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Sanctions for Discovery Abuse under New Rule 215 Procedure Forum.

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SANCTIONS FOR DISCOVERY ABUSE UNDER NEW RULE 215†

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† For the full text of Rule 215 of the Texas Rules of Civil Procedure see the appendix to this article.

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I. INTRODUCTION

The Texas trial lawyer who sets out to learn the meaning of the 1984 version of the Texas Rules of Civil Procedure on discovery should read the last rule first.[1] As part of the overhaul of our discovery rules, the Supreme Court of Texas, aided by its Advisory Committee and the State Bar Committee on Administration of Justice, has made major, perhaps revolutionary, changes in the enforcement mechanism. Specifically, the court has promulgated all new Rule 215 styled: "Abuse of Discovery; Sanctions." If Rule 215 is read first, the reader should have no trouble remaining alert while digesting the other discovery rules.

The title of Rule 215 alerts the observer to the organizational change effected by the new rule. Since the original promulgation of the Texas Rules of Civil Procedure in 1941, provisions for sanctions have been enacted and amended in a continuous patchwork process.[2] Before April 1, 1984, three rules were devoted to sanctions,[3]

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1. *See* TEX. R. CIV. P. 215. By its 177-page order of December 5, 1983, adopting amendments to the Texas Rules of Civil Procedure, the Supreme Court of Texas promulgated rule revisions affecting virtually all areas of civil procedure. These amendments became effective April 1, 1984. The discovery rules underwent substantial reorganization and substantive change under the order. The amendments affecting the discovery rules other than the new sanctions rule are analyzed in the accompanying article by Justice Barrow and Mr. Henderson. *See* Barrow & Henderson, *1984 Amendments to the Texas Rules of Civil Procedure Affecting Discovery,* 15 ST. MARY'S L.J. 713 (1984).

2. For example, former Rule 170, which provided sanctions for violations of the rules

and sanction provisions appeared in at least seven other locations throughout the discovery rules.[4] Rule 215 brings all[5] sanction provisions under one roof.[6] This one rule clearly advises lawyers and litigants of the cost of non-compliance with the discovery rules.[7]

A quick comparison will further reveal that Rule 215 is partially patterned after its counterpart in the Federal Rules of Civil Procedure, Rule 37.[8] The promulgation of Rule 215, however, effects a change in pretrial procedure much greater than the collection of all sanction rules in one place. The adoption of the new rule is more than an incorporation of Federal Rule 37. Rule 215 extends beyond prior Texas practice and beyond current federal practice. In this provision lies the opportunity for great progress toward curing many of the ailments that plague the administration of justice in Texas. It

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governing orders for production and for an unjustified refusal to admit the genuineness of a document or the truth of a fact, remained intact from September 1, 1941 to April 1, 1984. Tex. R. Civ. P. 170 Historical Note (Vernon 1976). In 1957, former Rule 215a pertaining to the failure to answer deposition questions was promulgated. It was amended in 1962 and in 1971 and each time its application was slightly broadened. *See* Tex. R. Civ. P. 215a Historical Note (Vernon 1976). Former Rule 215b, which made sanctions available against a deposing party for certain transgressions was enacted in 1973. Tex. R. Civ. P. 215b Historical Note (Vernon 1976). Former Rule 169 contained two provisions whereby a party could be deemed to have admitted the genuineness of a document or a fact matter. One of these was present in the original 1941 rule. The other was added in 1973. Tex. R. Civ. P. 169 Historical Note (Vernon 1976). Finally, as rewritten in 1981, former Rules 167 and 168 contained various sanction-type provisions for improper actions relating to requests for production and interrogatories. Tex. R. Civ. P. 167(3) & 168(6), (7)(a)(3), (8) (Vernon Supp. 1983). Subdivision (8) of former Rule 168 incorporated by reference the sanctions of former Rules 170 and 215a. Tex. R. Civ. P. 168(8) (Vernon Supp. 1983).

3. *See* Tex. R. Civ. P. 170, 215a, 215b (Vernon 1976).

4. *See* Tex. R. Civ. P. 167a(b)(1), 169 (Vernon 1976), Tex. R. Civ. P. 167(3), 168(6), 168(7)(3), 168(8) (Vernon Supp. 1983).

5. The statement that all discovery sanction provisions are contained in Rule 215 should be qualified. The substance of former Rule 215b providing an expense sanction against a party who gives notice of a deposition and then fails to attend or whose witness does not attend because of the fault of the party now appears in Rule 203. For a discussion of Rule 203, see Barrow & Henderson, *1984 Amendments to the Texas Rules of Civil Procedure Affecting Discovery,* 15 ST. MARY'S L.J. 713, 752-53 (1984).

6. TEX. R. CIV. P. 215 comment.

7. When the Committee on Administration of Justice set about to revamp the Texas discovery rules they had as a major goal the formulation of one rule dealing with the consequences of discovery abuse. Rule 215 is the product of that endeavor. Statement of Professor William V. Dorsaneo III of September, 1982, Reasons for General Revisions of Discovery Rules, Agenda for the Advisory Committee for the Supreme Court of Texas (Nov. 12-13, 1982).

8. FED. R. CIV. P. 37.

may also enable the Texas judiciary to avoid potential pitfalls and to promote fair and efficient civil litigation in the future.

Of course, a meaningful impact of Rule 215 depends upon its implementation by the bench and bar of Texas. With that fact in mind, this article discusses the meaning of Rule 215 and its expected impact on civil procedure in Texas. The overall philosophy and purpose behind the rule are considered, and in this context, its provisions are examined in an attempt to explain the rule's probable effect on Texas litigation. Emphasis is placed on the many changes enacted, but retained practices are discussed when helpful.

II. PURPOSE OF SANCTIONS UNDER RULE 215

It is axiomatic that the rule providing for discovery abuse sanctions must serve the ends of the Texas Rules of Civil Procedure and especially those of the discovery rules.[9] Rule 1 announces the goal of the rules to be the just adjudication of substantive rights with great expedition and dispatch at the least cost practicable.[10] Modern discovery rules, designed to serve the broad goal of Rule 1, are intended to convert the "trial of a lawsuit from a game of chance and surprise, or 'Blind Man's Bluff,' " to an openly, orderly search for truth.[11]

In too many instances, however, the old game has merely been replaced by a new one.[12] The new game is played with overbroad requests, unreasonable delay tactics, and meaningless responses.[13] The idea of the game is often to induce settlement for nuisance value or to make continuation of the lawsuit infeasible or impossible.[14] The sanction power represents the trial court's only weapon and the victimized party's only protection against these stratagems.

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9. Comment, *Imposition and Selection of Sanctions in Texas Pretrial Discovery Procedure,* 31 BAYLOR L. REV. 191, 194-96 (1979).

10. TEX. R. CIV. P. 1.

11. Pearson Corp. v. Wichita Falls Boys Club Alumni Ass'n, Inc., 633 S.W.2d 684, 686 (Tex. App.—Fort Worth 1982, no writ); *see* West v. Solito, 563 S.W.2d 240, 243 (Tex. 1978).

12. *See* SCM Societa Commerciale S.P.A. v. Industrial & Commercial Research Corp., 72 F.R.D. 110, 111 (N.D. Tex. 1976). Judge Porter expressed exasperation over the court time required to arbitrate "no show and no tell discovery games." *Id.* at 111. As a result of concern over widespread discovery abuse, he announced a new get tough policy regarding discovery sanctions. *See id.* at 112.

13. *See* General Motors Corp. v. Lawrence, 651 S.W.2d 732, 734 (Tex. 1983).

14. *See* SCM Societa Commerciale S.P.A. v. Industrial & Commercial Research Corp., 72 F.R.D. 110, 111-12 (N.D. Tex. 1976).

In light of the demands now made on our courts, sanctions have not been as effective as they must be to make possible the efficient administration of justice. Sanctions will not perform that function until a broader understanding of their purpose is developed.[15] Traditional learning teaches that the office of sanctions is to secure compliance with the subject discovery order.[16] In response to the increased volume and complexity of litigation, however, federal and Texas courts have realized that sanctions can, and must, serve more far-reaching goals.[17]

The United States Supreme Court has declared that discovery sanctions[18] should be employed by federal courts as a deterrent to future abuses of discovery. In *National Hockey League v. Metropolitan Hockey Club, Inc.,*[19] the Supreme Court reviewed a court of appeals' reversal of an order of dismissal, which had been entered as a sanction for failure to answer interrogatories as ordered.[20] In holding that no abuse of discretion by the trial court was shown, the Court reasoned:

[H]ere, as in other areas of the law, the most severe in the spectrum of

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15. In recent years, commentators have urged the utilization of sanctions to accomplish more general and long-term goals. *See* Pope & McConnico, *Practicing Law With the 1981 Texas Rules,* 32 BAYLOR L. REV. 457, 465-68 (1980); Spears, *The Texas Rules of Civil Procedure: 1981 Changes in Pre-Trial Discovery,* 12 ST. MARY'S L.J. 633, 651 (1981); Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions,* 91 HARV. L. REV. 1033, 1033-35 (1978). Another fact blamed for the ineffectiveness of sanctions is the reluctance of trial judges to impose them. *See* Pope & McConnico, *Practicing Law With the 1981 Texas Rules,* 32 BAYLOR L. REV. 457, 467-68 (1980).

16. The imposition of sanctions has often been held an abuse of discretion when, although it took inordinate coercion, discovery was finally permitted. *See* Young Cos. v. Bayou Corp., 545 S.W.2d 901, 902 (Tex. Civ. App.—Beaumont 1977, no writ). In *Young Cos.,* the trial court was held to have abused its discretion in imposing sanctions on one defendant. *See id.* at 902. The court of appeals reversed as to that defendant because the defendant eventually provided discovery although it took five months to get a good faith response to the plaintiff's interrogatories. *See id.* at 903; *see also* Smith v. Wilkins, 577 S.W.2d 522, 524 (Tex. Civ. App.—Texarkana 1979, no writ); Ebeling v. Gawlik, 487 S.W.2d 187, 190 (Tex. Civ. App.—Houston [1st Dist.] 1972, no writ).

17. *See, e.g.,* National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642-43 (1976) (deterrent to future violations); Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1066-67 (2d Cir. 1979) (prevent party from profiting from his own wrongdoing); Waguespack v. Halipoto, 633 S.W.2d 628, 630-31 (Tex. App.—Houston [14th Dist] 1982, writ dism'd w.o.j.) (facilitate litigation, prevent abuse of legal process, protect litigants, deter discovery abuse).

18. *See* FED. R. CIV. P. 37.

19. 427 U.S. 639, 643 (1976).

20. *See id.* at 639.

> sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. If the decision of the Court of Appeals remained undisturbed in this case, it might well be that *these* respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts.[21]

By the above-quoted language, the Supreme Court clearly accepted as legitimate aims of discovery sanctions the coercion of compliance, the deterrence of future violation by the derelict party, and the deterrence of similar action by future litigants.

In *Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp.,*[22] the United States Court of Appeals for the Second Circuit approved the preclusion of the plaintiff's proof of damages even though the plaintiff had belatedly complied with discovery orders.[23] The court recognized a threefold purpose served by discovery sanctions.[24] Preclusion orders assure that a party will not profit by his own surreptitious action.[25] Additionally, sanctions serve as specific deterrents to secure compliance with a particular order.[26] Finally, courts should use sanctions for their healthy effect on the future actions of the litigants involved and on those litigants appearing before the court in later cases.[27] In *Cine Forty-Second Street Theatre Corp.,* the court considered this view essential to the judiciary's efforts to extricate itself from the pretrial quagmire threatening to engulf the litigation process.[28]

A further consideration, as well as the enlightening perspective of a trial judge, is put forth in *Riverside Memorial Mausoleum, Inc. v.*

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21. *Id.* at 643 (emphasis in original).

22. 602 F.2d 1062 (2d Cir. 1979).

23. *See id.* at 1068.

24. *See id.* at 1066.

25. *See id.* at 1066; *see also* Dellums v. Powell, 566 F.2d 231, 235 (D.C. Cir. 1977).

26. *See* Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1066 (2d Cir. 1979); *see also* Robison v. Transamerica Ins. Co., 368 F.2d 37, 39 (10th Cir. 1966).

27. *See* Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1063-64 (2d Cir. 1979).

28. *See id.* at 1063-64.

Sonnenblic-Goldman Corp.[29] The court in that case explains the indispensable role of the sanctions rule in enabling the trial judge to expeditiously move his cases.[30] The efficient handling of all cases is necessary to open the judicial process to all citizens who seek adjudication of their rights.[31]

Texas courts have met the challenge of officiating modern discovery battles by recognizing that use of the sanction power must be directed to objectives beyond the coercion of compliance with a particular order. In *Southern Pacific Transportation Co. v. Evans,*[32] the appellant contended that the trial court abused its discretion in rendering a default judgment against him because he had eventually provided discovery.[33] The court of appeals acknowledged the old rule that sanctions are to be used to secure compliance with discovery rules and not to punish.[34] The court further noted, however, that widespread discovery abuse dictated a revised approach. In affirming the default judgment, the court approved the use of sanctions as a general deterrent to violation of discovery procedure.[35]

In *Bottinelli v. Robinson,*[36] the court faced an argument similar to that in *Evans.* The trial court ordered a dismissal only after granting the appellant several opportunities to obey court orders and avoid the sanction. The court of civil appeals viewed this approach as more than mere punishment. The threat of sanctions was primarily used in this case to encourage compliance with discovery requests.[37] The execution of the sanction order was justified as a deterrent to future violations of discovery rules and court orders.[38] The court also recognized that trial courts must combat abusive dis-

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29. 80 F.R.D. 433 (E.D. Pa. 1978).

30. *See id.* at 436-37.

31. *See id.* at 1063-64; *see also* G-K Properties v. Redevelopment Agency, 577 F.2d 645, 647-48 (9th Cir. 1978).

32. 590 S.W.2d 515 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.), *cert. denied,* 449 U.S. 994 (1980).

33. *See id.* at 518.

34. *See id.* at 518.

35. *See id.* at 518-19. In reaching its conclusion, the court relied on the United States Supreme Court case of *National Hockey League. See id.* (citing National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639 (1976)).

36. 594 S.W.2d 112 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

37. *See id.* at 118.

38. *See id.* at 118-19. The court quoted *National Hockey League* in support of its holding that sanctions should be used for their prophylactic effect. *See id.* (citing National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639 (1976)).

covery practices so that other litigants may have access to the courts for the prompt settlement of disputes.[39] The court concluded that the trial judge had used his discretion properly to achieve these goals.[40]

The development of this multiple-purpose approach to the imposition of discovery sanctions was advanced by the 1981 amendments to the Texas Rules of Civil Procedure.[41] In *Waguespack v. Halipoto,*[42] the 1981 rule changes were seen as providing the tools "to facilitate the litigation of lawsuits" and "to prevent abuse of the legal process".[43] The court of appeals explained that these new tools were meant to deter discovery abuse and to protect litigants from excessive burden and expense.[44]

In recent years, a new concept of the office of sanctions has clearly emerged in answer to new challenges facing the Texas judicial system. Through decisions and rule changes, our courts have recognized that discovery sanctions must do more than just obtain compliance of the recalcitrant party.[45] The most important of the newly-embraced purposes is deterrence of future violations.[46] Moreover, courts have held that sanctions are properly used to ensure that the abuser does not profit by his wrong, and that his adver-

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39. *See id.* at 118; *see also* G-K Properties v. Redevelopment Agency, 577 F.2d 645, 647 (9th Cir. 1978).

40. In contrast, the court in *Lewis v. Illinois Employers Ins. Co.* held that the trial court abused its discretion by rendering a default judgment against a party that filed interrogatory answers fifteen minutes before judgment was rendered. *See* Lewis v. Illinois Employers, Ins. Co., 590 S.W.2d 119, 119 (Tex. 1979). Such eleventh-hour compliance will not immunize a derelict party under Rule 215. Under the new Rule 215, it should not be an abuse of discretion for a trial court to follow the course of the trial court in *Lewis.*

41. *See* Pope & McConnico, *Practicing Law With the 1981 Texas Rules,* 32 BAYLOR L. REV. 457, 465-68 (1980). The 1981 amendments included new provisions in Rules 167 and 168 designed to place more authority in the hands of the trial judge to remedy non-compliance with his discovery orders. *See* Tex. R. Civ. P. 167(3) & 168(6), (8) (Vernon Supp. 1983).

42. 633 S.W.2d 628 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.).

43. *Id.* at 629.

44. *See id.* at 630-31; *see also* Illinois Employers Ins. Co. v. Lewis, 582 S.W.2d 242, 244 (Tex. Civ. App.—Beaumont), *writ ref'd n.r.e. per curiam,* 590 S.W.2d 119 (Tex. 1979).

