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PRE-TRIAL DISCOVERY IN TEXAS

by

James B. Sales*

THE Texas Rules of Civil Procedure governing pre-trial discovery directly affect every attorney engaged in a litigation oriented practice. It is impossible to handle properly any litigation without utilizing the tools of discovery. Preparation is the hallmark of any successful litigation, and the effective use of pre-trial discovery is the foundation of that preparation.

Recent amendments to the Texas rules have substantially liberalized the ambit of discovery. The reach of discovery, however, is neither unfettered nor undefined. It is important, therefore, to understand the parameters of discovery as well as the limitations imposed by traditional testimonial privileges.

This Article reviews both the scope and limits of pre-trial discovery in order to assist in clarifying the current status of discovery procedures. Further, this Article identifies those areas in which the nature of the rules themselves or recent Texas Supreme Court decisions have generated confusion in applying the rules.

I. PRODUCTION OF DOCUMENTS AND THINGS

A. *General Considerations*

Rule 167 provides that upon a motion showing good cause, any party may seek production of any designated documents, papers, books, accounts, letters, photographs, objects or tangible things which constitute or contain, or are reasonably calculated to lead to the discovery of, evidence material to any issue.¹ Rule 167 further authorizes entry upon designated lands for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation which may be located on the property. Despite the broad categorization of matters amenable to production under the rule, the traditional Texas rules of testimonial privilege impose limits on the scope of discovery.²

Motions for production under rule 167 may be made at any stage of a proceeding.³ Consequently, a party may file a motion for production at any time after appearance by the party upon whom the motion is served.⁴ Although this rule contemplates discovery during the pre-trial stage, a re-

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1. TEX. R. CIV. P. 167. See generally *Ramsay v. Santa Rosa Medical Center*, 498 S.W.2d 741 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.), cert. dismissed w.o.j., 417 U.S. 939 (1974).

2. See, e.g., *Allen v. Humphreys*, 20 Tex. Sup. Ct. J. 469 (July 20, 1977).

3. *Dobbins v. Gardner*, 377 S.W.2d 665 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.); *Dunlap v. Chase*, 336 S.W.2d 303 (Tex. Civ. App.—Waco 1960, no writ).

4. *Dunlap v. Chase*, 336 S.W.2d 303 (Tex. Civ. App.—Waco 1960, no writ).

quest for production may be initiated during trial.⁵ This means, of course, that the trial court may order production of authorized items of discovery at any time during the trial.⁶ Substantial discretion is accorded the trial court in determining the propriety of ordering production of nonprivileged and relevant documents and things, both at the pre-trial stage and during trial.

The application of rule 167 is limited to the parties involved in the cause of action.⁷ The operative effect of a motion for production cannot be extended to non-parties. Similarly, the provisions of rule 167 do not apply to criminal matters such as a habeas corpus proceeding to secure bail on a criminal charge.⁸

The documents or things to be produced must be within the possession, control, or custody of a party;⁹ there is not, however, a requirement that the documents or things be within the territorial jurisdiction of the court. Custody and control, not geographical location within the state, is thus the critical test.¹⁰ Consequently, a party may be compelled to produce authorized documents and things which may presently reside in the custody or actual possession of any employee, agent, attorney, or other intermediary. The determinative factor is the right of control over the matter sought for production.

A showing of good cause is essential for the production of documents or things. Rule 167 specifically requires that the motion of any party seeking production must establish good cause. Despite substantial liberalization of rule 167 precipitated by the 1973 amendments, the supreme court retained, as a predicate for production, the requirement of good cause.¹¹ Under the comparable federal rule, good cause was eliminated as a prerequisite for production.¹² Pursuant to the good cause requirement, the party moving for production is obligated to establish that the information sought is not otherwise available and that the documents and things are material or relevant to some issue involved in the litigation.¹³ The Texas Supreme Court decision in *Carroll Cable Co. v. Miller*,¹⁴ approving an order for production of an insuring agreement, seemed to relax the standard necessary to satisfy a showing of good cause. In that case, however, relaxation of the good cause standard was apparently motivated, to some degree, by the provision of rule

5. *Dobbins v. Gardner*, 377 S.W.2d 665 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.) (court possesses the power, without formal motion or subpoena, to order production during trial).

