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Good Cause in the Texas Rules of Civil Procedure.

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GOOD CAUSE IN THE TEXAS RULES OF CIVIL PROCEDURE

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I. INTRODUCTION

A young lawyer, having just passed the Texas Bar Examination and excited to begin the practice of law, accepts the first case of her legal career. The cause of action is one of negligence and personal injury stemming from a car accident involving her client and an employee of MadeUp Dough Co.[1] During the discovery process, the lawyer is served

1. The facts of this hypothetical are loosely based on those of *Rainbo Baking Co. v. Stafford*, 787 S.W.2d 41 (Tex. 1990). In this case, a truck owned and operated by petitioner struck a vehicle driven by respondent motorist. Rainbo Baking Co. v. Stafford, 33 Tex. Sup. Ct. J. 32, 32 (Tex. Oct. 11, 1989) (per curiam). Respondent sued petitioner for negligence and personal injury. *Id.* During discovery, respondent was served with interrogatories and provided the name of a non-party witness. *Id.* at 32-33. Respondent never supplemented the interrogatory and when she called the witness at trial, petitioner objected on the grounds that the witness was not sufficiently identified. *Id.* at 32. At issue in the case was the respondent's failure to supplement an interrogatory answer concerning a witness's testimony that was later called at trial. *Id.* Rainbo filed an appeal for review of

with interrogatories, but fails to provide opposing counsel the name of an expert witness slated to testify on behalf of her client during the proceedings. She never supplements the interrogatory, and when she calls the expert witness at trial, counsel for MadeUp objects on the ground that the witness was never timely identified.

Having expected the case to settle, the attorney reads Texas Rule of Civil Procedure 193.6 and discovers that a party may be excused for failing to supplement a discovery response where the court finds "good cause."[2] Researching the phrase "good cause," the attorney reads *Craddock v. Sunshine Bus Lines, Inc.*[3] There she finds that the Texas Supreme Court has defined good cause as "[un]intentional, or [not] the result of conscious indifference . . . but . . . due to a mistake or an accident."[4] For good measure, she also reads the case of *Stelly v. Papania*.[5] There she finds that the definition of good cause, with regard to deemed admissions, is similar to that relating to equitable motions for new trial; "good cause" can be established by a showing of accident or mistake rather than the result of conscious indifference.[6]

The attorney explains to the judge that she mistakenly expected the case to settle. She asks the judge to find, on the basis of this mistake, that good cause exists for her failure to supplement the discovery response. The judge refuses to find good cause, however, because with regard to the testimony of expert witnesses, the standard has not been satisfied.[7] The testimony of the witness is therefore not allowed, and the lawyer ultimately fails to prove her client's case. Confused?

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the judgment allowing the testimony, and the court of appeals held that it was not an abuse of discretion for the trial court to admit the testimony of the witness. *Rainbo Baking Co.*, 787 S.W.2d at 41. Rainbo then filed an application of writ of error which was denied. *Id.* at 42. The court noted that it disapproved "of the court of appeals' holding that the trial court did not abuse its discretion." *Id.* at 41. It found that the testimony was cumulative of other evidence properly admitted and thus "the trial court's error did not amount to such a denial of the rights of the petitioner as was calculated to cause and probably did cause the rendition of an improper judgment." *Id.* at 42.

2. TEX. R. CIV. P. 193.6.

3. 133 S.W.2d 124 (Tex. 1939).

4. Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 133 S.W.2d 124, 126 (Tex. 1939).

5. 927 S.W.2d 620 (Tex. 1996).

6. Stelly v. Papania, 927 S.W.2d 620, 622 (Tex. 1996).

7. *See* Alvarado v. Farah Mfg. Co., 830 S.W.2d 911, 915 (Tex. 1992) (addressing these factors—inadvertence of counsel, lack of surprise, and the uniqueness of the excluded evidence—which, when standing alone, do not satisfy the good cause requirement for failing to make, amend, or supplement a discovery response in a timely manner).

The phrase "good cause" appears thirty-one times in the Texas Rules of Civil Procedure.[8] At odds with the stated goal of the Rules—"to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law"[9]—Texas courts have assigned at least three very different definitions to this seemingly simple

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8. TEX. R. CIV. P. 5 (Enlargement of Time); TEX. R. CIV. P. 10 (Withdrawal of Attorney); TEX. R. CIV. P. 13 (Effect of Signing of Pleadings, Motions and Other Papers; Sanctions); TEX. R. CIV. P. 18a (Recusal or Disqualification of Judges); TEX. R. CIV. P. 93 (Certain Pleas to Be Verified); TEX. R. CIV. P. 141 (Court May Otherwise Adjudge Costs); TEX. R. CIV. P. 165a (Dismissal for Want of Prosecution); TEX. R. CIV. P. 171 (Master in Chancery); TEX. R. CIV. P. 190.2 (Discovery Control Plan; Suits Involving $50,000 or Less; Level 1); TEX. R. CIV. P. 191.1 (Modification of Procedures); TEX. R. CIV. P. 193.2 (Objecting to Written Discovery); TEX. R. CIV. P. 193.6 (Failing to Timely Respond; Effect on Trial); TEX. R. CIV. P. 196.1 (Request for Production and Inspection to Parties); TEX. R. CIV. P. 196.6 (Expenses of Production); TEX. R. CIV. P. 196.7 (Request or Motion for Entry Upon Property); TEX. R. CIV. P. 198.3 (Effect of Admissions; Withdrawal or Amendment); TEX. R. CIV. P. 203.6 (Use); TEX. R. CIV. P. 204.1 (Motion and Order Required); TEX. R. CIV. P. 247 (Tried When Set); TEX. R. CIV. P. 253 (Absence of Counsel as Ground for Continuance); TEX. R. CIV. P. 265 (Order of Proceedings on Trial by Jury); TEX. R. CIV. P. 320 (Motion and Action of Court Thereon); TEX. R. CIV. P. 329 (Motion for New Trial on Judgment Following Citation by Publication); TEX. R. CIV. P. 330 (Rules of Practice and Procedure in Certain District Courts); TEX. R. CIV. P. 541 (Continuance); TEX. R. CIV. P. 566 (Judgments by Default); TEX. R. CIV. P. 680 (Temporary Restraining Order); TEX. R. CIV. P. 684 (Applicant's Bond); TEX. R. CIV. P. 745 (Trial Postponed); TEX. R. CIV. P. 792 (Time to File Abstract); TEX. R. CIV. P. 796 (Surveyor Appointed).

9. TEX. R. CIV. P. 1; *see also* Bynum v. Shatto, 514 S.W.2d 808, 811 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.) (stating that the rules of civil procedure were not "designed as traps for the unwary nor should they be [interpreted as precluding] a litigant from presenting the truth"). The facts in *Bynum* were undisputed. *Bynum*, 514 S.W.2d at 809. The appellant creditor filed an action to collect against the appellee debtor ten years and ninety days after the original judgment on the debt. *Id.* Appellant asked appellee to admit that he had been out of the state for ninety days between the time of the first judgment and the time the second action was filed in a request for admission. *Id.* Four days after the response deadline, appellant denied the request. *Id.* Appellant filed a motion to strike the response as late and to deem the request admitted. *Id.* The trial court denied the motion and entered judgment in favor of the appellee on the ground that the action was barred. *Bynum*, 514 S.W.2d at 809-10. Appellant appealed and the court ruled that the trial court did not err in deciding to accept appellee's response. *Id.* at 811 (quoting Gordon v. Williams, 164 S.W.2d 867, 868 (Tex. Civ. App.—Eastland 1942, no writ)). The *Bynum* court said:

> Rule No. 169 will perform a most useful office in our jurisprudence, provided it is wisely administered. It should not be so construed as to give one litigant an advantage over his opponent, permitting him to have judgment without supporting testimony when, without injustice to either party, the case can be opened for a full hearing on the evidence.

Id.

pair of words.[10] By so doing, the Texas Judiciary has apparently exempted itself from the high standard it has set for Texas litigators—that language used must be "clear and precise," and so unequivocal that it cannot reasonably have any other meaning.[11]

This Comment will discuss the three most commonly employed standards of good cause: withdrawal of deemed admissions and motions for new trial;[12] requests for discovery and expert witnesses;[13] and late filing of objections to discovery.[14] Each standard, along with its stated rationale and underlying reasoning, will be laid out in turn. Part IIA discusses good cause as it relates to withdrawal of deemed admissions under Texas Rule of Civil Procedure 198.3 and equitable motions for new trial under Texas Rule of Civil Procedure 320. Part IIB lays out the second good cause standard—that relating to the failure to disclose an expert witness under Texas Rule of Civil Procedure 193.6. Part IIC then discusses the third standard of good cause—that required when objections to discovery are not timely filed under Texas Rule of Civil Procedure 193.2. Part III analyzes the various definitions under the criteria of uniformity, achieving the stated goals of the Texas Rules and efficiency. Part IV sets forth a proposal, arguing that the Part IIB standard of *Alvarado v. Farah Manufacturing Co.*,[15] relating to disclosure of expert witnesses, should be adopted as the uniform benchmark to be used by Texas courts. Finally, Part V concludes with a discussion of foreseeable and probable problems associated with such an adoption of the *Alvarado* standard and possible solutions or means to mitigate the effects of those dilemmas.

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10. *See, e.g.*, *Alvarado*, 830 S.W.2d at 914 (holding, implicitly, that good cause can be shown to satisfy TEX. R. CIV. P. 215.5 in the interest of allowing a full presentation of the merits of a case); Remington Arms Co. v. Canales, 837 S.W.2d 624, 625-26 (Tex. 1992) (holding that a "trial court abused its discretion in failing to find good cause when Remington had previously provided a response to an identical request"); N. River Ins. Co. v. Greene, 824 S.W.2d 697, 700 (Tex. App.—El Paso 1992, writ denied) (stating that a party can establish good cause, with regard to TEX. R. CIV. P. 169(2), by showing that its failure to answer was accidental or the result of a mistake, and not intentional or the result of conscious indifference).

11. *See* Anadarko Petroleum Corp. v. Thompson, 94 S.W.3d 550, 554 (Tex. 2002) (stating that a lease's language will not be held to impose a special limitation unless its "language is so clear, precise, and unequivocal that we can reasonably give it no other meaning").

12. TEX. R. CIV. P. 198.3; TEX. R. CIV. P. 320.

13. TEX. R. CIV. P. 193.6.

14. TEX. R. CIV. P. 193.2.

15. 830 S.W.2d 911 (Tex. 1992).

II. STANDARDS OF GOOD CAUSE

A. *Good Cause Standard #1*

1. Withdrawal of Deemed Admissions—Rule 198.3

During the discovery phase of litigation, requests for admissions are drafted to require the responding party to either admit or deny specific facts in an effort to eliminate matters not in controversy.[16] A request is deemed admitted as a matter of law if, on the day after the answers are due, no answers or objections have been served or no privileges asserted.[17] In such instances, the trial court has no dis-

16. *See N. River Ins. Co.*, 824 S.W.2d at 700 (explaining the purpose of requests for admissions); *see also* Carrasco v. Tex. Transp. Inst., 908 S.W.2d 575, 578 (Tex. App.—Waco 1995, no writ) (restating that the purpose of deemed admissions is to clarify facts). In *Carrasco*, appellant worker challenged the district court's judgment ordering the appellee employer to compensate him $2,892 in unpaid overtime compensation. *Id.* at 576. Carrasco claimed that the court erred in four respects—notably "that TTI was not bound by its responses to requests for admissions." *Id.* The court reversed the trial court's action sustaining the attorney general's objection to the admission of appellee's answers to requests for admission. *Id.* at 578. The court reasoned that when the state became a litigant, it was required to follow the same rules of procedure that govern all other litigants, and since the attorney general did not object to the requests for admissions, appellee waived any objections that it had to the requests. *Id.* at 578-79.

17. TEX. R. CIV. P. 198.2(c); *see also* Marshall v. Vise, 767 S.W.2d 699, 700 (Tex. 1989) (stating that unanswered requests for admissions are deemed admitted automatically, unless the court grants a motion to amend or withdraw). In *Marshall*, the defendant failed to answer plaintiff's request for admissions in an action for tortious interference with a business contract. *Id.* at 699. Instead of objecting to the introduction of evidence contradictory to defendant's deemed admissions that established the essential elements of the plaintiff's claim, the plaintiff elicited testimony from the defendant as an adverse witness that directly contradicted the deemed admissions. *Id.* During Vise's direct examination of Marshall, Marshall testified that Vise was terminated for willful misconduct and gross neglect of duties. *Id.* The trial court then entered a take-nothing judgment. *Id.* at 700. On appeal, the intermediate court reversed the judgment and rendered for the plaintiff based on the defendant's deemed admissions. *Marshall*, 767 S.W.2d at 700. The court ultimately reversed and remanded on the grounds that the appellate court erroneously considered the defendant's deemed admissions to be conclusive. *Id.* Additionally, the court held that the plaintiff's failure to timely object to the defendant's contrary testimony waived the effect of the admissions. *Id. See also* Payton v. Ashton, 29 S.W.3d 896, 897-98 (Tex. App.—Amarillo 2000, no pet.) (restating Rule 198.2's requirement that a responding litigant has between 30 and 50 days to reply, and should that reply be untimely or non-existent, then each request is deemed automatically admitted). *Payton* involved a challenge by appellant to a county court judgment denying her request to deem her requests for admissions admitted because appellee failed to answer them and entering judgment for the appellee. *Id.* at 897. In the underlying action, Ashton sued Payton for conversion. *Id.* Evidence existed in the record that Payton's requests for admissions were mailed to Ashton via certified mail, return receipt requested. *Id.* Additionally, the record contained evidence that the requests were returned "unclaimed." *Id.* It was unknown whether the requests were unclaimed because appellee opted not to receive them or whether he even knew of their existence.

cretion to refuse to deem the requests admitted; the process is automatic.[18]

The party against whom the admissions were deemed then has the option to file a motion to strike, withdraw, or amend the admissions.[19] The

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Payton, 29 S.W.3d at 897. The court affirmed the trial court's judgment on the grounds that the requests were returned unclaimed constituted some evidence upon which the court could have concluded that appellee never received them. *Id.* at 898. In other words, because the trial court could have concluded that the duty to respond never ripened, it could have also held that the appellee's failure to respond did not result in the requests being admitted. *Id.*

18. *See* Barker v. Harrison, 752 S.W.2d 154, 155 (Tex. App.—Houston [1st Dist.] 1988, writ dism'd) (discussing the impact of Rule 169). The court states:

> Under [R]ule 169, as amended, effective April 1, 1984, a requested admission is deemed admitted without the necessity of a court order if no objection or written answer to the request for admission is filed within 30 days after service of the request. Thus, in the absence of a timely answer or objection, facts are deemed admitted as a matter of law, and the trial court has no discretion to refuse to deem the facts admitted.