45. *See* Bottinelli v. Robinson, 594 S.W.2d 112, 118 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ) (encouraging compliance not sole important function of sanctions).

46. *See* National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976) (severe sanctions must be available to deter those who might be tempted to abuse discovery); Southern Pacific Transp. Co. v. Evans, 590 S.W.2d 515, 518-19 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.) (abuse of rules has caused trend toward use of sanctions to deter violations).

sary does not suffer by it.[47] The sanction power may now also be used to protect an innocent party from an unreasonable burden and expense caused by misuse of discovery.[48] Finally, prevention of needless delay and consumption of court time has been approved as a legitimate sanction goal.[49]

Rule 215, if correctly implemented, gives the trial courts of Texas the flexibility required to orient sanction orders to these multiple purposes. Rule 215 grants trial judges far more flexibility than they had under the old rules. The new rule even bestows greater sanction authority upon Texas trial courts than is enjoyed by their federal counterparts. Examination of Rule 215's terms evinces its potential to be forcefully used to advance the goal of substantive justice administered inexpensively with expedition and dispatch.[50]

III. EXAMINATION OF RULE 215

A. *The Motion for Sanctions or Order Compelling Discovery: Subdivision 1.*

Subdivision (1) establishes a procedure by which the discovering party may bring an alleged violation of the discovery rule before the court. This procedure is available for virtually every type of transgression[51] except violation of the rules on requests for admissions,[52] and on physical or mental examinations.[53] Generally, the winning party on the motion is entitled to recover his expenses.[54] The subdivision also contains a special proviso by which a person may enforce

47. *See* Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1066 (2d Cir. 1979); *see also* Southern Pacific Transp. Co. v. Evans, 590 S.W.2d 515, 519 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.) (facts of case, in which crucial evidence had been destroyed, showed necessity for prompt answers).

48. *See* Waguespack v. Halipoto, 633 S.W.2d 628, 631 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.) (cost of unpenalized discovery abuse is borne by non-abusing party).

49. *See* Riverside Memorial Mausoleum, Inc. v. Sonnenblick-Goldman Corp., 80 F.R.D. 433, 436-37 (E.D. Pa. 1978); *see also* Bottinelli v. Robinson, 594 S.W.2d, 112, 118 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ) (discovery abuse deprives litigants of access to courts and further crowds dockets).

50. *See* TEX. R. CIV. P. 1 (stating goal of rules to be achievement of justice with "great expedition and dispatch and at least expense" practicable).

51. *See* TEX. R. CIV. P. 215(1)(b)(1)-(1)(b)(3).

52. *See* TEX. R. CIV. P. 169, 215(4).

53. *See* TEX. R. CIV. P. 167a, 215(2)(7).

54. *See* TEX. R. CIV. P. 215(1)(d), (2)(b)(2).

his right to recover his own statement from a party.[55]

1. The Relief Sought

Rule 215 communicates its punch in its first sentence. That sentence reflects a great expansion of the trial judge's discretion in dealing with discovery abuse. Rule 215(1) allows a discovering party, after reasonable notice to other parties and persons affected[56] to apply for sanctions or an order compelling discovery.[57] The most interesting aspect of subdivision (1) is the option given the movant to ask the court to impose sanctions on his non-complying opponent without first obtaining a court order directing the opponent to make discovery.[58] Thus, the trial court is free to order sanctions in a vast category of cases in which it formerly had no such prerogative.[59]

Before the effective date of the new rules, if the party from whom discovery was requested made some response the discovering party was necessarily obligated to move for an order to compel discovery. Only after violation of that order could the discovering party seek and the court impose sanctions.[60] In contrast, if a party completely

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55. *See* TEX. R. CIV. P. 215(1)(e).

56. Due process requires as a prerequisite to the imposition of sanctions that the resisting party be given reasonable notice of the motion for a discovery order and opportunity to be heard thereon. *See* Sears, Roebuck & Co. v. Hollingsworth, 156 Tex. 176, 181, 293 S.W.2d 639, 642 (1956); Smith v. Wilkins, 577 S.W.2d 522, 524 (Tex. Civ. App.—Texarkana 1979, no writ). Subdivision (2) of Rule 215 similarly requires notice and a hearing before the court's invocation of sanctions. *See* TEX. R. CIV. P. 215(2)(b).

57. *See* TEX. R. CIV. P. 215(1).

58. *Cf.* Tex. R. Civ. P. 215(2)(b). Under this provision, the trial court is given the commensurate authority to impose sanctions for failure to comply with a good discovery request in the absence of a court order to do so. *See id.*

59. *Compare* Tex. R. Civ. P. 170, 215a(a)-(b) (Vernon 1976) (violation of court order a requisite for imposing sanctions of taking facts as established, disallowing defenses, striking pleadings, and award of expenses) *with* TEX. R. CIV. P. 215(1)-(2) (violation of court order not necessary for imposition of sanctions).

60. *See* Lewis v. Illinois Employers Ins. Co., 590 S.W.2d 119, 119-20 (Tex. 1979). The *Lewis* case established this rule for interrogatory discovery. *See id.* at 119-20. This holding survived the 1981 rewriting of former Rule 168. *See* Saldivar v. Facit-Addo, Inc., 620 S.W.2d 778, 779 (Tex. Civ. App.—El Paso 1981, no writ); Pope & McConnico, *Practicing Law With the 1981 Texas Rules,* 32 BAYLOR L. REV. 457, 483 (1980). Former Rule 167 stipulated that if either side were unhappy with a request for production or a response thereto it could insist on a hearing. *See* Tex. R. Civ. P. 167(3) (Vernon Supp. 1983). If the court ordered the requested party to produce and he failed to do so, former Rule 170 authorized the imposition of sanctions. *See* Tex. R. Civ. P. 170 (Vernon 1976). If a deponent appeared for his deposition, but refused to answer a question, the deposing party could seek an order to compel the answer under the former Rule 215a. *See* Tex. R. Civ. P. 215a(a)

failed to respond to a set of interrogatories, he was subject to immediate sanction.[61] If a deponent was served with notice or subpoena for a deposition and did not attend, the court was empowered to punish him for contempt or to invoke sanctions.[62] Whether a court could impose sanctions for an absolute failure to respond to a request for production under the former rules has not been decided.[63] As written, those rules seemed to make a motion to compel production and its violation prerequisite to an order of sanctions.[64] Obviously, in the absence of an order compelling discovery, the situations in which the trial court had discretion to impose sanctions for violation of discovery rules were very limited.

The new Rule 215 is designed to incorporate and extend the holding of *Lewis v. Illinois Employers Insurance Co.*[65] In *Lewis,* the Texas Supreme Court ruled that the trial court's authorization to

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(Vernon 1976). If that order was violated, the court was free to punish the deponent for contempt or to order any sanction of former Rule 170. *See* Plodzik v. Owens-Corning Fiberglas Corp., 549 S.W.2d 52, 54 (Tex. Civ. App.—Austin 1977, no writ); Henson v. Citizens Bank of Irving, 549 S.W.2d 446, 448-49 (Tex. Civ. App.— Eastland 1977, no writ).

61. *See* Lewis v. Illinois Employers Ins. Co., 590 S.W.2d 119, 120 (Tex. 1979). This aspect of the *Lewis* holding also survived the 1981 amendments to the rules. *See* Fears v. Mechanical & Indus. Technicians, Inc., 654 S.W.2d 524, 528-29 (Tex. App.—Tyler 1983, writ requested); Pope & McConnico, *Practicing Law With the 1981 Texas Rules,* 32 BAYLOR L. REV. 457, 483 (1980).

62. *See* Brown v. Brown, 520 S.W.2d 571, 575 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ); Thomas v. Thomas, 446 S.W.2d 590, 591-92 (Tex. Civ. App.—Eastland 1969, writ ref'd n.r.e.); Tex. R. Civ. P. 215a(c) (Vernon 1976). *But see* Hibbler v. Walker, 593 S.W.2d 398, 400 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ) (contrary to former Rule 215a(c) and to *Brown* and *Thomas* and can only be considered erroneous). There was division among the courts as to whether sanctions could be imposed for a party's failure to attend or to produce a witness in accordance with his agreement. *Compare* Roquemore v. Roquemore, 431 S.W.2d 595, 600 (Tex. Civ. App.—Corpus Christi 1968, no writ) (trial court's striking of pleading considered no abuse of discretion where deponent failed to appear for depositions as agreed by counsel) *with* Barrientos v. Texas Employers Ins. Ass'n, 507 S.W.2d 900, 903 (Tex. Civ. App.—Amarillo 1974, writ ref'd n.r.e.) (abuse of discretion found where trial court struck pleadings when non-party failed to appear for depositon as agreed) *and* Hough v. Johnson, 456 S.W.2d 775, 777-78 (Tex. Civ. App.—Austin 1970, no writ) (agreement of counsel for party to waive notice of depositions not binding on party and no sanctions could be imposed for failing to appear).

63. *See* Waguespack v. Halipoto, 633 S.W.2d 628, 632 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.). In this case, the requester moved directly for sanctions after the other parties failed to respond. But the court did not impose sanctions until its order to produce had been ignored. The court of appeals pointed to this fact as a consideration serving to justify the trial court's action. *Id.* at 632.

64. *See* Tex. R. Civ. P. 170 (Vernon 1976); Tex. R. Civ. P. 167(3) (Vernon Supp. 1983).

65. 590 S.W.2d 119 (Tex. 1979); *see* Tex. R. Civ. P. 215 comment.

impose sanctions depended on the degree of compliance or non-compliance present. When a party responded to some, but not all, interrogatories, the interrogating party was required to move for an order compelling the interrogated party to answer. If that order was violated, the court had discretion to utilize sanctions. But when the interrogated party made no response, the propounding party could move immediately for sanctions.[66] In this manner, *Lewis* distinguished between a total failure to answer an entire set of interrogatories and an inadequate or incomplete response to a set of interrogatories.

The *Lewis* distinction is not perpetuated by Rule 215. Rather, the rule applicable to an absolute failure to answer interrogatories under *Lewis* now obtains for any failure to adequately respond.[67] This treatment is prescribed for all forms of discovery that are initiated by action of the parties independent of the court, except for requests for admissions.[68] In other words, if the deposed, interrogated, or requested party does not respond sufficiently to one question or request for production, the discovering party may elect to move immediately for sanctions without first obtaining an order for discovery.[69] The Texas Supreme Court explains:

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66. *See* Lewis v. Illinois Employers Ins. Co., 590 S.W.2d 119, 120 (Tex. 1979).

67. *See* Tex. R. Civ. P. 215(1), 215(2)(b).

68. *See* TEX. R. CIV. P. 215(1)(b)(1)-(1)(b)(3). The comment states: "New Rule 215 retains the conclusion reached in [*Lewis*] and extends such rule to cover all discovery requests, except requests for admissions." TEX. R. CIV. P. 215 comment.

69. The potential impact of this new authorization of sanctions is underscored by a comparison with federal procedure. In federal courts the general rule is that sanctions cannot be imposed until the errant party has violated a court order. Federal Rule 37(a) provides a mechanism by which the discovering party may move the court to compel previously requested discovery. A few federal discovery rules including Rule 35 (physical and mental examinations), require a court order before discovery need be made. Violation of any discovery order activates the power of the trial court, upon motion, to decree sanctions under Rule 37(b)(2). *See* FED. R. CIV. P. 37(b)(2); 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2282, at 757 (1970). The rule is different when the party from whom discovery is requested completely fails (1) to attend his deposition, (2) to respond to a set of interrogatories, or (3) to respond to a request for production. *See* FED. R. CIV. P. 37(d). No court order is necessary, and the discovering party may immediately move for sanctions under federal Rule 37(d). *See id.* This rule also applies if the court has ordered appearance when the order was not required. *See* Independent Prods. Corp. v. Loew's Inc., 283 F.2d 730, 733 (2d Cir. 1960). For sanctions to be available in the absence of a violated court order, the failure to cooperate with discovery must be absolute. *See* Laclede Gas Co. v. Warnecke Corp., 604 F.2d 561, 565 (8th Cir. 1979); SEC v. Research Automation Corp., 521 F.2d 585, 588-89 (2d Cir. 1975). The situations in which the federal trial judges have

> New Rule 215 leaves to the discretion of the court whether to impose sanctions with or without an order compelling discovery, so that the court will be free to apply the proper sanction order based upon the degree of the discovery abuse involved.[70]

The case of *Fears v. Mechanical & Industrial Technicians, Inc.*[71] may be instructive on this point. Fears was served with interrogatories on November 4, 1980. When Fears had made no response by December 16, 1980, Mechanical & Industrial moved to strike Fears' answer and for default judgment. Fears' lawyer three times refused delivery of the motion by certified mail. The lawyer also denied that he had received a copy of the motion by regular mail. On January 26, 1981, the court struck Fears' answer and on February 5 rendered default judgment against him.[72] The court of appeals apparently considered these acts, evidencing scorn for the judicial process, to justify the harsh sanction imposed in the absence of an actual breach of a court order.[73]

The situations in which the court is justified in ordering sanctions in the absence of a violaton of a previous order will not be common. Some special circumstance will ordinarily be necessary to prevent a direct sanction order from constituting an abuse of discretion.[74] A complete failure to respond or to attend will warrant immediate sanctions more often than will an insufficient response.[75] But the trial lawyer must remember that the supreme court has chosen not to curtail the trial judge's authority simply because some answer is

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discretion to impose sanctions before ordering discovery, therefore, are much more limited than those now open to the Texas trial judge.

70. TEX. R. CIV. P. 215 comment. It is interesting that the Committee on Administration of Justice and the Advisory Committee suggested that sanctions be made available uder Rule 215(2)(b) only after breach of an order commanding discovery. Instead, the Texas Supreme Court designed the scheme herein. This is a clear indication of the court's intention to bestow broad discretionary powers upon the trial court.

71. 654 S.W.2d 524 (Tex. App.—Tyler 1983, writ requested).

72. *See id.* at 526, 528.

73. *See id.* at 527-28.

74. *See id.* at 524.

75. *See, e.g.,* Lewis v. Illinois Employers Ins. Co., 590 S.W.2d 119, 120 (Tex. 1979) (immediate motion for sanctions without court order requiring interrogatories be answered is appropriate when party fails to answer any questions); Fears v. Mechanical & Indus. Technicians, 654 S.W.2d 524, 528-29 (Tex. App.—Tyler 1983, writ requested) (imposition of sanctions without court order commanding answers proper when no answers at all were made to interrogatories); Thomas v. Thomas, 446 S.W.2d 590, 591-92 (Tex. Civ. App.—Eastland 1969, writ ref'd n.r.e.) (failure to attend deposition warranted immediate discovery sanctions).

made, although that answer may be insufficient. It must be expected that the trial judge's decision will be upheld if, upon consideration of all the circumstances that are usually evaluated in passing on a sanction ruling, he is within his discretion in ordering sanction directly for non-compliance with a request.

2. The Appropriate Court

Paragraph (1)(a) of Rule 215 clarifies a matter that was not directly addressed by the rules before the recent amendments. That paragraph informs a litigant as to which court he should address his application for a court order under the rule. Rule 215(1)(a) is, in substance, identical to its counterpart in the federal rules, though it is rearranged for clarity's sake.[76] It pertains to both a motion to compel discovery and a motion for sanction.

The general rule is that the motion is properly addressed to the court in which the action is pending. Thus, Rule 215(1)(a) conforms with the practice under the old rules.[77] Matters relating to a deposition, however, are treated differently. If the deponent is a party to the suit, the opposing party may address the motion to the court in which the case is filed or to any district court in the district where the deposition is held. If the deponent is not a party, the order may be sought only in the deposition court. The rule is designed to spare the non-party witness the expense and inconvenience of possible cross-state travel to defend himself.[78] The former rules authorized both courts, in different measure, to deal with any deposition dispute regardless of whether the witness was a party.[79] Consistent

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76. *See* FED. R. CIV. P. 37(a)(1).

77. *See* Tex. R. Civ. P. 170 (Vernon 1976); Tex. R. Civ. P. 167(3), 168(6), 168(7)(3), 168(8) (Vernon Supp. 1983). The objection and sanction provisions of the former rules, with the exception of former Rule 215a, consistently referred to "the court" without explanation. Read in context, such references are obviously to the court where the case is pending. This intention becomes clearer when the other rules are contrasted with former Rule 215a, which has always distinguished between the lawsuit court and the deposition court. *See* Tex. R. Civ. P. 215a (Vernon 1976). A motion to compel discovery or to invoke sanctions, other than for transgression of the deposition rules, therefore, had to be addressed to the court in which the lawsuit was filed. This is explicitly stated in new Rule 215(1)(a). *See* TEX. R. CIV. P. 215(1)(a).

