f)(1) (discovery of insurance agreement under which insurer may be liable to satisfy judgment).

116. TEX. R. CIV. P. 166b(f)(2).

117. *See* Ayers v. Pastime Amusement Co., 240 F. Supp. 811, 812 (E.D.S.C. 1965) (plaintiff entitled to discover true nature of settlement); Walling v. R.L. McGinley Co., 4 F.R.D. 149, 150 (E.D. Tenn. 1943) (production of settlements executed by defendant's employees in connection with settlement of claims allowed). *See generally* FEDERAL PROCEDURE § 26:233 (Bancroft-Whitney Co. Ed. 1982) (Federal Rule 34 allows production of releases and covenants not to sue). Some courts require a particularized showing of a likelihood that admissible evidence will be generated by the dissimenation of the terms of the settlement agreement. *See* Bottaro v. Hatton Assoc., 96 F.R.D. 158, 160 (E.D.N.Y. 1982).

118. *See* TEX. R. EVID. 408-09, 411.

119. *Compare* TEX. R. CIV. P. 166b(2)(g) (discovery of statement previously made) *with* Tex. R. Civ. P. 167(6) (Vernon Supp. 1983) (discovery of statement perviously made).

ment previously given by him to a party.[120] On the other hand, Rule 166b(3)(b) states that written statements of potential parties and witnesses are exempt from discovery.[121] Consequently, a witness or party who gives a statement can obtain a copy of his own statement, but not a copy of the statement of another party or witness.[122] The federal courts generally allow a party to obtain a list of persons who have given a statement in a case.[123] When this question arises in a Texas tribunal, the court may consider the definition of "persons having knowledge of relevant facts," the protection granted to work product, and the exempt communications taking place after the occurrence that forms the basis of the lawsuit.[124]

8. Medical Records; Medical Authorization

The medical records section of Rule 167(7) has been modified and transferred to Rule 166b(2)(h).[125] The new rule requires a written request for the disclosure of such records.[126] As in the former rule, the requesting party is required to furnish a copy of all records so obtained to the person of whom the request was made.[127] Contrary to the former rule, however, no longer must this information be provided free of charge to all other parties. Rather, the information need only be made available to parties, and they are responsible for the costs of reproducing the records.[128] Rule 166b also extends the period before trial during which medical records must be made available to parties and the furnishing party.[129] This time period

120. *See* TEX. R. CIV. P. 166b(2)(g).

121. *See id.* 166b(3)(b).

122. *See id.* 166b(2)(g), (3)(b).

123. *Cf.* Sersted v. American Can Co., 535 F. Supp. 1072, 1080 (E.D. Wis. 1982)(defendant entitled to discover names and addresses of witnesses who gave statements); Ballard v. Terrak, 58 F.R.D. 184, 185 (E.D. Wis. 1972) (defendant required to disclose names of witnesses). *But cf.* Arco Pipeline Co. v. S/S Trade Star, 81 F.R.D. 416, 417-18 (E.D. Pa. 1978) (one may obtain copy of witnesses' statements by properly worded interrogatory).

124. *See* TEX. R. CIV. P. 166b(2)(d), (3)(a), (3)(d).

125. *Compare* Tex. R. Civ. P. 167(7) (Vernon Supp. 1983) (party alleging injury required to disclose medical records) *with* TEX. R. CIV. P. 166b(2)(h) (party alleging injury required to produce or authorize disclosure of related medical records).

126. *Id.* 166b(2)(h).

127. *See id.*

128. *See id.* (records made available to parties "under reasonable terms and conditions").

129. *See id.*

has been extended from fourteen days to thirty days.[130] In addition, the rule specifically provides that mailing notice of the availability of such records constitutes making them available.[131]

C. *Exemptions*

Section 3 of Rule 166b contains exemptions.[132] Subsection 3(a) maintains the traditional work product exemption.[133] Written statements of potential witnesses and parties are protected by subsection 3(b).[134] Subsection 3(b) also entitles a person to obtain a copy of his own statement.[135] Consulting experts are addressed in subsection 3(c).[136] Rule 166b(3)(e) exempts "any matter protected from disclosure by privilege."[137] This incorporates all types of privileges that the courts have held to be valid under former Rule 186a.[138]

The most notable change in exemptions is in Rule 166b(3)(d), which exempts communications passing between a party and his employees, agents, and investigators.[139] This provision is taken from old Rule 186a.[140] Rule 166b maintains the general exemption regarding communications passing between agents, representatives, or employees of any party "when made subsequent to the occurrence or transaction upon which the suit is based, and made in connection with the prosecution, investigation, or defense of the

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130. *Compare id.* 166b(2)(h) (thirty days) *with* Tex. R. Civ. P. 167(7) (Vernon Supp. 1983) (fourteen days).

131. *See* TEX. R. CIV. P. 166b(2)(h).

132. *See id.* 166b(3).

133. *See id.* 166b(3)(a).

134. *See id.* 166b(3)(b).

135. *See id.* Section II, B, subsection 7(2)(g) of this article discusses the discoverability of a list of persons who have given a statement in a case.

136. *See id.* 166b(3)(c). The discoverability of consultants is discussed in conjunction with rule 166b(2)(e) in section II, B, subsection 5 of this article.

137. *Id.* 166b(3)(e).

138. *See* West v. Solito, 563 S.W.2d 240, 244 (Tex. 1978) (discovery rules encompass all privileges under Texas law); Automatic Drilling Mach., Inc. v. Miller, 515 S.W.2d 256, 259 (Tex. 1974) (qualified privilege for trade secrets; discovery allowed when information material and unavailable from other source); Fisher v. Continental Ill. Nat'l Bank & Trust Co., 424 S.W.2d 664, 671 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.) (discovery of communications of attorney allowed because attorney-client privilege is privilege of client); *General Commentary-1966,* Tex. R. Civ. P. 186a (Vernon 1976) (common privileges are attorney-client privilege and privilege against self-incrimination).

139. *See* TEX. R. CIV. P. 166b(3)(d).

140. *Compare id. with* Tex. R. Civ. P. 186a (Vernon 1976).

claim."[141] The rule omits the clause contained in Rule 186a that exempted "information obtained in the course of an investigation of a claim or defense by a person employed to make such investigation."[142]

In *Ex Parte Hanlon,*[143] the Texas Supreme Court interpreted Rule 186a literally and denied a request to depose an insurance investigator concerning information obtained by him in the course of his work.[144] This exemption has been omitted from the rule because of its potential for abuse and because it arguably duplicated the exemption retained in Rule 166b(3)(d). As amended, Rule 166b provides ample protection for communications made in connection with the "investigation of the occurrence or transaction out of which the claim has arisen."[145]

D. *Protective Orders*

Section 4 of Rule 166b includes a redrafted provision governing protective orders.[146] Of note, the requirement of good cause previously set forth in Rule 186b has been omitted. The major change in the form of this rule is the elimination of the specific acts that the trial court may take and the inclusion of three broader, non-exclusive types of protective orders that may be made.[147] Although reworded, the new rule contemplates similar protective orders as were available under the former rule.[148]

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141. TEX. R. CIV. P. 166b(3)(d).

142. Tex. R. Civ. P. 186a (Vernon 1976).

143. 406 S.W.2d 204 (Tex. 1966).

144. *See id.* at 207.

145. TEX. R. CIV. P. 166b(3)(d).

146. *See id.* 166b(4).

147. *See id.* Rule 166b(4) provides:

a. ordering that requested discovery not be sought in whole or in part, or that the extent or subject matter of discovery be limited, or that it not be undertaken at the time or place specified.

b. ordering that the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court.

c. ordering that results of discovery be sealed or otherwise adequately protected; that its distribution be limited; or that its disclosure be restricted.

Id.

148. *Compare id. with* Tex. R. Civ. P. 186b (Vernon 1976). The trial court has broad discretion to allow or deny discovery, and it should utilize protective orders when necessary to prevent discovery abuses. *See* Joy v. North, 692 F.2d 880, 893 (2d Cir. 1982), *cert denied,* Baldwin v. Joy, __ U.S. __, 103 S. Ct. 1498, __ L. Ed. 2d __ (1983).

Whether or not a protective order is granted is within the discretion of the trial court.[149] Moreover, a protective order will not be set aside except upon a showing of a clear abuse of discretion.[150] The 1984 rules enlarge and liberalize discovery in Texas. Because the new rules enhance one's ability to seek discovery, it may be necessary for trial judges to be equally as liberal in granting protective orders when appropriate to protect the rights of litigants. Often, it is better to limit discovery at the outset rather than to attempt to cure an improper disclosure once discovery has been granted.[151]

E. *Duty to Supplement*

The final section of Rule 166b, section 5, concerns the duty to supplement, formerly in Rule 168(7).[152] This duty now applies to all forms of discovery, not just to interrogatories and depositions.[153] When supplementation is required, it now must be made thirty days prior to trial, not fourteen as under the former rule.[154]

The grounds giving rise to a duty to supplement have been rewritten and broadened. The rule now demands that supplementation is required if the initial response was either incorrect or incomplete when made or if a correct and complete response later proves not to be both true and correct and the circumstances are such that failure to amend is in substance misleading.[155] If an expert is obtained by a party and inquiry on that subject has been made previously, disclosure of the new expert is required.[156] The party who obtained the expert must state the name, address, and telephone number of the expert and the substance of the expert's testimony.[157] Except upon leave of court, this information must be provided no less than thirty

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149. *See* Fisher v. Continental Ill. Nat'l Bank & Trust Co., 424 S.W.2d 664, 670 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.).

150. *See* Meyer v. Tunks, 360 S.W.2d 518, 522 (Tex. 1962).

151. *See generally* West v. Solito, 563 S.W.2d 240, 246 (Tex. 1978) (judge should examine documents alleged to be privileged prior to production of documents); Automatic Drilling Mach., Inc. v. Miller, 515 S.W.2d 256, 259-60 (Tex. 1974) (court should have sustained plaintiffs protective order before ordering full disclosure of trade secrets).

152. *Compare* TEX. R. CIV. P. 166b(5) *with* Tex. R. Civ. P. 168(7) (Vernon Supp. 1983).

153. *See id.* 166b(5).

154. *Compare id.* (thirty days prior to trial) *with* Tex. R. Civ. P. 168(7) (Vernon Supp. 1983) (fourteen days prior to trial).