6. *McGregor v. Gordon*, 442 S.W.2d 751 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.).

7. TEX. R. CIV. P. 167 states: "the court in which an action is pending may order any party" See *Hopkins v. Hopkins*, 540 S.W.2d 783 (Tex. Civ. App.—Corpus Christi 1976, no writ).

8. *Ex parte Davis*, 542 S.W.2d 192 (Tex. Crim. App. 1976).

9. See, e.g., *Cutler v. Gulf States Util. Co.*, 361 S.W.2d 221 (Tex. Civ. App.—Beaumont 1962, writ ref'd n.r.e.).

10. Cf. *Hasting Oil Co. v. Texas Co.*, 149 Tex. 416, 234 S.W.2d 389 (1950); *Brown v. Lundell*, 334 S.W.2d 616 (Tex. Civ. App.—Amarillo 1960), *aff'd*, 162 Tex. 84, 344 S.W.2d 863 (1961); *Robb v. Gilmore*, 302 S.W.2d 739 (Tex. Civ. App.—Fort Worth 1957, writ ref'd n.r.e.) (the court may also order inspection or tests of objects and other things).

11. TEX. R. CIV. P. 167 specifies that "upon motion of any party showing good cause therefor and upon notice to all parties"

12. FED. R. CIV. P. 34.

13. See *Gulf Constr. Co. v. St. Joe Paper Co.*, 24 F.R.D. 411 (S.D. Tex. 1959); *Cutler v. Gulf States Util. Co.*, 361 S.W.2d 221 (Tex. Civ. App.—Beaumont 1962, writ ref'd n.r.e.).

14. 501 S.W.2d 299 (Tex. 1973).

167 specifically designating insuring agreements to be subject to production.¹⁵

In the subsequent case of *Ex parte Shepperd*¹⁶ the supreme court reaffirmed the continued vitality of the good cause requirement in a case not involving an insuring agreement. Thus, a showing of good cause continues to be essential and circumscribes the prerogative of the court to order production of documents or things. In *Shepperd* the supreme court emphasized the importance of establishing the good cause predicate, noting, "while the Rule specifically authorizes discovery of expert reports, it contains general qualifications that the party seeking discovery *must show* 'good cause'"¹⁷ Consequently, the moving party must affirmatively demonstrate to the trial court by both sufficient pleadings and proof the *need* for and the *materiality* of the matters sought for production.¹⁸

Further, the court must expressly find the existence of need and materiality. The mere ministerial granting of production in the absence of a finding of need and materiality contravenes the good cause requirement.¹⁹ In considering good cause under federal rule 35, the United States Supreme Court in *Schlagenhauf v. Holder* observed:

[Good cause is] not met by mere conclusionary allegations of the pleadings—nor by mere relevance to the case—but require[s] an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination. . . . The ability of movant to obtain the desired information by other means is also relevant.²⁰

Similarly, in *Irwin v. Basham*²¹ the plaintiff sought production from the defendant of various sales schedules and income tax returns in connection with a suit for profits allegedly resulting from an oral real estate transaction. Concluding that the trial court properly denied the request for production, the court noted:

No facts were either pleaded or proved that such good cause existed. A party does not show himself entitled to a discovery order simply by asking for it. A mere conclusion in the motion as to the need for discovery is not sufficient. Sufficient facts must be alleged to enable the trial court to see the need as well as the materiality of what is sought.

15. *Id.*

16. 513 S.W.2d 813 (Tex. 1974).

17. *Id.* at 815 (emphasis added). In finding that the movants had satisfied the requirement the court stated, "The condemnees contend the reports are material for purposes of cross-examination and impeachment of the appraisers when they testify at the trial. We agree. . . . This information generally would not be available to the landowners from other sources. Thus, the good cause and materiality requirements are satisfied" *Id.* at 815-16.

18. *Bryan v. General Elec. Credit Corp.*, 553 S.W.2d 415 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ); *Irwin v. Basham*, 507 S.W.2d 621 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.); *Zuider Zee Oyster Bar, Inc. v. Martin*, 503 S.W.2d 292 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e.).

19. *Maresca v. Marks*, 362 S.W.2d 299 (Tex. 1962); *Ramsay v. Santa Rosa Medical Center*, 498 S.W.2d 741 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.), *cert. dismissed w.o.j.*, 417 U.S. 939 (1974).