78. *See In re* Corrugated Container Antitrust Litigation, 662 F.2d 875, 881 (D.C. Cir. 1981).

79. *See* Tex. R. Civ. P. 215a (Vernon 1976). Under former Rule 215a, a deponent's failure to answer a question propounded on oral or written examination could result in an order compelling an answer by the court in which the action was pending or by the court in

with the old rule,[80] matters relating to an oral deposition and matters relating to a deposition on written questions are treated identically.[81]

Cross-reference should be made to two other items in Rule 215, paragraphs (1)(d) and (2)(a). Paragraph (1)(d) requires "the court" to award a recovery of expenses, including attorney fees, to the prevailing party on a motion to compel unless opposition was substantially justified or the award would be unjust.[82] The phrase "the court" as used in paragraph (1)(d) must be understood as defined by paragraph (1)(a). The deposition court is therefore under the same command and has the same authority to require the payment of expenses on a motion to compel as does the court presiding over the suit.[83] This is consistent with former practice under the old rules.[84]

Rule 215(2)(a) delimits the sanction authority of the deposition court. That court is empowered to punish a witness for contempt if he fails to appear or to be sworn or to answer a question after being directed by the court to do so. In contrast, the court in which the action is pending has broad discretion to apply any of an array of sanctions.[85] This will often render the latter court a more attractive forum in which to pursue a motion against a party deponent.

3. The Motion

The actual authorization of the motion for an order compelling compliance with a discovery request or imposing sanctions is found

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the deposition district. *See id.* 215a(a). Violation of that order or the refusal of a deponent to be sworn after being ordered to do so was punishable by either court as contempt. In addition, the court in which the lawsuit was filed could impose further just sanctions. *See id.* 215a(b). Failure by any witness to appear for his deposition as directed by proper notice or subpoena could be treated as contempt by either court. The court with jurisdiction of the case could impose severe sanctions on a party under these circumstances. *See id.* 215a(c).

80. *See id.* 215a(a), 215a(c).

81. *See* TEX. R. CIV. P. 215(1)(a). That "matters relating to a deposition" is used in Rule 215(1)(a) to refer to depositions on both oral and written questions is evidenced by subparagraph (1)(b)(2). *See* TEX. R. CIV. P. 215(1)(b)(2). That provision clearly indicates that the procedures designed in subdivision (1) apply to both forms of depositions.

82. *See id.* 215(1)(d).

83. The authority of the deposition court to require the payment of expenses on a motion to compel discovery is consistent with the policy of discouraging frivolous resort to the courts. This policy underlies provisions for such awards found in TEX. R. CIV. P. 215(1)(d), (1)(c), (2)(b)(8), (3), and (4)(b).

84. *See* Tex. R. Civ. P. 215a(a) (Vernon 1976).

85. *See* TEX. R. CIV. P. 215(2)(b).

in Rule 215(1)(b). The transgressions that justify the motion are listed in subparagraphs (1) through (3). In general, a motion under Rule 215(1) is made available for virtually any breach of the rules regulating depositions, interrogatories, and requests for production.

The violations specified in paragraph (1)(b) include absolute failures to make discovery. If a deponent utterly fails to appear for the taking of his deposition[86] or if a corporate or other entity deponent fails to designate a person to testify,[87] the motion will be available. Similarly, a motion may be employed when a party ignores a set of interrogatories[88] or a request for production.[89] And the same motion may be made when the deponent appears, but will not answer a question.[90] The discovering party may also move for a discovery order or for sanctions for failure to answer a single interrogatory.[91] Finally, a failure to respond that all discovery sought by a request for production will be allowed or failure to allow discovery that is requested will authorize a Rule 215(1) motion.[92]

Furthermore, while two actions that infract the deposition rules are not expressly listed in Rule 215(1)(b), they are unquestionably implied in the rule. Since paragraph (1)(b) covers violations by a non-party deponent, failure to appear after being subpoenaed is necessarily included in the provision for failure to appear pursuant to "proper notice."[93] Also, a deponent's refusal to be sworn must be encompassed by the provisions relative to a deponent's failure to appear or refusal to be sworn.[94]

The breadth of the Texas trial judge's discretion in dealing with discovery disputes is again stressed by a comparison with federal practice.[95] All the transgressions contained in Rule 215(1)(b) are

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86. *See id.* 215(1)(b)(2)(a).

87. *See id.* 215(1)(b)(1).

88. *See id.* 215(1)(b)(3)(a).

89. *See id.* 215(1)(b)(3)(c).

90. *See id.* 215(1)(b)(2)(b).

91. *See id.* 215(1)(b)(3)(b).

92. *See id.* 215(1)(b)(3)(d).

93. *See id.* 215(1)(b)(2)(a). This interpretation is in conformity with previous practice. *See* Tex. R. Civ. P. 215a(c) (Vernon 1976).

94. TEX. R. CIV. P. 215(1)(b)(2). This reading of the rule is consistent with previous practice. *See* Tex. R. Civ. P. 215a(b) (Vernon 1976).

95. For a similar comparison with pre-1984 Texas practice see *supra* text accompanying notes 55-69.

also dealt with by the federal sanctions rule.[96] The federal rule, however, provides two distinct procedures. Generally, any failure less extreme than a complete non-response only allows a federal court to order discovery.[97] Then, only upon violation of that order is a federal court empowered to order sanctions.[98] On the other hand, a federal court may immediately invoke sanctions for an absolute failure to respond to a request.[99]

A potentially useful procedural change is found in the penultimate sentence of Rule 215(1)(b). A deposing party may adjourn an oral deposition and promptly move for an order. Alternatively, he may complete the examination and then move for an order under Rule 215(1)(b). Under the old rules, if the deposing party was unhappy with an answer or a refusal to answer, he was obligated to finish the questioning on other matters before a motion was proper.[100]

The words of the provision make the discovering party's option absolute. He should be free to make the choice based on depositon strategy so as to make the deposition as efficacious as possible. One case under the federal provision does counsel some caution. In *Independent Productions Corp. v. Loew's Inc.,*[101] the examining counsel haulted a depositon to contest the dependent's claim of privilege. The deponent returned to his home in California from New York where the deposition was being taken. Not only did the trial court sustain the assertion of privilege, but it ordered the deposing party to pay opposing counsel's fees and expenses incurred in the trip to California to finish the examination.[102]

The last sentence of paragraph (1)(b) is one of several provisions intended to protect the person from whom discovery is sought from the inconvenience and expense of an unjustified effort at discovery.

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96. *See* FED. R. CIV. P. 37(a)(2), (d).

97. *Id.* at 37(a).

98. *Id.* at 37(b)(2). The purpose of the requirement that a party from whom discovery is sought be ordered to make discovery before he is subject to imposition of sanctions is to ensure that he is "given adequate notice and an opportunity to contest the discovery. . . ." Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208, 1213 (8th Cir. 1981). The philosophy of the new Texas rule is to require proper exercise of discretion so that sanctions are not unjustly imposed.

99. FED. R. CIV. P. 37(d).

100. *See* Tex. R. Civ. P. 215a(a) (Vernon 1976).

101. 27 F.R.D. 426 (S.D.N.Y. 1961).

102. *See id.* at 429.

The new rule expands the trial court's power to force discovery and to protect litigants and other parties from unfounded requests. Accordingly, if the court denies a motion to compel discovery or a motion for sanctions, it may make any protective order permitted by Rule 166b.[103]

Essentially the same standards apply to a motion for a protective order made in response to a motion to compel discovery as apply to a motion made before the time for discovery. That is, the burden is on the movant to show his entitlement to protection. Additionally, the decision of whether to issue a protective order is addressed to the sound discretion of the trial court.[104] Review of the trial court's decision is had only on the grounds of a clear abuse of discretion.[105]

There is, however, an additional consideration when the motion for protection is delayed until the discovering party brings the matter to court. Rule 166b(4), unlike the predecessor provision of former Rule 186b,[106] does not require that a motion for a protective order be made "seasonably." Nevertheless, timeliness of the motion, under the circumstances, may be considered in deciding whether to grant the motion.[107] Thus, the courts may expect some explanation of why the protective order was not sought earlier.[108] The safe practice is for the person opposing discovery to move for the protective order as soon as the need is realized.

4. Evasive or Incomplete Answer

Historically, Texas appellate courts have evidently entertained no doubt that our trial courts are empowered to compel full answers to

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103. *See* TEX. R. CIV. P. 166b(4). For a discussion of protective orders see Barrow & Henderson, *1984 Amendments to the Texas Rules of Civil Procedure Affecting Discovery,* 15 ST. MARY'S L.J. 713, 734 (1984).

104. *See* Alice Nat'l Bank v. Edwards, 408 S.W.2d 307, 312 (Tex. Civ. App.—Corpus Christi 1966, no writ).

105. *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.).

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

107. *See* Jolly v. Superior Court, 540 P.2d 658, 660 (Ariz. 1975); 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2035, at 262-63 (1970).

108. *Cf.* Automatic Drilling Mach., Inc. v. Miller, 515 S.W.2d 256, 260 (Tex. 1974). The Texas Supreme Court held that a motion for a protective order could not be overruled just because it was not made until the deposition had commenced. The court in *Miller* cited extenuating circumstances that indicated the motion was "seasonable." *Id.* at 260. Under the new rule, since the moton is not required to be "seasonably made," less extreme extenuating circumstances should be sufficient.

discovery questions.[109] This power is now expressed in Rule 215(1)(c). For purposes of subdivision (1) of Rule 215, an evasive or incomplete answer is no answer at all.[110] This rule inspired one court to warn:

> [I]t is a dangerous practice which incurs risk of possible sanctions for a party to limit an interrogatory addressed to it to only a portion of the information which it expressly requests. Parties like witnesses are required to state the truth, the whole truth and nothing but the truth in answering written interrogatories.[111]

The party who asserts that an answer is inadequate has the burden to prove the answer's incompleteness or evasiveness.[112] Of course, whether an answer is insufficient must be determined under all the circumstances of the particular controversy,[113] and the general rule is said to be that candor is required. That is, the answering party must candidly reveal the information sought, or must candidly state that he objects to the query.[114] The trial court does not abuse its discretion by refusing to order a better answer, even though the questions could have been more fully answered, if the answers made are adequate.[115]

A rough idea of what kind of answer fails under paragraph (1)(c) can be gathered from the cases. A partial answer that reserves some possible future objection has been held to be no answer at all.[116] A declaration that the documents containing the information sought

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109. *See, e.g.,* Alexander v. Barlow, No. 01-82-0640-cu (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (not yet reported) (trial court's sanction of striking defendant's answer for incomplete answers to interrogatories upheld); Bass v. Duffey, 620 S.W.2d 847, 849 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ) (no abuse of discretion when trial court struck defendant's answers for incomplete interrogatories); Young Cos. v. Bayou Corp., 545 S.W.2d 901, 902 (Tex. Civ. App.—Beaumont 1977, no writ) (trial court's action in striking defendant's answers for answering interrogatories in bad faith upheld). This rule, while stated in general terms, will have its greatest effect on discovery by interrogatories.

110. Rule 215(1)(c) is a verbatim adoption of Federal Rule 37(a)(3). For that reason, several federal cases are relied on in this discussion.

111. *See* Hunter v. International Sys. & Controls Corp., 56 F.R.D. 617, 631 (W.D. Mo. 1972).

112. *See* Daiflon v. Allied Chem. Corp., 534 F.2d 221, 227 (10th Cir. 1976).

113. *See* Alexander v. Barlow, No. 01-82-0640-cu (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (not yet reported).

114. *See* Dollar v. Long Mfg., N.C., Inc., 561 F.2d 613, 616-17 (5th Cir. 1977).

115. Local 472, United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Indus. v. Georgia Power Co., 684 F.2d 721, 724 (11th Cir. 1982).

116. *See* Dollar v. Long Mfg., N.C., Inc., 561 F.2d 613, 616-17 (5th Cir. 1977).

are unavailable may be evasive because the answering party does not state whether he has personal knowledge of the answers.[117] Reference to attached documents that do not contain the answers requested is insufficient.[118] Answers such as "unknown" and "denied" have been held so blatantly inadequate as to indicate bad faith.[119] An interrogated party who answers by referring the interrogating party to company records must state that the desired information is in the records.[120] A response that the answer might be there is deficient.[121] Further, a general answer to a specific question will not suffice.[122]

In this regard, specific mention must be made of *Phillips v. Vinson Petroleum Supply Co.*[123] In *Phillips,* the court held that the trial court, upon finding interrogatory answers to be insufficient, must tell the responding party the specific nature of the deficiencies and must grant an opportunity for that party to cure the errors. Only then may sanctions be ordered.[124] Whatever may be said of the *Phillips* holding before April 1, 1984, it is clearly too broad under new Rule 215. Under the new rule, sanctions are authorized any time a set of interrogatory answers contains even one inadequate reply. Circumstances such as whether the interrogated party was given an opportunity to supplement or amend are relevant only upon review for abuse of discretion.

5. The Award of Expenses

Almost twenty years ago, United States District Court Judge Lloyd MacMahon penned this oft-quoted cry of frustration:

> The Federal Rules of Civil Procedure were designed as an affirmative aid to substantive justice, and those who choose to read them re-

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117. *See* Alliance to End Repression v. Rochford, 75 F.R.D. 438, 440 (N.D. Ill. 1976).

118. Alexander v. Barlow, No. 01-82-0640-cu (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (not yet reported).

119. *See* Young Cos. v. Bayou Corp., 545 S.W.2d 901, 902 (Tex. Civ. App.—Beaumont 1977, no writ).

120. *See* TEX. R. CIV. P. 168(2); *see also* Barrow & Henderson, *1984 Amendments to the Texas Rules of Civil Procedure Affecting Discovery,* 15 ST. MARY'S L.J. 713, 740-41 (1984).

121. *See In re* Master Key, 53 F.R.D. 87, 90 (D. Conn. 1971); *cf.* Daiflon, Inc. v. Allied Chem. Corp., 534 F.2d 221, 227 (10th Cir. 1976).

122. *See* Westman Comm'n Co. v. Hobart Corp., 541 F. Supp. 307, 313 n.8 (D. Colo. 1982).

123. 581 S.W.2d 789 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ).

124. *See id.* at 792.

> strictively do so at their peril. It is time that depositions be conducted by members of the bar in a cooperative manner, in accordance with both the letter and spirit of the rules, without petty bickering and without intervention by busy courts with more important matters pressing for attention. It is clear to us that plaintiffs' attorney has no conception of his obligation to observe the rules "as an officer of the court" or otherwise. Rather, he appears to be bent on concealing vital facts or, at best, waging a war of delay, expense, harassment and frustration. There is no justification for his conduct, no basis at all for his instructing the deponents not to answer. As a result, the cooprative atmosphere envisaged by the federal rules has been poisoned by antagonism.[125]

Modern discovery should be conducted by the litigants, according to the rules, and without court intervention. The court should have to step in only to settle a legitimate controversy that requires impartial determination.[126] Rule 215(1)(d) is designed to encourage the parties to leave the trial court out of discovery matters unless adjudication is genuinely needed.[127]

The thrust of Rule 215(1)(d) is that when the adversaries carry a discovery dispute before the court the losing party can expect to pay expenses. That is, to the victor goes expenses and attorney fees.[128] The court must afford an opportunity for hearing on the matter before an award of expenses can be made.[129] At the hearing, the

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125. Shapiro v. Freeman, 38 F.R.D. 308, 312 (S.D.N.Y. 1965).

126. *See* Ohio v. Crofters, Inc., 75 F.R.D. 12, 20-21 (D. Colo. 1977), *aff'd sub nom.* Ohio v. Arthur Andersen & Co., 570 F.2d 1370 (10th Cir. 1978), *cert. denied,* 439 U.S. 833 (1979).

127. Rule 215(1)(d) is patterned after federal Rule 37(a)(4). In commenting on the federal provision, Professors Wright and Miller state:

> A major purpose of the 1970 revision of the discovery rules was to encourage extrajudicial discovery with a minimum of court intervention. One means of accomplishing that was to tighten the judicial sanctions with respect to unjustified insistence upon or objection to discovery. This led the draftsmen to place 'new emphasis on the availability and compulsory nature of an award of expenses.'

8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE§ 2288, at 786 (1970); *accord* Addington v. Mid-American Lines, 77 F.R.D. 750, 751 (W.D. Mo. 1978); FED. R. CIV. P. 37(a)(4) Notes of Advisory Committee on Rules; 4A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 37.02 [10.-1], at 37-49 (2d ed. 1983).