Id. In *Barker*, appellant truck driver sought review of a district court order awarding damages to appellee automobile driver in an action to recover damages from an auto accident. *Id.* at 154. In the underlying action, appellee auto driver filed an action against appellant truck driver. *Id.* Following a non-jury trial, the court awarded damages of $5,676.68 to appellee. *Id.* On appeal, the appellant challenged the legal and factual sufficiency of the evidence used in support of the damage award. *Barker*, 752 S.W.2d at 155. The court affirmed the judgment on the grounds that the appellant had neither answered nor objected to appellee's request for admission within the thirty day time period. *Id.* Additionally, the court reasoned that since he did not file a motion requesting that he be allowed to file late answers for good cause or that the deemed admissions be withdrawn, appellee's requests for admissions were deemed admitted. *Id.* Because the deemed admissions then established the essential elements of appellee's case, the court overruled the appellant's points of error. *Id.*

19. *See* Boone v. Tex. Employers' Ins. Ass'n, 790 S.W.2d 683, 686 (Tex. App.—Tyler 1990, no writ) (highlighting the pertinent portions of Rule 169).

> Rule 169 . . . provides a time frame for the making, serving and filing of requests for admissions. It also provides specifically, in pertinent part, as follows:
> Each matter of which an admission is requested shall be separately set forth. The matter is admitted without necessity of a court order unless, within thirty (30) days after service of the request, or within such time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney . . . . 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 reasonable inquiry and that the information known or easily obtainable by him is insufficient to enable him to admit or deny.* A party who considers that a matter of which an admission is requested

Texas Rules of Civil Procedure state that a party may withdraw or amend a deemed admission upon a showing of good cause for such withdrawal or amendment if "the court finds that the parties relying upon the responses and deemed admissions will not be unduly prejudiced and that the presentation of the merits of the action will be subserved by permitting the party to amend or withdraw the admission."[20] Thus, the motion to strike, withdraw, or amend deemed admissions should include a showing of three things: good cause, no prejudice, and that by striking, the case will be tried on the merits.[21]

The party seeking to strike the deemed admissions must show good cause as to why its answers to requests for admissions were not timely served.[22] Good cause is established by showing that the failure to file was not intentional or the result of a conscious disregard of the obligation to timely file.[23] In other words, even a slight excuse is

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presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of paragraph 3 of Rule 215, deny the matter or set forth reasons why he cannot admit or deny . . . [the matter].

Id.

20. TEX. R. CIV. P. 198.3(b).

21. *See* TEX. R. CIV. P. 198.3(a)-(b) (designating the requirements to withdraw or amend a deemed admission).

22. TEX. R. CIV. P. 198.3(a); *see also* Wal-Mart Stores, Inc. v. Deggs, 968 S.W.2d 354, 356-57 (Tex. 1998) (holding that defendant Wal-Mart established good cause by showing that its failure to respond was the result of an accident and defendant acted diligently once alerted to its store manager's failure to respond to discovery requests); City of Houston v. Riner, 896 S.W.2d 317, 320 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (holding that the "trial court abused its discretion when it refused to permit the withdrawal of the deemed admission" since the city established good cause for its failure to respond). In *Riner*, uncontroverted evidence showed that the request was served on the office building's security guard. *Id.* at 319. "The guard accepted and delivered mail for tenants on different floors of the building" without the city's authorization, and the guard had no "recollection of receiving the involved documents." *Id.* The court, citing *Boone*, 790 S.W.2d at 689, and *Ramsey v. Criswell*, 850 S.W.2d 258, 259 (Tex. App.—Texarkana 1993, no writ), based its decision on the standard that good cause is established where it is shown that the failure to respond was not intentional or in conscious disregard of the obligation to timely file an answer, stating that "even a slight excuse for the original failure to answer is sufficient." *Id.*

23. *Ramsey*, 850 S.W.2d at 259. In *Ramsey*, appellant landowner sought review of the summary judgment entered by the district court in favor of appellee road contractor in appellee's action for breach of contract and foreclosure of a mechanic's lien. *Id.* at 258. The appellant contended that the court abused its discretion by denying his motion to withdraw deemed admissions which formed the basis for the summary judgment. *Id.* at 258-59. In the underlying action, appellee filed suit against appellant landowner to collect the balance due on a contract for the construction of a road. *Id.* at 259. Appellant was served with requests for admissions and did not serve them until two days after they were due. *Id.* Thus, the admissions were deemed admitted pursuant to Texas Rule of Civil Procedure 169. *Id.* The appellant filed a motion to withdraw the deemed admissions and

sufficient.[24] The standard may even be satisfied by mere accident or mistake.[25]

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the trial court denied it, instead granting appellee's motion for summary judgment based on the admissions. *Id.* The court stated that the appellant bore the burden to present evidence to establish good cause for his failure to timely answer, that withdrawal would not prejudice the opposing party, and that the presentation of the merits would be served by withdrawing the admissions. *Id.* However, appellant offered no evidence to support allegations that his late responses were due to illness. *Id.* Thus, the court held that the trial court properly denied the appellant's motion. *Id.* at 260. *See also Boone*, 790 S.W.2d at 689 (analogizing the good cause standard for setting aside a default judgment with that of withdrawing deemed admissions and stating that good cause is satisfied where the defaulting party did not intentionally or consciously disregard his obligation to file an answer). In *Boone*, appellant employee challenged a district court judgment on a jury verdict against appellee workers' compensation insurer for compensation benefits for total incapacity. *Id.* at 684. In the underlying action, appellant claimed that the trial court abused its discretion in granting appellee's "pretrial motion to withdraw three deemed admissions of fact," despite the fact that appellant recovered against the workers' compensation insurer. *Id.* The principle issue on appeal was whether TEIA made a sufficient showing to satisfy the good cause requirement of Texas Rule of Civil Procedure 169. *Id.* Appellant claimed that his work-related injury was the producing cause of total and permanent incapacity. *Id.* On appeal, the court stated the record showed that appellee did not intentionally abuse or resist the discovery process or consciously disregard its obligation to timely file answers to the requests for admissions. *Id.* at 686. The court determined that appellee's counsel inadvertently failed to timely answer, and thus concluded that the trial court did not abuse its discretion in withdrawing the deemed admissions. *Id.* at 688-89.

24. *Ramsey*, 850 S.W.2d at 259; *see also* Webb v. Ray, 944 S.W.2d 458, 461 (Tex. App.—Houston [14th Dist.] 1997, no writ) (noting that "the threshold issue is whether the appellants established good cause by showing that their failure to answer was the result of accident or mistake"); *Boone*, 790 S.W.2d at 689 (analogizing the good cause standard for setting aside a default judgment with that of withdrawing deemed admissions and stating that good cause is satisfied where the defaulting party did not intentionally or consciously disregard his obligation to file an answer); *Halton*, 792 S.W.2d at 465-66 (stating that good cause can be shown even though a party may have been negligent, if his negligence does not rise to the level of conscious indifference). In *Halton*, the defendant workers' compensation carrier sought review from a district court decision rendering summary judgment in favor of the plaintiff injured worker and judgment that plaintiff recover workers' compensation payments, lifetime medical benefits and attorneys fees. *Id.* at 462-63. Defendant claimed "that the trial court abused its discretion in failing to grant" its motion to set aside deemed admissions and to extend filing time for objections and responses to plaintiff's requests for admissions. *Id.* at 463. The court agreed, holding that it was an abuse of discretion for the trial court to deny defendant's motion to set aside and extend time to file answers on the grounds that "good cause" was sufficiently shown to warrant the withdrawal of the deemed admissions. *Id.* at 467. Although the responses were filed 55 days late, the court held that the defendant's "counsel was diligent in filing the answers immediately after the missed deadline came to his attention." *Id.*

25. *See* Cudd v. Hydrostatic Transmission, Inc., 867 S.W.2d 101, 104 (Tex. App.—Corpus Christi 1993, no writ) (holding that good cause was satisfied where a mistake was made in counting the days permitted to serve answers, which led to the failure to respond to requests for admissions); *see also* N. River Ins. Co. v. Greene, 824 S.W.2d 697, 701 (Tex. App.—El Paso 1992, writ denied) (holding that the trial court abused its discretion in de-

Second, the party must show that the other party will not be unduly prejudiced by the striking of the deemed admissions.[26] Delay of trial is but one fact in determining prejudice against a party.[27] Finally, the party against whom the admissions were deemed must state that a trial on the merits will occur by striking the admissions.[28]

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nying a motion to permit the late filing of responses where the mistake was due to an inadvertent calendar diary error). In *North River,* appellant insurance company challenged a district court decision denying its motion to permit the late filing of responses to requests for admissions and which granted summary judgment to appellee claimant in a suit for workers' compensation benefits. *Id.* at 698. In the underlying action, appellee claimant sustained an injury in the workplace and filed a claim for workers' compensation benefits. *Id.* She served numerous requests for admissions on the insurance company, which failed to file a response within the thirty-day time limit. *Id.* The lower court denied appellant's motion for late filing and granted appellee's motion for summary judgment. *Id.* On appeal, the court found that appellant's counsel discovered that the responses had not been timely filed and then filed answers within the same month. *N. River*, 824 S.W.2d at 701. The court found no evidence that the deadline was intentionally ignored or that the appellant had suffered any prejudice as a result of the late responses; it reversed and remanded the judgment. *Id.*

26. TEX. R. CIV. P. 198.3(b); *see also Wal-Mart Stores, Inc.*, 968 S.W.2d at 357 (holding that the plaintiff would not have been unduly prejudiced if the deemed admissions were withdrawn because Deggs was not dependent on the deemed admissions for developing her case); Morgan v. Timmers Chevrolet, Inc., 1 S.W.3d 803, 807 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (holding that Chevrolet's waiting more than two years and during the middle of the trial to try to withdraw deemed admissions upon which the Morgans relied upon "in preparing their case, caused undue prejudice to the Morgans"). In *Morgan*, the plaintiffs appealed a take-nothing judgment rendered by the district court in favor of defendant car dealer in a personal injury case alleging that the court erred in allowing the defendant to withdraw deemed admissions after the trial had begun. *Id.* at 805. During the course of discovery, plaintiff's counsel sent a request to the defendant for admissions. *Id.* Defendant responded to half of the requests; counsel for the plaintiff then notified the defendant of the fact and requested responses to those missing. *Id.* Two years later, at trial, the defendant's motion to withdraw the admissions was granted. *Id.* at 805-06. On appeal, the court reversed on the grounds that the defendant's failure to answer after the error was brought to his attention was a factor against him in establishing "good cause." *Morgan*, 1 S.W.3d at 807. Additionally, the court held that waiting more than two years to withdraw the deemed admissions caused undue prejudice to the plaintiffs. *Id.* Thus, the court concluded that the trial court abused its discretion in allowing the withdrawal of the deemed admissions once the trial had begun. *Id.*

27. *See N. River Ins. Co.*, 824 S.W.2d at 701 (holding that the motion to permit a late filing of answers should have been granted where the failure to answer did not cause a delay but instead actually resulted in a more speedy disposition since the case was decided by summary judgment rather than on the merits).