20. 379 U.S. 104, 118 (1964). *See Narro Warehouse, Inc. v. Kelley*, 530 S.W.2d 146 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) (merely pleading the conclusion that good cause exists for the production of documents is insufficient).

21. 507 S.W.2d 621 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.).

Moreover, such facts must be proved; the granting of such a motion is not automatic upon request.²²

The burden of establishing both need and materiality is therefore imposed on the moving party. Although the matters sought for production are properly discoverable, improper pleading of the need for and the materiality of those matters is fatal.²³

Originally, rule 167 limited discovery to documents which *constituted or contained evidence material* to the matters in litigation.²⁴ This limitation on the scope of production was substantially modified by the 1973 amendment. Production is now justified if the documents or things involved constitute *or contain or are reasonably calculated to lead to the discovery of evidence material* to any matter involved in the pending litigation.²⁵ This latter modification has greatly extended the ambit of permissible discovery. Tests and surveys not otherwise relevant to any issue in the pending litigation may be subject to production because of the likelihood that such information would lead to discovery of relevant and admissible evidence.²⁶ Obviously, this effectively enlarges the discretionary prerogative of the trial court in determining the existence of good cause for production. The supreme court in *Allen v. Humphreys* concluded:

Rule 167 does not require as a prerequisite to discovery that the items sought to be discovered be admissible into evidence. It is enough that the documents in question be 'reasonably calculated to lead to the discovery of' evidence material to the cause of action. Furthermore, the above-described complaints and answers might well establish a pattern of disease and for that reason are relevant on the issue of causation. Thus the documents are material to the issue of causation, and, together with their unavailability from any other source, this suffices to show good cause for their production.²⁷

B. *Information Subject to Production*

Rule 167 contemplates discovery of documents, papers, books, accounts, letters, photographs, objects, or tangible things which constitute or contain, or are reasonably calculated to lead to the discovery of, evidence material to any matter involved in the action. In the absence of traditional rules of testimonial privilege, these designated items must be disgorged upon a proper motion.

Rule 167 has been interpreted to authorize the production of the income

22. *Id.* at 625.

23. In *Texhoma Stores, Inc. v. American Cent. Ins. Co.*, 424 S.W.2d 466, 472 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.), the court specifically noted that movant failed to satisfy his burden of establishing good cause "in the absence of both allegation and proof of fact . . . why the requested information is material to issues involved."

24. TEX. R. CIV. P. 167 (1948).

25. Statutory provisions may, however, extend a privilege exempting certain items from discovery. See *Texarkana Memorial Hosp., Inc. v. Jones*, 551 S.W.2d 33, 35 (Tex. 1977), holding that records and proceedings of any hospital committee, medical organization committee, or extended care facility are privileged under TEX. REV. CIV. STAT. ANN. art. 4447d, § 3 (Vernon 1969) and thereby protected from production.

26. See, e.g., *Allen v. Humphreys*, 20 Tex. Sup. Ct. J. 469 (July 20, 1977); *Texhoma Stores, Inc. v. American Cent. Ins. Co.*, 424 S.W.2d 466 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.).

27. 20 Tex. Sup. Ct. J. 469, 472 (July 20, 1977).

tax returns of a party.²⁸ Income tax returns in a generic sense have been judicially denominated as beyond the shield of testimonial privilege and are subject to discovery.²⁹ Tax returns are particularly pertinent in suits for damages on the issue of lost wages or loss of earning capacity. The fact that a party no longer possesses a copy of previously filed tax returns does not relieve him from the duty to comply with a production order. A party may be required to obtain income tax returns filed with the Internal Revenue Service. A party, as a taxpayer, is deemed to have constructive custody of and control over returns filed with the Internal Revenue Service.³⁰

The entire income tax return, however, is not per se discoverable.³¹ The trial court is obligated to separate the relevant and material portions of the tax return from the irrelevant and immaterial.³² Indeed, the failure of the trial court to examine and separate the material matters from the immaterial constitutes an abuse of discretion.³³