128. This was the intent and effect of the promulgation of a similar provision in the federal rules. *See* FED. R. CIV. P. 37(a)(4) Notes of Advisory Committee on Rules; 4A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 37.02 [10.-1], at 37-49, (2d ed. 1983); 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2288, at 787-88 (1970).

129. *See* Addington v. Mid-American Lines, 77 F.R.D. 750, 752 n.1 (W.D. Mo. 1978) (requirement of hearing under FED. R. CIV. P. 37(a)(4)).

unsuccessful party on the motion has the burden of showing that his position was substantially justified. Alternatively, the loser may seek to show that other circumstances make an award of expenses unjust. If one of these exceptions is not shown, the prevailing party is entitled to recover his expenses on the motion including reasonable attorney fees. If the court grants part of the motion and denies part, the court may apportion the expenses in a just manner.[130]

By its terms, Rule 215(1)(d) applies only to the disposition of a motion to compel discovery. But what is said regarding paragraph (1)(d) is also generally applicable to the disposition of: (1) a motion to determine the sufficiency of answers or objections to requests for admissions,[131] (2) a motion to force production of the movant's own statement,[132] (3) a motion for sanctions for failure to make discovery,[133] and (4) a motion for sanctions for abuse of the discovery process.[134]

Recovery of expenses by the prevailing party on any of these motions should be more attainable under Rule 215 than in the past. Before the 1984 changes, the rules contained four provisions for an award of expenses when the court had to resolve a discovery quarrel. An award was available to the winning party on a motion to compel an answer to a deposition question if the winner could prove that his adversary's position was not substantially justified.[135] The same standard was applied when awarding expenses on a motion to determine the adequacy of a reply to requests for admissions.[136] The court could award expenses to the party resisting a request for production if the court found the request to be outside the scope of the rules or unreasonably frivolous or harassing. If the response to a

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130. One commentator has noted that in apportioning the expenses, the court will weigh the extent to which each party was successful and justified. *See* 4A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 37.02 [10.-3], at 37-51 (2d ed. 1983). In federal practice, however, the entire burden of expenses has generally been placed on the party more at fault. *See* Shenker v. Sportelli, 83 F.R.D. 365, 366-67 (E.D. Pa. 1979); White v. Beloginis, 53 F.R.D. 480, 481 (S.D.N.Y. 1971).

131. *See* TEX. R. CIV. P. 215(4)(b) (incorporates Rule 215(1)(d)).

132. *See id.* 215(1)(e) (contains provision substantially parallel to Rule 215(1)(d)).

133. *See id.* at 215(2)(b)(8) (provides for recovery of expenses in essentially same terms as Rule 215(1)(d)).

134. *See* TEX. R. CIV. P. 215(3). This provision incorporates Rule 215(2)(b)(8), which in turn is roughly equivalent to Rule 215(1)(d).

135. *See* Tex. R. Civ. P. 215a(a) (Vernon 1976).

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

request for production was shown to be unreasonably frivolous or made for the purpose of delay, the discovering party could recover expenses.[137] Similarly, if interrogatories were unreasonable, frivolous, or harassing, the court could award expenses to the objecting party. If, on the other hand, the interrogated party's objections were found unreasonable, frivolous, or made for delay, or if a good faith effort to answer was not made, the propounding party could recover his expenses.[138] Some stretching of the request for production and interrogatory rules was required to find authorization of an award of expenses when the party from whom discovery was sought had completely ignored the requests.[139]

Rule 215 seeks to replace this existing set of rules with one standard for the award of expenses on any discovery motion. The burden is shifted to the unsuccessful litigant to establish that his position was substantially justified or that the award for some reason would be unjust.[140] These changes are intended to make an award of expenses more readily available and thus to discourage avoidable court intervention in the discovery process.[141]

Texas appellate courts have not defined "substantial justification." Some understanding may be gained, however, by considering the construction given the same term under the federal rules. Of course, whether a party's insistence on or resistence to discovery in a particular case is justified depends on the circumstances. The Advisory Committee's Note to Federal Rule 37 indicates that the issue depends on whether a genuine dispute exists.[142] When one party's right to the desired information or the other's right to withhold it

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137. *See* Tex. R. Civ. P. 167(3) (Vernon Supp. 1983).

138. *See* Tex. R. Civ. P. 168(6) (Vernon Supp. 1983).

139. *See* Waguespack v. Halipoto, 633 S.W.2d 628, 633-34 (Tex. Civ. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.); *see also* Tex. R. Civ. P. 170 (Vernon 1976); Tex. R. Civ. P. 167(3) (Vernon Supp. 1983); *cf.* Tharp v. Blackwell, 570 S.W.2d 154, 158 (Tex. Civ. App.—Texarkana 1978, no writ).

140. *Cf.* Addington v. Mid-American Lines, 77 F.R.D. 750, 751 (W.D. Mo. 1978); Lakeside Bridge & Steel Co. v. Mountain State Constr. Co., 400 F. Supp. 273, 279 (E.D. Wis. 1975) (expenses awarded to winning party since losing party submitted nothing to indicate that expenses should not be awarded).

141. *See* Addington v. Mid-American Lines, 77 F.R.D. 750, 751 (W.D. Mo. 1978); FED. R. CIV. P. 37(a)(4) Notes of Advisory Committee on Rules.

142. *See* FED. R. CIV. P. 37(a)(4) Notes of Advisory Committee on Rules. The note reads: "On many occasions, to be sure, the dispute is genuine, though ultimately resolved one way or the other by the court. In such cases, the losing party is substantially justified in carrying the matter to court." *Id.*

raises difficult legal issues, resort to judicial resolution is warranted.[143] In other words, if the disputed issue is one on which reasonable minds could genuinely differ, neither side is without substantial justification in forcing a hearing. A good faith belief will not immunize the party from an award of expenses if there is no fairly litigable issue.[144]

Since the 1970 amendments to the federal rules, federal courts have frequently charged expenses against the resisting party.[145] Discovering parties have also been held to act without substantial justification in seeking to compel discovery.[146] But it must be remembered that the permissible scope of discovery is broad, and if information sought is not clearly improper the discovering party may be considered substantially justified.[147] On the other hand, Texas rulemakers have been very concerned over runaway discovery that may be used to bury an opponent in paper and expense.[148] A party to a Texas lawsuit should consider challenging discovery when it appears that he is being victimized by this practice.[149]

One added feature to the award of expense rule that is noteworthy

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143. 4A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 37.02 [10.-1], at 37-49 (2d ed. 1983).

144. *See* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2288, at 790 (1970).

145. A party who neither answers objections, nor seeks an extension of time to answer interrogatories clearly cannot claim justification. *See* Addington v. Mid-American Lines, 77 F.R.D. 750, 751 (W.D. Mo. 1978); Hunter v. International Sys. & Controls Corp., 56 F.R.D. 617, 631-32 (W.D. Mo. 1972). A deponent is not justified in refusing to answer because of an unfounded assertion of privilege. *See* Palma v. Lake Wankomis Dev. Co., 48 F.R.D. 366, 369-70 (W.D. Mo. 1970). Likewise, evasive or incomplete answers are not warranted. *See* Bates v. Firestone Tire & Rubber Co., 83 F.R.D. 535, 539-40 (D.S.C. 1979); Powerlock Sys., Inc. v. Duo-Lock, Inc., 56 F.R.D. 50, 52 (E.D. Wisc. 1972). Certainly, once the trial court has ordered a deponent to answer, further refusal is not justified. *See* Weigel v. Shapiro, 608 F.2d 268 (7th Cir. 1979).

146. A deposing party who challenges a correct claim of privilege has been held to lack justification. *See* Independent Prods. Corp. v. Loew's Inc., 27 F.R.D. 426, 429 (S.D.N.Y. 1970). Where an interrogating party propounds questions outside the scope delineated by a previous court order he is subject to payment of expenses. *See* Whitehouse Invs. Ltd. v. Bernstein, 51 F.R.D. 163, 165 (S.D.N.Y. 1970). Furthermore, a party who persists in asking questions that have been ruled irrelevant does so without justification. *See* Unilectric, Inc. v. Holwin Corp., 243 F.R.D. 393, 349-400 (7th Cir. 1957), *cert. denied,* 355 U.S. 830 (1958).

147. *See* Reygo Pac. Corp. v. Johnston Pump Co., 680 F.2d 647, 649 (9th Cir. 1972).

148. *See* Pope & McConnico, *Practicing Law With the 1981 Texas Rules,* 32 BAYLOR L. REV. 457, 461-63 (1980). In fact, the concern over out-of-control discovery is the driving factor behind the Texas Supreme Court's inclusion of subdivision (3) in Rule 215.

149. Of course, the wise course by which to challenge an harassing discovery effort is a motion for protective order or an objection rather than requiring the request.

is the provision for an award against the attorney for the unsuccessful party. The purpose is to deter attorneys from instigating harassing or dilatory tactics.[150] The award may be against the attorney only or against the attorney and client jointly.

The righteousness or wickedness of the idea may be, and has been, debated.[151] In defense of the provision, it has been said: "Thus is placed directly on attorneys a somewhat unique sanction to refrain from the frivolous, to weigh carefully considerations of relevancy and privilege, and to advise in accordance with their best judgment."[152] No one in the legal profession would contest the healthiness of these desired effects. There is a recognized danger that legitimate efforts at discovery might be inhibited.[153] The court must be careful to implement this sanction in a way that advances its salutory purpose while avoiding its potential danger. The attorney should be made to pay his adversary's expenses only when it is shown that the attorney's advice is at the root of the unjustified conduct.[154] That is, when imposition of other sanctions would punish the client for the sins of his counsel, the court should consider charging expenses against the lawyer.[155]

The last sentence of paragraph (1)(d) provides a standard by which to measure the amount recoverable. "Reasonable expenses, including attorneys fees" are defined as "expenses which are reasonable in relation to the amount of work reasonably expended." This stipulation makes clear that the award under Rule 215(1)(d) is provided not as penalty but as reimbursement.[156] The court will be re-

150. Minutes of the Advisory Committee for the Supreme Court of Texas (Nov. 12-13, 1982) (comments of Mr. Beck and Mr. McConnico).

151. Actually, the debate resulted in the Committee on Administration of Justice recommending the provision for sanctions against attorneys and the Advisory Committee recommending against it. The Texas Supreme Court preferred the approach of the Committee on Administration of Justice. An interesting debate of the matter by some outstanding members of the legal community is recorded in the Minutes of the Advisory Committee for the Supreme Court of Texas, at 109-22 (Nov. 12-13, 1982).

152. Louisell, *Discovery and Pre-Trial Under the Minnesota Rules,* 36 MINN. L. REV. 633, 650 (1952).

153. *See* Reygo Pac. Corp. v. Johnston Pump Co., 680 F.2d 647, 649 (9th Cir. 1982).

154. *See* Humphreys Exterminating Co. v. Poulter, 62 F.R.D. 392, 395 (D. Md. 1974); Associated Radio Serv. Co. v. Page Airways, Inc., 73 F.R.D. 633, 636 (N.D. Tex. 1977).

155. *See* Butler v. Pearson, 636 F.2d 526, 531 (D.C. Cir. 1980).

156. *Cf.* United States v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 1365, 1371 (9th Cir. 1980). In *Sumitomo,* the award was justified not only as compensation to the wronged party but also as a fine to deter future abuse. *See id.* at 1371. The justification relied upon

quired to receive evidence to determine the proper amount to award.[157] An award made under Rule 215(1)(d) is to be paid at the time directed by the court. Thus, the trial court may stipulate that payment is to be immediate or that the amount will be taxed as cost. Regardless of when the payment is ordered, the order is only appealable upon final judgment. This evidently is the rule when the award is against the attorney as well as when it is against the party.[158]

6. The Motion To Recover a Person's Own Statement

Rule 215(1)(e) clarifies a matter left to implication under the 1981 amendments. In 1973, a paragraph was added to former Rule 167 that established a person's right to recover his own statement concerning the subject of a lawsuit from a party who had possession of the statement. The former rule also provided a means to enforce the right. Two sentences of the new paragraph arranged for a motion to force the production of the statement and for an award of expenses on the motion.[159] Those two sentences were dropped in the 1981 amendments, and the remainder of the paragraph became former Rule 167(6).[160] The motion to compel production and the award of expenses were available under former Rule 167(3) dealing with objections in general.[161]

The new Rule 166b(2)(g) is a verbatim adoption of former Rule 167(6).[162] It does not contain any means to enforce the right it embodies. It would be stretching Rule 215 to find a remedy without paragraph (1)(e), because the balance of the rule provides remedies for parties only. Realizing the inadequacy if no remedy was pro-

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in *Sumitomo* for the amount of the expenses awarded will not be sufficient under Rule 215(1)(d).

157. *See* Weigel v. Shapiro, 608 F.2d 268, 272 (7th Cir. 1979); Lakeside Bridge & Steel Co. v. Mountain State Const. Co., 400 F. Supp. 273, 279 (E.D. Wis. 1975).

158. Federal practice permits the attorney to appeal the order against him immediately. *See* Reygo Pacific Corp. v. Johnston Pump Co., 680 F.2d 647, 648 (9th Cir. 1982).

159. *See* Tex. R. Civ. P. 167 Historical Note (Vernon 1976).

160. *See* Pope & McConnico, *Practicing Law With the 1981 Texas Rules,* 32 BAYLOR L. REV. 457, 472 (1980); *see also* Tex. R. Civ. P. 167(6) (Vernon Supp. 1983).

161. *See* Pope & McConnico, *Practicing Law With the 1981 Texas Rules,* 32 BAYLOR L. REV. 457, 472 (1980); *see also* Tex. R. Civ. P. 167 (Vernon Supp. 1983).

162. *See* TEX. R. CIV. P. 166b(2)(g); For a discussion of this section, see Barrow & Henderson, *1984 Amendments to the Texas Rules of Civil Procedure Affecting Discovery,* 15 ST. MARY'S L.J. 713, 715-35 (1984).

vided, the Advisory Committee added Rule 215(1)(e),[163] which permits the person desiring return of his statement to move the court to order its production and provides for a recovery of expenses similar to that found in paragraph (1)(d).[164]

B. *Sanctions for Failure To Comply with Discovery Orders or Requests: Subdivision 2.*

Subdivision 2 empowers the court to use sanctions to force a person from whom discovery is sought to permit or provide discovery in compliance with the rules. The deposition court is granted sanction power to deal with a recalcitrant deponent.[165] The court in which the action is pending is authorized to invoke a wide range of sanctions to force discovery.[166] The rule also provides for the enforcement of an order to produce directed to a non-party.[167]

1. Sanctions by the Deposition Court

A motion to compel a deponent to appear or to be sworn or to answer a question may be addressed to any district court in the district where the deposition is held.[168] If that order is not honored, Rule 215(2)(a) permits punishment of the reluctant deponent. Paragraph (2)(a) stipulates that a deponent may be held in contempt of court if, after being directed by the deposition court to appear, or to be sworn, or to answer a question, he fails to comply.

This provision represents only minor deviations from earlier practice. Under the old rule, the deposition court and the court in which the action was pending had concurrent jurisdiction over deposition disputes regardless of whether the deponent was a party. The court that ordered compliance could punish a violation of its order by holding the deponent in contempt of court. The deposing party always had the option of going to either court.[169] Presently, Rules 215(1)(a) and (2)(a) require that if the deponent is not a party to the lawsuit, the deposing party may only seek an order from the deposi-

163. Minutes of the Advisory Committee for the Supreme Court of Texas, at 106-08 (Nov. 12-13, 1982).

164. *See* TEX. R. CIV. P. 215(1)(e).

165. *See* TEX. R. CIV. P. 215(2)(a).

166. *See id.* 215(2)(b).

167. *See id.* 215(2)(c).

168. *See id.* 215(1)(a).

169. *See* Tex. R. Civ. P. 215a (Vernon 1976).

tion court. Likewise, the discovering party may seek a contempt citation against the intransigent witness only in the deposition court.

Arguably, another small change in procedure is effected by paragraph (2)(a). The former rule made a deponent who failed to appear for his deposition after service of subpoena immediately subject to a contempt citation.[170] Rule 215(2)(a) may be read to demand violation of a special court order to appear in order to subject the absent deponent to penalties for contempt. A subpoena, however, is a lawful mandate of the court. If a subpoenaed witness does not attend his deposition, therefore, a contempt citation should be obtainable.[171]

2. Sanctions by the Court in Which the Action Is Pending

Paragraph (2)(b) is the mainstay of Rule 215. It is a sweeping grant of power to the court in which the action is pending to utilize sanctions against the parties to force discovery. A study of this paragraph's provisions further reveals the tremendous scope of the power bestowed upon the trial court to deal with efforts to frustrate discovery.