28. TEX. R. CIV. P. 198.3(b); *see also In re* Kellogg-Brown & Root, Inc., 45 S.W.3d 772, 777 (Tex. App.—Tyler 2001, orig. proceeding) (holding that the trial court's denial of the motion to withdraw precluded the defendant from presenting a viable defense at trial). In the underlying suit of *Kellogg-Brown*, plaintiff's personal representative claimed that the decedent contracted malignant mesothelioma because decedent was negligently exposed to asbestos while performing construction work. *Id.* at 773. The plaintiff served

The Texas Supreme Court first interpreted this rule[29] with regard to whether a party can withdraw its original response to a request for admission and then substitute a different response in *Stelly*.[30] This case will form the partial basis for the first standard of good cause in Texas jurisprudence.[31]

In *Stelly*, Papania sued Stelly and the City of Port Neches, Texas, alleging that the city had created the dangerous condition that caused him to slip and fall on a patch of mud in front of Stelly's home.[32] In response to a request for admissions, Stelly mistakenly admitted he was the owner of the premises on which Papania injured himself.[33] On this basis, Papania non-suited the city, and the trial court dismissed all claims against it with prejudice.[34] Stelly later discovered that the city actually owned the land where Papania fell, and subsequently moved to amend his previous admission.[35]

The trial court granted the motion to amend.[36] The court of appeals reversed, holding that petitioner failed to show that his amended responses would not prejudice Papania.[37] The Texas Supreme Court then reversed the decision of the court of appeals, stating that the surveyor's report, indicating that Stelly's boundary line ended seven feet before the street curb, satisfied the good cause standard for petitioner to amend his response and that the new admissions did not prejudice respondent any-

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discovery requests to which the relator failed to timely respond. *Id.* at 773-74. Thus, the requests were deemed admitted under Rule 198.2(c). *Id.* at 774. Relator filed a petition for writ of mandamus to the appellate court to direct the trial court to vacate its order denying relator's motion to withdraw or amend its deemed admissions. *Id.* The court held that the relator satisfied the good cause standard for withdrawal or amendment of its deemed admissions as nothing in the record indicated that the failure to respond was intentional or the result of conscious indifference and the plaintiff would not be unduly prejudiced by the amendment of the deemed admissions. *In re Kellogg-Brown*, 45 S.W.3d at 776.

29. TEX. R. CIV. P. 169 (Vernon 1998, repealed 1999). TEX. R. CIV. P. 169 was repealed effective January 1, 1999. *Id.* Its present-day counterpart is TEX. R. CIV. P. 198.3. Prior to 1999, the rule read: A party may withdraw "deemed admissions upon a showing of good cause for such withdrawal or amendment if the court finds that the parties relying upon the responses and deemed admissions will not be unduly prejudiced and that the presentation of the merits of the action will be subserved thereby." TEX. R. CIV. P. 169 (Vernon 1998, repealed 1999).

30. Stelly v. Papania, 927 S.W.2d 620, 621 (Tex. 1996).

31. *Stelly*, 927 S.W.2d at 622.

32. *Id.* at 621.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Stelly*, 927 S.W.2d at 621.

37. *Id.*

way because his failure to give timely notice under the Texas Tort Claims Act barred his claim against Port Neches.[38]

The court reiterated that since the 1988 amendment to Rule 169, the threshold standard for the withdrawal of *deemed* admissions is "good cause."[39] It then extended the rule to withdrawing and substituting admissions and stated that where a party requests the withdrawal of deemed admissions, it can establish good cause by showing its failure to respond to a request was accidental or a mistake, and not intentional or the result of conscious indifference.[40]

2. Equitable Motion for New Trial—Rule 320

The "good cause" standard for the withdrawal of deemed admissions is analogous to that required to obtain an equitable motion for a new trial.[41] Where a default judgment is rendered against a defendant who failed to file an answer or did not appear at a hearing, the defendant may file a motion for new trial.[42] The motion should allege the three elements of what is commonly referred to as the *Craddock* test.[43]

In *Craddock*,[44] plaintiff and his wife sustained injuries when their car collided with defendant's bus.[45] Citation was issued to the agent of defendant's insurance company and subsequently became lost when accidentally placed with mail of a less-important classification.[46] The letter

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38. *Id.* at 622.

39. *Id.* at 622 (citing Employers Ins. v. Halton, 792 S.W.2d 462, 465 (Tex. App.—Dallas 1990, writ denied)).

40. *Id.*; *see also* N. River Ins. Co. v. Greene, 824 S.W.2d 697, 700 (Tex. App.—El Paso 1992, writ denied) (explaining that accident or mistake committed by counsel may be deemed as negligent behavior, but will not necessarily rise to the level of conscious indifference that would bar the admission of a motion for leave to file); *Halton*, 792 S.W.2d at 465 (holding that good cause may be shown by negligence, so long as the negligence does not rise to the level of conscious indifference).

41. *See* Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 133 S.W.2d 124, 126 (Tex. 1939) (holding that in order to equitably secure a new trial, the defendant must state that its failure to file was not intentional or the result of conscious indifference, but was due to accident or mistake).

42. *See* TEX. R. CIV. P. 320 (stating that "[n]ew trials may be granted and judgment set aside for good cause, on motion or on the court's own motion on such terms as the court shall direct").

43. *Craddock*, 133 S.W.2d at 126. The three-prong *Craddock* test requires that: (1) the defendant state that its failure to file or appear was "not intentional, or the result of conscious indifference on his part, but was due to a mistake or an accident"; (2) the defendant must present a "meritorious defense"; and (3) the defendant must state that the setting aside of the default judgment will cause the plaintiff no delay or injury. *Id.*

44. Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 133 S.W.2d 124 (Tex. 1939).

45. *Id.* at 124.

46. *Id.* at 124-25.

was not discovered until the day upon which the default judgment was rendered.[47] On the following day, the defendant's insurance company filed a motion for a new trial.[48]

The supreme court, in holding that the trial court abused its discretion when it denied the defendant's motion, articulated the standard for setting aside a default judgment and granting a new trial.[49] The principle, set forth to guide trial courts, which the court noted possess a limited amount of discretion in the matter, states that "[a] default judgment should be set aside and a new trial ordered in any case in which the failure of the defendant to answer before judgment was not intentional, or the result of conscious indifference on his part, but was due to a mistake or an accident . . . ."[50] The court clarified that the judgment will only be set aside "provided [that] the motion for a new trial sets up a meritorious defense."[51] Additionally, the motion for new trial must be filed at a time when its granting will not occasion delay or cause injury to the plaintiff.[52]

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47. *Id.* at 125.

48. *Id.* at 125. Rule 320, which governs the granting of new trials, states:

> New trials may be granted and judgment set aside for good cause, on motion or on the court's own motion on such terms as the court shall direct. New trials may be granted when the damages are manifestly too small or too large. When it appears to the court that a new trial should be granted on a point or points that affect only a part of the matters in controversy and that such part is clearly separable without unfairness to the parties, the court may grant a new trial as to that part only, provided that a separate trial on unliquidated damages alone shall not be ordered if liability issues are contested. Each motion for new trial shall be in writing and signed by the party or his attorney.

TEX. R. CIV. P. 320.

49. *Craddock*, 133 S.W.2d at 126.

50. *Id.*

51. *Id.*

52. *Id.* The *Craddock* standard for good cause and default judgments was also adopted for cases involving want of prosecution. *See* Garcia v. Barreiro, 115 S.W.3d 271, 276-77 (Tex. App.—Corpus Christi 2003, no pet. h.) (stating that when a case is dismissed for want of prosecution, "the court shall reinstate the case upon finding, after a hearing that the failure of the party or his attorney [to appear] was not intentional or the result of conscious indifference but was due to an accident or mistake or that the failure has been otherwise reasonably explained"). The court in *Garcia* held that "the operative standard [when a case is dismissed for want of prosecution] is essentially the same as that for setting aside a default judgment." *Id.* at 277. Citing *Smith v. Babcock & Wilcox Const. Co.*, 913 S.W.2d 467, 468 (Tex. 1995), the court stressed:

> A failure to appear is not intentional or due to conscious indifference within the meaning of the rule merely because it is deliberate; it must also be without adequate justification. Proof of such justification—accident, mistake or other reasonable explanation—negates the intent or conscious indifference for which reinstatement can be denied.

Id.

When a defendant satisfies each part of the three-prong test, the trial court must set aside the default judgment.[53] The test first requires that the defendant state that its failure to file an answer or appear at the hearing was not intentional or the result of conscious indifference, but was due to an accident or mistake.[54] Texas courts have been extremely gener-

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53. *See* Dir., State Employees Workers' Comp. Div. v. Evans, 889 S.W.2d 266, 268 (Tex. 1994) (stating that the trial court's failure to order a new trial when the *Craddock* test is satisfied amounts to an abuse of discretion). The issue for consideration in *Evans* involved "whether a movant is required to introduce evidence at the hearing on its motion for new trial in order to satisfy the [*Craddock*] test . . . when the movant has attached affidavits in support of its motion." *Id.* at 267. In this workers' compensation case, the trial court awarded lump-sum benefits in excess of $92,000 to the worker after finding her totally and permanently incapacitated without the state being present at the trial. *Id.* The state filed a motion for new trial; the motion was overruled by the trial court and affirmed on appeal. Dir., State Employees Workers' Comp. Div. v. Evans, 835 S.W.2d 230, 232 (Tex. App.—Waco 1992), *rev'd*, 889 S.W.2d 266 (Tex. 1994). The Texas Supreme Court reversed and remanded on the grounds that it was error for the court of appeals to rely on *Carey Crutcher, Inc. v. Mid-Coast Diesel Servs., Inc.*, 725 S.W.2d 500, 502 (Tex. App.—Corpus Christi 1987, no writ), "which held that the failure to offer into evidence affidavits attached to a motion for new trial precludes the affidavits from being considered for purposes of [satisfying] the meritorious defense element of the *Craddock* test." Dir., State Employees Workers' Comp. Div. v. Evans, 889 S.W.2d 266, 268 (Tex. 1994). The court stated that "[t]he holding in *Carey Crutcher* conflicts with the procedure for motions for new trial set out in . . . *Ivey v. Carrell*, 407 S.W.2d 212, 215 (Tex. 1966)." *Id.* The court went on to say that "[a]ffidavits attached to the motion . . . do not have to be offered into evidence in order to be considered by the trial court for the meritorious defense element . . . of the *Craddock* test"; it is enough that they "are attached to the motion . . . and are part of the record." *Id.*

54. *See* Estate of Pollack v. McMurrey, 858 S.W.2d 388, 391 (Tex. 1993) (stating that the threshold issue is "whether the Estate's failure to answer was intentional or the result of conscious indifference"). In *Pollack*, the respondent estate creditor sued petitioner "for fraud in connection with a real estate transaction." *Id.* at 389. Petitioner Pollack passed away after answering the suit. *Id.* In response, the court issued a writ of *scire facias*, which required the petitioner estate to defend the suit. *Id.* at 390. The writ of *scire facias* was served on the Secretary of State in accordance to the Texas long-arm statute and forwarded to petitioner's executors. *Id.* There was no evidence that the executors ever received the writ. *Id.* A default judgment was entered against the petitioner and their motion for new trial was denied by the trial court and was affirmed on appeal. *Id.* at 389-90. The Texas Supreme Court reversed on the grounds that lacking actual knowledge of the litigation, a failure to answer cannot be "intentional or the result of conscious indifference." *Id.* at 391. In *Bank One v. Moody*, the court notes:

> [The] court has consistently interpreted the *Craddock* test as having . . . three elements: (1) the failure of the defendant to answer before judgment was not intentional, or the result of conscious indifference on his part, but was due to a mistake or an accident; provided (2) the motion for a new trial sets up a meritorious defense; and (3) is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff.

Bank One v. Moody, 830 S.W.2d 81, 82-83 (Tex. 1992). In *Moody,* the petitioner garnishee sought a writ of error to review an appellate court judgment, alleging that its motion for

ous in holding that defendants have satisfied this requirement.[55] For ex-

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new trial should have been granted and that the test for granting a new trial was misapplied. *Id.* at 81-82. In the underlying action, respondent garnishor served a writ of garnishment on petitioner. *Id.* at 82. Petitioner failed to answer and thus respondent obtained a default judgment. *Id.* Petitioner then filed a motion for new trial which was overruled by the trial court and affirmed on appeal. *Id.* The petitioner contended that it did not file a written answer because it believed it had complied with the requirements of the garnishment when it sent the funds from the debtor's account to the court. *Id.* The court reversed and remanded on the grounds that the court of appeals improperly applied the test for granting a motion for a new trial after a default by splitting the first prong of the test into two distinct requirements. *Id.* at 84-85. The court held that the respondent satisfied the first element of the test by showing that the failure to answer was a mistake of law. *Id.* at 84.