155. *See* TEX. R. CIV. P. 166b(5)(a)(1)(2).

156. *See id.* 166b(5)(b).

157. *See id.*

days prior to the beginning of trial; this is a modification of the fourteen-day period found in former Rule 168(7). Sanctions for the failure to disclose such experts are provided in Rule 215.[158]

III. RULE 167. DISCOVERY AND PRODUCTION OF DOCUMENTS AND THINGS FOR INSPECTION, COPYING, OR PHOTOGRAPHING

Substantial portions of Rule 167, which formerly contained information on the scope of discovery, have now been moved to Rule 166b. This was necessary to assure that all scope matters were included in one rule. In addition, former sections 5 (expert reports), 6 (statements), 7 (injury damages), and 8 (constructive possession) are now incorporated into Rule 166b.[159] A portion of old section 3 dealing with sanctions has been moved to Rule 215.

The primary substantive change in Rule 167 is the addition of a sentence to subsection 1(c), which reads: "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."[160] This amendment places the same standard upon the movant as the 1981 amendments placed on the respondent.

The wording of the new rule's "request" subsection is taken from Federal Rule 34(a).[161] The nomenclature utilized in the rule, i.e., "individual item" or "category" evidences the intent of the drafters as to the form the usual request should take. Construing the federal rule, Professor Moore has concluded that "[t]he question is whether a reasonable man would know what documents or things are called for."[162] The requirement of "reasonable particularity" is one not susceptible to exact definition.[163] Whether a particular request satis-

158. *See id.* 215; *see also* Kilgarlin & Jackson, *Sanctions for Discovery Abuse Under New Rule 215,* 15 ST. MARY'S L.J. 767, 816-20 (1984).

159. *Compare* Tex. R. Civ. P. 166b *with id.* 167(5), (6), (7), (8) (Vernon Supp. 1983).

160. TEX. R. CIV. P. 167(1)(c).

161. *Compare id. with* FED. R. CIV. P. 34(a).

162. 4A D. EPSTEIN, J. LUCAS & J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 34.07 (2d ed. 1983).

163. *See* Laufman v. Oakley Bldg. & Loan Co., 72 F.R.D. 116, 122 (S.D. Ohio 1976) (production requests of "any and all documents" sufficient under Rule 34(b)); Mallinckrodt Chem. Works v. Goldman, Sachs & Co., 58 F.R.D. 348, 353-54 (S.D.N.Y. 1973) ("reasonable particularity" defined in terms of identification).

fies this test must be based upon the facts of each case,[164] and the trial judge is vested with broad discretion to adjudge the sufficiency of one's request for production.[165]

As a general rule, the courts scrutinize requests more closely if the requests are not specific as to either the time, category, or item demanded.[166] Therefore, a request that covers an unspecified or overbroad time period may still be upheld if the items or categories are described in detail.[167] Likewise, a request for items in which the description is overbroad may be upheld if such request is limited to a specific period of time.[168]

The requirement of particularity is important since "vague or duplicative demands may cause confusion and disarray in responding" to the request[169] and may lead to unnecessary court interference in the discovery process.[170] The nature of the case often determines the level of particularity required.[171] For example, complex commercial litigation may provide the context for more general category descriptions since the movant often will be unaware of the specific

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164. *See In re* Folding Carton Antitrust Litigation, 76 F.R.D. 420, 424 (N.D. Ill. 1977); Mallinckrodt Chem. Works v. Goldman, Sachs & Co., 58 F.R.D. 348, 353 (S.D.N.Y. 1973).

165. *See* Bowman v. General Motors Corp., 64 F.R.D. 62, 68 (E.D. Pa. 1974).

166. *See* Securities & Exch. Comm'n v. American Beryllium & Oil Corp., 47 F.R.D. 66, 68 (S.D.N.Y. 1968).

167. *See* Houdry Process Corp. v. Commonwealth Oil Ref. Co., 24 F.R.D. 58, 62-63 (S.D.N.Y. 1959) (designation by category proper if category sufficiently described); *cf.* Democratic Nat'l Comm. v. McCord, 356 F. Supp. 1394, 1396 (D.D.C. 1973) (subpoena of materials covering extended time period valid because items requested particularly specified).

168. *See* Alliance to End Repression v. Rochford, 75 F.R.D. 430, 431 (N.D. Ill. 1976); Milner v. National School of Health Technology, 73 F.R.D. 628, 632 (E.D. Pa. 1977).

169. *See* United States v. International Business Machs. Corp., 83 F.R.D. 97, 107 (S.D.N.Y. 1979). Recognizing that instances will arise in which duplication in a request will occur, it is advisable for the movant to include in his request an addendum directing that the respondent make discovery with respect to that portion of the request to which the item is primarily responsive. *See id.* at 107.

170. *See* Baise v. Alewel's, Inc., 99 F.R.D. 95, 98 (W.D. Mo. 1983) (request for contents of expert's work file overbroad because probably contained work product and other privileged information). A vague or overbroad request invites an objection and needlessly involves the court in the discovery process.

171. *Cf.* Alexander v. Rizzo, 52 F.R.D. 235, 236 (E.D. Pa. 1971). In *Alexander,* the plaintiffs brought a civil rights action to seek relief from police practices of engaging in mass investigatory arrests. *See id.* at 235-36. The plaintiffs assumed the burden of showing that the police department engaged in improper investigatory practices as a matter of policy. *See id.* at 236-38. The court weighed the plaintiff's need to obtain evidence and the burden upon the defendant. The court ruled that the defendant was required to provide the plaintiff with evidence concerning three specific investigations. The results of this discovery would form the basis of a decision of the merits of the plaintiff's claim. *See id.* at 236-38.

documents in the possession of his opponent until after discovery has been accomplished.[172] Thereafter, when initial discovery has been completed and the parties have succeeded in narrowing the issues to some extent, greater particularity justifiably may be required.[173] Similarly, in less complex lawsuits in which the very nature of the case renders requests susceptible to greater particularity, the requesting party should act accordingly. Common sense will play a primary role in establishing the parameters of permissible requests under Rule 167.[174]

In ruling upon the sufficiency of a request for production, the court also may wish to consider the burden of compliance.[175] "The burden of production must be compared to the size of and resources available to the responding party."[176] This factor should not, however, give a party carte blanche to level unfairly overbroad requests merely because his opponent has considerable financial or other resources.[177] Likewise, parties should not be allowed to hide behind their lack of resources as a reason not to answer discovery. The ability to respond is only one factor properly considered by the court in determining whether a request is sufficiently particular.

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172. *See* United States v. International Business Machs. Corp., 83 F.R.D. 97, 107 (S.D.N.Y. 1979).

173. The degree of specificity required depends partially upon the information one has about the documents he requests. *See* Westhemeco Ltd. v. New Hampshire Ins. Co., 82 F.R.D. 702, 709-10 (S.D.N.Y. 1979).

174. *See* United States v. International Business Machs. Corp., 83 F.R.D. 97, 107 (S.D.N.Y. 1979) (in complex litigation, common sense dictates that description by categories is sufficient); *In re* Hunter Outdoor Prods. Inc., 21 Bankr. 188, 192 (Bankr. D. Mass. 1982) (request for all documents that "show or tend to show that defendant is guilty" insufficiently particularized and patently overbroad).

175. *See* Olmert v. Nelson, 60 F.R.D. 369, 370 (D.D.C. 1973); Casson Constr. Co. v. Armco Steel Corp., 91 F.R.D. 376, 378 (D. Kan. 1980). The party resisting discovery must show specifically how the request is burdensome. *See* Goodman v. Wagner, 553 F. Supp. 255, 258 (E.D. Pa. 1982).

176. United States v. International Business Machs. Corp., 83 F.R.D. 97, 108 (S.D.N.Y. 1979) ("inconvenience is relative to size").

177. *See* Halder v. International Tel. & Tel. Co., 75 F.R.D. 657, 658 (E.D.N.Y. 1977) (although requests under defendant's control, defendant "should not be forced to engage in extensive research and compilation"). Use of liberal discovery rules to "harass opponents is common, and requires viligence of the district judges to prevent." Marrese v. American Academy of Orthopaedic Surgeons, 706 F.2d 1488, 1495 (7th Cir. 1983); *see In re* Richardson-Merrell, Inc., 97 F.R.D. 481, 484 (S.D. Ohio 1983) (discovery should not be used to embarrass or annoy opponent); *see also* Goldman v. Belden, 98 F.R.D. 733, 736 (W.D.N.Y. 1983) (courts should not allow plaintiffs with groundless claims to abuse discovery simply to obtain information to enhance settlement value of suit).

The nature of the case and the nature of the movant's inquiry also should be considered in ruling upon requests for production.[178] This will require the trial judge to make an objective determination of whether the requested information is of sufficient importance to the disposition of the case to warrant imposing upon the respondent the burden of producing the information. If the request in dispute concerns a matter of incidental importance to the resolution of the case, it will be more difficult to justify an extremely burdensome response.[179] On the contrary, requests dealing with the central issues in a lawsuit may be granted with less justification.

If the court concludes that a request is not sufficiently particular, it may deny the request altogether[180] or it may cut the request down to a reasonable scope and grant it.[181] Whether a request is denied or cut down in scope is a matter in the discretion of the trial judge.[182] For example, in *General Motors Corp. v. Lawrence,*[183] the plaintiff requested certain information concerning fuel spills as to all General Motors vehicles, and no time period was specified.[184] The Texas Supreme Court concluded that the request was overbroad

178. *See* Lehnert v. Ferris Faculty Ass'n-MEA-NEA, 556 F. Supp. 317, 318 (W.D. Mich. 1983). "[T]he extent of a discovery burden that a party must justifiably bear is measured by the nature, importance, and complexity of the inquiry involved in a given case." *Id.* at 318.

179. *See* Duncan v. Maryland, 78 F.R.D. 88, 96 (D. Md. 1978) (in employment discrimination suit, court considered nature of case and burden of compliance and limited plaintiff's interrogatories to school at which plaintiff worked as opposed to all schools run by defendant).

180. *See* Bowman v. General Motors Corp., 64 F.R.D. 62, 66 n.3 (E.D. Pa. 1974) (interrogatory requesting details of all patents owned by GM denied because overly broad); *In re* Transtex Corp., 10 Bankr. 235, 240 (Bankr. Mass. 1981) (interrogatory requesting date, time, and substance of conversations with each agent or employee of plaintiff denied because overbroad).