The sanctions of paragraph (2)(b) are imposable for the misdeeds of parties, or of officers, directors, or managing agents of parties, or of persons designated to testify on an entity party's behalf. Consistent with the scheme of Rule 215(1), this provision empowers the court to resort directly to sanctions upon a failure to comply with a proper discovery request.[172] Alternatively, the court may wait to decree sanctions until a discovery order is violated. If an order is in effect at the time a motion for sanctions is brought, the issue becomes whether that order was violated. The propriety of the underlying discovery request will have been determined when discovery was ordered.[173] In reviewing a decree ordering discovery sanctions

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170. *See id.* 215a(c) (Vernon 1976).

171. *See* Fisher v. Marubeni Cotton Corp., 526 F.2d 1338, 1340-41 (8th Cir. 1975). In *Fisher,* the court noted:

> A district court has inherent power to enforce compliance with its lawful orders and mandates by awarding civil contempt damages, including attorneys fees. . . . A subpoena is a lawfully issued mandate of the court issued by the clerk thereof. It is the responsibility of every citizen to respond to this mandate.

Id. at 1340-41.

172. *See* TEX. R. CIV. P. 215(2)(b).

173. *See* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2289, at 790-91 (1970).

for violation of a discovery order, the appellate court will consider the propriety of the order.[174] The trial court's decision whether to order discovery or to immediately impose sanctions is relevant only to a determination of whether it abused its discretion.

Rule 215(2)(b) sanctions are available for a party's failure to obey any order to provide or permit discovery. The import of this general language is to allow sanctions for any order that has the effect of commmanding that discovery be made no matter what rule authorized the order.[175] The rule specifically includes Rule 167a orders to submit to physical or mental examination or to produce another for examination and orders pursuant to Rule 215(1).[176]

Before imposing sanctions for the violation of any discovery request or order, the noncomplying party must be given notice and a hearing. Not only are these safeguards required by Rule 215, but due process also demands that the allegedly derelict party be afforded reasonable notice and opportunity to be heard before sanctons are invoked.[177] Even if fair notice and hearing are given, the imposition of sanctions may offend the requisites of due process.[178] The United States Supreme Court in *Insurance Corp. of Ire-*

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174. *See* Lueg v. Tewell, 572 S.W.2d 97, 101 (Tex. Civ. App.—Corpus Christi 1978, no writ).

175. *Cf.* Associated Radio Serv. Co. v. Page Airways, Inc., 73 F.R.D. 633, 636 (N.D. Tex. 1977); FED. R. CIV. P. 37(b)(2) Advisory Committee's Note. For example, in *Associated Radio Service Co.,* the trial court treated its previous order mandating a discovery conference and a report thereon as an order to permit or provide discovery within the meaning of Federal Rule 37(b)(2). *See* Associated Radio Serv. Co. v. Page Airways, Inc., 73 F.R.D. 633, 636 (N.D. Tex. 1977).

176. *See* TEX. R. CIV. P. 215(2)(b).

177. *See* Lueg v. Tewell, 572 S.W.2d 97, 104 (Tex. Civ. App.—Corpus Christi 1978, no writ); Plodzik v. Owens-Corning Fiberglas Corp., 549 S.W.2d 52, 54 (Tex. Civ. App.—Austin 1977, no writ); *see also* Fisher v. Marubeni Cotton Corp., 526 F.2d 1338, 1343 (8th Cir. 1975); *cf.* Fears v. Mechanical & Indus. Technicians, Inc., 654 S.W.2d 524, 528-29 (Tex. App.—Tyler 1983, writ requested). In *Fears,* the court of appeals upheld a default judgment, rendered as a discovery sanction, over appellant's complaint that he had no notice of appellee's motion. *Id.* Appellant had three times refused delivery of notice by registered mail and claimed to have never received notice by regular mail. The court found that notice had been accomplished in accordance with Rule 21a. *Id.* at 529. At this writing, application for writ of error in *Fears* is pending before the Texas Supreme Court. Comment on the case would be inappropriate. Notice and hearing are also prerequisite to an order compelling discovery. *See* Sears, Roebuck & Co. v. Hollingsworth, 156 Tex. 176, 181, 293 S.W.2d 639, 642 (1956); TEX. R. CIV. P. 215(2)(b).

178. *See* Societe Internationale Pour Participations Industrielles v. Rogers, 357 U.S. 197, 209-11 (1958); Hammond Packing Co. v. Arkansas, 212 U.S. 322, 329-30 (1909); Hovey v. Elliot, 167 U.S. 409, 414-15 (1897). *See generally* Note, *The Emerging Deterrence Orienta-*

land v. Compagnie des Bauxites de Guinee[179] articulated due process requirements that seem applicable to discovery sanction orders in general. *Compagnie des Bauxites,* it is submitted, holds that for a sanction decree to pass constitutional muster it must be just, and be specifically related to the harm done by the condemned conduct. The first standard merely requires that in the circumstances of the particular case the trial court did not abuse its discretion. The second standard requires that the remedy for the subject discovery abuse be tailored to redress the resultant prejudice to the other party.[180] Examination of the sanctions authorized by Rule 215(2)(b) must be made with these due process concerns in mind.

a. Orders as Are Just

Paragraph (2)(b), while specifically authorizing a broad range of sanctions, permits the trial judge some room for artistic deviation. The court is directed to invoke orders as are just, and is not confined to the list that ensues. This phraseology encourages the trial court to adjust his sanction decree in a way that most efficaciously promotes its purpose in the situation confronted. The power to impose these sanctions should be equally as broad, flexible, and plural as the power to use one of the specific sanctions.[181]

Although the provision for just sanctions has been resorted to infrequently, the use of such sanctions has been upheld under similarly worded former rules.[182] One Texas appeals court wisely relied on the "as are just" language to approve the trial court's invocation of a sanction that seemed fair, but arguably was not expressly provided for under the former rule.[183] Considerable resourcefulness was exhibited by the trial court in *Firestone Photographs, Inc. v. Lamaster.*[184] In *Lamaster,* an order assessing periodic monetary

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tion in the Imposition of Discovery Sanctions, 91 HARV. L. REV. 1033, 1041-44 (1978) (discussion of constitutional issues involving imposition of sanctions).

179. ___ U.S. ___, 102 S. Ct. 2099, ___ L. Ed. 2d ___ (1982).

180. *See id.* at ___, 102 S. Ct. at 2107-08, ___ L. Ed. 2d at ___.

181. *See* Comment, *Imposition and Selection of Sanctions in Texas Pretrial Discovery Procedure,* 31 BAYLOR L. REV. 191, 193 (1979).

182. *Compare* TEX. R. CIV. P. 215(2)(b) (trial court can order sanctions "as are just") *with* Tex. R. Civ. P. 170 (Vernon 1976) (orders "as are just") *and* 215a(b) (Vernon 1976) (orders "as are just").

183. *See* Waguespack v. Halipoto, 633 S.W.2d 628, 634 (Tex. App.—Houston [14th Dist.] 1982, writ dism'd).

184. 567 S.W.2d 273 (Tex. Civ. App.—Texarkana 1978, no writ).

penalties for continued disobedience was approved as a just sanction in the circumstances.[185] In an interesting federal case, the trial court in essence shifted the burden of proof because of the non-burdened party's failure to make discovery.[186] The trial court's margin for creativity, however, is not unlimited. In *General Motors Corp. v. Lawrence,*[187] the Supreme Court of Texas bluntly held that "[c]ompelling discovery of non-relevant material . . . is not one of the available sanctions . . . ."[188]

b. Disallowing Further Discovery

Rule 215(2)(b)(1) embodies a new sanction heretofore unknown to the Texas or federal rules.[189] Subparagraph (2)(b)(1) permits the court to disallow the disobedient party the use of further discovery of any kind or of a particular kind. This proviso's long absence from civil procedure is mildly surprising since its very nature is a logical inclusion in an array of discovery sanctions. If a party does not responsibly use a discovery weapon, he may be restrained from using further discovery tools.

There are two points which need be made concerning this new sanction device. First, it seems to be naturally suited for use against the discovering party. For instance, the too common tactic of burying the adversary in paperwork and litigation expense may be checked by this sanction. The use of Rule 215(2)(b)(1) is authorized by subdivision (3) of the rule.[190] Second, the flexibility of this type of sanction makes it possible to tailor the sanction to meet the specific transgression presented. For example, in an order to halt discovery of a particular kind, the court can prevent the sanctioned party from using one form of discovery or from seeking information regarding one aspect or issue of the case. Of course, this sanction should not lightly be invoked. The modern approach to litigation is

185. *See id.* at 277. For a good discussion of "as are just" sanctions and a cogent criticism of *Lamaster* see Comment, *Imposition and Selection of Sanctions in Texas Pretrial Discovery Procedure,* 31 BAYLOR L. REV. 191 (1979).

186. *See* S.E.C. v. Los Angeles Trust Deed & Mortgage Exch., 24 F.R.D. 460, 468 (S.D. Cal. 1959).

187. 651 S.W.2d 732 (Tex. 1983).

188. *Id.* at 734.

189. Some use has been made of the type of sanctions contemplated by Rule 215(2)(b)(1). *See* Park-Tower Dev. Group, Inc. v. Goldfeld, 87 F.R.D. 96, 97 (S.D.N.Y. 1980).

190. *See* TEX. R. CIV. P. 215(3).

to encourage wide-open discovery among the parties. Thus, the power to limit discovery should not be abused by its utilization against a non-deserving litigant or a broader use than appropriate to remedy the particular abuse.

c. Charging Expenses of Discovery or Taxable Court Costs

Rule 215(2)(b)(2) authorizes a second new sanction.[191] This subparagraph permits the trial court to charge discovery expenses and/or taxable court costs against the disobedient party. This sanction is similar to the other provisions for reimbursement of expenses necessitated by improper discovery conduct;[192] however, it is potentially much more devastating because the award is not necessarily tied to the cost resulting from the abuse. This subparagraph states that, in an appropriate case, the court can tax all the expenses of discovery against one litigant or his attorney. This could amount to a staggering sum.

In the usual case, this subparagraph envisions a more modest award. Wise use of discretion will ordinarily require a connection between the award and the discovery violation redressed. That is, an award of expenses or court costs caused by or related to a certain misdeed will more often be appropriate than will a larger award. The award should not be against the attorney unless it is clear that he instigated the violation.[193]

d. Facts Taken as Established

Subparagraph (2)(b)(3) grants the court discretion to order that designated facts of the case shall be taken to be established in accordance with the claim of the innocent party. This sanction has been available under the Texas rules since 1941.[194] Rule 215 retains the definition of the sanction and expands its availability.[195] This

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191. The sanctions of Rule 215(2)(b)(2) have also been used without specific authorization. *Cf.* Park-Tower Dev. Group, Inc. v. Goldfeld, 87 F.R.D. 96, 98-99 (S.D.N.Y. 1980).

192. *Cf.* TEX. R. CIV. P. 215(1)(d), (2)(b)(8), (3), (4)(c).

193. Humphreys Exterminating Co. v. Poulter, 62 F.R.D. 392, 395 (D. Md. 1974).

194. *See* Tex. R. Civ. P. 170(a), 215a(b) (Vernon 1976); Tex. R. Civ. P. 168(8) (Vernon Supp. 1983).

195. Before the 1984 amendments took effect, this penalty was available for non-compliance with an order to produce, Tex. R. Civ. P. 170 (Vernon 1976), or for non-compliance with an order to answer deposition questions, *id.* at 215a(b) (Vernon 1976), or for abuse of interrogatory discovery, *id.* at 168(8) (Vernon Supp. 1983). Its applicability is now governed

sanction's new applicability to failure to obey an order to submit to or to produce another for medical examination is interesting.[196] Plaintiff's failure to comply with such an order in a personal injury case has resulted, under the parallel federal rule, in an order deeming plaintiff's physical condition to be as claimed by defendant.[197] The resulting detriment to plaintiff's case is obvious.

The outstanding feature of the established fact sanction is its adaptability. An order under this subparagraph may be used to neutralize an advantage the recalcitrant party might otherwise gain from his obstinance. When a party's wrongful conduct operates to make a fact unfairly difficult to prove, that fact may be held to be established without proof. Thus, the punishment is made to fit the crime. The order establishing facts has generally been used accordingly.[198] In fact, the United States Constitution may require a tailoring of the sanction decreed to the violation remedied.[199] If the established fact sanction is properly applied, its ultimate effect on the lawsuit and the parties' rights is irrelevant.[200]

e. Preclusion of Evidence

Subparagraph (2)(b)(4) authorizes the trial court to refuse the disobedient party the right to support or oppose designated claims or defenses. Additionally, the court may prohibit the introduction of specified evidence. This sanction existed before the 1984 amendments, but its availability has been broadened.[201]

Similar to an order deeming facts established, a preclusion order ensures that a litigant does not profit from his own wrong.[202] If a requested party unjustifiably retains evidence, and the requester is

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by the general language of Rule 215(2)(b) so that the sanction may be used in response to any discovery violation. *See supra* text accompanying notes 171-75.

196. *See* TEX. R. CIV. P. 167a.

197. *Cf.* McMullen v. Travelers Ins. Co., 278 F.2d 834, 835 (9th Cir. 1960).

198. *See* English v. 21st Phoenix Corp., 590 F.2d 723, 728 (8th Cir.), *cert. denied,* 444 U.S. 832 (1979); McMullen v. Travelers Ins. Co., 278 F.2d 834, 835 (9th Cir. 1960); Black v. Sheritan Corp., 371 F. Supp. 97, 102 (D.D.C. 1974).

199. *See* Insurance Corp. of Ireland v. Compagnie des Bauxities de Guinee, __ U.S. __, __, 102 S. Ct. 2099, 2107-08, __ L. Ed. 2d __, __ (1982).

200. *See* Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, __ U.S. __, __, 102 S.Ct. 2099, 2108, __ L. Ed. 2d __, __ (1982); McMullen v. Travelers Ins. Co., 278 F.2d 834, 835 (9th Cir. 1960).

201. *See* Tex. R. Civ. P. 170(b), 215a(b), 215a(c) (Vernon 1976); Tex. R. Civ. P. 168(8) (Vernon Supp. 1983).

202. United States v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 1365, 1369 (9th Cir.

prejudiced by his resulting inability to study the evidence, the evidence should ordinarily be excluded. One Court has cautioned, however, that:

> [t]he right to present evidence . . . is so important that it should not be denied unless the offering party has withheld relevant information that he had a clear duty to produce, and even then the evidence should not always be excluded if the rights of the opposing party can be fully protected.[203]

Such considerations have been the basis of the federal courts' insistence that evidence not be precluded if the requested litigant was unable to provide discovery and the failure was not his fault.[204] Nevertheless, when a preclusion sanction is clearly justified, the fact that it ruins the sanctioned party's case does not render the order an abuse of discretion.[205] Moreover, severe preclusion sanctions may be resorted to as a deterent to future derelictions.[206]

f. Extreme Sanctions

The majority of cases involving discovery sanctions concern the sanctions authorized by Rule 215(2)(b)(5). This provision empowers the trial court to order a stay of proceedings, to strike pleadings, to dismiss the plaintiff's case, or to render default judgment against the defendant. These sanctions are termed the "ultimate" or "extreme" sanctions. It is settled that, consistent with due process considerations, ultimate sanctions cannot be imposed unless the failure to make discovery is willful, in bad faith, or due to some fault of the disobedient party.[207] The use of these orders to deter future abuses,

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1980); Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1066 (2d Cir. 1979).

203. Lloyd A. Fry Roofing Co. v. State, 524 S.W.2d 313, 319-20 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.).

204. *See* United States v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 1365, 1369-70 (9th Cir. 1980); Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1066-67 (2d Cir. 1979); Dorsey v. Academy Moving & Storage, Inc., 423 F.2d 858, 860-61 (5th Cir. 1970).

205. *See* Philadelphia Housing Auth. v. American Radiator & Standard Sanitary Corp., 50 F.R.D. 13, 19 (E.D. Pa. 1970).

206. *See* United States v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 1365, 1369 (9th Cir. 1980).

207. *See* Societe Internationale Pour Participations Industrielles v. Rogers, 357 U.S. 197, 212 (1958).

however, is appropriate.[208]

Rule 215(2)(b)(5) almost tracks the language of the former rules. As with the sanctions of subparagraphs (2)(b)(3) and (2)(b)(4), subparagraph (2)(b)(5) sanctions are available to redress a wider range of violations.[209] The only alteration of the extreme sanctions provision effected by the 1984 amendments resolves a split among the Texas courts of appeals. Under the prior rule, it was not clear whether dismissal with prejudice was an appropriate sanction.[210] The new rule clarifies that uncertainty by expressly providing for dismissal with or without prejudice. This provision represents another incident of the broadening of the trial court's power to handle discovery problems. Consequently, under new Rule 215(2)(b)(5) the judge's decision to dismiss with prejudice will simply be measured by the abuse of discretion standard.