55. Strackbein v. Prewitt, 671 S.W.2d 37, 39 (Tex. 1984) (addressing accident or mistake when defendant thought his staff sent the citation to its attorney). In *Strackbein*, petitioner buyer sought review of a district court decision, which reversed the denial of motions for a new trial, and to set aside a default judgment filed by respondent seller stemming from a contract for the resale of an automobile. *Id.* at 38. In the underlying action, the buyer brought an action under the DTPA. *Id.* The buyer was awarded a default judgment, but it was later reversed on appeal. *Id.* After further review, the court affirmed holding there was no evidence that the seller's failure to answer was the result of conscious indifference or an intentional act. *Id.* at 39. The seller's motion for a new trial and the accompanying affidavits were subjected to the *Craddock* test and passed. *Id.* at 37. As such, a new trial should have been granted. *Id.* The seller's affidavit stated that he had a meritorious defense to the suit in that he acted solely as an agent for another company in his dealings with the buyer so he could not be liable in an individual capacity as alleged. *Id.* As such, the court ruled that the seller had sufficiently set up a meritorious defense as required by *Craddock*. *Id.* Similarly, in *Ward v. Nava*, personal injury defendant/petitioner sought review of an appellate decision affirming the trial court's overruling of petitioner's motion for a new trial following a default judgment. Ward v. Nava, 488 S.W.2d 736, 737 (Tex. 1972). Petitioner claimed that the trial court improperly denied him a new trial following entry of a default judgment against him. *Id.* The trial court's ruling was affirmed on appeal. *Id.* On review to the Supreme Court of Texas, it was the contention of the petitioner that (1) the court erred in holding that evidence disputing service may not come from the defendant himself, (2) that the default judgment should have been set aside as petitioner's failure to answer was due to an accident, and (3) petitioner had a meritorious defense. *Id.* at 737. Additionally, petitioner contended that it was error for the appellate court to hold that the supporting affidavit accompanying the motion for a new trial was factually insufficient. *Id.* at 739. The court held that the question of service was a question of fact for determination by the trier of facts and as such, the court would not disturb the finding. *Id.* at 738. The court noted that the motion must allege facts which constitute a defense to the cause of action and must be supported by evidence proving that the defendant has a meritorious defense. *Id.* Ultimately, the court reversed the lower court holding, finding that petitioner's motion met the requirements. *Id.* at 739. Additionally, in *In re Marriage of Parker*, appellant husband challenged the judgment of the district court which granted appellee wife's petition for divorce even though the appellant claimed he was not afforded proper notice of the trial setting. *In re* Marriage of Parker, 20 S.W.3d 812, 814 (Tex. App.—Texarkana 2000, no pet.). In the underlying action, appellant filed an answer to his wife's petition for divorce but failed to appear for trial. *Id.* at 814. The court granted the divorce and distributed the marital property. *Id.* On appeal, appellant alleged that he

was not given proper notice of the trial setting as required by Texas Rule of Civil Procedure 245. *Id.* at 815. Appellant admitted that he had received notice from appellee's counsel fourteen days prior to trial, but alleged that he sent a letter to the court administrator requesting clarification as to the actual trial setting. *Id.* It was his contention that the court administrator failed to respond to the letter. *Id.* After review, the court reversed the post-answer default holding that a default must be set aside and a new trial granted where the failure leading to the default was due to accident or mistake and was not intentional or the result of conscious indifference. *Id.* at 819. The court reasoned that the appellant's letter to the court administrator seeking clarification of the trial setting, in addition to his reasonable belief that "he would receive the forty-five days' notice required by Rule 245," negated a finding of conscious indifference. *Id.* at 819. Next, in *K-Mart Corp.*, appellant tortfeasor challenged the district court's granting of a default judgment to appellee victim. K-Mart Corp. v. Armstrong, 944 S.W.2d 59, 60 (Tex. App.—Amarillo 1997, writ denied). Appellant contended that the trial court erred in denying a trial on the merits after it granted a default judgment to appellee. *Id.* After review, the court held that the appellant's evidence indicated that it had mailed the lawsuit to its claims management company and satisfied the requirement that it was not consciously indifferent to the need to file an answer. *Id.* at 61-62. Additionally, the court held that appellant alleged sufficient facts to set up a meritorious defense to the claim of injury and the extent of the damages actually suffered. *Id.* Accordingly, the court reversed the default judgment, determining that the granting of a new trial would not cause injury to appellee or undue delay in the proceedings. *Id.* at 63. In *Aero Mayflower*, appellant moving company appealed a county court judgment denying its motion for a new trial against appellee homeowners when appellant's attorney failed to appear at trial. Aero Mayflower Transit Co. v. Spoljaric, 669 S.W.2d 158, 159 (Tex. App.—Fort Worth 1984, writ dism'd). In the underlying action, appellee homeowners brought an action against appellant for loss of personal property occasioned during a move across the country. *Id.* When appellant's attorney unintentionally failed to appear at the trial, the lower court entered judgment against the appellant. *Id.* Appellant's motion for a new trial was denied and the court initially denied the motion on appeal. *Id.* at 160. However, on rehearing, the court reversed its initial decision and remanded the case for trial. *Id.* at 159. The court reasoned that appellant was entitled to a new trial because appellant's attorney failed to appear not out of conscious indifference but based on his involvement in a previously convened trial. *Id.* at 160. Additionally, the court held that the appellant alleged a meritorious defense based on the motion and that the motion was filed on a timely basis so as not to occasion injury or delay. *Id.* Further, in *National Rigging*, appellant company sought review of a district court judgment denying its motion to set aside a default judgment and grant a new trial in appellee city's suit alleging negligence, breach of contract and breach of warranty. Nat'l Rigging, Inc. v. City of San Antonio, 657 S.W.2d 171, 172 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.). In the underlying action, the city of San Antonio sued appellant company and another company for damages stemming from an accident that damaged a transformer, which appellant and the other company had contracted to move to an electric plant owned by the city. *Id.* Both companies were managed by the same president, who answered only for the other company. *Id.* Appellant sought review following the lower court's rendition of a default judgment against it and the denial of a motion to set aside the default and grant a new trial. *Id.* at 172. After review, the court found that under the *Craddock* test for setting aside defaults, appellant's failure to answer was due to a mistake. *Id.* Additionally, the court found that the appellant alleged a meritorious defense to the action where it pled facts suggesting that the transformer suffered no damage following the accident. *Id.* Additionally, in *Beard*, appellant carpet installer sought review of a default judgment granted by county court in favor

ample, the courts have gone so far as to hold that even a mistake of law satisfies this requirement.[56]

Second, the defendant must set up a meritorious defense.[57] A meritorious defense is one that would cause a different result at retrial if proven, although not necessarily an opposite one.[58] It is not a requirement that the defendant actually prove the defense; she is merely required to present one.[59]

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of appellee restaurant owner on appellee's cross-action to recover the difference in price between the cost of carpeting, installed by appellant, and the cost of vinyl tile, which subsequently replaced the carpet. Beard v. McKinney, 456 S.W.2d 451, 452 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ). In the underlying action, appellant brought an action against appellee restaurant owner and appellee filed a cross-action to recover damages arising out of the installation of carpet in the restaurant owned by appellee. *Id.* The trial court granted a default judgment in favor of appellee, and on review appellant complained of the trial court's overruling of his motion for new trial on the grounds that his failure to file was unintentional and he had alleged a meritorious defense. *Id.* The court reversed, stating that the trial court erred in denying the motion for new trial because the pleadings and evidence on the record satisfied the *Craddock* test for determining whether to set aside a default judgment. *Id.* at 543.

56. *See Moody*, 830 S.W.2d at 85 (holding that a mistake of law may be sufficient to satisfy the first element of the three element *Craddock* test). Subsequent to *Craddock*, courts also held that a mistake of law satisfies the mistake segment of the first element of the test. *See, e.g.*, Angelo v. Champion Rest. Equip. Co., 713 S.W.2d 96, 97 (Tex. 1986) (holding that a mistaken belief that paying the underlying claim was a sufficient answer satisfies the test); Tex. State Bd. of Pharmacy v. Martinez, 658 S.W.2d 277, 280-81 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.) (holding that the mistaken belief that exclusive venue rested in a county other than the county of the suit satisfies the test).

57. Ivy v. Carrell, 407 S.W.2d 212, 214 (Tex. 1966). *Ivy* stands for the proposition that "[t]he rule of *Craddock* does not require *proof* of a meritorious defense in the accepted sense to entitle one to a new trial after default; the motion should be granted if it '*sets up* a meritorious defense.'" *Id.* This burden is "much less onerous" than the burden that must be met "in a bill of review proceeding filed after expiration of the time for filing a motion for a new trial." *Id.*

58. *See* Liepelt v. Oliveira, 818 S.W.2d 75, 77 (Tex. App.—Corpus Christi 1991, no writ) (adopting the rule applicable to motions for new trial which seek to set aside default judgments entered on the failure of a defendant to file an answer and those entered on the failure to appear for trial which is stated in *Craddock*). *Craddock* articulates this rule as follows:

> A default judgment should be set aside and a new trial ordered in any case in which the failure of the defendant to answer before judgment was not intentional, or the result of conscious indifference on his part, but was due to a mistake or accident; provided the motion for a new trial sets up a meritorious defense and is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff.

Id. (quoting Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 393, 133 S.W.2d 124, 126 (Tex. 1939)).

59. *Ivy*, 407 S.W.2d at 214; *see also* Dir., State Employees Workers' Comp. Div. v. Evans, 889 S.W.2d 266, 270 (Tex. 1994) (noting that the "[s]etting up of a meritorious

Finally, the defendant is required to state that she is ready for trial and willing to reimburse the plaintiff for all reasonable expenses incurred in obtaining the default judgment.[60] However, the failure to satisfy this requirement by offering reimbursement does not necessarily preclude the granting of a new trial.[61] The purpose of this prong is to protect the plaintiff against a delay that would cause a disadvantage at trial, such as the loss of witnesses or other valuable evidence.[62]

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defense is determined based on the facts alleged in the movant's motion and supporting affidavits, regardless of whether those facts are controverted"; "[i]t is sufficient that the movant's motion and affidavits set forth facts which in law constitute a meritorious defense"); K-Mart Corp. v. Armstrong, 944 S.W.2d 59, 63 (Tex. App.—Amarillo 1997, writ denied) (stating that "[i]n determining the meritorious defense element, we look to the facts alleged in the movant's motion and supporting affidavits, regardless of whether those facts are controverted"). *But see* Cont'l Carbon Co. v. Sea-Land Servs., Inc., 27 S.W.3d 184, 191 (Tex. App.—Dallas 2000, pet. denied) (holding that the defendant's allegation that it did not owe the debt was not sufficient to set up a meritorious defense because the suit was based on a sworn account).

60. *See Evans*, 889 S.W.2d at 270 (stating that Ms. Evans' allegations failed "to show an injury that would negate the State's showing of no undue delay or injury" as "the State offered to go to trial immediately and to reimburse Ms. Evans for the expenses incurred in obtaining the default judgment"); Stone Res., Inc. v. Barnett, 661 S.W.2d 148, 152 (Tex. App.—Houston [1st Dist.] 1983, no writ) (restating the law that in order to satisfy "the requirement that a new trial will not prejudice the non-movant, the moving party must offer and show that it is ready, willing and able to go immediately to trial"). Additionally, *Barnett* acknowledged that the defaulting party must offer "to reimburse the non-movant for the reasonable expenses incurred in obtaining a default judgment." *Id. See also* Crabbe v. Hord, 536 S.W.2d 409, 411 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.) (stating that in a motion for new trial the movant must make an offer "to 'do equity' in the event a new trial be granted so as to make or keep such party whole by reimbursement of his expenses attendant to the trial pursuant to which he obtained the default").

61. *See Evans*, 889 S.W.2d at 270 n.3 (stating that "[t]he willingness of a party to go to trial immediately" and to offer to pay the expenses incurred in obtaining the default are factors for the court to consider in deciding whether or not to grant a new trial; they are not however dispositive); Cliff v. Huggins, 724 S.W.2d 778, 779 (Tex. 1987) (holding that an offer to reimburse the cost of obtaining a default judgment is not a precondition but an important factor in determining whether a new trial should be granted); *Angelo*, 713 S.W.2d at 98 (stating that the court should deal with each equitable motion for a new trial on a case-by-case basis and that the failure to offer to reimburse the non-movant should not in every instance preclude the granting of the motion); G&C Packing Co. v. Commander, 932 S.W.2d 525, 529 (Tex. App.—Tyler 1995, writ denied) (refusing to adopt the rule that a defendant is required to offer to pay expenses as proof of no injury, stating that "such an offer is not mandatory and will not preclude the granting of a new trial").

62. *See Evans*, 889 S.W.2d at 270 n.3 (stressing that "[t]he willingness of a party to go to trial immediately and pay the expenses of the default judgment are important factors for the court to look to in determining whether it should grant a new trial. They are not dispositive of whether the motion should be granted."); *see also Cliff*, 724 S.W.2d at 779 (holding that an offer to reimburse the plaintiff for costs is an important factor for the trial court to consider but is not a precondition for granting a new trial); Angelo v. Champion

The court goes on to cite its own dicta in coming to this standard.[63] Acknowledging the need for simplicity and consistency in practice, the court repeated language from an earlier opinion stating: "[T]he practice in our own courts ought to be referable to some general principle, to produce uniformity . . . ."[64] Subsequent case law has gone on to further define the standard.[65]

This first standard of good cause, which requires nothing more than a mere showing of negligence or mistake,[66] seems to be based on the rationale that mistakes in the practice of law and the misperception of facts are inevitable. Lawyers are only human, and despite the efforts of competent support staff and the convenience and precision of electronic calendars, deadlines will be overlooked. Accidents will happen, however,

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Rest. Equip. Co., 713 S.W.2d 96, 98 (Tex. 1986) (indicating that courts are more favorable upon defaulting defendants who are ready to go to trial without delay).

63. Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 133 S.W.2d 124, 125 (Tex. 1939).

64. Dowell v. Winters, 20 Tex. 793, 797 (1858). The court in *Dowell* held that the lower court erred in overruling the plaintiff's motion to "open the default" on the grounds that the default was unintentionally made and was caused by a mistake as to the correct practice of the court. *Id.* Such an excuse is sufficient to excuse a default when the defendant swears to his meritorious answer. *Id.*

65. *See* Smith v. Babcock & Wilcox Constr. Co., 913 S.W.2d 467, 468 (Tex. 1995) (stating that "[a] failure to appear is not intentional or due to conscious indifference within the meaning of the rule merely because it is deliberate; it must also be without adequate justification"). In *Smith*, plaintiffs filed a suit for damages against the defendants. *Id.* at 467. Plaintiffs' attorney obtained a date for trial, which coincided with another date the attorney had involving another matter in another trial court. *Id.* Plaintiffs' attorney sought a continuance, which was denied. *Id.* "Neither the Smiths nor their attorney appeared" for trial and the defendants moved for a dismissal. *Id.* at 468. The plaintiffs and an intervenor moved to reinstate the case, but the trial court denied the motion and the court of appeals affirmed. *Id.* Upon review, the Texas Supreme Court reversed on the grounds that the attorney for the plaintiffs had reasonably explained his failure to appear because he was involved in a trial in another county and on that basis believed that the trial court would have granted his motion for a continuance. *Id.*; *see also* Ivy v. Carrell, 407 S.W.2d 212, 213 (Tex. 1996) (stressing that conscious indifference means more than mere negligence); Bank One v. Moody, 830 S.W.2d 81, 84 (Tex. 1992) (holding that proof of such justification—accident, mistake, or other reasonable explanation—negates the intent or conscious indifference for which reinstatement can be denied).