181. *See, e.g.,* Hinton v. Entex Inc., 93 F.R.D. 336, 337-38 (E.D. Tex. 1981) (in employment discrimination suit, discovery limited to facility where plaintiff was employed); Greene v. Raymond, 41 F.R.D 11, 14-15 (D. Colo. 1966) (overbroad interrogatories limited as to period of inquiry); Eaddy v. Little, 235 F. Supp. 1021, 1022 (E.D.S.C. 1964) (interrogatory requesting plaintiff to list amount of annual earnings during past ten years overbroad and thus, limited to five-year period).

182. *See* Tavoulareas v. Piro, 93 F.R.D. 35, 40 (D.D.C. 1981); *In re* IBM Peripheral EDP Devices Antitrust Litigation, 77 F.R.D. 39, 41 (N.D. Cal. 1977); Schultz v. Haxton, 50 F.R.D. 95, 98 (N.D. Miss. 1970); *see also* Clarostat Mfg., Inc. v. Alcor Aviation, Inc., 544 S.W.2d 788, 791 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.) (denial of motion for production of documents not abuse of discretion).

183. 651 S.W.2d 732 (Tex. 1983).

184. *See id.* at 732.

and would have required the delivery of substantial information not relevant to the case.[185] Therefore, the court directed that the request should be limited to General Motors trucks for the model years 1949 through 1972.[186]

On December 7, 1983, the Texas Supreme Court heard arguments in *Jampole v. Stovall,*[187] an original mandamus action. This cause of action involves a suit for products liability against General Motors.[188] Plaintiffs sought discovery of substantial items from General Motors, concerning fuel spills and post and pre-production test data. Judge Stovall granted a portion of the request and instructed plaintiffs to reapply if the discovery granted proved insufficient.[189] The outcome of this case will clarify the scope of such requests.

IV. RULE 168: INTERROGATORIES TO PARTIES

Very few changes were made in the substance of Rule 168, with the exception of several deletions.[190] The portions of the former rule governing the duty to supplement and constructive possession are now in Rule 166b.[191] In addition, all sanctions are now contained in Rule 215.[192] Rule 168(5) maintains the limit upon the numbers of answers that may be required in response to interrogatories.[193] The thirty-answer limit imposed by the rule may be altered by agreement of the parties or court order.[194]

A nominal change was made in the final sentence of subsection 2(b) of the rule.[195] The amendment concerns the "option to produce

185. *See id.* at 734.

186. *See id.* at 734.

187. Cause number C-2125. The Honorable Hugo Touchy recently has been named Judge of the 129th District Court in Harris County, from which this cause originated. Judge Touchy reaffirmed the order issued by Judge Stovall, and a motion to substitute Judge Touchy in place of Judge Stovall was granted by the supreme court. Thus, this cause will be disposed of under the style *Jampole v. Touchy.*

188. *See id.*

189. *See id.*

190. *See* TEX. R. CIV. P. 168.

191. *Id.* 166b(2)(b), (5).

192. *Id.* 215. Substantial changes were recommended in the area of sanctions, many of which were based upon provisions previously included in rule 168. *See* Kilgarlin & Jackson, *Sanctions for Discovery Abuse Under New Rule 215,* 15 ST. MARY'S L.J. 767 (1984).

193. TEX. R. CIV. P. 168 (5) (number of questions in set of interrogatories limited to no more than thirty answers).

194. *See id.*

195. *See id.* 168(2)(b).

business records" section of the rule and provides: "The specification of records provided shall include sufficient detail to permit the interrogating party to locate and to identify as readily as can the party served, the records from which the answers may be ascertained."[196] This provision corresponds closely with the final sentence of Federal Rule 33(c).[197] Few federal cases have construed this provision, as it was added to the federal rule only in 1980. The comment accompanying Rule 33(c), however, is informative:

> A party who is permitted by the terms of this subdivision to offer records for inspection . . . should offer them in a manner that permits the same direct and economical access that is available to the party. If the information sought exists in the form of compilations, abstracts or summaries then available to the responding party, those should be made available to the interrogating party. The final sentence is added to make it clear that a responding party has the duty to specify, by category and location, the records from which answers to interrogatories can be derived.[198]

Thus, the specificity requirement is defined in terms of category and location. This rule, however, providing the interrogated party with the option to produce business records is not to be used to avoid discovery or to shift the burden of determining *whether* the information sought exists; only the burden of sorting it out is shifted.[199] The interrogated party must respond that the information sought is or is not in specified records. When sorting through the records would be equally burdensome on both parties the requesting party is required to assume the burden.[200]

V. RULE 169: ADMISSIONS OF FACTS AND OF GENUINENESS OF DOCUMENTS

Numerous changes were made in the substance of Rule 169.[201] Most of these changes were adopted from Federal Rule 36, and the two rules are now substantially the same.[202] The first change in the

196. *Id.*
197. *Compare id. with* FED. R. CIV. P. 33(c).
198. FED. R. CIV. P. 33(c) advisory committee note to 1980 amendment.
199. *See In re* Master Key, 53 F.R.D. 87, 90 (D. Conn. 1971).
200. *See* Mid-America Facilities, Inc. v. Argonaut Ins. Co., 78 F.R.D. 497, 498 (E.D. Wis. 1978); Technitrol, Inc. v. Digital Equip. Corp., 62 F.R.D. 91, 93 (N.D. Ill. 1973).
201. *See* TEX. R. CIV. P. 169.
202. *Compare id. with* FED. R. CIV. P. 36.

rule concerns the scope of requests for admissions. Previously, a request could be made as to any "relevant matter."[203] The amended rule omits this term and states that scope is controlled by Rule 166b.[204]

Rule 169 now allows requests concerning documents not furnished to the opposing party, but "made available for inspection or copying."[205] Thus, some additional burden may be placed on the respondent to secure copies of documents that are the subject of a request.

The period after which a response to a request for admissions is required has been lengthened from "not less than ten days" to "within thirty days."[206] The thirty-day limit is consistent with other time changes in the discovery rules. One exception to this time limit concerns a defendant who has been served with requests immediately after the filing of suit. In this situation, the answers are due within thirty days after being served or within forty-five days after service of the citation and petition, whichever is longer.[207] As in the prior rule, each of these time limits is subject to being altered by court order.

The procedure for serving and responding to requests has been altered under the 1984 amendments. It is no longer required that the request specify that it is made under Rule 169.[208] Requests for admissions now must "separately set forth" each matter of which an admission is requested.[209] This specificity requirement corresponds with the burden placed upon the respondent. A specific request comports with the purpose of the rule, which is "to avoid the necessity of proving facts which are not controverted and which are peculiarly within the knowledge of or readily ascertainable to the party litigant of whom admissions are requested."[210] Therefore, requests

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203. *See* Tex. R. Civ. P. 169 (Vernon 1976).

204. *See id.* 169(1); *see also supra* text accompanying notes 5-37 (requests of mixed questions of law and facts). *See generally* Bush, *Rule 169: An Overview,* 44 TEX. B.J. 1049 (1981) (general discussion of Rule 169 and pre-1984 cases on questions of law).

205. TEX. R. CIV. P. 169(1).

206. *Compare id. with* Tex. R. Civ. P. 169 (Vernon 1976).

207. TEX. R. CIV. P. 169(1); *cf.* 4A D. EPSTEIN, J. LUCAS & J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 36.05[4] (2d ed. 1983) (discussion of time period for filing response to requests for admissions under Federal Rule 36).

208. TEX. R. CIV. P. 169.

209. *See id.* 169(1).

210. Texas Gen. Indem. Co. v. Lee, 570 S.W.2d 231, 233 (Tex. Civ. App.—Eastland

generally should be worded in such a way that they may be answered by a simple "yes" or "no" answer.[211] If this is not practicable, the request should be in "simple and concise terms in order that it can be denied or admitted with an absolute minimum of explanation or qualification."[212]

If no response is made within the required time limit and if no motion for an extension is made by the responding party, the matters are conclusively established "without the necessity of a court order."[213] In the past, there has been some confusion as to the effect of an answer or a motion for an extension of time when the answer or motion is made after the termination of the time limit to respond.[214] The purpose of the rule and the amendment thereto evidence an intent that requests for admissions are established upon the expiration of the time limit unless a motion for an extension is received *prior* to the due date. Once a request for admissions is established, section 2 of Rule 169 provides that the court may, on motion, permit the withdrawal or amendment of the admission.[215]

The procedure established in the rule is clear. If a response is not received by the due date, the matters in question are deemed admitted; no court order is required.[216] The responding party's recourse thereafter is to move the court to allow withdrawal or amendment of

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1978), *writ ref'd n.r.e. per curiam,* 584 S.W.2d 700 (Tex. 1979); *see* Masten v. Masten, 165 S.W.2d 225, 227 (Tex. Civ. App.—Fort Worth 1942, writ ref'd).

211. *See* Johnstone v. Cronlund, 25 F.R.D. 42, 46 (E.D. Pa. 1960).

212. Havenfield Corp. v. H & R Block, Inc., 67 F.R.D. 93, 96 (W.D. Mo. 1973).

213. TEX. R. CIV. P. 169(1); *accord* Elkins v. Jones, 613 S.W.2d 533, 534 (Tex. Civ. App.—Austin 1981, no writ). Admissions under Rule 169 have been interpreted to be "legal admissions," such as a statement in one's pleadings. *See* Agristor Credit Corp. v. Donahoe, 568 S.W.2d 422, 427 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.).

214. *Compare* Bynum v. Shatto, 514 S.W.2d 808, 810-11 (Tex. Civ. App.—Corpus Christi 1974, no writ) (motion for extension of time allowed after time limit expired) *and* Schlindler v. Ag Areo Distribs., Inc., 502 S.W.2d 581, 584 (Tex. Civ. App.—Corpus Christi 1973, no writ) (no abuse of trial court's discretion in granting motion for extension of time after time limit expired) *with* Trevino v. Central Freight Lines, Inc., 613 S.W.2d 356, 359 (Tex. Civ. App.—Waco 1981, no writ) (no answer, then matters are deemed admitted; motion for extension required) *and* Packer v. First Tex. Sav. Ass'n, 567 S.W.2d 574, 575 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.) (no response before time period expired; requests deemed admitted by default).