The rule now expressly provides for production of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy a judgment entered in an action, or to reimburse or indemnify for payments made to satisfy a judgment. Previously, insuring agreements were not discoverable under rule 167.³⁴ The provision now in effect was patterned after federal rule 26(b)(2) which has been consistently interpreted to permit discovery of the entire insuring agreement, including policy limits.³⁵ The federal rule, however, unlike its Texas counterpart, was modified by deletion of the good cause requirement. Because both need and materiality constitute the quintessence of good cause, a question was raised as to whether this provision was sufficiently broad to justify disclosure of policy limits. This concern was prompted by an earlier opinion of the Texas Supreme Court that policy limits were not material, in advance of trial, to any issue involved in a tort action.³⁶ In *Carroll Cable Co. v. Miller*³⁷ the court resolved the question in favor of disclosure. In defining good cause in relation to insuring agreements, the court announced: "It is sufficient showing of good cause that an insurance agreement is not available to the moving party and that the information is needed to determine settlement and litigation strategy."³⁸ Thus, while the rule contains a general good cause requirement, the allegations deemed sufficient to satisfy the requirement in *Carroll* obviate any real showing of need and materiality for obtaining production of insuring agreements. An allegation that the policy is not available and is

28. *Maresca v. Marks*, 362 S.W.2d 299 (Tex. 1962); *Crane v. Tunks*, 160 Tex. 182, 328 S.W.2d 434 (1959); *Lloyds v. Hale*, 405 S.W.2d 639 (Tex. Civ. App.—Amarillo 1966, writ ref'd n.r.e.).

29. *Crane v. Tunks*, 160 Tex. 182, 328 S.W.2d 434 (1959).

30. See generally *Tollefsen v. Phillips*, 16 F.R.D. 348 (D. Mass. 1954); *Reeves v. Pennsylvania R.R.*, 80 F. Supp. 107 (D. Del. 1948).

31. *Maresca v. Marks*, 362 S.W.2d 299 (Tex. 1962).

32. *Id.*

33. *Id.*

34. *Great Am. Ins. Co. v. Murray*, 437 S.W.2d 264 (Tex. 1969).

35. See, e.g., *Ballard v. Allegheny Airlines, Inc.*, 54 F.R.D. 67 (E.D. Pa. 1972); *Grise v. Crownover*, 57 F.R.D. 210 (E.D. Tenn. 1971); *Clower v. Walters*, 51 F.R.D. 288 (S.D. Ala. 1970).

36. *Great Am. Ins. Co. v. Murray*, 437 S.W.2d 264 (Tex. 1969).

37. 501 S.W.2d 299 (Tex. 1973).

38. *Id.*

needed to plan settlement and litigation strategy suffices. Liberalization of the requirements for disclosure of insuring agreements was designed to foster a climate for settlement and thereby reduce the volume of litigation. Unfortunately, the accessibility of this information has produced some problems.³⁹

The relaxed standard for good cause defined in *Carroll Cable Co.* apparently has been limited to the unique item of the insuring agreement. In other situations the good cause requirement and the concomitant obligation to plead and prove need for and materiality of items has been reaffirmed by the supreme court.⁴⁰

The identity and location of any potential party or witness may now be obtained from communications or other papers in the possession, custody, or control of a party. Prior to the 1973 amendments the supreme court in *Ex parte Ladon*⁴¹ determined that the attorney for a bus company was not required to produce a list of passengers compiled by the bus driver following an accident. This decision was predicated on the traditional privilege accorded post-occurrence communications. Although this general privilege remains, rule 167 now specifically eliminates from this privileged status any communications which reflect the identity and location of potential parties or witnesses.

Traditionally, expert witness opinions and reports were protected against discovery. The reports of experts employed by a party were judicially recognized to be privileged;⁴² the written reports of technical experts qualified as communications between a party and its agent made subsequent to an occurrence and in connection with the prosecution or defense of a claim, and thus were privileged.⁴³

Currently, however, the rule provides for the production of the reports of experts expected to be called as witnesses. This modifies the rule articulated in *State v. Ashworth*⁴⁴ that a written appraisal report was protected from disclosure during the pre-trial stage. This change represents an awareness of the realities of complex litigation involving the use of highly technical witnesses to provide sophisticated opinions and conclusions. The disclosure of expert witness reports in advance of trial allows the adverse party to investigate the basis of experts' opinions and to prepare an effective cross-examination. Effective cross-examination represents the only adequate means to test the validity of the opinions and conclusions of experts expressed on subjects that are beyond the knowledge and common under-

39. The Advisory Committee's Explanatory Statement to the Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 487, 499 (1970), observed that information concerning insurance coverage will conduce settlement and avoid protracted litigation in some cases, but in others it may have an opposite effect.