66. *See Craddock*, 133 S.W.2d at 126 (holding that the defendant's failure to file must not be intentional or the result of conscious indifference but due instead to an accident or a mistake); N. River Ins. Co. v. Greene, 824 S.W.2d 697, 700-01 (Tex. App.—El Paso 1992, writ denied) (stating that a party can establish good cause with regard to TEX. R. CIV. P. 169(2) by showing that its failure to answer was accidental or the result of a mistake, and not intentional or the result of conscious indifference); Boone v. Tex. Employers' Ins. Ass'n, 790 S.W.2d 683, 689 (Tex. App.—Tyler 1990, no writ) (analogizing the good cause standard for setting aside a default judgment with that of withdrawing deemed admissions and stating that good cause is satisfied where the defaulting party did not intentionally or consciously disregard his obligation to file an answer).

clerical errors can constitute good cause.[67] It is clear, however, that these types of mistakes will not preclude a party from receiving a trial based on the full presentation of the merits.[68]

The logic behind the drafting of the rule and the interpretation of it by the courts seeks to ensure that innocent parties with legitimate cases are not negatively affected where an attorney is negligent or mistaken. This rationale is consistent with the defense of mistake in both contract[69] and criminal law.[70] That is to say that in some instances, especially those

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67. Fibreboard Corp. v. Pool, 813 S.W.2d 658, 683 (Tex. App.—Texarkana 1991, writ denied). *Fibreboard* involved "an appeal from a judgment entered against six defendants in a products liability case in which five plaintiffs suffered asbestos-related injuries" as a direct result of their exposure to products manufactured by the defendants. *Id.* at 665. "The basis of the lawsuit was strict liability for failure to warn of the risks of exposure to asbestos." *Id.* at 665-66. Defendant manufacturers raised thirty-eight points on appeal of the trial court's award of damages to plaintiff workers. *Id.* at 666. The court ruled that the evidence did not show conscious indifference by the defendants and set aside that portion of the award of punitive damages. *Id.* at 683. It held that the record did not indicate that counsel in the present case consciously disregarded his obligation to timely file its answers to the requests. *Id.* The court otherwise affirmed. *Id.* at 696.

68. *See* Esparza v. Diaz, 802 S.W.2d 772, 776 (Tex. App.—Houston [14th Dist.] 1990, no writ) (holding that an accident or mistake upon the part of counsel may constitute negligence upon her part, but it will not necessarily constitute conscious indifference so as to preclude granting a motion for leave to file). *Esparza* involved a civil rights action filed by appellant inmate against appellee sergeant and unidentified others seeking damages. *Id.* at 774. Appellee filed a motion to dismiss the action as frivolous, which the trial court granted. *Id.* Appellant sought review, claiming that the court abused its discretion in granting the motion and in allowing the appellee to withdraw his admissions before trial. *Id.* at 775. On appeal, the court affirmed, stating that the trial court properly withdrew the admissions because there was no undue prejudice towards the appellant, appellant's requests were improper and the appellant failed to show an abuse of discretion. *Id.* at 776-77.

69. *See* Hoffman F. Fuller, *Mistake and Error in the Law of Contracts*, 33 EMORY L.J. 41, 41 (1984) (citing Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933) (discussing the countervailing ideas in contract law "that justice is achieved by enforcing" agreements made by the parties and thereby protecting the integrity of bargains "and, on the other hand, that justice is measured" with hindsight by examining the fairness of the bargain)); *see also* Tyson v. Alexander, 672 S.W.2d 624, 626 (Tex. App.—Amarillo 1984, no writ) (holding that a mutual material mistake of fact makes a contract voidable). A mutual mistake is one common to both parties which causes each party to labor under the same misconception on a material fact, on a term of the agreement, or on a provision of a written instrument embodying such an agreement. Allen v. Berrey, 645 S.W.2d 550, 553 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.). Most commonly, a mutual mistake exists when both parties know what they have agreed to, but a common mistake in the contract fails to correctly state the agreement or where both parties contract on an assumption not expressed in the contract which turns out to be incorrect. Volpe v. Schlobohm, 614 S.W.2d 615, 617-18 (Tex. Civ. App.—Texarkana 1981, no writ).

70. *See* TEX. PEN. CODE ANN. § 8.03(b) (Vernon 2004) (discussing the defense of mistake in criminal law).

where the requisite intent is not in existence, parties should not be punished for innocent oversights or mistakes.

B. *Good Cause Standard #2: Testimony of Expert Witnesses—Rule 193.6*

Rule 193.6 of the Texas Rules of Civil Procedure deals with requests for discovery and states that a party who fails to timely make, amend, or supplement a discovery response may not introduce in evidence the material or information that was not timely disclosed or offer the testimony of a witness (other than a named party) who was not timely identified, unless the court finds that there was good cause for the failure.[71] Additionally, if "the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other part[y]," the information not timely disclosed may be allowed into evidence.[72]

In order to exclude the testimony of a witness not identified in disclosures, a party must file a timely objection; the objection should be made either in a pretrial motion to exclude or when the witness is first offered at trial.[73] Once the objection is made, the exclusion is automatic unless

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It is an affirmative defense to prosecution that the actor reasonably believed the conduct charged did not constitute a crime and that he acted in reasonable reliance upon:
(1) an official statement of the law contained in a written order or grant of permission by an administrative agency charged by law with responsibility for interpreting the law in question; or
(2) a written interpretation of the law contained in an opinion of a court of record or made by a public official charged by law with responsibility for interpreting the law in question.

Id.

71. TEX. R. CIV. P. 193.6(a)(1) (replacing Rule 215.5 effective January 1, 1999). TEX. R. CIV. P. 215.5 stated:

> A party who fails to respond to or supplement his response to a request for discovery shall not be entitled to present evidence which the party was under a duty to provide in a response or . . . to offer the testimony of an expert witness or of any other person having knowledge of a discoverable matter, unless the trial court find[s] . . . good cause sufficient to require admission exists.

TEX. R. CIV. P. 215.5 (Vernon 1998, superseded 1999).

72. TEX. R. CIV. P. 193.6(a)(2).

73. *See* Clark v. Trailways, Inc., 774 S.W.2d 644, 647 (Tex. 1989) (stating that "the better-reasoned approach is to require a party opposing the admission of the testimony or evidence under [R]ule 215(5) to object when the testimony or evidence is offered at trial"; this rule serves a dual purpose of guaranteeing trial courts the opportunity to evaluate any previous good cause finding, while at the same time "providing litigants and courts alike with a uniform and consistent rule regarding the preservation of error under rule 215(5)"). *Clark* involved a wrongful death action brought by the respondent estate against the petitioner bus company. *Id.* at 645. At the trial, the respondent introduced testimony from a

the offering party shows good cause or a lack of unfair prejudice to the other party.[74] The trial court has the discretion to determine whether or not the good cause requirement has been satisfied.[75]

This discovery rule requiring disclosure of the expert's testimony before trial is intended to provide adequate information about the expert's opinions to allow the opposing party the resources to cross-ex-

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liability witness whose identity and location had not been fully disclosed in responses to discovery. *Id.* The court of appeals found that the trial court committed reversible error in allowing the witness to testify. *Id.* The petitioners appealed and the Texas Supreme Court reversed. *Id.* at 648. The Texas Supreme Court reasoned that the trial court should not have allowed the testimony absent a finding of good cause. *Id.* at 647. However, the court found that the petitioner failed to object to the testimony at trial and thus the objection was waived on appeal. *Id.* at 648.

74. TEX. R. CIV. P. 193.6(a)(1)-(2); *see also* Alvarado v. Farah Mfg. Co., 830 S.W.2d 911, 914 (Tex. 1992) (stating that "[t]he rule is mandatory, and its sole sanction—[the] exclusion of evidence—is automatic, unless there is good cause to excuse its imposition"); Northwestern Nat'l County Mut. Ins. Co. v. Rodriguez, 18 S.W.3d 718, 722 n.1 (Tex. App.—San Antonio 2000, pet. denied) (discussing that Rule 193.6 provides an alternative for the court to the "draconian sanctions" required by Rule 215(5)'s lack of good cause requirement). The new rule allows the party seeking to introduce an undisclosed witness to show either good cause or a lack of unfair surprise or prejudice. *Rodriguez*, 18 S.W.3d at 718.

75. *See* Aluminum Co. v. Bullock, 870 S.W.2d 2, 3 (Tex. 1994) (citing Smithson v. Cessna Aircraft Co., 665 S.W.2d 439, 442 (Tex. 1984) (stating that when a "party fails to designate an expert pursuant to Rule 166b(6)(b), the expert may not testify 'unless the trial court finds that good cause sufficient to require admission exists'"; it is the trial court which has the discretion to determine whether the offering party met its burden of showing good cause)); *Alvarado*, 830 S.W.2d at 914 (reiterating that the trial court has the "discretion to determine whether the offering party has met his burden of showing good cause to admit the testimony; but the trial court has no discretion to admit testimony excluded by the rule without a showing of good cause"); Morrow v. H.E.B., Inc., 714 S.W.2d 297, 298 (Tex. 1986) (stating that the "[d]etermination of good cause is within the sound discretion of the trial court," and can only be set aside upon a showing of an abuse of discretion). In *Morrow*, the petitioner filed an action alleging negligence for a slip and fall caused by the respondent corporation. *Morrow*, 714 S.W.2d at 297. The petitioner served interrogatories on the respondent asking for the names and addresses of the employees who had assisted her after her fall. *Id.* The respondent provided the petitioner with the name of a witness and mistakenly listed his address as Missouri. *Id.* Respondent subsequently failed to supplement its answer when it discovered that the witness was in fact living in Texas. *Id.* The trial court excluded the testimony pursuant to Rule 166b(5). *Id.* The court of appeals reversed, holding that the trial court abused its discretion in excluding the testimony. *Id.* The Texas Supreme Court held that it was not an abuse of discretion for the trial court to exclude the testimony offered by the witness and reversed and remanded the case to the court of appeals for further consideration. *Id.* at 298. The court reasoned that under Rule 215(5), the respondent was required to supplement its responses to interrogatories and its failure to comply resulted in the loss of opportunity to present the witness's testimony. *Id.* at 297.

amine the expert and to rebut this testimony with its own experts.[76] Additionally, the goal of the court in interpreting Rule 193.6 has been to encourage full pre-trial discovery of the issues and facts so that the interested parties can make realistic assessments of their respective positions.[77] It is the hope of the judiciary that this ability to realistically assess the positions of the parties will prevent trial by ambush and facilitate settlements.[78] The Texas Supreme Court, in *Alvarado v. Farah Manufacturing Co.*,[79] indicated that the "good cause" required by Rule 193.6 is a type of "super cause" in that negligence alone will not suffice.[80]

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76. *See* Exxon Corp. v. W. Tex. Gathering Co., 868 S.W.2d 299, 304 (Tex. 1993) (implying that it is the function of the trial court to ensure that the opposing party is given the necessary information regarding the opinions of the testifying witness); *see also* Reliance Ins. Co. v. Denton Cent. Appraisal Dist., 999 S.W.2d 626, 630 (Tex. App.—Fort Worth 1999, no pet.) (stating that "[t]he trial court is the gatekeeper of expert evidence, and appellate courts cannot usurp that function"); Castillo v. Am. Garment Finishers Corp., 965 S.W.2d 646, 652 (Tex. App.—El Paso 1998, no pet.) (opining that the rationale for excluding an unidentified witness's testimony—despite lack of surprise, unfairness, or ambush—is to assure that when preparing for trial, a party need not be concerned about unidentified witnesses being called to testify).

77. *See* Rainbo Baking Co. v. Stafford, 787 S.W.2d 41, 42 (Tex. 1990) (discussing the goal of the court in relation to Rules 166(b) and 215(5)).

78. Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394, 396 (Tex. 1989). The issue in *Gee* involved a workers' compensation claim filed by a claimant for an injury caused by a metal pallet that crushed his leg while he worked for the Campbell Soup Company. *Id.* at 394. The claimant alleged that he suffered a general injury and, in the alternative, that the injury affected his body generally. *Id.* at 395. The trial court found in favor of the claimant, but reversed the decision on appeal because the trial court admitted a witness's testimony despite the claimant's failure to identify the witness in interrogatories or to show good cause for allowing the testimony. *Id.* On appeal, the court reversed and remanded back to the appellate court on the grounds that while the claimant failed to show good cause for failing to previously identify the witness, the trial court's error in admitting the testimony was not reversible in light of the other evidence supporting the claim. *Id.* at 396-97.

79. 830 S.W.2d 911 (Tex. 1992).