215. TEX. R. CIV. P. 169(2).

216. *Cf.* Milene Music, Inc. v. Gotauco, 551 F. Supp. 1288, 1292 (D.R.I. 1982) (if party fails to answer or object to requests under Federal Rule 36, requests deemed admitted); Weva Oil Corp. v. Belco Petroleum Corp., 68 F.R.D. 663, 666 (N.D.W.Va. 1975) (failure to respond to requests for admissions is deemed admission of facts set forth).

the admission.[217] Although the time limits of Rule 169 appear to be mandatory, the trial court has great discretion in discovery matters.[218] Trial judges should strive to require compliance with Rule 169's time limits, while utilizing their discretion to allow withdrawal or amendment when fairness so dictates.

A sworn response is no longer required by Rule 169. As amended, a written answer or objection will suffice.[219] Any objection must be accompanied by a reason therefore. If the movant is of the opinion that the objection is well taken, he may do nothing. If the movant wishes to challenge the propriety of the objection, he may move to determine the sufficiency of the objection under Rule 215(4)(b).[220] Rule 215 specifically states that "an evasive or incomplete answer may be treated as a failure to answer."[221] It would be in keeping with the purpose of Rule 169 to treat evasive objections similarly.[222]

Rule 169(1) provides that an objection is improper if based solely upon the contention that the matter in question presents a genuine issue for trial.[223] Rather, in such an instance, the party upon whom the request is served should either deny the matter or set forth reasons why he cannot admit or deny it, as provided in Rule 215(3).[224]

Under the prior practice, it was common for a party to deny an entire request if any part of it properly was subject to a denial. Moreover, it was not unusual for a party to deny a request based upon a subjective, strained interpretation of what the request sought to establish. These practices are no longer allowed by the rule, as it provides: "A denial shall fairly meet the substance of the requested

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217. TEX. R. CIV. P. 169(2). If some response is filed by the due date, the court may be more lenient in allowing an amendment thereto. *See In re* Kaltenbach, 28 Bankr. 337, 339 (Bankr. S.D. Ohio 1983).

218. *See* Sanders v. Harder, 148 Tex. 593, 597, 227 S.W.2d 206, 208 (1950); Mathes v. Kelton, 565 S.W.2d 78, 81-82 (Tex. Civ. App.—Amarillo), *aff'd,* 569 S.W.2d 876, 878 (Tex. 1978). Section 2 of the rule contains two prerequisites to the withdrawal or amendment of an admission, but the court has considerable discretion in determining if these prerequisites have been met. *See* TEX. R. CIV. P. 169(2).

219. *See id.* 169(1).

220. *Id.* 215(4)(b).

221. *Id.*

222. *See* Asea, Inc. v. Southern Pac. Transp. Co., 669 F.2d 1242, 1245-47 (9th Cir. 1981) (failure to comply with literal requirements of rule justifies deeming requested matters admitted).

223. TEX. R. CIV. P. 169(1).

224. *See id.* 169(1), 215(3).

admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder."[225] The respondent now is required to ascertain the "essential truth" and the substance of the request.[226] This provision evidences "the drastic character of the burden placed upon the one to whom the request is made. It is clear, unambiguous, unequivocal and means what it says."[227]

The final substantive change in Rule 169 is the inclusion of a sentence that "[a]n answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or easily obtainable by him is insufficient to enable him to admit or deny."[228] This proviso was adopted from Federal Rule 36(a).[229] The federal courts have interpreted Rule 36(a) to meet those situations in which the responding party justifiably is unable to obtain the information necessary to respond to the request.[230] In such a case, the response should state that a reasonable inquiry has been made, and the party possesses insufficient information to allow him to formulate a proper response.[231] Federal law holds that the failure to include this in a response constitutes a failure to comply with the rule and may subject the respondent to sanctions or deemed admissions.[232] The mere inclusion of this declaration in a response, however, will not suffice. The trial judge must determine

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225. *Id.* 169(1).

226. *See id.; see also* Havenfield v. H & R Block, Inc., 67 F.R.D. 93, 97 (W.D. Mo. 1973) (plaintiff's evasive answers to requests deemed admitted because do not respond to "essential truth" or substance of requests).

227. Havenfield v. H & R Block, Inc., 67 F.R.D. 93, 97 (W.D. Mo. 1973) (quoting Dulansky v. Iowa-Illinois Gas & Elec. Co., 92 F. Supp. 118, 123 (S.D. Iowa 1950).

228. TEX. R. CIV. P. 169(1). Presumably, the amended rule incorporates the pre-1984 standard, i.e., a request extends to matters "within the knowledge of or *readily ascertainable* by the litigant of whom the request is made." *See* Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co., 490 S.W.2d 818, 825 (Tex. 1972) (emphasis in original).

229. FED. R. CIV. P. 36(a).

230. *See* Ranger Ins. Co. v. Culberson, 49 F.R.D. 181, 183 (N.D. Ga. 1969) (if cannot reasonably obtain information, respondent may set forth facts showing inability to answer requested information); Anderson v. United Air Lines, Inc., 49 F.R.D. 144, 149 (S.D.N.Y. 1969) (responses to requests must be based on information within respondent's knowledge or ascertainable by reasonable inquiry).

231. *See* TEX. R. CIV. P. 169(1); *see also* Stewart v. Vaughn, 504 S.W.2d 600, 602 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ).

232. *See* City of Rome v. United States, 450 F. Supp. 378, 383-84 (D.D.C. 1978); Adley

whether, in fact, the respondent has made a good-faith attempt to secure the information necessary to allow him to formulate a response.[233] The overriding consideration is the nebulous concept of good faith.[234] Further, even in those instances in which a party in good faith is unable to answer the inquiry, the federal courts require the response to be accompanied by specific reasons in support thereof.[235]

Section 2 of Rule 169 is basically unchanged by the 1984 amendments.[236] As discussed above, if no response is received within the allotted time, the matters are deemed admitted, and no court action is required. Thereafter, the respondent may move the court to allow withdrawal or amendment of the admissions. Two prerequisites must be met to allow withdrawal or amendment. First, the court must find that such action would promote the presentation of the merits of the action. Second, the party who obtained the admission must fail to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. The first factor implicitly places the burden on the party seeking withdrawal or amendment to convince the court that withdrawal or amendment will promote the presentation of the merits of the case.[237] Thereafter, the burden is placed upon the requesting party to show prejudice.[238]

"The prejudice contemplated by the [r]ule is not simply that the party who initially obtained the admission will now have to con-

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Express Co. v. Highway Truck Drivers & Helpers, Local No. 107, 349 F. Supp. 436, 451-52 (E.D. Pa. 1972).

233. *See* Asea, Inc. v. Southern Pac. Transp. Co., 669 F.2d 1242, 1247 (9th Cir. 1981).

234. *See* Criterion Music Corp. v. Tucker, 45 F.R.D. 534, 536 (S.D. Ga. 1968) (good faith shown because ascertainment of information not within immediate reach of answering party).

235. *See* Cada v. Costa Line, Inc., 95 F.R.D. 346, 348 (N.D. Ill. 1982); United States v. American Tel. & Tel. Co., 83 F.R.D. 323, 333 (D.D.C. 1979).

236. *See* TEX. R. CIV. P. 169(2).

237. In federal court, withdrawal does not require a showing of excuseable neglect, but the movant must provide some explanation for his failure to respond. *See* Jones v. Employers Ins. of Wausau, 96 F.R.D. 227, 230 (N.D. Ga. 1982). There is authority in Texas that the party seeking withdrawal or amendment must show a "legal or equitable" excuse to avoid the effect of deemed admissions. *See* Mathes v. Kelton, 565 S.W.2d 78, 81 (Tex. Civ. App.—Amarillo 1977), *aff'd,* 569 S.W.2d 876, 878 (Tex. 1978); Burnett v. Cory Corp., 352 S.W.2d 502, 507 (Tex. Civ. App.—Dallas 1961, writ ref'd n.r.e.)

238. *See* St. Regis Paper Co. v. Upgrade Corp., 86 F.R.D. 355, 357 (W.D. Mich. 1980) (plaintiff failed to show prejudice; defendant allowed to amend admissions).

vince the fact finder of its truth. Rather it relates to the difficulty a party may face in proving its case."[239] The example given by one federal court is difficulty that may arise because of the "unavailability of a key witness" and "the sudden need to obtain evidence with respect to the questions previously answered by the admission."[240] In deciding the question of prejudice, the federal courts generally attempt to strike a balance between the interests of justice and diligence in litigation.[241]

VI. RULE 188: DEPOSITIONS IN FOREIGN JURISDICTIONS

This is a new rule intended to provide guidance in interstate and international litigation.[242] Section 1 of the rule establishes four methods for taking written or oral depositions: (1) a customary notice-type deposition under Texas law or the law of the jurisdiction in which the deposition is held; (2) a deposition before a court-appointed commissioner; (3) pursuant to a letter interrogatory or a letter of request; or (4) pursuant to the terms of any treaty or convention.[243]

Section 2 expounds on the commission pursuant to which a deposition may be taken.[244] This commission is directed to all authorized deposition officers and states that such officer immediately should issue a subpoena to the deponent informing him of the time and place of the deposition. The officer shall then take the deposition and return it to the clerk of the issuing court.

The procedure for a deposition pursuant to a letter interrogatory is set forth in section 3.[245] The rule states that the letter interrogatory shall be addressed to the appropriate authority in the state in which the deposition is to be taken. This officer is to summon the

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239. Brook Village North Ass'n v. General Elec. Co., 686 F.2d 66, 70 (1st Cir. 1982); *see* Weva Oil Corp. v. Belco Petroleum Corp., 68 F.R.D. 663, 667 (N.D.W. Va. 1975) (prejudice exists if withdrawal would require lengthy, laborious, and costly proof by party who obtained admission).

240. Brook Village North Ass'n v. Elec. Co., 686 F.2d 66, 70 (1st Cir. 1982).

241. *See* Hadra v. Herman Blum Consulting Eng'rs, 74 F.R.D. 113, 114 (N.D. Tex. 1977).

242. *See* TEX. R. CIV. P. 188. *See generally* Bishop, *International Litigation in Texas: Obtaining Evidence in Foreign Countries,* 19 HOUS. L. REV. 361, 385-97 (1982) (discussion of practical problems of pretrial discovery in foreign jurisdictions).

243. *See* TEX. R. CIV. P. 188(1).