40. *Allen v. Humphreys*, 20 Tex. Sup. Ct. J. 469 (July 20, 1977). See also the discussion of *Ex parte Shepperd*, 513 S.W.2d 813 (Tex. 1974), at notes 16-18 *supra* and accompanying text.

41. 160 Tex. 7, 325 S.W.2d 121 (1959); accord, *Perez v. San Antonio Transit Co.*, 342 S.W.2d 802 (Tex. Civ. App.—Eastland 1961, writ ref'd).

42. *State v. Ashworth*, 484 S.W.2d 565 (Tex. 1972); *Hodges v. State*, 403 S.W.2d 207 (Tex. Civ. App.—Texarkana 1966, writ ref'd n.r.e.); *Shirley v. Dalby*, 384 S.W.2d 362 (Tex. Civ. App.—Texarkana 1964, writ ref'd n.r.e.). See generally *Sales, Discovery Problems in Aviation Litigation*, 38 J. AIR L. & COMM. 297 (1972).

43. *State v. Ashworth*, 484 S.W.2d 565 (Tex. 1972).

44. *Id.*

standing of the ordinary layman. For this reason, the reports of experts expected to testify are now discoverable in advance of trial, subject to a showing of good cause.⁴⁵

The reports of experts retained by a party for consultation only in pending litigation and not for the purpose of providing testimony at the trial are not discoverable even upon a showing of good cause. Since rule 167 simply excludes from the post-occurrence communications privilege only the written reports of experts expected to testify, the reports of non-testifying experts continue to qualify as written communications of an agent employed by a party and made in connection with the prosecution or defense of a claim.⁴⁶ The modification of the post-occurrence communication provision rather than the wholesale abrogation of the entire testimonial privilege confirms this conclusion. Moreover, retention of the testimonial privilege of the non-testifying consultant comports with the rationale undergirding the change. If discovery of expert reports in advance of trial is intended to facilitate preparation for effective cross-examination of technical witnesses, disclosure of reports of consulting specialists who will not furnish evidence in the litigation is unwarranted. The real concern motivating the rule modification was the avoidance of trial by ambush; the ambush never materializes if the expert consultant does not assume the role of a participant in the trial.

Contemporaneously with its modification of the testimonial privilege that protected expert witness reports, the supreme court, in the rule governing the scope of oral examination of witnesses, specifically retained the testimonial privilege with respect to the conclusions and opinions of experts employed solely for consultation.⁴⁷ The same rationale governed retention of the protective shield for consultants. The obvious problem engendered by the distinction between an expert witness and a consulting expert involves the standard for characterizing the expert.

The problem of defining an "expert witness" was initially confronted in *Houdaille Industries, Inc. v. Cunningham*⁴⁸ which involved a suit to recover damages for negligent performance of a foundation investigation and pavement design. The defendant filed a motion for production of the written reports of several experts who had been employed by the plaintiff to examine and evaluate the paving problem. The attorney for the plaintiff responded by sworn answer that the experts were used solely for consultation and would not be called as witnesses, except perhaps for rebuttal purposes. After an in-camera examination, the trial court ordered production of the requested reports. After reviewing the historical evolution of rule

45. *Colonial Airlines v. Janas*, 13 F.R.D. 199 (S.D.N.Y. 1952) (good cause not established where material forming the basis of expert's report was available to adverse party). *Contra*, *Franks v. National Dairy Prod. Corp.*, 41 F.R.D. 234 (W.D. Tex. 1966) (court ordered production of expert's report on analysis of shortening which exploded, apparently ignoring admonition of the Supreme Court in *Schlagenhauf v. Holder*, 379 U.S. 104 (1964), which stressed importance of showing of good cause when that requirement was still incorporated in the federal rule).

46. *See generally* *State v. Ashworth*, 484 S.W.2d 565 (Tex. 1972).

47. *TEX. R. CIV. P. 186a*. In *Ex parte Shepperd*, 513 S.W.2d 813, 817 (Tex. 1974), the supreme court observed that "the clear policy enumerated in the Rules [is] that the opinions of experts used solely for consultation should be shielded from discovery . . ."