80. *See* Alvarado v. Farah Mfg. Co., 830 S.W.2d 911, 915 (Tex. 1992) (noting that the requirement for showing good cause is "strict"); *see also* Jamail v. Anchor Mortgage Servs., Inc., 809 S.W.2d 221, 223 (Tex. 1991) (holding that the fact that the witness's knowledge related "only generally" to the cause of action did not excuse the failure to identify the witness and establish good cause to admit the testimony). *Jamail* involved a suit for negligence and violation of the Deceptive Trade Practices-Consumer Protection Act (DTPA). *Jamail*, 809 S.W.2d at 222. The respondent lender refused to honor a loan commitment previously approved to petitioner borrowers. *Id.* The respondent lender counterclaimed and alleged petitioners' claims had no basis and were brought in bad faith. *Id.* The court of appeals affirmed the trial court's judgment, which awarded damages to the petitioners for negligence but awarded nothing on the DTPA claim or the counterclaim. *Id.* On appeal, the court held that testimony not designated by the respondent in discovery was admitted in error but that the error was harmless. *Id.* at 223. *See also Rainbo Baking Co.*, 787 S.W.2d at 41 (refusing to find good cause to admit the testimony of an undisclosed

The facts of the case are as follows: Jose Alvarado, employee of the defendant manufacturing company Farah, filed a worker's compensation claim after being diagnosed as having a pulmonary embolism.[81] Alvarado received medical treatment for the condition and returned to work on doctor's orders to not sit or stand for long periods of time.[82] These orders kept Alvarado from performing his usual work, which required long periods on his feet, but Farah refused to reassign Alvarado to one of the other jobs that he could perform, and instead, placed the employee on "sustained layoff" status.[83] Alvarado was never recalled to work and subsequently filed an action for damages.[84]

Shortly after filing the action, Alvarado sent interrogatories to Farah that requested the names of each potential witness that might be used in the trial.[85] Farah responded with the names of several people.[86] Alvarado did the same.[87]

A week before the trial, Alvarado subpoenaed two witnesses who had not been identified in his answers to Farah's interrogatories.[88] On the first day of the trial, Farah moved to exclude the testimony because the witnesses were not previously identified.[89] The trial court denied the motion, the witness testified over the objection of Farah, and the jury found for Alvarado in an amount in excess of $1.1 million.[90] The court of appeals held that the admission of the witness's testimony was reversible error and remanded for a new trial.[91]

In affirming the decision of the court of appeals, the Texas Supreme Court alluded to the problematic history of the courts' interpretations of the rule since its promulgation in 1984 and its language-clarifying amend-

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witness when the attorney expected the case to settle and only first contacted the witness on the day of the trial); Boothe v. Hausler, 766 S.W.2d 788, 789 (Tex. 1989) (stating that the failure to supplement answers to an interrogatory requesting a witness's correct contact information should have resulted in an exclusion of the witness's testimony); Collins v. Collins, 904 S.W.2d 792, 802 n.12 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (refusing to find good cause for the ability to cross-examine and possibly impeach an unidentified witness); First Fin. Dev. Corp. v. Hughston, 797 S.W.2d 286, 295 (Tex. App.—Corpus Christi 1990, writ denied) (finding that good cause did not exist where a party believed that the defendants, who eventually settled, would carry the burden of defense at trial).

81. *Alvarado*, 830 S.W.2d at 912.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 913.
86. *Alvarado*, 830 S.W.2d at 913.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. Alvarado v. Farah Mfg. Co., 830 S.W.2d 911, 911 (Tex. 1992).

ment in 1988.[92] The court noted that of the ten times it had previously considered whether an unidentified witness should have been allowed to testify, in eight of the cases the trial courts had admitted testimony not timely identified without the requisite finding of "good cause."[93] In attempting to rationalize the trial courts' uneven and inconsistent applications of the rules of procedure in these cases, the Texas Supreme Court restated the apparent rationale for permitting the undisclosed testimony:

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92. *Id.* at 914.

93. *Id. See, e.g.*, Rainbo Baking Co. v. Stafford, 787 S.W.2d 41, 41-42 (Tex. 1990) (holding that the plaintiff failed to show good cause for the failure to supplement the interrogatory answer concerning a witness but that the trial court's error did not cause the rendition of an improper judgment); Sharp v. Broadway Nat'l Bank, 784 S.W.2d 669, 671 (Tex. 1990) (per curiam) (stating that a lack of surprise, unfairness, or ambush does not alone satisfy good cause to preclude the sanction of automatic exclusion of expert testimony not timely identified in discovery); McKinney v. Nat'l Union Fire Ins. Co., 772 S.W.2d 72, 75-76 (Tex. 1989) (holding that permitting an undisclosed witness to testify was harmless error); Clark v. Trailways, Inc., 774 S.W.2d 644, 647-48 (Tex. 1989) (holding that the testimony of the plaintiff's witness should not have been admitted as the plaintiffs failed to supply the defendants with the address of the witnesses as requested by the interrogatories but that the defendants failed to preserve the complaint by failing to object when the testimony was offered at trial); Boothe v. Hausler, 766 S.W.2d 788, 789 (Tex. 1989) (per curiam) (holding, on application for writ of error, that it was reversible error to allow the defense witness to testify over an objection based on the defendant's failure to supplement the interrogatory answers with the witness's address because the testimony of the witness was crucial in determining whether an assault actually was committed by the defendant); Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394, 396-97 (Tex. 1989) (holding that since the employee failed to give the names of his physician and uncle in answer to his employer's interrogatory concerning witnesses it was error to admit the testimony of both in the workers' compensation hearing). However, the court did not find reversible error because the doctor testified that he was not qualified to comment on whether the injuries were connected and the uncle's testimony was unnecessary as the employee could have testified to his disability. *Gee*, 765 S.W.2d at 397. *See also* E.F. Hutton & Co. v. Youngblood, 741 S.W.2d 363, 364 (Tex. 1987) (per curiam) (holding, on application for writ of error, that the plaintiff's failure to identify expert witnesses with regard to reasonable attorney's fees in answer to interrogatories prevented the award of attorney's fees because the plaintiff failed to demonstrate good cause for the failure); Gutierrez v. Dallas Indep. Sch. Dist., 729 S.W.2d 691, 693 (Tex. 1987) (holding that the testimony of a "surprise" expert witness called by the defendant employer should not have been allowed in the employee's action for workers' compensation benefits as the witness was not included in the defendant's response to the employee's interrogatory and defendant failed to show good cause as to why it should be allowed); Yeldell v. Holiday Hills Ret. & Nursing Ctr., Inc., 701 S.W.2d 243, 246-47 (Tex. 1985) (holding that the trial court properly exercised its discretion by disallowing the testimony of the defendant's witness when the employer's attorney failed to supplement his answer to the plaintiff's interrogatory that asked for the names of all witnesses who had knowledge of the facts and circumstances, which formed the basis of the lawsuit; and good cause for that failure was not shown).

Allowing "a full presentation of the merits of the case."[94] However, the court could not agree that such a rationale was sufficient in the particular facts of this case.[95]

While the court acknowledged the importance of allowing the parties a full opportunity to present the merits of their case, it stated that "it is not in the interest of justice to apply the rules of procedure" inconsistently.[96] In the opinion of Justice Hecht, excusing non-compliance with Rule 215 (now Rule 193.6) frustrates the reasonable expectation of the parties that both he and his adversary will be subject to the rules of procedure.[97] The purpose of Rule 215.5 is "to promote responsible assessment of settlement and prevent trial by ambush."[98]

The court then addressed what constitutes "good cause" as applicable to the rule.[99] The inability to locate a witness despite good faith efforts or the inability to anticipate the use a testimony at trial might support a finding of good cause.[100] However, inadvertence of counsel, lack of surprise, and the uniqueness of the excluded evidence, in and of themselves, are not enough to establish good cause.[101]

The court explained the rationales for these standards as "intuitive."[102] If good cause could be shown simply by inadvertence of counsel or the uniqueness of the evidence, exceptions would engulf the rule and it would be pointless.[103] As a result, the court demands a "strict showing" of good cause and "strict adherence" to the rule, thus establishing a requirement that "super cause" be shown in order to satisfy the requirements of the rule.[104]

This second standard of good cause, which requires more than negligence, seems to be based on the rationale that, yes, lawyers are human beings and they will make mistakes, but the court will not condone or

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94. *See Alvarado*, 830 S.W.2d at 914 (quoting the language of the trial court in permitting a previously undisclosed witness to testify "in the interest of justice in getting everything on the table, which this court tries to do when possible").

95. *Id.*

96. *Id.*

97. *Id.*

98. *See Alvarado*, 830 S.W.2d at 914 (stating that the underlying purpose of the discovery rules is to ensure fairness and prevent "trial by ambush").

99. *Id.* at 914-15.

100. *Id.* at 914 (citing Clark v. Trailways, Inc., 774 S.W.2d 644, 647 (Tex. 1989)).

101. *Id.* at 915 (citing Sharp v. Broadway Nat'l Bank, 784 S.W.2d 669, 671-72 (Tex. 1990)); *Clark*, 774 S.W.2d at 646; Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394, 395 n.2 (Tex. 1989); E.F. Hutton & Co. v. Youngblood, 741 S.W.2d 363, 364 (Tex. 1987); Morrow v. H.E.B., Inc., 714 S.W.2d 297, 298 (Tex. 1986).

102. *Alvarado*, 830 S.W.2d at 915.

103. *Id.*

104. Alvarado v. Farah Mfg. Co., 830 S.W.2d 911, 915 (Tex. 1992).

endorse those mistakes to the detriment of the opposing litigant. "The good cause exception permits a trial court to excuse a failure to comply with discovery in difficult or impossible circumstances."[105] Thus, the court advocates a higher standard of accountability than the *Stelly* and *Craddock* courts.

C. *Good Cause Standard #3: Late Filing of Objections to Discovery—Rule 193.2*

Good cause, with regard to the late filing of objections to discovery, is determined on a case-by-case basis.[106] A party may object to a request for discovery for a number of reasons.[107] The burden rests on the party resisting discovery to plead its objection(s).[108] Regardless of how im-

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105. *Id.* at 914.

106. *See* Remington Arms Co. v. Canales, 837 S.W.2d 624, 625 (Tex. 1992) (holding that although it has been repeatedly held "that inadvertence of counsel does not constitute good cause," where the circumstances are such that identical requests for production were concurrently pending in similar litigation seeking the same documents but only one was timely answered, good cause is satisfied).

107. TEX. R. CIV. P. 193.2. A party may object to a request for discovery for seven possible reasons. *Id.* A party may object where the discovery request asks for information outside of the scope of discovery. TEX. R. CIV. P. 192.3. A party may object when a request asks for information that is not relevant or that will not lead to admissible evidence. TEX. R. CIV. P. 192.3(a). *See also* Martin v. Khoury, 843 S.W.2d 163, 166-67 (Tex. App.—Texarkana 1992, orig. proceeding) (holding that a membership list of a nonparty organization for voir dire use is not discoverable). A party may object when a discovery request asks for a type of discovery not permitted by the rules. *See* TEX. R. CIV. P. 195.1, 197.1 (stating that a party is not allowed to learn the identity of the other party's testifying expert witnesses through interrogatories). A party may object when a discovery request asks for the production of information that, at the time the response is made, is not reasonably available. TEX. R. CIV. P. 193.1. Where a party makes an improper request for discovery, the other party may file an objection before the response is due, stating why the request is improper. TEX. R. CIV. P. 192.6. A party may object if the information requested has previously been provided in response to other discovery. *See* Sears, Roebuck & Co. v. Ramirez, 824 S.W.2d 558, 559 (Tex. 1992) (holding that Sears was not required to produce tax returns to prove net worth as it had already produced an audited, certified annual report).

108. State v. Lowry, 802 S.W.2d 669, 671 (Tex. 1991). In *Lowry*, the State of Texas brought suit against insurance companies asserting antitrust violations. *Id.* at 670. During the litigation the Attorney General sought to protect the identity of the authors of the complaint letters which led to the investigation. *Id.* Production was ordered by the trial court. *Id.* at 671. On appeal for a writ of mandamus, the court concluded that the trial judge properly ordered production. *Id.* at 674. Additionally, the court found that the failure of the judge to conduct an *in camera* examination of the letters constituted an abuse of discretion. *Id.*

proper the request for discovery, the party to whom the request is addressed must object or its objections are waived.[109]

The party resisting discovery must make a specific objection for each discovery item it wishes to exclude.[110] The party must make these precise objections at or before the time to respond to discovery, unless it has obtained an extension or can show good cause for its untimeliness.[111]

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109. *See* Young v. Ray, 916 S.W.2d 1, 3 (Tex. App.—Houston [1st Dist.] 1995, orig. proceeding) (holding that a failure to timely object to privileged material waives the privilege). In *Young*, relator insureds filed an action against defendant insurers alleging bad faith relating to two insurance policies. *Id.* at 1. "The plaintiffs brought the lawsuit after a judgment was rendered against them in an earlier lawsuit in which the defendants had refused to defend and indemnify them." *Id.* In the earlier suit, the plaintiffs were sued "for the wrongful death of a woman who struck a cow while driving" along property belonging to the plaintiffs. *Id.* In that case, a Colorado court rendered a $2,000,000 judgment against the plaintiffs. *Id.* Subsequently, the plaintiffs requested that the defendants produce specific documents. *Id.* at 2-3. The defendants neither complied with the request nor objected to it. *Id.* at 3. "[T]he plaintiffs filed a motion to compel the production of" the requested documents and the motion was granted only with regard to those documents in existence on the date the litigation was filed. *Id.* at 2-4. In response, the plaintiffs filed a motion for writ of mandamus seeking to compel the trial court to order the production of all documents requested. *Id.* The writ was conditionally granted on the grounds that that the defendants did not timely object to the request, did not ask for additional time to respond, and did not show good cause for their failure to respond. *Id.* at 4. Therefore, under Rule 166(b)(4), defendants had waived their objections to the discovery request. *Id.*

110. TEX. R. CIV. P. 193.2(a); *see, e.g., In re* Alford Chevrolet-Geo, 997 S.W.2d 173, 181 (Tex. 1999) (stating that a party resisting discovery is not allowed to "simply make conclusory allegations that the requested discovery is unduly burdensome or unnecessarily harassing"); Nat'l Union Fire Ins. Co. v. Hoffman, 746 S.W.2d 305, 307 n.3 (Tex. App.—Dallas 1988, orig. proceeding) (reiterating that restatement of an objection to producing documents "to the extent that" they might fall within a particular privilege is not the specific pleading required by *Peeples v. Fourth Supreme Judicial Dist.*, 701 S.W.2d 635 (Tex. 1985)). In *Hoffman*, relator insurance company requested a hearing on its objection to a request for production by a third party corporation, PepsiCo, Inc., in a suit to declare that relator was obligated to defend Pepsi's subsidiary Frito-Lay, Inc. in a Delaware patent infringement suit. *Hoffman*, 746 S.W.2d at 307. Respondent district court judge ruled that relator had waived its privilege claims and ordered relator to produce the documents. *Id.* at 308. Relator sought a writ of mandamus, but the court only directed respondent to vacate its order, with the exception of respondent's denial of relator's motion to quash depositions of relator's former attorneys because the court found that respondent properly found that relator had waived its privilege with regard to a letter written by the attorneys. *Id.* at 308-09. The court held that relator had not waived its privilege claims because relator's request for a hearing was filed in a reasonable, timely manner even though it was not filed with relator's response to the request for production, and that respondent abused his discretion when he refused to review documents offered in support of relator's claims of privilege because an inspection of the documents was necessary to determine the validity of the privilege claims. *Id.* at 311-12.