244. *See id.* 188(2).

245. *Id.* 188(3).

deponent, cause the deposition to be taken and reduced to writing, and return it to the court from which the letter interrogatory issued. A similar procedure is established in section 4 for a deposition pursuant to a letter of request.[246]

Finally, Rule 188(5) provides for the waiver of defects in taking the deposition.[247] The inference may be drawn that the waiver provisions of Rules 204(4) and 207(3) would apply to depositions taken under Rule 188.[248]

VII. RULE 200: DEPOSITIONS UPON ORAL EXAMINATION

Frequent complaints have been leveled at the manner in which the provisions governing discovery are scattered in innumerable places throughout the rules. The guidelines that control depositions previously suffered from this problem more than any of the other discovery rules. The 1984 amendments should help eliminate this problem.

A major improvement has been made in setting forth all deposition rules in the order in which they would be used by the practitioner. Following this scheme, Rule 200 governs oral depositions and outlines the notice requirements for such depositions.[249] Rule 200 provides that an oral deposition may be taken "[a]fter commencement of the action."[250] This statement must be read in light of the next clause, which states that leave of court to take a deposition must be obtained "only if a party seeks to take a deposition prior to the appearance day of any defendant."[251] Construing these two provisions together, the trial court may allow a party to serve notice of an oral deposition prior to the appearance day of the defendant as long as the actual date of the taking of the deposition is after appearance day. If the party desires to take the deposition prior to appearance day, he must move the court for permission to do so.[252]

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246. *See id.* 188(4).
247. *See id.* 188(5).
248. *See id.* 204(4), 207(3).
249. *See id.* 200.
250. *Id.* 200(1).
251. *Id.* 200(1)
252. Analogizing to the law of preliminary injunctions, the court in *Notaro v. Koch* held that the following four requirements must be met to obtain expedited discovery:

(1) irreparable injury, (2) some probability of success on the merits, (3) some connec-

Formerly, Rule 186b required a sworn motion showing good cause to take a deposition prior to appearance day.[253] The good cause requirement has been omitted under the amended rule. In addition, the Texas Supreme Court Advisory Committee considered including in Rule 200 two exceptions to the "appearance day" limitation. The first exception would have allowed depositions to be taken if the plaintiff filed a motion supported by an affidavit showing good cause for taking the deposition prior to appearance day. A second exception contemplated by the Advisory Committee would have allowed the taking of a deposition if the defendant had served a notice of taking a deposition or otherwise sought discovery. Both of these provisions were omitted from the final rule by the supreme court.[254] The conclusion may be made that the court wished to allow the trial judge to determine the fairness of allowing a deposition prior to appearance day without regard to any specific exceptions stated in the rule.

Following the practice in the federal rules, subsection 2(a) of Rule 200 provides that "reasonable" notice is required for taking a deposition.[255] The traditional ten-day requirement has been abandoned. Many of the changes in the rules are based upon the assumption that adversaries will act in good faith in litigation, and that allowing parties more control over the manner in which they conduct their cases will be more conducive to the full and fair adjudication of issues. Abuses of this provision properly are dealt with in Rule 215.[256]

Former Rule 200 demanded that notice be sent only to the party whose deposition was sought.[257] Today, multi-party litigation is extremely common. Recognizing this fact, Rule 200 now provides that notice of the proposed deposition also must be served upon "every

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tion between the expedited discovery and the avoidance of the irreparable injury, and (4) some evidence of the injury that will result without expedited discovery looms greater than the injury that the defendant will suffer if the expedited relief is granted. Notaro v. Koch, 95 F.R.D. 403, 405 (S.D.N.Y. 1982). This is a rather harsh set of requirements, but it may prove useful in Texas practice.

253. *See* Tex. R. Civ. P. 186(b) (Vernon 1976).

254. *See* TEX. R. CIV. P. 200.

255. *Compare id.* 200(2)(a) *with* FED. R. CIV. P. 30(b)(1).

256. *See* TEX. R. CIV. P. 215(2); *see also id.* 166b(4) (allowance of protective orders for abuses of discovery).

257. *See id.* 200 (Vernon 1976).

other party or his attorney of record."[258]

Rule 200(2)(b) concerns oral depositions of corporations, partnerships, associations, and governmental agencies.[259] The party proposing to take the deposition is now required to describe with reasonable particularity the matters on which examination is requested.[260] The designation of who is to give testimony for the organization, formerly in Rule 200, is now incorporated into Rule 201.[261]

Finally, the provision formerly contained in Rule 186 concerning diligence in obtaining the deposition of a witness has been moved to Rule 252.[262] The Texas Supreme Court considered this proper, as this question arises primarily in the contexts of motions for continuance. Only minor textual changes were made in the rule, and its interpretation should remain the same as under the former rule.

VIII. RULE 201. COMPELLING APPEARANCE; PRODUCTION OF DOCUMENTS AND THINGS; DEPOSITION OF ORGANIZATION

The substance of Rule 201 remains the same as in the former rule, with the majority of the changes relating to grammar and terminology, along with the changes necessary to conform Rule 201 to Rule 166b.[263] In section 1, the reference to Article 2324b[264] has been deleted; instead, reference should now be made to Rule 208(4) for a specification of who is a proper, authorized party to issue a subpoena.[265]

In section 2, the parenthetical in the former rule that enumerated what "designated documents" could be requested has been de-

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258. *Id.* 200(2)(a).

259. *See id.* 200(2)(b).

260. *See id.* 200(2)(b). This language is found in FED. R. CIV. P. 30(b)(6) and incorporates the specificity requirement formerly contained in the final paragraph of Rule 189.

261. TEX. R. CIV. P. 201.

262. *Id.* 252.

263. *See id.* 201.

264. *See id.* 201(1); *see also* TEX. REV. CIV. STAT. ANN. art. 2324b (Vernon Supp. 1982-1983) (regulation of court reporters).

265. TEX. R. CIV. P. 208(4). Rule 208(4) provides that "[a]ny person authorized to administer oaths including notaries public (whether or not the person is a certified shorthand reporter), is an officer who is authorized to issue a subpoena or a subpoena duces tecum. . . ." *Id.*

leted.[266] Consistent with the analogous provisions of other rules, Rule 201 now simply makes reference to Rule 166b's scope guidelines. Similarly, section 3 now provides that a party may be compelled to produce documents pursuant to a Rule 201(2) request "if the notice sets forth the individual items or categories of items to be produced with reasonable particularity."[267]

Section 4 of amended Rule 201 complements Rule 200(2)(b) in setting forth the mechanism for designating who will testify if the deponent is a corporation, partnership, association, or governmental entity.[268] Depending on the statement in the notice of matters to be inquired about, the deponent designates the person or persons who will testify as to each matter or inquiry.[269] The deponent then directs those persons to appear at the proper time and place to give their testimony.[270]

Section 5, regarding the time and place of taking a deposition, has been amended slightly.[271] The change concerns persons designated pursuant to section 4. Rule 201(5) proposes that the county of suit is a reasonable place at which to take such persons' depositions only if the deponent-organization is a party.[272] If the deponent-organization is a non-party, the deposition should be taken at a reasonable place, as that term is defined in Rule 201.[273]

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266. *Compare id.* 201 *with* Tex. R. Civ. P. 201 (Vernon Supp. 1983).

267. *Id.* 201(3).

268. *See id.* 201(4).

269. *See id.* at 201(4). If the notice designates the matters of inquiry with reasonable particularity, the court may order a corporation to designate and produce the witnesses who will testify at the depositions. *See* Tietz v. Textron, Inc., 94 F.R.D. 638, 639 (E.D. Wis. 1982). It is important to remember that the information and knowledge of a corporation's agents are imputed to the corporation and its designated witness. *See* Casson Constr. Co. v. Armco Steel Corp., 91 F.R.D. 376, 381 (D. Kan. 1980).

270. *See* TEX. R. CIV. P. 201(4).

271. *See id.* 201(5).

272. *Id.* 201(5). Reporter's Note to Amended Rule 201. The rule makes reference to the protective orders section of Rule 166b. Specifically, Rule 166b(4)(b) provides that the court may order that "the discovery be undertaken only . . . at the time and place directed by the court." *Id.* 166b(4)(b).

273. *Id.* 201(5) (reasonable places are county of witness' residence, county of employment, county where witness regularly transacts business, or other convenient place).

IX. RULE 202: NON-STENOGRAPHIC RECORDING; DEPOSITION BY TELEPHONE

The primary source of new Rule 202 is former Rule 215c.[274] Minor changes have been made in the language used in the new rule.[275] Also, the format of the rule was changed from that of Rule 215c, and the protective orders language in Rule 215c(d) was deleted.

An additional section, which was adopted from Federal Rule 30(b)(7), was included in Rule 202.[276] As amended, the rule provides:

> The parties may stipulate in writing, or the court may upon motion, order that a deposition be taken by telephone. For the purposes of this rule and Rules 201, 215-1a, and 215-2a, a deposition taken by telephone is taken in the district and at the place where the deponent is to answer questions propounded to him.[277]

Federal Rule 30 was amended to provide for depositions by telephone in 1980, and few cases have arisen construing the rule's provisions.[278] The notes of the United States Supreme Court Advisory Committee state: "The final sentence is added to make it clear that when a deposition is taken by telephone it is taken in the district and at the place where the witness is to answer the questions rather than where the questions are propounded."[279] This directive correlates with Rules 215(1)(a) and 215(2)(a) regarding the proper court in which to apply for sanctions.[280]

X. RULE 203: FAILURE OF PARTY OR WITNESS TO ATTEND OR TO SERVE SUBPOENA; EXPENSES

Section 1 of Rule 203 is a verbatim recital of the provisions of former Rule 215b(1).[281] Rule 203(1) provides for the payment of

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274. *Compare id.* 202 *with* Tex. R. Civ. P. 215c (Vernon 1976).

275. *See* TEX. R. CIV. P. 202. The rule substituted "other than stenographic" for "non-stenographic" and "stenographic transcription" for "written record." The probable purpose of these changes was to broaden and update the language of the rule. Moreover, the rule's new vernacular is consistent with that in use in the Federal Rules. *See* FED. R. CIV. P. 30(b)(4).

276. *See* FED. R. CIV. P. 30(b)(7).

277. *See* TEX. R. CIV. P. 202(2).