Existing case law provides a measure of guidance as to when dismissal with prejudice, rather than dismissal without prejudice, is appropriate. After the statute of limitations on the plaintiff's cause of action has run, dismissal with prejudice and dismissal without prejudice are the same penalty. When the applicable limitations period has not expired, dismissal with prejudice is obviously a much harsher penalty than dismissal without prejudice. It follows that misconduct of greater gravity is required to justify dismissal with prejudice.[211] In many cases the gravity of the misconduct is a function of the plaintiff's culpability; the more culpable the plaintiff, the more likely final dismissal is justified. A showing of actual bad

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208. *See* National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976).

209. *See* Tex. R. Civ. P. 170(c), 215a(b), 215a(c) (Vernon 1976); Tex. R. Civ. P. 168(8) (Vernon Supp. 1983).

210. The dispute is exemplified by the holdings of two 1979 court of civil appeals cases. One case expresses the view that, as ordinarily understood, "dismissal" is not an adjudication of the parties' rights, but merely returns them to their status quo before the lawsuit. Gonzalez v. Mann, 583 S.W.2d 637, 640 (Tex. Civ. App.—Houston [14th Dist.]), *rev'd per curiam on other grounds,* 595 S.W.2d 102 (Tex. 1979). The court reasoned that since Rule 170 did not say "with prejudice," it meant without prejudice. *See id.* at 640. On the other hand, the case of *Bottinelli v. Robinson* held that dismissal could be with prejudice, because otherwise an imbalance in available relief for plaintiffs and defendants would exist. *See* Bottinelli v. Robinson, 594 S.W.2d 112, 116-17 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

211. *See* Phillips v. Vinson Supply Co., 582 S.W.2d 789, 791-92 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ) ("only the most aggravating of circumstances would warrant a default judgment on the merits").

faith, as opposed to a lower degree of fault, such as negligence, may be necessary.[212] The gravity of the plaintiff's abuse of discovery may also be reflected in the resultant harm to the defendant. The greater the defendant's harm, the greater the justification for dismissal with prejudice. For instance, if the plaintiff's actions have precluded the defendant from obtaining helpful evidence, dismissal with prejudice may be necessary to protect the defendant.[213] Other circumstances may call for the harsh sanction of final dismissal; but, in general, any time a trial court contemplates disposal of a lawsuit on procedural grounds rather than on the merits it must exercise caution.

Under the new rule, as under previous practice, certain orders that appear to be authorized by the sanctions rule are not authorized. The law of default judgments proscribes certain actions by the trial court even in invoking discovery sanctions. If the defendant's answer is not stricken, the trial court cannot render default judgment on the pleadings either as to liability or to damages. In such a case, the judgment is a post-answer default judgment, and the plaintiff must prove his case as to every element.[214] If the answer is stricken, the court may render a no-answer default judgment. But even then, default judgment may not be rendered as to damages if the alleged damages are unliquidated. In such a case the plaintiff, upon hearing after notice to the defendant, must prove his loss.[215] When the defendant's answer is stricken and the plaintiff seeks liquidated damages, the trial court has authority to render a final, dis-

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212. *See* Southern Pacific Transp. Co. v. Evans, 590 S.W.2d 515, 519 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.), *cert. denied,* 449 U.S. 994 (1980); Fultz v. Cummins Sales & Service, Inc., 587 S.W.2d 515, 519 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.); *cf.* Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1068 (2d Cir. 1979) (gross negligence in failure to comply with disovery order justified sanction equivalent in effect to dismissal with prejudice).

213. *See* Southern Pacific Transp. Co. v. Evans, 590 S.W.2d 515, 519 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.), *cert denied,* 449 U.S. 994 (1980). In *Evans,* the discovery sanction involved was a default judgment rather than dismissal with prejudice. *See id.* at 519. Final dismissal of a plaintiff's case is the rough equivalent of rendition of default judgment against a defendant. Thus, the same misbehavior that justifies default judgment generally justifies dismissal with prejudice.

214. *See* Nutting v. National Homes Mfg. Co., 639 S.W.2d 721, 724 (Tex. App.—Austin 1982, no writ).

215. *See* Pearson Corp. v. Witchita Falls Boys Club Alumni Ass'n, Inc., 633 S.W.2d 684, 687 (Tex. App.—Fort Worth 1982, no writ); Bass v. Duffey, 620 S.W.2d 847, 849-50 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

positive default judgment as a discovery sanction.[216]

Orders imposing the sanctions of Rule 215(2)(b)(5) have been measured against the abuse of discretion standard in a myriad of cases in as many fact situations. An analysis of these holdings in search for reliable or even helpful generalizations would be of dubious utility; it is certainly beyond the scope of this article. One discernible rule that has evolved, however, does merit special attention. The new rule may well have undercut a tendency of the courts to hold that the trial judge necessarily abuses his discretion when he orders dismissal or default any time the sanctioned party has made some effort to comply with the discovery requests.[217]

This judicial tendency was elucidated in *Young Cos. v. Bayou Corp.*[218] The court in *Young Cos.* noted that sanctions are to be used to coerce compliance with discovery rules and not to punish the noncomplying party.[219] Thus, if the threat of sanctions eventually achieved compliance with the discovery request, the actual invocation of sanctions would be purposeless. The court held that sanctions were unavailable against a party who ultimately made the sought-after discovery.[220]

The better view, however, was expressed in *Southern Pacific Transportation Co. v. Evans,*[221] which refuted the rationale of *Young Cos.* The *Evans* court embraced a broader view of the function of sanctions. The court recognized that sanctions should serve a deterrent purpose. Obviously, the potency of sanction rules as a deterrent to obstructive discovery practice is largely nullified if eleventh-hour compliance will enable a party to escape sanctions. Accordingly, the eventual compliance argument was rejected, and the trial court's decree was affirmed.[222]

If, as previously explained, the thrust of Rule 215 is to adopt a

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216. *See* Reimer v. Ford Motor Credit Co., 635 S.W.2d 162, 165 (Tex. App.—Houston [1st Dist.] 1982, no writ).

217. *See* Saldivar v. Facit-Addo, Inc., 620 S.W.2d 778, 778-79 (Tex. Civ. App.—El Paso 1981, no writ); Illinois Employers Ins. Co. v. Lewis, 582 S.W.2d 242, 245 (Tex. Civ. App.—Beaumont), *writ ref'd n.r.e. per curiam,* 590 S.W.2d 119 (Tex. 1979); Young Cos. v. Bayou Corp., 545 S.W.2d 901, 902-03 (Tex. Civ. App.—Beaumont 1977, no writ).

218. 545 S.W.2d 901 (Tex. Civ. App.—Beaumont 1977, no writ).

219. *See id.* at 903.

220. *See id.* at 902-03.

221. 590 S.W.2d 515 (Tex. Civ. App.—Houston [1st Dist.] 1979), writ ref'd n.r.e.), *cert. denied,* 499 U.S. 994 (1980).

222. *See id.* at 518-19.

new attitude about the office of sanctions, the eventual compliance rationale cannot stand. This reasoning is grounded in an outmoded notion of discovery sanctions. Modern litigation demands use of sanctions to serve purposes beyond the mere ultimate achievement of discovery. Consequently, eventual compliance with the rules is only a factor for the trial court to weigh in devising an appropriate order.

g. Contempt of Court

Rule 215 (2)(b)(6) authorizes the court in which the action is pending to punish disobedience of a discovery order as a contempt of court. Unlike the sanctions of subparagraphs (2)(b)(1)-(5), the contempt sanction is justified only by a violation of a court order. Consequently, the breach of the discovery rules alone is not enough to invoke a contempt citation.

The former rules provided for a citation for contempt to enforce certain discovery orders. If a deponent refused to answer a question after being so ordered, he could be held in contempt of court under the old rules.[223] Failure to attend a deposition after being subpoenaed also enabled the court to punish the witness for contempt.[224] The 1981 amendments granted the trial judge the power to treat abuse of interrogatory discovery as contempt of court.[225]

Rule 215 (2)(b)(6) expands the applicability of a contempt citation as a sanction for discovery impropriety. The court may hold a party in contempt for violation of any discovery order except an order to submit to physical or mental examination or to produce another for examination. In this regard, medical examination orders are specifically exempted.[226] A subpoena commanding a party to appear and to be deposed should be considered a court order for purposes of subparagraph (2)(b)(6).[227]

From case law, one might conclude that the contempt citation has not been a very popular discovery sanction in Texas. The lack of discussion of the contempt citation in appellate cases, however, may be explained by the sobering effect such an order usually has on the

223. *See* Tex. R. Civ. P. 215a(b) (Vernon 1976).
224. *See id.* 215a(c) (Vernon 1976).
225. *See* Tex. R. Civ. P. 168(8) (Vernon Supp. 1983).
226. *See* Tex. R. Civ. P. 215(2)(b)(6).
227. *Cf.* Fisher v. Marubeni Cotton Corp., 526 F.2d 1338, 1340 (8th Cir. 1975).

obstinate individual. The citation will ordinarily produce compliance with a court order. In fact, one Texas appellate court held that a trial court abused its discretion in dismissing a case without first trying to coerce compliance via a contempt order.[228]

Under contempt provisions similar to those of Rule 215, federal courts have punished parties for both civil and criminal contempt.[229] Criminal contempt has been reserved for more aggravated disobedience.[230] In deciding whether to treat conduct as either civil or criminal contempt, or as no contempt at all, the federal courts' focus has been on the willfulness of the violator's wrongdoing.[231]

h. Violation of Medical Examination Order

In 1973, the Texas Supreme Court added Rule 167a to our Rules of Civil Procedure. Subdivision (a) of the rule reads:

> (a) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.[232]

Rule 167a, unaltered by the 1984 amendments, does not provide a sanction for failure to comply with an order issued under the rule. The rules pertaining to discovery sanctions were not amended in 1973 to give the trial court a means to enforce its medical examination order.[233] Thus, it appeared that the only remedy available was

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228. *See* Texhoma Stores, Inc. v. American Central Ins. Co., 398 S.W.2d 344, 347 (Tex. Civ. App.—Tyler), *writ ref'd n.r.e. per curiam,* 401 S.W.2d 593 (Tex. 1966) (disapproving this reasoning because it was applied to proceedings at trial, whereas discovery sanctions are only available pretrial).

229. *See* Jones v. Louisiana State Bar Ass'n., 602 F.2d 94, 97 (5th Cir. 1979); Southern Ry. Co. v. Lanham, 403 F.2d 119, 124-26 (5th Cir. 1968).

230. *See* Jones v. Louisiana State Bar Ass'n, 602 F.2d 94, 97 (5th Cir. 1979).

231. *See id.* at 97; Colorado Milling & Elevator Co. v. American Cyanamid Co., 11 F.R.D. 306, 307 (W.D. Mo. 1951); Roth v. Paramount Pictures Distrib. Corp., 8 F.R.D. 31, 32 (W.D. Pa. 1948); Crosley Radio Corp. v. Hieb, 40 F. Supp. 261, 263 (S.D. Iowa 1941).

232. TEX. R. CIV. P. 167a.

233. *See* Tex. R. Civ. P. 170, 215a (Vernon 1976).

a contempt order against the recalcitrant party.[234] A strained interpretation of Rule 167a might have allowed the court to exclude the testimony of the refusing party's doctor.[235] Moreover, one case held that the trial judge must have power to stay proceedings until the party complies with the order.[236]

This lack of an effective enforcement mechanism for medical examination orders is rectified by Rule 215. Subparagraph (2)(b)(7) makes violation of an order to appear for or to produce another for physical or mental examination punishable by the sanctions of subparagraphs (2)(b)(2)-(5). The party failing to comply will be excused if he shows that he is unable to appear or produce another for examination.

Subparagraph (2)(b)(7) summarizes the sanctions available for violation of a Rule 167a(a) order. This provision performs two additional functions not otherwise dealt with in paragraph (2)(b).[237] First, since the contempt sanction is not listed as an authorized sanction in subparagraph (2)(b)(6), enforcement by contempt citation is prohibited for an order to produce another for examination. Second, this provision excuses the inability to fulfill the requirements of the order.

When the party ordered to appear or to produce another for examination claims that he could not comply, he has the burden to prove his inability to comply with the order. The comment to the rule's federal counterpart maintains that the party so ordered must show that he cannot comply with the order in good faith.[238] This modification seems reasonable, but it should not forbid the trial court to punish a party for negligent non-compliance.[239] The party should be required to apply his best efforts to satisfy the order.

Logically, the party ordered to submit to examination will only be excused by an inability to appear caused by an unforeseeable

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234. *See* Sales, *Pre-Trial Discovery in Texas,* 31 Sw. L.J. 1017, 1037 (1978).

235. *See id.*

236. Harrell v. Fashing, 562 S.W.2d 544, 546 (Tex. Civ. App.—El Paso 1978, no writ).

237. *See* TEX. R. CIV. P. 215(2)(b). Subparagraph (2)(b)(7) is partly redundant of other portions of paragraph (2)(b). By the terms of Rule 215(2)(b), the sanctions provided therein apply to the violation of any Rule 167a(a) order. In addition, subparagraph (2)(b)(6) exempts a party's failure to submit to a medical examination as ordered from punishment for contempt.

238. *See* FED. R. CIV. P. 37(b)(2)(E) Notes of Advisory Committee on Rules.

239. Note, *Proposed 1967 Amendments to the Federal Discovery Rules,* 68 COLUM. L. REV. 271, 294-96 (1968).

change in circumstances that arose after the order was entered and beyond the party's control. The requirements for showing the inability to produce another for examination are less stringent. First, before the order is made the court must determine that the person to be produced is in the legal custody or control of the party so ordered. Despite the existence of legal control, however, if the party is practically unable to produce the other person, the non-compliance should be forgiven. Of course, the trial court remains free to issue another order to accomplish the needed examination.

i. Expenses

Rule 215(2)(b)(8) authorizes an award of expenses as a sanction for violation of any discovery order. This sanction is provided in lieu of, or in addition to, any other imposed sanction. Thus, though subparagraph (2)(b)(8) is not listed in subparagraph (2)(b)(7), an expense award is authorized for violation of an order to submit to or to produce another for medical examination.

In essence, the expense award under subparagraph (2)(b)(8) is similar to that provided by Rule 215(1)(d) against the unsuccessful party on a motion to compel discovery. The general rule of subparagraph (2)(b)(8) mandates that the trial court require the noncomplying party to pay reasonable expenses caused by the noncompliance. The mandatory nature of the provision is intended to encourage its use to deter litigants from persisting in their disobedience to the point where a sanction decree is necessary.[240]

The court should refrain from an award of expenses only where it affirmatively finds that the disobedience was substantially justified or that some other circumstance would make the award unjust. The situations in which a party is substantially justified in violating a discovery order are rare. The reluctant party had a chance to argue the underlying discovery question when the order was entered and lost the argument. His duty to provide or permit the requested discovery, therefore, is not before the court on a motion for sanctions for violation of the discovery order. To show that his breach of the order was justified, the party must satisfy the court that he reasonably believed that he had complied. If he is unable to show this, he may try to prove that some other circumstances, such as his inability

240. *See* Addington v. Mid-American Lines, 77 F.R.D. 750, 751 (W.D. Mo. 1978).

to comply, makes an award of expenses unjust.[241]

This subparagraph permits the discovering party to recover his expenses caused by his adversary's violation. The award encompasses more than merely the expenses incurred in obtaining the sanction order. Any reasonable expense resulting from the delay caused by the other party's obstinance or from the fact that the discovering party was deprived of needed information may be included in the award. For example, if the discovering party is put to the expense of uncovering the requested information in some other manner, he is entitled to recover that expense. An expense award under this rule may be against the recalcitrant party, his lawyer, or both.[242] The court may require that the expenses be paid at a fixed date or adjudged as costs. In any event, an award of expenses is reviewable only on appeal from the final judgment.[243]

3. Sanctions Against a Non-Party for Failure To Produce

In 1981, subdivision (4) was added to Rule 167.[244] For the first time, the rules provided a procedure whereby a party could obtain a court order against a person not a party to the lawsuit directing him to produce documents or things.[245] No sanction, however, was specifically designated to deal with the non-party's violation of the discovery order. The newly enacted version of Rule 167 retains subdivision (4), and to correct the earlier omission, a sanction for violation of Rule 167(4) order has been provided. Rule 215(2)(c) now provides that a non-party who violates an order to produce may be held in contempt of court.