111. TEX. R. CIV. P. 193.2(e); *see also* Shannon v. Devine, 917 S.W.2d 465, 467 (Tex. App.—Houston [1st Dist.] 1996, orig. proceeding) (granting mandamus relief where defendant's motion to quash realtor's depositions by written questions and subpoena duces te-

Rule 193.2 governs objections to discovery requests.[112] It provides that "[a]n objection that is not made within the time required, or that is obscured by numerous unfounded objections, is waived unless the court excuses the waiver for good cause shown."[113] The Texas Supreme Court, in *Remington Arms Co. v. Canales*,[114] decided that good cause with regard to this discovery rule must be decided on a case-by-case basis.[115]

In *Remington*, the defendant gun manufacturer failed to reply within the thirty-day time limit to a request for production in a class action suit.[116] The plaintiffs filed a motion to compel, claiming that Remington's failure to timely respond waived any objections and privileges it might assert.[117] The defendant company then sought a motion for extension to file and provided an affidavit of counsel as to establish good cause for its lack of punctuality.[118] At a subsequent hearing, Remington's counsel testified that despite his office's inadvertence in failing to timely answer the particular request of the plaintiff, a timely response and objec-

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cum was granted despite defendant's failure to timely object to discovery request); *Young*, 916 S.W.2d at 4 (holding that because defendants failed to timely object to the discovery requests they waived their objections that the requests were improper). It should be noted that this discussion is no longer applicable to privileged information; an objection to a request for privileged information is not proper. *In re* Monsanto Co., 998 S.W.2d 917, 924 (Tex. App.—Waco 1999, orig. proceeding). Instead, the party must "assert" a privilege under Texas Rule of Civil Procedure 193.3 to preserve a privilege from written discovery. *Id.* However, a party will not waive a privilege if it mistakenly objects instead of complying with TEX. R. CIV. P. 193.3. *See In re* Univ. of Tex. Health Ctr., 33 S.W.3d 822, 826 (Tex. 2000) (holding that the hospital did not waive its privilege by improperly filing an objection). In *University*, the plaintiff sued the defendant hospital for negligence after he contracted an infection following open heart surgery. *Id.* at 824. The trial court ordered production of the documents, many of which the defendant contended were protected from discovery by statutory medical peer review committee privileges. *Id.* The plaintiff contended that the statutory privileges had been waived. *Id.* The court concluded that there was no waiver of the exemption from discovery afforded by statute, and thus the trial court abused its discretion in ordering the production of the documents. *Id.*

112. TEX. R. CIV. P. 193.2 (replacing TEX. R. CIV. P. 166(b)(4) effective Jan. 1, 1999). Rule 166(b)(4) read: "After the date on which answers are to be served, objections [to discovery] are waived unless an extension of time has been obtained by agreement or order of the court or good cause is shown for the failure to object within such period." TEX. R. CIV. P. 166(b)(4) (Vernon 1998, repealed 1999).

113. TEX. R. CIV. P. 193.2.

114. 837 S.W.2d 624 (Tex. 1992).

115. *See* Remington Arms Co. v. Canales, 837 S.W.2d 624, 625 (Tex. 1992) (holding that good cause is satisfied where identical requests for production are concurrently pending in similar litigation seeking exactly the same documents and only one is timely answered).

116. *Id.* at 624-25.

117. *Id.* at 625.

118. *Id.*

tions were made to an identical request by the same counsel for plaintiff in other litigation involving the same issue.[119]

The trial court granted the plaintiff's motion to compel, demanding production of all responsive documents partially on the grounds that Remington failed to establish good cause to excuse its late objections.[120] The court of appeals reviewed and found no abuse of discretion in the trial court's decision, holding that inadvertence of counsel was inadequate to establish good cause.[121]

In issuing a writ of mandamus against the trial judge ordering him to vacate his orders to produce the documents,[122] the Texas Supreme Court acknowledged that it has consistently held that inadvertence of counsel does not satisfy the good cause requirement of the discovery rules.[123] The court went on to state that it would not depart from this precedent.[124] However, it distinguished *Remington* from *Alvarado* and recognized that the present case involved an issue of first impression: Whether good cause is satisfied where identical requests for production are concurrently pending in similar litigation seeking the exact same documents but only one request is timely answered.[125]

Citing its decision in a similar case decided earlier that year,[126] the court held that the trial court did in fact abuse its discretion by failing to

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119. *Id.* The request for production in the underlying class action, *Luna v. Remington Arms Co.*, No. 28,730 (D. Ct. Jim Wells County), differed from that in *Munoz v. Remington Arms Co.*, No. 7417 (D. Ct. Childress County), in but two ways: the caption and the date of signature. *Remington*, 837 S.W.2d at 625 n.1. In all other respects, including the six-page Exhibit A delineating 48 types of documents as to which production was sought, they were identical. *Id.*

120. *Id.* at 625.

121. *Id.*

122. *Id.* at 626.

123. *Remington*, 837 S.W.2d at 625 (citing Sharp v. Broadway Nat'l Bank, 784 S.W.2d 669; E.F. Hutton & Co. v. Youngblood, 741 S.W.2d 363, 364 (Tex. 1987)).

124. *Id.*

125. Remington Arms Co. v. Canales, 837 S.W.2d 624, 625 (Tex. 1992).

126. *See* Smith v. Southwest Feed Yards, Ltd., 835 S.W.2d 89, 91-92 (Tex. 1992) (holding that the trial court abused its discretion in failing to find good cause where responsive information was submitted, though in the incorrect format). In *Southwest Feed Yards*, petitioner personally answered interrogatories submitted to him by respondent Southwest, but failed to include his own name in response to a question seeking disclosure of potential witnesses. *Id.* at 90. In compliance with the pretrial order, he did give timely notice of his intent to testify a week before trial. *Id.* When he attempted to testify at trial, respondent objected because petitioner was not on the list responsive to its interrogatory seeking the identity of all persons with knowledge of relevant facts. *Id.* The trial court sustained the objection, denying petitioner an opportunity to testify. *Id.* Judgment was entered on a jury verdict for respondent. *Id.* The court of appeals affirmed, and petitioner applied for a writ of error. *Id.* The court granted petitioner's application, holding that the intent of TEX. R. CIV. P. 215(5) was to prevent parties from being ambushed. *Id.* at 91. The court held that

find good cause where Remington had already responded to an identical discovery request.[127] This holding, however, is quick to point out that it should be read narrowly and some discretion must be reserved to the trial court.[128]

This third standard of good cause, which calls for a case-by-case determination subject to some discretion of the trial court, seems to be based on the rationale that, while miscommunications and inadvertence of counsel are not in and of themselves sufficient to justify a failure to respond to a discovery request, there may be times when such failures should be overlooked in the interest of justice.[129] In such cases, the presiding judge must be allowed to ensure that the litigants are given the opportunity to have their cases tried on the merits.

III. Analyzing the Standards in Relation to the Goals of the Rules of Civil Procedure

The main "objective of the rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law."[130] The rules are based on car-

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under the facts, respondent had not been ambushed. *Id.* Thus, the court held that the trial court abused its discretion in denying petitioner an opportunity to testify in his own defense. *Id.*

127. *Remington Arms*, 837 S.W.2d at 626.

128. *Id.*

129. *See id.* at 625-26 (stating that, on an issue of first impression, the trial court abused its discretion in failing to find good cause when Remington had previously provided a response to an identical request despite the fact that its failure to respond to the request at issue was due to inadvertence of counsel). The court was sure to limit its holding but gave the trial courts some discretion to permit the testimony of an individual not identified in response to a proper interrogatory. *Id.*

130. Tex. R. Civ. P. 1; *see also* Burden v. John Watson Landscape Illum., Inc., 896 S.W.2d 253, 256 (Tex. App.—Eastland 1995, writ denied) (opining that the rules of procedure "were not designed to trap the unwary"). In *Burden*, appellee ex-employer filed an action against appellant ex-employee seeking a declaratory judgment that appellant was not entitled to compensation under an employment contract terminated by appellee, and appellant counterclaimed for breach of employment contract. *Burden*, 896 S.W.2d at 254. The trial court shortened the filing period for responses to requests for admissions to fourteen days. *Id.* Appellant was served with a request for admissions and failed to timely respond, but instead filed within 30 days. *Id.* Appellant then filed a motion to withdraw the deemed admissions on account of a clerical error. *Id.* at 255. The trial court found for appellee and denied the motion to withdraw. *Id.* On appeal, the court reversed on the grounds that the trial court abused its discretion in denying appellant's motion to withdraw. *Id.* at 255-56. The court reasoned that the appellant diligently rectified the error, he showed good cause for the failure to timely respond, the parties would not be unduly prejudiced by the withdrawal of the admissions, and the presentation of the merits would be served. *Id.* at 255-56. *See also* Metzger v. Sebek, 892 S.W.2d 20, 38 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (stating that the rules of civil procedure provide a trial

rying out the expressed legislative policy of disposal of civil litigation with "dispatch,"[131] and these rules are the means of effectuating, in an orderly fashion, the rights of litigants.[132] The rules should be constructed liberally, so that this purpose may be reached with "as great expedition and

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judge "with the tools to facilitate the litigation of lawsuits and, to a certain extent, to prevent abuse of the legal process"). In *Metzger*, appellant husband and appellee wife were awarded joint custody over their three children during divorce proceedings. *Id.* at 27. One of the children later exhibited signs of abuse and following numerous evaluations, appellant was suspected. *Id.* at 28-29. The trial court entered a divorce decree that granted appellee managing conservatorship over the three children, that ordered the abused child be hospitalized for treatment, and that ordered appellant to pursue therapy. *Id.* at 34. Appellant brought suit in the trial court which granted a directed verdict for appellee on all causes of action. *Id.* at 47. Appellant challenged that it was trial court error to direct the verdict for appellee and that he was denied a fair trial. *Id.* Acknowledging that in Texas, a trial court's exercise of its "inherent power" is partially promoted by, and partially guided by, the Texas Rules of Civil Procedure, the court found no trial court partiality or trial judge advocacy and affirmed the trial court's directed verdict on all of appellant's theories. *Id.* at 39, 54.

131. *See* Matlock v. Matlock, 151 Tex. 308, 249 S.W.2d 587, 590 (Tex. 1952) (stating that the court seeks to adhere to the Legislature's policy that civil litigation should not be drawn out but disposed of with dispatch; the end result being the better administration of justice). The sole question for decision in *Matlock* was the right of the petitioner to have the judgment of the trial court affirmed on certificate. *Id.* at 588. Petitioner husband appealed an order from the Court of Civil Appeals which overruled his motion to have the judgment of the trial court affirmed on certificate. *Id.* On appeal, the court reversed and affirmed the judgment of the trial court on certificate on the grounds that Rule 387 gave the husband the absolute right to have the case affirmed on certificate unless his wife made a showing of her right to have the record filed after the expiration of the sixty-day period for filing a motion for new trial governed by Rule 386. *Id.* at 589.