48. 502 S.W.2d 544 (Tex. 1973).

167, the supreme court concluded that the plaintiff was not required to produce the reports of experts who would not be called as witnesses but was obligated to produce the reports of experts who potentially might be utilized for rebuttal. The supreme court, interpreting the intent and meaning of rule 167, declared:

As stated, Houdaille has disclaimed by sworn answer that Spencer Buchanan and the experts of Shilstone Testing Laboratory will be called as witnesses; it follows that their reports are not discoverable.

In this connection, Houdaille states in its affidavits and answers to the motion for discovery that while it may not utilize the experts of Bayou Industries, Inc., as witnesses in chief, it may do so for rebuttal or impeachment purposes. It insists that the reports of such witnesses are also protected from discovery under these circumstances. The 1973 amendments suggest no exception in this respect, and we hold that none was intended. Their clear purport is to protect a party utilizing the assistance of experts from discovery of their reports only when they will not be used as a witness, whether in chief or otherwise.⁴⁹

Underscoring the rationale which prompted the change in rule 167, the supreme court emphasized that protection from discovery is accorded the conclusions and opinions of experts only when such experts will not be utilized as witnesses, whether in chief or otherwise. In the absence of an unequivocal disclaimer that experts employed by a party will not be called as witnesses at trial, the reports of such experts are subject to production. The court further clarified the disclaimer requirement by holding that a party is not authorized to defer a decision characterizing an expert as either a witness or a consultant.⁵⁰ Since the underlying intent of the rule contemplates providing a party an adequate opportunity to prepare an effective cross-examination of technical witnesses, failure to make the election at the time the motion for production is filed would frustrate the purpose of the rule. Consequently, an unqualified sworn disclaimer is required to invoke the privilege against disclosure by consulting experts.

The decision in *Houdaille* recognizes that the testimonial privilege against pre-trial production extends only to experts not expected to be called as witnesses at the trial.⁵¹ This is consistent with the rationale underlying the amendments since the need to possess the opinions and conclusions of technical witnesses to prepare an effective cross-examination or rebuttal is absent when the expert will not participate in the trial. Nevertheless, the decision to denominate an expert as a consultant must be made at the time discovery is initiated and the decision must be unqualified and categorical. This was emphasized in *Barker v. Dunham*,⁵² in which the expert was questioned on deposition regarding his opinion on the failure of a crane boom. The witness was instructed not to answer on the basis that the attorney had not yet decided whether to utilize the witness as an expert at trial. In ordering discovery of the expert's opinion the supreme court stated:

49. *Id.* at 548.

50. *Id.*

51. *Id.* (disclaimer by a party that expert would not be called as witness shielded the reports from pre-trial production). *But see* Comment, *Discovery of Experts' Reports in Texas*, 28 Sw. L.J. 617 (1974), suggesting that the supreme court ignored other compelling reasons for expanding rather than limiting the scope of discovery.

52. 551 S.W.2d 41 (Tex. 1977).

American Hoist [defendant] has neither disclaimed an intention to call him as a witness nor asserted that he will be 'used solely for consultation.' Where a party does not positively aver that the expert in question will be 'used solely for consultation' and will not be called as a witness at the trial, the policy of allowing broad discovery in civil cases is furthered by permitting discovery of that expert's reports, factual observations, and opinions.⁵³

Defining a "consulting expert" has likewise created confusion. This issue was also considered by the supreme court in *Barker*.⁵⁴ Plaintiff's husband was fatally injured when a crane boom failed and collapsed. The plaintiff sought through deposition to elicit the opinions and conclusions of the vice-president in charge of engineering for the manufacture of the crane. Although the vice-president was a qualified structural engineer and had examined the crane and formulated opinions on the cause of the collapse, the attorney for the manufacturer refused to allow him to express any expert opinions. The court ordered the vice-president to furnish his opinions since he had not been unequivocally declared to be a consulting expert. Significantly, however, the court observed:

The initial question here is whether the authorized discovery procedures apply to the witness Montgomery, an officer and regular employee of American Hoist and therefore not an 'expert' specially employed for consultation. The rules draw no distinction between an expert who is a regular employee and one who is temporarily employed to aid in the preparation of a claim or defense, and we thus hold the procedures authorized by the Texas Rules of Civil Procedure apply to Montgomery.⁵⁵