278. FED. R. CIV. P. 30(b)(7).

279. FED. R. CIV. P. 30 advisory committee note to 1980 amendment.

280. *See* TEX. R. CIV. P. 215(1)(a).

281. *Compare id.* 203(1) *with* Tex. R. Civ. P. 215b(1) (Vernon 1976).

expenses and attorney's fees if a party gives notice of the taking of a deposition and subsequently fails to attend.[282]

Section 2 of Rule 203 is taken from former Rule 215b(2), but it has been modified.[283] The prior provision concerning failure to serve a subpoena upon a witness has been deleted.[284] This language originally was adopted from the federal rules.[285] Considering the fact that subpoenas are not used to compel the attendance of all deposition witnesses,[286] it was improper to word the rule on the basis of a failure to serve a subpoena. Thus, the subpoena language was deleted, and a "fault" standard was substituted to determine the culpability of the party noticing the deposition when the witness fails to appear.[287]

The language of amended Rule 203 provides the trial judge with discretion to determine whether a party has been sufficiently recalcitrant to require such party to reimburse another party for expenses and attorney's fees. The trial judge, therefore, may award costs in a clear case of nonfeasance or misfeasance in obtaining the presence of the witness, and he may deny such an award when the absence of the witness is beyond the control of the party responsible for setting up the deposition or is due to excuseable neglect.[288]

XI. RULE 204. EXAMINATION, CROSS-EXAMINATION, AND OBJECTIONS

Rule 204 evidences an attempt on the part of the Texas Supreme Court to combine several short, fragmented rules related to the taking of oral depositions into one more easily understandable rule. As

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282. *See* TEX. R. CIV. P. 203(1).

283. *Compare id.* 203(2) *with* Tex. R. Civ. P. 215b(2) (Vernon 1976).

284. *See* TEX. R. CIV. P. 215b(2) (Vernon 1976).

285. *See* FED. R. CIV. P. 30(g).

286. Reporter's Note to Amended Rule 203.

287. *See* TEX. R. CIV. P. 203(2).

288. *See, e.g.,* Cronin v. Midwestern Okla. Dev. Auth., 619 F.2d 856, 864 (10th Cir. 1980) (failure to proceed with deposition sufficient to require party giving notice to reimburse other party for reasonable expenses incurred in attending deposition); Fino v. McCollum Mining Co., 93 F.R.D. 455, 459 (N.D. Tex. 1982) (plaintiff required to pay defendant for expenses incurred on discovery junket in Ecuador because only four of ten noticed witnesses appeared at deposition); National Acceptance Co. of Am. v. Doede, 78 F.R.D. 333, 337 (W.D. Wis. 1978) (plaintiff awarded costs and attorney's fees because deponent's failure to appear was due to defendant's failure to subpoena him).

amended, Rule 204 contains four sections.[289] These four sections contain the substance of former Rules 204-207.[290] In addition, the amended rule is written in a manner more conducive to a proper understanding of its intended effects and purposes.

Section 1 is clarified to the extent that it states that written cross-questions are to be served upon the party proposing to take the deposition, and the deposing party then is responsible for transmitting the cross-questions to the deposition officer for presentation to the witness.[291] As in the former rule, cross-questions must be served upon the deposing party within ten days from the date of the service of notice of the taking of the deposition as provided for in Rule 200.[292]

Former rule 200 imposed a mandatory ten-day notice requirement for taking a deposition.[293] As discussed in section VII of this paper, amended Rule 200 was modified to require only "reasonable" notice.[294] Although the ten-day requirement has been omitted from Rule 200, Rules 200 and 204 may be construed to require that the party wishing to submit cross-questions be given ten days in which to submit such questions. Therefore, in those instances in which cross-questions are used, Rule 204 may impliedly reimpose the ten-day notice requirement for taking a deposition. Parties generally will work out this timing problem in an amicable manner.

Only cosmetic changes were made in sections 2 and 3. Section 3 now explicitly provides that the oral testimony of the witness shall be recorded at the time it is given and thereafter transcribed by the deposition officer or some person under his supervision.[295] The former rule's provision permitting the deponent to reduce the testimony to writing has been omitted, as has the statement regarding the necessity of the deponent subscribing the written transcription.[296]

Rule 204(4) makes a substantial modification in Texas practice.

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289. *See* TEX. R. CIV. P. 204(1)-(4).

290. *Compare id.* 204(1)-(4) *with* Tex. R. Civ. P. 204-207 (Vernon 1976).

291. TEX. R. CIV. P. 204(1).

292. *Compare id. with* Tex. R. Civ. P. 204 (Vernon 1976).

293. *See* Tex. R. Civ. P. 200 (Vernon 1976).

294. TEX. R. CIV. P. 200(2)(a).

295. *See id.* 204(3).

296. *See* Tex. R. Civ. P. 206 (Vernon 1976). The requirement regarding the witness's signature on the transcribed deposition is incorporated into amended Rule 205. *See id.*

As amended, section 4 provides: "Except in the case of objections to the form of questions or the nonresponsiveness of answers, which objections are waived if not made at the taking of an oral deposition, the court shall not be confined to objections made at the taking of the testimony."[297] Prior to the amendment to Rule 204, a party could withhold objections to the form of the questions or answers. These objections would be lost only if the deposition was filed one day prior to trial and written objections with notice to the opposing party again were not made before trial commenced.[298] Moreover, former Rule 214 stated that nonresponsive matters included within a deposition, which were not pertinent, were considered surplusage and could be stricken upon objection thereto.[299]

Amended Rule 204(4) was intended to facilitate the use of depositions at trial by requiring that form and manner objections be made at a time when the deposing party could correct them or else they are waived.[300] Many practitioners customarily agree to reserve form objections until the time of trial, and waiver agreements may be allowed under the amended rule.[301] In the absence of a waiver agreement, if a party disagrees with the form of a question or if he considers an answer nonresponsive, Rule 204(4) requires him to state such during the deposition or the objection is waived.[302]

A minor change made in the language of section 4 is that the deposition officer should record all testimony elicited from the witness even though it may be the subject of an objection by the opponent. Thereafter, the propriety of the objection may be ruled on by the trial judge.[303]

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297. TEX. R. CIV. P. 204(4).

298. *See* Tex. R. Civ. P. 212 (Vernon 1976).

299. *See id.* 214 (Vernon 1976). *See generally* Haney Elec. Co. v. Hurst, 624 S.W.2d 602, 606-07 (Tex. Civ. App.—Dallas 1981, writ dism'd) (discussion of admissibility of unresponsive deposition testimony).

300. *See* TEX. R. CIV. P. 204(4).

301. The rule speaks in mandatory terms; however, the policy underlying discovery by agreement should allow for non-waiver agreements, pursuant to Rule 11, similar to those currently utilized by practitioners.

302. *See id.* 204(4).

303. *See id.* Generally, it is improper to direct the witness, either explicitly or implicitly, not to answer a question. *See* Langston Corp. v. Standard Register Co., 95 F.R.D. 386, 390 (N.D. Ga. 1982). Even if the question inquires into irrelevant matters, the better practice may be to answer the question and to note one's objection. *See* International Union of Elec., Radio & Mach. Workers v. Westinghouse Elec. Corp., 91 F.R.D. 277, 280 (D.D.C. 1981). The one objection that should be made is an objection based on privilege. *Cf.* 4A D.

XII. RULE 205: SUBMISSION TO WITNESS; CHANGES; SIGNING

Incorporated into new Rule 205 is former Rule 209.[304] As amended, Rule 205 states that the deposition of a party-witness may be submitted to the party's attorney of record.[305] This is analogous to the former rule's provision permitting the deposition officer to notify a party's attorney that the deposition was ready for inspection.[306] In addition, the first paragraph of Rule 205 makes reference to the permissibility of a waiver, by the parties and the witness, of the signature requirement as well as the requirement that the witness examine the deposition after it has been transcribed.[307] This is simply putting in writing what was already a common practice.

The final portion of the first paragraph of former Rule 209 has been deleted from the amended rule. The old rule distinguished between depositions of parties and non-parties. The purpose of this deletion and the modification to the second paragraph of Rule 205 is to equate parties and non-parties with regard to the deposition officer's authority to file an unsigned, unexamined deposition.[308] Rule 205 now states that if the witness fails to sign and return the deposition within twenty days of its submission to him, the deposition officer should state the facts underlying the absence of the signature on the deposition.[309] The deposition may then be used at trial as though it were signed. Reference then is made to amended Rule 207, which governs the use of depositions at trial.[310] As in the former rule, the court has discretion to exclude all or part of the unsigned deposition if the reasons given for the failure to sign so require.[311] No change was made in the manner of making changes in a deposition.[312]

EPSTEIN, J. LUCAS & J. MOORE, MOORE'S FEDERAL PRACTICE, ¶ 30.59 (2d ed. 1983) (claim of privilege should be raised at taking of deposition).

304. *Compare* TEX. R. CIV. P. 205 *with* Tex. R. Civ. P. 209 (Vernon 1976).

305. TEX. R. CIV. P. 205.

306. *See* Tex. R. Civ. P. 209 (Vernon 1976).

307. *See* TEX. R. CIV. P. 205.

308. *See* Reporter's Note to Amended Rule 205.

309. *See* TEX. R. CIV. P. 205.

310. *See id.*

311. *See id.*

312. *See id.* (changes in form or substance entered on deposition by officer with witness' statement of reasons for making changes).

XIII. RULE 206: CERTIFICATION AND FILING BY OFFICER; EXHIBITS; COPIES; NOTICE OF FILING

Rule 206 contains portions of former Rules 208, 208a, and 210.[313] The rule previously numbered 206 has been repealed and its substance incorporated into amended Rule 204. Amended Rule 206 now includes all matters relating to the proper handling of a completed deposition.[314]

Sections 1 through 4 of Rule 206 were patterned after Federal Rule 30(f).[315] Section 1 clarifies the procedure to be used in certifying and filing depositions. The rule states that it is the duty of the officer taking the deposition to transcribe and file it.[316] The certification is to include the charges incurred in preparing the completed deposition.[317] Once the deposition has been certified, the deposition officer is to seal it in an envelope stating the title of the action and the name of the deponent. It is then filed with the court in which the action is pending.[318] The procedure for filing is subject to being altered by court order.[319]

Section 2 contains new materials concerning the treatment of exhibits. Any party may request that exhibits be marked and annexed to the deposition, and parties maintain the right to inspect and copy such exhibits.[320] If the party supplying the exhibits wishes to retain them, he may do so in two ways: first, he may provide verified copies to be substituted for the originals; or, second, he may have the

313. *Compare id.* 206 (certification and filing of deposition; exhibits; copies; notice of filing) *with* Tex. R. Civ. P. 208 (Vernon 1976) (depositions certified and returned) *and id.* 208a (Vernon 1976) (certification of officer's charges for completion of deposition) *and id.* 210 (Vernon 1976) (opening of depositions on file by clerk for inspection of party).