C. *Sanctions for Abuse of the Discovery Process: Subdivision 3*

When new Rule 215 was proposed to the Texas Supreme Court in late 1982, the rule covered five pages and contained four subdivisions. Virtually the entire rule dealt with compelling discovery and punishing refusal to make discovery. In recent years, however, the court has recognized dangers to our system of justice arising from

241. *Cf. id.*

242. *See* TEX. R. CIV. P. 215(2)(b)(8).

243. *But see* Reygo Pacific Corp. v. Johnston Pump Co., 680 F.2d 647, 648 (9th Cir. 1982) (federal practice permits attorney to immediately appeal order charging expenses).

244. *See* Tex. R. Civ. P. 167(4) (Vernon Supp. 1983).

245. *See id.*

misuse and abuse of discovery which go beyond the refusal to permit discovery.[246] These concerns were verbalized last year by Justice Campbell as he wrote for the court: "Although this court has extensively revised the discovery rules to expedite discovery, the revisions have not solved the abuse of the discovery process caused by overly broad requests, delay in production, or production of material in a meaningless manner."[247]

In an effort to arm Texas trial judges against abusive discovery tactics, the supreme court engrafted a new subdivision (3) into Rule 215 which reads as follows:

> 3. Abuse of Discovery Process in Seeking, Making, or Resisting Discovery. If the court finds a party is abusing the discovery process in seeking, making or resisting discovery or if the court finds that any interrogatory or request for inspection or production is unreasonably frivolous, oppressive, or harassing, or that a response or answer is unreasonably frivolous or made for purposes of delay, then the court in which the action is pending may impose any sanction authorized by paragraphs (1), (2), (3), (4), (5), and (8) of paragraph 2b of this rule. Such order of sanction shall be subject to review on appeal from the final judgment.[248]

Clearly, this subdivision is susceptible of an interpretation that subsumes the rest of the rule. Logically, all discovery conduct could be categorized as either seeking, making, or resisting discovery. Broadly read, then, Rule 215(3) makes the sanctions of subparagraphs (2)(b)(1)-(5) and (8) automatically available upon any discovery impropriety.

It is imperative that subdivision (3) be applied with its underlying goal firmly in mind. This subdivision is intended to address serious discovery problems not dealt with in the other provisions of Rule 215. Subdivision (3) should not ordinarily be resorted to when a more specific provision of Rule 215 provides for the situation at hand. Rule 215(3) is of greatest application to cases of abusive seek-

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246. One step in the effort to meet these challenges was the promulgation in 1981 of former Rules 167 and 168. Portions of these rules, Rules 167(3), 168(6), and 168(8), have been blended to form new Rule 215(3). *See generally* Pope & McConnico, *Practicing Law with the 1981 Texas Rules,* 32 BAYLOR L. REV. 457, 460-66, 479-83 (1980) (discussion of components of former rules). Because the idea of abusive discovery tactics was not introduced into the rules until 1981, the idea has not yet received authoritative construction.

247. General Motors Corp. v. Lawrence, 651 S.W.2d 732, 734 (Tex. 1983).

248. TEX. R. CIV. P. 215(3).

ing of discovery. The subdivision is of lesser importance when the abuse is in the making of discovery and is least useful in dealing with abusive resistance to discovery.

An award of expenses under paragraph (1)(d) against a movant who unjustifiably seeks to compel discovery is the only sanction of subdivisions (1) and (2) available against a party seeking discovery. Any other complaint against the discovering party is subject to sanctions only if it is an abuse within the meaning of Rule 215(3). The chief target of subdivision (3) seems to be the paper war, the technique of drowning an opponent in a sea of paper and expense. The main weapon in this attack is the word processor, which spews out voluminous discovery requests without regard to relevance or propriety.[249] This provision gives the trial judge the means to extricate the litigation from this quagmire. The new sanction of disallowing discovery is especially well-suited for ending the paper war.

The operation of Rule 215(3) will be less broad when a party complains of an abuse in the making of discovery. For purposes of

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249. *See* SCM Societa Commerciale S.D.A. v. Industrial & Commercial Research Corp., 72 F.R.D. 110, 112 (N.D. Tex. 1976). In *SCM Societa,* Judge Porter, after recounting twenty-three separate discovery events, complained:

> The sad part of the foregoing chronology is that the only things accomplished in this time span are the production of incomplete answers to Plaintiff's first set of interrogatories, the impregnation of my file cabinets, the generation of legal fees and the fact that I have aged a year. Or is it ten?
>
> The effect of these vexatious discovery tactics has been to substantially hamper the speedy, just and efficient determination of legal disputes in the federal courts. These kinds of practices cost litigants large amounts of money with the collateral effect of tilting the scales of justice in the direction of the party that can best afford to pay.
>
> This case makes abundantly clear that the supposedly self-executing federal discovery rules are being abused.

Id. at 112. Judge Porter specifically addressed the problem of the paper war:

> This is often accomplished by use of what I consider an unprofessional and insulting practice. I am talking about canned or form interrogatories. I have seen defendants served with hundreds of irrelevant canned questions that have been cut and pasted together by a paralegal or other staff assistant. In many cases the numbers were not consecutive. If the plaintiff's lawyer is not willing to take the time to prepare questions to fit his case the defendant and his attorney should not be compelled to answer them. I do not mean that form questions are *per se* inappropriate. However, if used at all, the form or canned questions must be used selectively, must be germane to the case, must be prepared by a lawyer or under his direction, must be a reasonable number given the nature of the case, and must be consecutively numbered. If I am convinced that a lawyer has breached this standard or has in any way acted unreasonably I will deny the discovery and/or impose sanctions.

Id. at 113 n.5.

a motion to compel discovery or for sanctions, an evasive or incomplete answer to a discovery request is equated with no answer at all.[250] When this provision enables the court to invoke the sanctions of subdivisions (1) and (2) to deal with improper making of discovery, subdivision (3) has no application. The evasive answer proviso of Rule 215(1)(c), however, is most easily applied to interrogatory answers and may not be efficiently utilized when a response to a request for production is challenged. Subdivision (3), on the other hand, may be useful in deterring the tactic of deliberately disheveling documents before making production. A related practice is the mixing of voluminous, irrelevant items with the appropriate, sought-after documents. This technique is prohibited by the request for production rule[251] and is punishable by Rule 215(3).

The most restricted application of this subdivision is to redress resistance to discovery since this subject is ordinarily the province of subdivisions (1) and (2). In this context, subdivision (3) may serve primarily as a catch-all provision which encompasses violations not expressly mentioned elsewhere. For example, fairly read, Rules 215(1)(d) and (2)(b)(8) do not provide for an award of expenses against a party who unjustifiably resists a motion for sanction when no discovery order is yet in effect. Consequently, subdivision (3) may be used to provide the trial court enough flexibility to award expenses in this situation.

The remainder of this provision amplifies the broad language of the first clause. Sanctions under subdivision (3) are available if an interrogatory or request for production is unreasonably frivolous, oppressive, or harassing. The dictionary defines "frivolous" as "of little weight or importance"[252] and "oppressive" as "unreasonably burdensome or severe."[253] Additionally, the definition of "harass" is "to annoy persistently."[254] Thus, employment of interrogatories and of requests for production deserves sanction if the queries concern entirely irrelevant matters, or if the relevance of the information sought is slight while the difficulty in ascertaining it is extreme, or if the purpose is merely to annoy the opposing party. Similarly,

250. TEX. R. CIV. P. 215(1)(c).
251. TEX. R. CIV. P. 167(1)(f).
252. WEBSTER'S NEW COLLEGIATE DICTIONARY 461 (7th ed. 1975).
253. *Id.* at 805.
254. *Id.* at 522.

sanctions are provided for answers or responses that are unreasonably frivolous or made for delay. Thus, providing voluminous amounts of trivial information to obscure relevant items or to cause delay justifies imposition of sanctions under Rule 215(3).

D. *Sanctions for Improper Failure To Admit: Subdivision 4*

Subdivision (4) of Rule 215 is a self-contained sanction provision pertaining only to wrongful failure to admit the genuineness of a document or the truth of a factual matter. This subdivision, in conjunction with Rule 169, forms a comprehensive procedural scheme for requests for admissions and responses to them. These complimentary provisions must be applied to effect a system in which "the litigants, their attorneys and the trial court . . . in an informal manner approach each other and seek by fair and open methods to find the grounds upon which they differ, and those upon which they do not differ."[255]

Rules 169 and 215(4) evidence an intent to treat requests for admissions differently than other discovery. The remedies of Rule 215(4) are uniquely suited to effectuate the purpose of request for admissions discovery. There is no reason to resort to other subdivisions of the sanctions rule to redress violations of Rule 169.

1. Failure To Respond Properly

Paragraph (4)(a) pertains to the respondent's failure to correctly reply to requests for admissions. This sanction dictates that the matter inquired about is automatically admitted unless the respondent prevents the admission by properly serving a timely and adequate answer or objection to each matter asked about.[256] The subject matter of paragraph (4)(a) conforms to the amendments to Rule 169. In fact, the first sentence of this paragraph is entirely redundant of the

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255. *See* Masten v. Gower, 165 S.W.2d 901, 902 (Tex. Civ. App.—Fort Worth 1942, no writ); *see also* Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co., 490 S.W.2d 818, 825 (Tex. 1972); Texas Employers Ins. Ass'n v. Miller, 596 S.W.2d 621, 625 (Tex. Civ. App.—Waco 1980, no writ); Texas Gen. Indem. Co. v. Lee, 570 S.W.2d 231, 233 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.), *reh'g denied per curiam,* 584 S.W.2d 700 (Tex. 1979).

256. *See* Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co., 490 S.W.2d 818, 825-26 (Tex. 1972); Elkins v. Jones, 613 S.W.2d 533, 534 (Tex. Civ. App.—Austin 1981, no writ); Trevino v. Central Freight Lines, Inc., 613 S.W.2d 356, 359 (Tex. Civ. App.—Waco 1981, no writ).

second paragraph of Rule 169.[257] Paragraph (4)(a) appears in Rule 215 to provide a complete array of sanctions so that all consequences of failure to abide by Rule 169 may be found in the sanctions rule.

The final sentence of paragraph (4)(a) stipulates that an evasive or incomplete answer may be treated as no answer at all. The result is that the request so answered is deemed admitted. Although a new provision, it only codifies existing practice.[258]

Rule 215(4)(b) permits the requesting party to secure a court ruling on the propriety of the respondent's objections or answers. If an objection is challenged, the respondent bears the burden of justifying his objection. If he fails, the court is required to order that he answer the request. If the movant attacks the sufficiency of an answer, the movant must prove that the answer does not satisfy the requisites of Rule 169. If he succeeds, the court may either order that the matter is admitted or that further answer be made.

Rule 215(4) makes an important distinction between two degrees of deficient answers. The last sentence of paragraph (4)(a) states that an evasive or incomplete answer is considered no answer at all. Thus, the matter inquired about is automatically deemed admitted without a court order. In contrast, paragraph (4)(b) stipulates that if, upon motion by the requester, the court determines that an answer is defective under Rule 169, it may deem the query admitted or it may grant the respondent a second chance to answer. Rule 169, however, clearly demands that an answer be direct and complete.[259]

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257. The provisions of the first sentence of Rule 215(4)(a) are covered in the discussion of the parallel provisions of Rule 169 in Barrow & Henderson, *1984 Amendments to the Texas Rules of Civil Procedure Affecting Discovery,* 15 ST. MARY'S L.J. 713, 741-47 (1984).

258. *See, e.g.,* Stewart v. Vaughn, 504 S.W.2d 600, 602 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ) (trial court may consider evasive answers to request for admissions as admitted); Drake v. Texas Dep't of Pub. Safety, 393 S.W.2d 320, 324 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.) (evasive answer deemed admitted).

259. Tex. R. Civ. P. 169. RULE 169 provides, in part:

> The matter is admitted . . . unless . . . the party . . . serves . . . a written answer or objection addressed to the matter . . . . The answer shall specifically deny the matter or set forth in detail the reasons that the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested 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. An 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

Consequently, an evasive and incomplete answer by definition does not satisfy Rule 169.

This evident overlap could generate confusion regarding the necessity of a motion and order before a request answered evasively or incompletely is deemed admitted. The situation, however, is clarified by recognizing the distinction within the rule based on the severity of the defect. Logically, the inadequacy of the answer must be so severe as to constitute a failure to answer before the requesting party can safely ignore the response. Such treatment is appropriate only for an obviously evasive or incomplete response.[260] Similarly, if the court, upon motion, determines that the deficiency of the answer is obvious, it should deem the matter admitted. If, however, it appears that reasonable minds could differ regarding the sufficiency of the challenged answer, the requester must seek a ruling on the matter. If the court agrees with the requester, it should order the answer amended. The cautious course for the requesting party is always to move before trial to determine the propriety of the suspect answer.

Rule 215(4)(b) concludes with an incorporation of Rule 215(1)(d). The unsuccessful party on the motion to determine the sufficiency of answers or objections will ordinarily be required to reimburse his opponent for expenses incurred on the motion. To avoid the award, the loser must convince the court that his position was substantially justified or that other circumstances render the award unjust. All other provisions of paragraph (1)(d) are equally applicable to the award of expenses on a Rule 215(4)(b) motion.[261]

2. Failure To Admit a Matter Proved at Trial

"The vital force behind the admissions procedure is its sanction . . . ."[262] That sanction requires the party who improperly refuses

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reasonable inquiry and that the information known or easily obtainable by him is insufficient to enable him to admit or deny.

Id.

260. The suggested construction comports with previous practice. *See* Stewart v. Vaughn, 504 S.W.2d 600, 602 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ); McPeak v. Texas Dep't of Pub. Safety, 346 S.W.2d 138, 140-41 (Tex. Civ. App.—Dallas 1961, no writ).

261. *See* TEX. R. CIV. P. 215(4)(b).

262. Finman, *The Request for Admissions in Federal Civil Procedure,* 71 YALE L.J. 371, 426 (1962).

to admit a matter to pay the expenses of proving it at trial.[263] The sanction for refusing to admit a matter not genuinely in dispute is uniquely suited for its purpose. By requiring the refusing party to bear the expense of proving the unadmitted truth, the rules at once deter frivolous denial and make whole the innocent party.

The sanction rule for unjustified failure to admit has been substantially rewritten. From the original promulgation of the rules in 1940, until 1984, that sanction appeared in Rule 170 couched in its original words.[264] The updated version of the failure to admit sanction is found in Rule 215(4)(c). That paragraph is identical to federal Rule 37(c).[265]

The revision has worked three significant improvements. First, any failure to admit may trigger the sanction. The loophole that formerly existed[266] when the responding litigant claimed without warrant that he could not admit or deny is no longer available. There was no valid reason for the distinction between a denial and an answer refusing to admit. The sanction is meant to rectify any untenable refusal to admit.[267]

Second, the burden of proof is shifted from the movant to the non-admitting respondent. Under former Rule 170, the requesting party had to show that his adversary had "arbitrarily refused to co-operate" in order to recover expenses.[268] Now, once the requesting party proves the truth of the denied matter, he need only move for the paragraph (4)(c) award. It is the respondent's burden to show that his failure is excusable.

Finally, the former "arbitrary refusal to co-operate" standard is replaced with four more useful criteria. The respondent may avoid the Rule 215(4)(c) sanction if the request is held objectionable. This exemption, by its strict terms, is only applicable when the request has been held objectionable by the court. If the requested party objects and the movant does not press the matter to a hearing, how-

263. The remedy of Rule 215(4)(c) provides for post-trial relief, and it must be requested by motion to the trial court after trial. *See* Uhl v. Uhl, 524 S.W.2d 534, 536-37 (Tex. Civ. App.—Fort Worth 1975, no writ).

264. *See* Tex. R. Civ. P. 170 Historical Note (Vernon 1976).

265. *See* FED. R. CIV. P. 37(c).

266. *See* Tex. R. Civ. P. 170 (Vernon 1976).

267. *See* FED. R. CIV. P. 37(c) Notes of Advisory Committee on Rules.

268. *See* Tex. R. Civ. P. 170 (Vernon 1976); *see also* Hill Farm, Inc. v. Hill County, 425 S.W.2d 414, 419-20 (Tex. Civ. App.—Waco 1968), *aff'd,* 436 S.W.2d 320 (Tex. 1969).

ever, the movant has acquiesced in the objection. This should likewise foreclose a recovery of expenses.[269] Clearly, the fact that a request was objectionable does not preclude the award if the requested party never objects.[270] Another ground of excuse is that the admission sought was not of substantial importance. This excuse seems particularly useful to relieve a requested party from going to significant inconvenience to learn the truth of a matter of little relevance to the litigation.