The *Barker* decision extends the characterization of expert witness or consulting expert to an officer or employee of a party. Normally, any written communications, including opinions and conclusions, between an employee and a party made subsequent to an occurrence upon which the lawsuit is based and made in connection with the prosecution, investigation, or defense of such claim or lawsuit are exempt from discovery. Apparently, under *Barker*, an "expert" employee, agent or officer of a party, in the absence of an unequivocal statement that the expert will not be called as a witness at trial, is stripped of any testimonial privilege. This qualification to the general testimonial privilege unnecessarily tortures the literal provisions of the privilege articulated in rule 167. The testimonial privilege accorded employees and officers of a party should not be diminished by the expert witness or consulting expert appellation. In addition, it will now be necessary for the trial court judicially to evaluate and determine, in the first instance, whether the employee or officer of a party qualifies as an expert. This particular problem generally does not materialize when a party selects an independent as an expert to evaluate an occurrence.

Generally, discovery of the records of expert witnesses solely for the purpose of establishing bias or prejudice is prohibited⁵⁶ because such a

53. *Id.* at 44.

54. *Id.*

55. *Id.* at 43.

56. *See generally* Russell v. Young, 452 S.W.2d 434 (Tex. 1970) (court refused to sanction a

purpose does not satisfy the materiality requirement of good cause. If, however, the moving party demonstrates materiality, reports of expert witnesses that relate to transactions or matters other than those involved in the lawsuit may be discoverable. In *Ex parte Shepperd*,⁵⁷ for example, the condemnees sought reports prepared by the state's appraisers concerning the value of the land condemned as well as the value of adjacent tracts of land not involved in the litigation. The condemnees alleged that the appraisers' reports on adjacent tracts of land were essential for preparing an effective cross-examination and impeachment of the appraisers. The state responded that under *Russell v. Young*⁵⁸ reports of non-party witnesses which were to be utilized solely for showing bias or prejudice of the witness were protected from discovery. Distinguishing the *Russell* case and concluding that the testifying experts' reports concerning adjacent tracts of land were discoverable, the supreme court stated:

Finally, the reports are not sought solely, or even primarily, to show bias or prejudice. They are sought as evidence of possible inconsistencies in the appraiser's valuation of other properties *which the trial judges in these cases have determined to be essentially similar* to the subject properties. A thorough exploration, on cross-examination and re-direct examination, of any such inconsistencies and the reasons therefor, might well assist the jury in reaching an independent conclusion concerning the fair market value of the subject properties.⁵⁹

The supreme court, however, imposed certain limitations on this type of pre-trial discovery. The court stated that appraiser's reports involving adjacent tracts of land which were still in the negotiation or trial stage were protected from disclosure.⁶⁰ Circumscribed by this qualification, the reports of the appraisers involving adjacent tracts of land were discoverable.

As delineated in *Shepperd*⁶¹ the guidelines governing production of expert witness reports are threefold. If the personal records of an expert are sought solely to establish a possible bias or prejudice of the witness, the reports are protected from pre-trial discovery. However, in the event the reports of an expert witness, relating to matters other than the specific matters involved in the lawsuit, are substantively relevant to the opinions and conclusions formulated by the witness, the materiality requirement of good cause is satisfied and the reports are discoverable. Nevertheless, if such examinations and reports of similar products are prepared in connection with other pending or prospective litigation, the qualification announced in *Shepperd*⁶² limits pre-trial disclosure.

This issue was further considered in the recent case of *Allen v. Humphreys*.⁶³ The plaintiff instituted a workmen's compensation suit against Safeway Stores, Inc., and its insurers, alleging that she developed lung

party's efforts to compel an examining physician to produce personal financial records to demonstrate that the witness was plaintiff's doctor).

57. 513 S.W.2d 813 (Tex. 1974).

58. 452 S.W.2d 434 (Tex. 1970).

59. 513 S.W.2d at 816 (emphasis added).

60. *Id.* at 817.

61. *Id.* at 816.

62. *Id.* at 817.