314. *See* TEX. R. CIV. P. 206.

315. *Compare id.* 206(1) (certification and filing of deposition by officer) *and id.* 206(2) (exhibits) *and id.* 206(3) (furnishing copies of deposition to parties or deponent) *and id.* 206(4) (notice of filing) *with* FED. R. CIV. P. 30(f) (certification and filing by officers; exhibits; copies; notice of filing).

316. TEX. R. CIV. P. 206(1); *cf.* 4A D. EPSTEIN, J. LUCAS & J. MOORE, MOORE'S FEDERAL PRACTICE, ¶ 30.63[3] (2d ed. 1983) (discussion of filing requirement under Federal Rule 30(f)).

317. TEX. R. CIV. P. 206(1).

318. *See id.*

319. *See id.* The federal interpretation of the "unless otherwise ordered by the court" language in the first portion of the rule is that it was intended to allow the court to permit parties to retain depositions unless they are to be used in the action. *See* FED. R. CIV. P. 30(f)(1) advisory committee note to 1980 amendment.

320. TEX. R. CIV. P. 206(2).

originals marked and offer them for inspection and copying by the other parties, after which the materials may be used as if annexed to the deposition.[321] The analogous portion of Federal Rule 30 has been construed so that "[s]uch copies are a 'substitute' for the originals, which are not to be marked and which can thereafter be used or even disposed of by the person who produces them."[322] If a disagreement arises concerning the disposition of original exhibits, the court may order that the originals be annexed to and returned with the deposition pending final disposition of of the case.[323]

Rule 206(3) states that the deposition officer shall furnish a copy of the deposition to any party or to the deponent upon payment of reasonable charges therefor.[324] A problem that has arisen in the federal courts concerns who is required to make payment for the original transcription of the deposition.[325] This problem is based upon the wording of Federal Rule 30(c).[326] Professors Wright and Miller have concluded that Rule 30(c) invests discretion in the trial judge to apportion costs on one or all parties.[327]

Prior to the 1984 amendments, Rule 208a directed that "[t]he clerk of the court where such deposition is filed shall tax as costs the

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321. *See id.*

322. FED. R. CIV. P. 30(f)(1) advisory committee note to 1980 amendment. The same language in the Federal Rule has been construed thusly: "An amendment of Rule 30(f)(1) adopted in 1980 clarifies the previously opaque language and makes it explicit that a party can offer copies of a document to be marked and to serve thereafter as an original for all purposes." 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2114 (Supp. 1982).

323. *See* TEX. R. CIV. P. 206(2). Such an order would likely be made pursuant to TEX. R. CIV. P. 166b(4).

324. *See id.* 206(3).

325. *See* Caldwell v. Wheeler, 89 F.R.D. 145, 147-48 (D. Utah 1981); Haymes v. Smith, 73 F.R.D. 572, 574-75 (W.D.N.Y. 1976); *see also* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2117 (1970) (recognition of problem in assessing cost of transcription of deposition).

326. *See* FED. R. CIV. P. 30(c) ("If requested by one of the parties, the testimony shall be transcribed."). The problem generally arose when the party who initiated the deposition did not request a transcript but his opponent did. In such situations, the issue was "whether a reasonable charge for the transcript was the cost of a copy or whether the party who wished the transcript had to bear the charge for transcribing the deposition." 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2117 (1970).

327. *See* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2117 (1970); *see also* Caldwell v. Wheeler, 89 F.R.D. 145, 148 (D. Utah 1981) (after party who instigated deposition shows extenuating circumstances to relieve him from paying for transcripts, court has discretion to allocate costs among parties).

charges for preparing the original copy of the deposition."[328] This portion of the rule, however, is omitted from the amended rules. Hence, the confusion that exists in the federal courts now may exist in Texas. Texas courts should take a practical approach in resolving this matter.

Generally, the party initiating the deposition will wish to have it transcribed and should bear the cost of transcription.[329] If the movant does not want the deposition transcribed and a conflict arises as to who should bear the cost, the trial court should exercise its discretion in charging the expense to the parties. The court may wish to consider such factors as the overall conduct of the parties during discovery, whether taking the deposition appears to have been motivated by a good faith effort to discover relevant information, and the relative degrees of participation by the parties in the deposition itself. After considering these factors and others, the court may charge the cost of the deposition entirely against one party or it may apportion the cost among the parties.[330]

As under prior practice, the party filing the deposition is to give prompt notice of the filing to all other parties.[331] The final section of Rule 206 permits the inspection, by parties or the deponent, of a filed deposition.[332] An amendment to the new rule permits the court to make an order altering or fixing the right to inspect a filed deposition.[333]

XIV. RULE 207: USE OF DEPOSITIONS IN COURT PROCEEDINGS

In keeping with the policy of shortening and clarifying the rules

328. Tex. R. Civ. P. 208a (Vernon 1976).

329. *See* Caldwell v. Wheeler, 89 F.R.D. 145, 147 (D. Utah 1981); 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2117 (1970).

330. *See* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2117 (1970); 4A D. EPSTEIN, J. LUCAS & J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 30.59 (2d ed. 1983).

331. *Compare* TEX. R. CIV. P. 206(4) *with* Tex. R. Civ. P. 198 (Vernon 1976). Regarding the giving of notice of the filing of a written deposition, Professors Wright and Miller have concluded: "This requirement is frequently ignored and failure to give the required notice is waived in the absence of a motion to suppress the deposition." 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2119 (1970). A similar result is dictated by amended TEX. R. CIV. P. 207(3).

332. *See* TEX. R. CIV. P. 206(5).

333. *See id.* The old rule's requirement that the clerk indorse on the deposition at whose request the deposition was inspected has been omitted from Rule 206. *See* Tex. R. Civ. P. 210 (Vernon 1976).

when proper, the supreme court set forth in one rule the guidelines for the use of depositions in court proceedings.[334] Formerly, these provisions were covered in Rules 211-213.[335] Several aspects of the former practice were retained, and additional matters were adopted from the federal rules.[336]

Amended Rule 207 is slightly broader than before as it provides that a deposition "may be used by any person for any purpose against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof."[337] Further, Rule 207 now states that deposition testimony is permitted "insofar as admissible under the rules of evidence applied as though the witness were then present and testifying . . . ."[338] The newly promulgated Texas Rules of Evidence exclude deposition testimony from the definition of hearsay;[339] therefore, when such testimony is offered, it will not be subject to a hearsay objection, but all non-waived objections may be interposed.[340]

The long-standing Texas rule permitting the use of depositions regardless of the presence or absence of the deponent is retained in Rule 207.[341] The Committee on Administration of Justice recommended that an exception be established that would preclude the use of depositions if the deponent were present at trial. This exception would have been based upon a finding by the court that the oral testimony of the witness was necessary in the interest of justice and a finding that the witness could be brought into trial either of his

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334. *See* TEX. R. CIV. P. 207.

335. *See* Tex. R. Civ. P. 211-213 (Vernon 1976).

336. *Compare* TEX. R. CIV. P. 207(1) (use of depositions) *with* FED. R. CIV. P. 32(a) (use of depositions).

337. TEX. R. CIV. P. 207(1); *see In re* of Johns-Manville/Asbestosis Cases, 93 F.R.D. 853, 854-55 (N.D. Ill. 1982) (plaintiff allowed to use deposition of deceased physician who had testified for subsidiary corporation in prior case because of close relationship between corporations involved). In *Safeco Ins. Co. v. Gipson*, the court permitted the plaintiff to use a deposition taken prior to the insurance company being substituted for the insured. *See* Safeco Ins. Co. v. Gipson, 619 S.W.2d 275, 278 (Tex. Civ. App.—Texarkana 1981, writ dism'd w.o.j.). The court found this to be fair since the insurance company's attorney was present at the taking of the deposition. *See id.* at 278.

338. TEX. R. CIV. P. 207(1).

339. TEX. R. EVID. 801(E)(3).

340. *See* TEX. R. CIV. P. 204(4).

341. *See id.* 207(1); *see also* Hall v. White, 525 S.W.2d 860, 862 (Tex. 1975); Spring Branch Bank v. Mengden, 628 S.W.2d 130, 138 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.).

own volition or by subpoena. This proposal was rejected, making it clear that the Texas Supreme Court wishes to maintain the well-established Texas rule allowing the use of depositions in court proceedings regardless of the presence or absence of the deponent.[342]

Section 2 of Rule 207 is taken verbatim from former Rule 213(2).[343] Only one comment need be made regarding substitution of parties. This provision originally was borrowed from Federal Rule 32(a)(4) at a time when there apparently existed a requirement that the prior action be dismissed before the deposition could be used in a later action. In 1980, however, the federal rule was reworded to omit this putative requirement. The United States Supreme Court Advisory Committee stated: "The requirement that a prior action must have been dismissed before depositions taken for use in it can be used in a subsequent action was doubtless an oversight, and the courts have ignored it."[344] Although the Texas rule retains this "requirement," Texas courts must decide whether to allow it to be raised as an impediment to the use of depositions taken in a prior action.[345]

Section 3 of Rule 207 covers motions to suppress.[346] The new rule is substantially broader than former Rule 212 in that it covers virtually all aspects of the notice, transcription, delivery, and filing of the deposition.[347] Specifically, if the deposition has been on file one day

342. The use of depositions under Federal Rule 32(a)(3) is not as well established as Texas. *See, e.g.,* Redhead v. United States, 686 F.2d 178, 184 (3d Cir. 1982) (court's allowance of witness' deposition at trial when witness was present in courtroom, harmless error), *cert. denied,* — U.S. —, 103 S. Ct. 1190, — L. Ed. 2d — (1983); *In re* Transcontinental Energy Corp., 683 F.2d 326, 330 (9th Cir. 1982) (deposition excluded because party failed to prove that deponent lived more than 100 miles from place of hearing); *In re* Checkmate Stereo & Elecs., Ltd., 21 Bankr. 402, 413 (Bankr. E.D.N.Y. 1982) (showing of unavailability of party deponent not required prior to admission of deposition).