The third listed exemption from the expense sanction is the most important. If the non-admitting litigant establishes that he had reasonable grounds to believe he would prevail on the issue at trial, his failure is excused. Thus, Rule 215(4)(c) cannot be used as an end run to place on the losing party the entire expense of the winner's case. "[T]he true test under [Rule 215(4)(c)] is not whether a party prevailed at trial but whether he acted reasonably in believing he might prevail."[271]

The respondent's last chance to escape the taxing of expenses under paragraph (4)(c) is to show some other good reason for his failure to admit. The idea behind requests for admissions is to eliminate from the lawsuit uncontroverted facts that are known or readily ascertainable by one side.[272] This last exclusion may exempt the requested party from liability for expenses when he could not reasonably have learned the truth of the matter asked about.[273]

E. *Failure To Supplement Discovery Response: Subdivision 5*

Rule 215(5) is the sanction complement to the duty to supplement discovery in certain circumstances.[274] The sanctions of this provision are specially tailored to provide a fitting redress of violations of Rule 166b(5). The scheme established by these subdivisions is in-

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269. *See* Note, *Proposed 1967 Amendments to the Federal Discovery Rules,* 68 COLUM. L. REV. 271, 294 n.169 (1968).

270. *See* Cline v. Prowler Indus., Inc., 418 A.2d 968, 984 (Del. 1980).

271. FED. R. CIV. P. 37(c) Notes of Advisory Committee on Rules.

272. *See* Texas Gen. Indem. Co. v. Lee, 570 S.W.2d 231, 233 (Tex. Civ. App.—Eastland 1978), *writ ref'd per curiam,* 584 S.W.2d 700 (Tex. 1979).

273. *See* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2290, at 805-06 (1970).

274. *See* TEX. R. CIV. P. 166b(5); *see also* Barrow & Henderson, *1984 Amendments to the Texas Rules of Civil Procedure Affecting Discovery,* 15 ST. MARY'S L.J. 713, 735 (1984).

tended to frustrate any effort to unfairly surprise an opponent with undisclosed evidence.

Both these new provisions are drawn from former Rule 168(7),[275] which enunciated the duty to supplement now embodied in Rule 166b(5). The duty imposed under the former rule, however, extended only to interrogatory answers. Paragraph (a)(3) of former Rule 168(7) provided sanctions for non-disclosure of an expert witness whose identity had been sought by a previous interrogatory. Rule 166b(5) expands the duty to supplement by making the duty applicable to all forms of discovery. Correspondingly, Rule 215(5) expands the authorization of sanctions so that a sanction is available for any breach of the broadened duty to supplement.

Subparagraph (5)(a)(1) of Rule 166b demands that the responding party provide to the discovering party new information that shows the earlier response was incorrect. Subparagraph (5)(a)(2) directs supplementation when the respondent learns information that renders the previous reply misleading. Rule 166b(5)(b) states a special duty to supplement a correctly requested list of experts expected to testify at trial. The supplemental answer must identify the expert and must set forth the substance of his anticipated testimony. Paragraph (5)(c) of Rule 166b stipulates that a duty to supplement may arise from a court order, agreement of the parties, or a specific request for supplementation.[276]

Paragraph (5) sets forth two preclusionary sanction provisions that address any violation of the duty to supplement. First, the violator is deprived of the right to introduce the evidence improperly withheld. Second, for failure to disclose a newly discovered expert witness or fact witness, the respondent loses the right to offer the witness's testimony. These sanctions are mandatory. Of course, an exception is provided to this otherwise rigorous rule. The trial court may admit the evidence if it finds good cause sufficient to require its admission.

The duty to supplement responses to interrogatories was first cre-

275. Tex. R. Civ. P. 168(7) (Vernon Supp. 1983).

276. Rule 166b(5)(c) and Rule 215(5) preserve the holding of *Werner v. Miller,* 579 S.W.2d 455 (Tex. 1979). In *Werner,* one litigant attacked the trial judge's order setting a time table and procedure for the disclosure of expert witnesses. The order warned that experts not designated in accordance with the order would not testify. The Texas Supreme Court approved the order and the sanction for its violation. *See* Werner v. Miller, 579 S.W.2d 455, 455-57 (Tex. 1979).

ated by the 1973 amendments to former Rule 168.[277] At that time, no sanction for breach of the new duty was included. Thus, it was held that the trial judge had broad discretion to deal with any failure to amend answers.[278] In 1981, a strongly-worded sanction was added to the rule. That sanction rendered inadmissible the testimony of an undisclosed expert witness.[279] In this particular, Rule 215(5) tracks former Rule 168(7)(a)(3).

This express sanction provision created in 1981 has not yet been construed by the Supreme Court of Texas. The recent case of *Smithson v. Cessna Aircraft Co.*,[280] decided under the 1973 version of the rules, may provide insight into the intended operation of the new sanction rule. In rejecting the contention that the 1973 version of Rule 168 required exclusion of an undisclosed expert's testimony, the Texas Supreme Court reasoned:

> We cannot endorse such an inflexible restriction on the trial court's ability to fulfill its discretionary duties in conducting a fair trial and administering discovery rules. To conclude that there was only one permissible action available to the trial court is virtually to deny the court any discretion in these instances. Smithson may have surprised Cessna when she called an undisclosed expert witness but the record does not clearly establish that the granting of a continuance or a postponement of the trial would not have sufficiently protected Cessna from any harm due to the surprise . . . . Cessna, however, chose not to request a continuance or postponement even after the trial court refused to bar Baumann's testimony. Instead, Cessna asked only for one of the harshest sanctions available to the court. The failure to present a motion to continue or to postpone the trial severely undermines the assertion that the trial court abused its discretion . . . . We hold that under these circumstances the exclusion of Baumann's testimony was not mandatory.[281]

The approach taken in *Smithson* will not be appropriate under

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277. *See* Tex. R. Civ. P. 168 Historical Note (Vernon 1976). Prior to 1973, one court held that interrogatories were not continuing, and once answered there was no requirement to supplement them. *See* Coca Cola Bottling Co. v. Mitchell, 423 S.W.2d 413, 417-18 (Tex. Civ. App.—Corpus Christi 1967, no writ).

278. *See* Smithson v. Cessna Aircraft Co., 27 Tex. Sup. Ct. J. 229, 231-32 (Feb. 18, 1984); Allied Finance Co. v. Garza, 626 S.W.2d 120, 124-25 (Tex. App.—Corpus Christi 1981, writ ref'd n.r.e.).

279. *See* Tex. R. Civ. P. 168(7)(a)(3) (Vernon Supp. 1983).

280. 27 Tex. Sup. Ct. J. 229 (Feb. 18, 1984).

281. *Id.* at 232.

Rule 215(5). Under the reasoning of *Smithson,* to reverse the trial court's ruling to admit the resisted testimony, the appellate court must find clear evidence that preclusion was the only available effective remedy. The court in *Smithson* noted that preclusion of the testimony was not mandatory.[282] Under Rule 215(5), however, preclusion is mandatory. To admit the testimony, the trial court must affirmatively find the existence of good cause sufficient to require admission. This approach places the burden on the offering party to show that the evidence should be received. Further, the proponent must convince the trial court that the justice of the case requires or compels admission. The appellate court reviewing a ruling allowing the testimony must examine the record for support for this finding and if none exists, the trial court committed error.[283]

One further observation must be made regarding subdivision (5). The sanction of Rule 215(5) is imposable for the answering party's failure to seasonably supplement his response when supplementation is required by Rule 166b(5). Supplementation is never seasonable if made less than thirty days before trial unless the court finds good cause for permitting or requiring a later amendment. Whether the additional response is seasonable, initially depends on how much time has elapsed since the respondent first learned the new information. The duty to disclose after-acquired information arises when the information becomes known. Any lapse between then and the time further response is made should be explained by the party acquiring the information. The timeliness of the amendment is also influenced by practical trial needs. If supplementation occurs at

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282. *See id.* at 232.

283. This analysis should be compared to the opinions of the courts of appeals in Texas Employers Ins. Ass'n v. Webb, 660 S.W.2d 856 (Tex. App.—Waco 1983, writ ref'd n.r.e.), Texas Indus., Inc. v. Lucas, 634 S.W.2d 748 (Tex. App.—Houston [14th Dist.] 1982, writ granted), and National Surety Corp. v. Rushing, 628 S.W.2d 90 (Tex. App.—Beaumont 1981, no writ). The *Lucas* court adopted essentially the approach herein suggested. Texas Indus., Inc. v. Lucas, 634 S.W.2d 748, 758 (Tex. App.—Beaumont 1981, no writ). On the other hand, the courts in *Webb* and *Rushing* may have considered the trial judge's discretion to be slightly broader, and appellate review to be slightly more relaxed. The opinions may be read as requiring the party seeking preclusion to request in the alternative some less drastic relief such as a continuance. But these conclusions cannot be drawn with certainty. It appears that the record in *Webb* did reflect good cause sufficient to require the expert's testimony. The actual holding of *Rushing* is that the admission of the expert's testimony was harmless. Therefore, neither *Webb* nor *Rushing* is really contrary to the analysis offered herein. If any language of those cases is susceptible of a contrary reading it is submitted that such a construction should be resisted.

such a late date that the party receiving the new response does not have a chance for full discovery, exclusion of the evidence may be necessary.[284]

IV. CONCLUSION

The Texas Supreme Court has promulgated new Texas Rule of Civil Procedure 215 in hope of providing a means to promote the fair administration of justice. It can hardly be doubted that Rule 215 bestows upon Texas trial courts all the power needed to assume that the discovery system operates efficiently. Rule 215 provides a procedure for bringing a discovery dispute before the court for determination. The party who loses the argument will generally be required to bear the expense of the hearing. In addition, the rule vests the trial court with broad discretion to impose sanctions upon either the party unjustifiably resisting discovery, or the party wrongfully seeking discovery. A special sanction provision complements the requests for admissions rule to provide an easily administered procedure for defining and restricting the issue to be tried. Finally, meaningful protection is provided against surprise resulting from failure to timely supplement discovery.

Nevertheless, more is required. The power vested in the trial court must be used to effectuate the purposes of pretrial discovery. The courts must resolve to employ discovery sanctions, not only to obtain compliance with a particular order, but also to engender general respect for the discovery rules. In a small percentage of cases, discovery sanctions may cause the decision to rest partially on some basis other than the merits. It must be remembered, however, that a litigant who avails himself of the court system to assert or defend his rights and then flaunts its rules invites sanctions. If by the use of discovery sanctions future litigants are deterred from abusive discovery practices, the objective of fair and expeditious adjudication of substantive rights at minimum expense will be advanced. The beneficiaries will be those litigants who voluntarily abide by the letter and spirit of the rules and the taxpayers who sponsor our system of dispute settlement as well as the administration of justice itself.

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284. Pope & McConnico, *Practicing Law With the 1981 Texas Rules,* 32 BAYLOR L. REV. 457, 480-81 (1980).

V. APPENDIX

Rule 215. Abuse of Discovery; Sanctions

1. Motion for Santions or Order Compelling Discovery. A party, upon reasonable notice to other parties and all other persons affected thereby, may apply for sanctions or an order compelling discovery as follows:

a. Appropriate Court. On matters relating to a deposition, an application for an order to a party may be made to the court in which the action is pending, or to any district court in the district when the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken. As to all other discovery matters, an application for an order will be made to the court in which the action is pending.

b. Motion.

(1) If a party or other deponent which is a corporation or other entity fails to make a designation under Rules 200-2b, 201-4 or 208; or

(2) if a party, or other deponent, or a person designated to testify on behalf of a party or other deponent fails:

(a) to appear before the officer who is to take his deposition, after being served with a proper notice; or

(b) to answer a question propounded or submitted upon oral examination or upon written questions; or

(3) if a party fails:

(a) to serve answers or objections to interrogatories submitted under Rule 168, after proper service of the interrogatories; or

(b) to answer an interrogatory submitted under Rule 168; or

(c) to serve a written response to a request for inspection submitted under Rule 167, after proper service of the request; or

(d) to respond that discovery will be permitted as requested or fails to permit discovery as requested in response to a request for inspection submitted under Rule 167; the discovering party may move for an order compelling a designation, an appearance, an answer or answers, or inspection or production in accordance with the request, or apply to the court in which the action is

pending for the imposition of any sanction authorized by paragraph 2b herein without the necessity of first having obtained a court order compelling such discovery.

When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion pursuant to Rule 166b.

c. Evasive or Incomplete Answer: For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

d. Disposition of Motion to Compel: Award of Expenses. If the motion is granted, the court shall, after opportunity for hearing, require a party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay, at such time as ordered by the court, the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

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

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

In determining the amount of reasonable expenses, including attorney fees, to be awarded in connection with a motion, the trial court shall award expenses which are reasonable in relation to the amount of work reasonably expended in obtaining an order compelling compliance or in opposing a motion which is denied.

e. Providing Person's Own Statement. If a party fails to comply with any person's written request for the person's own statement as provided in paragraph 2(g) of Rule 166b, the person who made

the request may move for an order compelling compliance with paragraph 2(g) of Rule 166b. If the motion is granted, the movant may recover the expenses incurred in obtaining the order, including attorney fees, which are reasonable in relation to the amount of work reasonably expended in obtaining the order.

2. Failure to Comply with Order or with Discovery Request.

a. Sanctions by Court in District Where Deposition is Taken. If a deponent fails to appear or to be sworn or to answer a question after being directed to do so by a district court in the district in which the deposition is being taken the failure may be considered a contempt of that court.

b. Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rules 200-2b, 201-4 or 208 to testify on behalf of a party fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under paragraph 1 of this rule or Rule 167a, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following:

(1) An order disallowing any further discovery of any kind or of a particular kind by the disobedient party;

(2) An order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;

(3) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(4) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(5) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;

(6) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(7) When a party has failed to comply with an order under Rule 167a(a) requiring him to appear or produce another for examination, such orders as are listed in paragraphs (1), (2), (3), (4) or (5) of this subdivision, unless the person failing to comply shows that he is unable to appear or to produce such person for examination.

(8) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

c. Sanction Against Nonparty for Violation of Rule 167. If a nonparty fails to comply with an order under Rule 167, the court which made the order may treat the failure to obey as contempt of court.

3. Abuse of Discovery Process in Seeking, Making, or Resisting Discovery. If the court finds a party is abusing the discovery process in seeking, making or resisting discovery or if the court finds that any interrogatory or request for inspection or production is unreasonably frivolous, oppressive, or harassing, or that a response or answer is unreasonably frivolous or made for purposes of delay, then the court in which the action is pending may impose any sanction authorized by paragraphs (1), (2), (3), (4), (5), and (8) of paragraph 2b of this rule. Such order of sanction shall be subject to review on appeal from the final judgment.

4. Failure to Comply with Rule 169.

a. Deemed Admission. Each matter of which an admission is requested shall be deemed admitted unless, within the time provided by Rule 169, the party to whom the request is directed serves upon the party requesting the admissions a sufficient written answer or objection in compliance with the requirements of Rule 169, addressed to each matter of which an admission is requested. For purposes of this subdivision an evasive or incomplete answer may be treated as a failure to answer.

b. Motion. The party who has requested the admission may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer

does not comply with the requirements of Rule 169, it may order either that the matter is admitted or that an amended answer be served. The provisions of paragraph d of subdivision 1 of this rule apply to the award of expenses incurred in relation to the motion.

c. Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 169 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 169(1), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had a reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

5. Failure to Make Supplementation of Discovery Response in Compliance With Rule 166b. A party who fails to supplement seasonably his response to a request for discovery in accordance with paragraph 5 of Rule 166b shall not be entitled to present evidence which the party was under a duty to provide in a supplemental response or to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter when the information required by Rule 166b concerning the witness has not been disclosed, unless the trial court finds that good cause sufficient to require admission exists.

This is a new rule effective April 1, 1984. Rule 170 is deleted because this rule covers conduct in violation of Rule 167. The revisions to Rule 168, the deletion of Rule 170, and the provisions of new rule 215 are intended to clarify under what circumstances the most severe sanctions authorized under the rules are imposable. New Rule 215 retains the conclusion reached in *Lewis v. Illinois Employers Ins. Co. of Wausau,* 590 S.W.2d 119 (Tex. 1979), and extends such rule to cover all discovery requests, except requests for admissions. New Rule 215 leaves to the discretion of the court whether to impose sanctions with or without an order compelling discovery, so that the court will be free to apply the proper sanction order based upon the degree of the discovery abuse involved.

This rule is rewritten to gather all discovery sanctions into a

single rule. It includes specific provisions concerning the consequences of failing to comply with Rule 169, and spells out penalties imposable upon a party who fails to supplement discovery responses. It provides for sanctions for those who seek to make discovery in an abusive manner.