132. *See* Punch v. Gerlach, 153 Tex. 39, 263 S.W.2d 770, 771 (Tex. 1954) (stating that "[p]ractically all of the litigation under the rules of civil procedure is adversary in method and character. The spirit of the rules is to charge the attorneys of the litigants with the responsibility of preserving the legal rights of their clients in the progress of litigation by timely action."); Smirl v. Globe Laboratories, Inc., 144 Tex. 41, 188 S.W.2d 676, 678 (Tex. 1945) (adopting the statement that "[t]he office of a rule of procedure is to facilitate, rather than hinder, a speedy and final determination of all law suits in that way which will secure to litigants their substantial rights and to promote the peace and good order of the state"); State v. Perkins, 143 Tex. 386, 185 S.W.2d 975, 977 (Tex. 1945) (reiterating that the "rules [of civil procedure] and established practice thereunder are but the means of effectuating in orderly fashion the rights of litigants"); Olivares v. Servs. Trust Co., 385 S.W.2d 687, 687-88 (Tex. Civ. App.—Eastland 1964, no writ) (stating that the primary purpose of the Texas Rules of Civil Procedure is to dispose of cases on the merits). In *Olivares*, appellee creditor filed suit against appellant debtor to recover the balance owed on a promissory note and to foreclose on a lien on a television that it had for security of repayment of the note. *Olivares*, 385 S.W.2d at 687. Appellee's petition failed to allege the value of the mortgage property and the appellant failed to complain of this omission prior to the trial court's ruling. *Id.* The lower court granted relief for appellee and the court affirmed on the grounds that appellant waived the error by failing to timely object. *Id.* The court held that Rule 90 provided that every defect or omission in a pleading not specifically pointed out

dispatch and at the least expense both to the litigants and to the state as may be practicable."[133]

The current practice of assigning three different definitions to the exact same phrase "good cause" fails to satisfy this objective completely. How can the application of three different standards to one simple phrase ensure fairness in litigation—especially when one is left to the total discretion of voter-elected judges?[134] As the cases above have illustrated, such an application fails to result in a just and impartial application of substantive law.

Under the lenient *Stelly/Craddock* standard of good cause, Ermon Stelly was granted a motion to amend his deemed admissions because he made a mistake regarding the ownership of the premises in question.[135] Whether Mr. Stelly would have passed the more stringent *Alvarado* standard is questionable. Under the particular circumstances presented in *Remington,* the court found that inadvertence of counsel was sufficient to satisfy the case-by-case determination of good cause.[136] Whether Remington would have survived the scrutiny of the *Alvarado* test for good cause is doubtful. Under the "super" good cause standard of *Alvarado*, the court ruled that the expert who was not timely identified should not

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before the rendition of the judgment was waived in the interest of disposing of cases efficiently. *Id.* at 687-88.

133. TEX. R. CIV. P. 1; *see also* Stone v. Tex. Employers' Ins. Ass'n, 154 Tex. 21, 273 S.W.2d 59, 60 (Tex. 1954) (stating that the "rules are to be given liberal construction to the end that litigation may be conducted impartially and expeditiously resolved").

134. *See Judicial Selection in Texas: An Introduction, available at* http://www.ajs.org/js/TX.htm (last visited Oct. 14, 2004) (stating that "since 1876, judges at all levels of courts have been elected by the people in partisan elections"). "Between 1980 and 1986, campaign contributions to candidates in contested appellate court races increased by 250%." *Id.* "The 1988 supreme court elections were the most expensive in Texas history, with twelve candidates for six seats raising $12 million." *Id.* "Between 1992 and 1997, the seven winning candidates for the Texas Supreme Court raised nearly $9.2 million dollars." *Id.* "Of this $9.2 million, more than [forty percent] was contributed by parties or lawyers with cases before the court or by contributors linked to those parties." *Id. See also* Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 17 (1995) (laying out and critiquing the argument "that partisan elections is the only method by which accountability of judges can be ensured"; "[u]nless judges are periodically required to submit themselves to the electorate, there is no reliable means by which 'bad' judges can be removed from office"). Webster goes on to question the validity of this claim by pointing out that the majority of judges in states which use partisan elections reach the bench initially by interim appointment, and are then re-elected periodically, mostly without any opposition. *Id.* at 18. "In addition, most voters know virtually nothing about the qualifications of candidates for judicial office and, as a result, generally end up casting their votes based upon cues, such as party affiliation or name recognition." *Id.*

135. Stelly v. Papania, 927 S.W.2d 620, 621 (Tex. 1996).

136. Remington Arms Co. v. Canales, 837 S.W.2d 624, 625-26 (Tex. 1992).

have been allowed to testify.[137] In this case, good cause was not shown.[138] Clearly, the application of three different standards does not result in an impartial application of the law.

Furthermore, this practice is confusing. An inexperienced lawyer or one unfamiliar with the Texas rules could be easily misled. Texas courts hold lawyers to a standard of precise and specific language; it simply does not make sense for one phrase to mean different things in different contexts. A lawyer who must deal with "good cause" may research the phrase and see it means one thing but find that it is not the same thing with regard to her case. Such a practice results in an inefficient use of a lawyer's time. The efforts of attorneys would be better spent helping their clients rather than researching a simple phrase to ensure which of its meanings is applicable in a particular situation. One phrase should have one meaning and that meaning should be consistent. In order to reach the stated goal, a uniform definition of "good cause" must be adopted and employed by Texas courts.

A. *The* Stelly/Craddock *Standard of Good Cause*

Under the *Stelly/Craddock* notion of good cause, the standard is satisfied where the failure is an accident or a mistake, and not intentional or the result of conscious indifference.[139] This standard is relatively simple to satisfy—so long as a party is not consciously indifferent, good cause has been shown.[140] Accident and mistake also satisfy the test.[141] The low

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137. Alvarado v. Farah Mfg. Co., 830 S.W.2d 911, 913 (Tex. 1992).

138. *Id.*

139. *See* N. River Ins. Co. v. Greene, 824 S.W.2d 697, 700 (Tex. App.—El Paso 1992, writ denied) (stating that "[i]n deciding whether a failure to timely answer was the result of an accident or mistake, the controlling issue is the absence of a purposeful or bad faith failure to answer which reflects a conscious indifference"); Employers Ins. v. Halton, 792 S.W.2d 462, 465 (Tex. App.—Dallas 1990, writ denied) (holding that good cause may be shown by negligence, so long as the "negligence does not rise to the level of conscious indifference"); Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 133 S.W.2d 124, 126 (Tex. 1939) (holding that the defendant must state that its failure to file was not intentional or the result of conscious indifference but was due to accident or mistake).

140. *See Craddock*, 133 S.W.2d at 125-26 (holding that the defendant's failure to file must not be intentional or the result of conscious indifference but due instead to an accident or a mistake); *see also N. River Ins. Co.*, 824 S.W.2d at 700 (stating that a party can establish good cause, with regard to TEX. R. CIV. P. 169(2), by showing that its failure to answer was accidental or the result of a mistake, and not intentional or the result of conscious indifference); *Halton*, 792 S.W.2d at 465-66 (stating that good cause can be shown even though a party may have been negligent, if his "negligence does not rise to the level of conscious indifference").

141. *See* Cudd v. Hydrostatic Transmission, Inc., 867 S.W.2d 101, 104-05 (Tex. App.—Corpus Christi 1993, no writ) (holding good cause is satisfied where a mistake was made in counting the days permitted to serve answers led to a failure to respond to requests for

threshold ensures that litigants will not be punished and cases will be heard despite the sometimes unfortunate mistakes of lawyers. So long as the other party is not unfairly prejudiced the case will be heard and presumably the parties will receive a just, fair, and impartial adjudication of the issues of the case.

However, these minimal requirements give attorneys an embarrassingly large margin for error. The law tells lawyers they can forget, they can misplace, they can miscommunicate, they can blame it on someone else, and they can even make mistakes on behalf of their clients. So long as the attorney does not consciously disregard her responsibilities, her client does not suffer. But on some level, doesn't this encourage negligence or at least lax standards amongst members of the legal profession? Do we really want to hold ourselves to such a minimal level of professional responsibility? Under the *Stelly/Craddock* test, just about any reasonable explanation for an attorney's failure to respond, supplement, appear, or produce is excusable, and this is unacceptable.

B. *The* Remington Arms *Standard of Good Cause*

Under the *Remington Arms* standard of good cause, discretion is given to the trial court to determine whether the criteria have been satisfied. Thus, good cause is determined on a case-by-case basis with no basic guidelines or framework. A practice such as this inevitably will lead to an uneven application of the law.

C. *The* Alvarado *Standard of Good Cause*

The reasons given by courts for allowing testimony, despite failure to comply with discovery rules, share the basic rationale, sometimes expressed and sometimes implicit, that admitting the testimony allows a full

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admissions). In *Cudd*, appellee corporation Hydrostatic filed a motion for summary judgment against appellants, a small business and its owner, John Cudd, in appellee's suit on an open account. *Id.* at 102. The motion was granted based on appellants' failure to timely respond to request for admissions, which matters were subsequently deemed admitted. *Id.* Appellants challenged the summary judgment, arguing that the responses submitted were timely and that a request to withdraw the deemed admissions was made orally at the hearing. *Id.* On appeal, the court reversed, holding that the trial court abused its discretion by denying the motion to withdraw the deemed admissions. *Id.* at 105. The court reasoned that the denial of the motion was unreasonable where the appellant's oral motion was sufficient, the late filing was for good cause and nothing in the record indicated that appellee was unduly prejudiced by the withdrawal. *Id.* at 105. *See also N. River Ins. Co.*, 824 S.W.2d at 701 (holding that the trial court abused its discretion in denying a motion to permit the late filing of responses where the mistake was due to an inadvertent calendar diary error).

presentation of the merits of the case.[142] Trial courts permit a previously undisclosed witness to testify "in the interest of justice in getting everything on the table, which [courts should try] to do when possible. . . ."[143] Justice Hecht summarized the purpose of the *Alvarado* standard when he wrote, "while it is certainly important for the parties in a case to be afforded a full and fair opportunity to present the merits of their contentions, it is not in the interest of justice to apply the rules of procedure unevenly or inconsistently."[144] Additionally, he stated that "[i]t is both reasonable and just that a party expect that the rules he has attempted to comply with will be enforced equally against his adversary. To excuse noncompliance without a showing of good cause frustrates that expectation."[145]

Under the *Alvarado* standard of good cause, the goals of the rules of civil procedure are most likely to be achieved. Under such a test, good cause is not satisfied by mere negligence.[146] Instead, a type of "super" good cause is required. This framework does not encourage or allow to go unpunished the negligence of those in the legal profession. It ensures that each party has notice of the other's case and thus prevents trial by ambush.

It is admittedly more difficult to satisfy and may punish clients whose attorneys are negligent. These clients, however, will not be without a remedy. And by seeking retribution for the mistakes of their attorneys by filing a legal malpractice claim, the legal profession will rid itself of irresponsible and unprofessional lawyers.

IV. PROPOSED SOLUTION: ADOPT THE *ALVARADO* STANDARD OF GOOD CAUSE TO ACHIEVE THE GOALS OF THE RULES OF CIVIL PROCEDURE

In order to best ensure that the goals of the rules of civil procedure[147] are met, the courts must adopt and employ the *Alvarado* standard of good cause. This framework will keep the exception from swallowing the rule, but it is not so broad as to encourage negligence in the legal profession.

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142. *Alvarado*, 830 S.W.2d at 914.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 915.

147. TEX. R. CIV. P. 1 (stating that the goal of the rules is, "to obtain a just, fair, equitable[,] and impartial adjudication of the rights of litigants under established principles of substantive law").

The court in *Alvarado* reiterated what factors, in and of themselves, are not alone sufficient to satisfy the standard of good cause.[148] Included are lack of surprise,[149] inadvertence of counsel[150] and uniqueness of the excluded evidence.[151] The reasoning behind these factors is appealing—if any of the three were sufficient to alone establish good cause, the exception would certainly swallow up the rule.[152]

If inadvertence would alone meet the good cause requirement, a lawyer would be a fool to admit making a deliberate decision not to comply with the procedural rules—simply admitting to mistake would excuse the oversight.[153] If lack of surprise alone would satisfy the good cause requirement, the court would bear the additional burden of determining whether a party is genuinely surprised by an unidentified offer of testimony.[154] Relying on its earlier language in *Sharp,* the court reasoned: "A party is entitled to prepare for trial assured that a witness will not be called because opposing counsel has not identified him or her in response to a proper interrogatory."[155] Finally, if the good cause standard could be satisfied merely "by establishing the unique importance of the evidence to the presentation of the case, only unimportant evidence would ever be excluded, and the rule would be pointless."[156]

V. CONCLUSION

One phrase deserves one definition. In order to achieve the stated objective of the rules of procedure, the judiciary should give "good cause" a single meaning or the Texas Supreme Court should amend the rules by giving the three standards three different names. The standard best suited to achieve the goal of obtaining a "just, fair, equitable and impartial adjudication of the rights of [the] litigants under established princi-

148. *See Alvarado*, 830 S.W.2d at 915 (repeating that inadvertence of counsel, lack of surprise, and uniqueness of the excluded evidence do no constitute good cause, in and of themselves).

149. Sharp v. Broadway Nat'l Bank, 784 S.W.2d 669, 671 (Tex. 1990); Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394, 395 n.2 (Tex. 1989).

150. *Sharp*, 784 S.W.2d at 672; E.F. Hutton & Co. v. Youngblood, 741 S.W.2d 363, 364 (Tex. 1987).

151. Clark v. Trailways, Inc., 774 S.W.2d 644, 646 (Tex. 1989).

152. *Alvarado*, 830 S.W.2d at 915.

153. *Id.*

154. *Id.* The court goes on to point out that, "[t]he better prepared counsel is for trial, the more likely he is to have anticipated what evidence may be offered against his client, and the less likely he is to be surprised." *Id.* The court reasons, "It would hardly be right to reward competent counsel's diligent preparation by excusing his opponent from complying with the requirements of the rules." *Id.*

155. Alvarado v. Farah Mfg. Co., 830 S.W.2d 911, 915 (Tex. 1992).

156. *Id.*

ples of substantive law"[157] is the *Alvarado* standard of Texas Rule of Civil Procedure 193.6.

157. TEX. R. CIV. P. 1.