343. *Compare* TEX. R. CIV. P. 207(2) *with* Tex. R. Civ. P. 213(2) (Vernon 1976).

344. FED. R. CIV. P. 32(a)(4) advisory committee note to 1980 amendment.

345. *See* TEX. R. CIV. P. 207(2).

346. *See id.* 207(3).

347. *Compare id. with* Tex. R. Civ. P. 212 (Vernon 1975). Many courts of appeals have been hesitant to enforce technical signature and filing requirements when to do so would cause an unfair result. Hence, they have slowly broadened the definition of "manner of taking" in former Rule 212. *See, e.g.,* Baylor Univ. Medical Center v. Travelers Ins. Co., 587 S.W.2d 501, 506 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) (signature waived); Texas Employers Ins. Ass'n v. Henson, 569 S.W.2d 516, 517 (Tex. Civ. App.—Beaumont 1978, no writ) (nonresponsive answer deals with manner of taking deposition); Victoria Comfort Air Co. v. Alamo Express, Inc., 529 S.W.2d 250, 252 (Tex. Civ. App.—Corpus Christi 1975, no writ) (waiver of improper mailing address of court reporter). The new rule

before trial and notice thereof was given, a motion to suppress must be made before trial or all such errors are waived.[348] Rule 207(3) must be read in conjunction with Rule 204(4), which requires that objections as to the form of questions or the responsiveness of answers be made at the time the deposition is taken or they are waived.[349]

XV. RULE 208: DEPOSITIONS UPON WRITTEN QUESTIONS

The final discovery rule regards commencing, taking, and filing a deposition on written questions. Rule 208 greatly simplifies the determination of how to take such a deposition because it places all relevant guidelines into one rule.[350] It incorporates the substance of numerous prior rules, most notably Rules 189-192, 197, 208, and 210.[351]

Section 1 of Rule 208 states that a written deposition may be taken after "commencement" of the action.[352] In addition, it permits the use of Rule 201 to compel the attendance of the witness or the production of "designated items."[353] The contents of former Rule 189 are now in the second and third paragraphs of Rule 208. Rule 208 maintains the ten-day notice requirement for taking a deposition on written questions, and the contents of the notice are substantially the same as under the former rule.[354] An addition to the rule is the modification that was added to the proviso regarding production of documents. Rule 208 contains the language consistently used throughout the new rules, which states that such requests should be "by individual item or by category . . . with reasonable

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no longer uses the "manner of taking" language, thus impliedly negating the effects of these cases. The results, however, reached in these cases are now brought about by the specific language of Rule 207. *See* TEX. R. CIV. P. 207(3).

348. *See* TEX. R. CIV. P. 207(3).

349. *See id.* 207(3), 204(4).

350. *See id.* 208.

351. *See* Tex. R. Civ. P. 189 (Vernon 1976) (notice and service of written questions); *id.* 190 (Vernon 1976) (notice by publication); *id.* 191 (Vernon 1976) (service of notice of depositions when citation by publication); *id.* 192 (Vernon 1976) (cross-questions); *id.* 197 (Vernon 1976) (use of interpreter at deposition); *id.* 208 (Vernon 1976) (certification and return of depositions); *id.* 210 (Vernon 1976) (opening of depositions for inspection by parties or deponent).

352. *See* TEX. R. CIV. P. 208(1).

353. *Id.*

354. *See id.*

particularity."[355] The final paragraph of section 1 is taken verbatim from old Rule 189.[356]

Section 2 of Rule 208 incorporates closely the language of former Rules 190 and 191.[357] These rules governed notice by publication and service of citation by publication. No apparent changes were intended in these provisions. The language in former Rule 189 regarding service upon corporations and joint stock associations has been deleted.

Cross-questions, redirect and recross questions, and formal objections are now controlled by Rule 208(3).[358] The amended rule maintains the time schedule established under former Rule 192, i.e., cross-questions are due within ten days of service of direct questions, redirect questions are due within five days, then recross questions are due within three days.[359] Minor textual changes also were made. Rule 208(5) requires the delivery of all cross, redirect, and recross questions to the deposition officer.[360]

Two additions were made to section 3 of Rule 208. First, the rule now provides that "objections to the form of written questions are waived unless [they are] served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within five days after service of the last questions authorized."[361] This proviso was adopted from the federal rules[362] and is analogous to the waiver provisions established for oral depositions.[363]

A second change in Rule 208(3) is that the court may, for cause, enlarge or shorten the time allowed for questions.[364] The ten, five, and three day time limits formerly were used in the federal courts,

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355. *Id.*

356. *Compare id.* (naming of corporation as witness to be deposed) *with* Tex. R. Civ. P. 189 (Vernon 1976) (naming of corporation as witness to be deposed).

357. *Compare* TEX. R. CIV. P. 208(2) (notice by publication and service of notice when citation by publication) *with* Tex. R. Civ. P. 190 (Vernon 1976) (notice by publication) *and id.* 191 (Vernon 1976) (service of notice of depositions when citation by publication).

358. TEX. R. CIV. P. 208(3).

359. *Compare id. with* Tex. R. Civ. P. 192 (Vernon 1976).

360. *See* TEX. R. CIV. P. 208(5).

361. *Id.* 208(3).

362. *See* FED. R. CIV. P. 32(d)(3)(c).

363. *See* TEX. R. CIV. P. 204(4).

364. *See id.* 208(3).

and Professors Wright and Miller considered them "unrealistic."[365] Subsequently, the federal rule was amended to lengthen the time limits and to allow the court to enlarge or shorten the time.[366] The Texas rule maintains the stringent time limits, but the trial judge now is empowered to alter them if necessary, and he should utilize his discretion to do so in a proper case.[367]

A possible problem that could arise under amended Rule 208 centers around the rule's time limits. Notice of the taking of a written deposition may be served "[a]fter the commencement of the action," which may be interpreted to mean the filing of the original petition. Thereafter, cross-questions are due within ten days. It would be possible for the time limit for cross-questions to lapse before answer day.[368] In those instances in which notice of a written deposition is filed immediately after the action is commenced, the trial judge is empowered to enlarge the time for cross-questions until ten days after answer day.[369]

Section 4 of Rule 208 establishes who is authorized to act as a deposition officer.[370] Professor William Dorsaneo, who served as the reporter to the Advisory Committee, noted that "[p]aragraph 4 makes it clear that a person who is authorized to administer oaths, such as a notary public, may take a written deposition, even though he or she is not a certified shorthand reporter."[371] In addition, the amended rule permits such authorized persons to issue a subpoena or a subpoena duces tecum pursuant to Articles 2324b and 3746.[372] Section 4 incorporates the language of former Rule 197 authorizing

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365. *See* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2132 (1970).

366. *See* FED. R. CIV. P. 32.

367. *See* TEX. R. CIV. P. 208(3).

368. This timing problem did not arise under former practice because the rules generally were interpreted to allow service of notice only after answer day. The new rule is clearer, but it could give rise to the problem discussed herein. In addition, this problem is not common in federal courts because of the longer thirty-day time limit established for serving cross-questions. *See* FED. R. CIV. P. 31(a).

369. *Cf.* TEX. R. CIV. P. 200 (requires leave of court if party wishes to take oral deposition before answer day of defendant). It may be that the most appropriate way to deal with this problem is to read into Rule 208 the provision of Rule 200 requiring leave of court if a party wishes to take a written deposition prior to the appearance day of the defendant.

370. *Id.* 208(4).

371. Reporter's Note to Amended Rule 208.

372. TEX. R. CIV. P. 208(4); *see* TEX. REV. CIV. STAT. ANN. arts. 2324b, 3746 (Vernon Supp. 1982-1983).

the deposition officer to summon and swear an interpreter to facilitate the taking of the deposition.[373]

Rule 208(5) controls the taking and the return of a written deposition.[374] Section 5 replaces former Rule 196 and incorporates by reference Rules 204-206, which previously have been discussed.[375] The requirement of notice of the filing of a written deposition, formerly contained in Rule 198, is now in section 5 also.[376] Rule 208 concludes by permitting the inspection of filed depositions unless the court orders otherwise.[377]

XVI. CONCLUSION

Although the amendment process is a continuing one, the April 1, 1984 promulgations rectify many troublesome procedural problems and greatly simplify the format of the rules. Practitioners must familiarize themselves with the 1984 rules and must work within the framework established by the rules. Trial and appellate judges must stand ready to enforce the rules and control the conduct of litigants.

Litigants and attorneys should recognize the potential long-term effects of abusive discovery practices. A practice that appears strategically or tactically sound may develop into an unacceptable blemish upon the complexion of our system of civil procedure. Zealous advocacy cannot be used to camouflage improper discovery practices. Attorneys must assume the responsibility for discontinuing unnecessary and costly pretrial practices and for streamlining litigation procedures. The alternative to professional self-control is mandated regulation by the persons who ultimately must assume the burden for and cost of prolonged litigation.

The trial judges must require compliance with the rules, discourage needless and costly court appearances, and strive to dispose of court business in a fair but efficient manner. Indeed, the trial courts lie on the cutting edge of systematic reform. They must exert their full efforts in this quest. The 1984 rules provide a framework for change. But, as with any framework, it is the implementation that ultimately will determine the success of the new rules.

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373. *Compare* TEX. R. CIV. P. 208(4) *with* Tex. R. Civ. P. 197 (Vernon 1976).
374. *See* TEX. R. CIV. P. 208(5).
375. *See supra* text accompanying notes 289-333.
376. *Compare* TEX. R. CIV. P. 208(5) *with* Tex. R. Civ. P. 198 (Vernon 1976).
377. *See* TEX. R. CIV. P. 208(5). This provision is also found in TEX. R. CIV. P. 206(5).

Discovery problems sought to be remedied by the 1984 amendments are neither new nor unique to Texas.[378] All members of the Texas legal community, both the bench and the bar, must conscientiously strive to work within the spirit, if not the letter, of these rules. Nothing more is required. Anything less will thwart the design and mission of the amendment process.

378. *See generally* Annual Message on the Administration of Justice from Chief Justice Warren E. Burger (Midyear Meeting of the American Bar Association, February 12, 1984) (available from United States Supreme Court Public Information Office).