63. 20 Tex. Sup. Ct. J. 469 (July 20, 1977).

cancer from exposure during the course and scope of her employment in the meat department of a Safeway store to polyvinyl chloride particles released into the air when meat wrapping film was cut with hot wire. Plaintiff sought unsuccessfully to discover many items from defendants including: (1) copies of any surveys or test reports, done by anyone, to determine the amount or composition of particles released by burning of the plastic meat wrapping film used by Safeway; (2) all complaints by private individuals and the Government claiming that cancer had been contracted as a result of breathing polyvinyl chloride fumes; (3) all medical, laboratory, or other expert reports, not made in connection with plaintiff's claim, dealing with the possibility that polyvinyl chloride fumes could cause cancer; and (4) all correspondence, memoranda, safety bulletins, or other communications reflecting a decision of Safeway to abandon the use of hot wire cutting of plastic meat wrapping material.⁶⁴ The supreme court concluded that the trial court had abused its discretion in denying substantial amounts of requested discovery. These tests and surveys were deemed discoverable because they were not prepared in connection with the prosecution or defense of plaintiff's suit.⁶⁵ The court held that such tests and surveys were discoverable subject to a showing of need and materiality and to the limitation announced in *Shepperd*.⁶⁶ The court stated:

In *Shepperd* we held that production of reports prepared by non-testifying experts in a separate pending suit should not be ordered produced except upon 'an especially rigorous showing of good cause.' Finding no such showing here, we hold that relator is not entitled to produce by discovery any tests and surveys made by experts employed 'solely for consultation' in similar pending suits, if any, against any of the defendants. However, in connection with other such tests and surveys, we are persuaded that they would be material to the issue of causation and that the complexity and substantial expense of conducting similar tests suffice to show good cause. We therefore hold that, except insofar as such tests and surveys came within the rule announced in *Shepperd*, the trial court abused its discretion in denying this aspect of relator's motion for discovery.⁶⁷

It is important to note that the reports prepared in other litigation that were involved in *Shepperd* were prepared by the experts expected to be called as witnesses *in the trial of the pending litigation*. *Shepperd* did not involve or even consider reports involved in other litigation that were prepared by "consulting experts" *in the pending case*. Unquestionably, the evaluations made by an expert witness in other litigation that directly affect opinions and conclusions rendered in the pending litigation are extremely pertinent and should not be exempt from discovery, except as limited by the guidelines outlined in *Shepperd*. The same considerations, however, are totally absent when the reports involved in other litigation were prepared by a consulting expert who will not provide any evidence or constitute a factor in the pending litigation. The extension of *Shepperd* to include prior reports

64. *Id.* at 470.

65. *Id.* at 472.

66. 513 S.W.2d 813, 817 (Tex. 1974).

67. 20 Tex. Sup. Ct. J. at 472 (citations omitted).

prepared by consulting experts as distinguished from experts expected to be called as witnesses is unwarranted and, unfortunately, will further confuse rather than illuminate this area of pre-trial discovery.

As to the requested medical and laboratory reports the court in *Humphreys* declared:

Subject to the limitations announced by this Court in *Sheppard* [*sic*], these items, too, are discoverable. The reports are directed to the issue of causation and are unavailable from other sources. The request for production specifically excludes reports made by Charter Oaks in connection with the investigation or defense of Mrs. Allen's claim. However, the reports of experts who have been retained solely for consultation in the instant case are immune from discovery. Similarly, reports of experts who have been retained in other pending suits of the same nature and whose reports would be unavailable to the opposing party in such cases are not discoverable for purposes of the instant case absent 'an especially rigorous showing of good cause.' We find no such showing here.⁶⁸

Encompassed within the well established testimonial privilege shielding opinions and conclusions of consulting experts,⁶⁹ are not only the reports of independent and employee consultants which were prepared for the pending litigation, but also the consulting expert reports prepared for other pending although unrelated litigation.⁷⁰ The decision in *Humphreys*, however, greatly limits this protective privilege. Apparently, reports of consulting experts may be discoverable provided the consulting expert has not been employed in connection with the current litigation, and he has not been employed to assist in other unrelated but pending litigation in which his opinions and conclusions would also be protected.⁷¹

Significantly, however, the decision in *Sheppard*, upon which the court in *Humphreys* purported to rely, presented a distinguishable situation. In that case, the question was whether reports of experts who were to testify at trial and which bore a material relation to the issues could be discovered even though not prepared in connection with the instant case. In contrast, the court in *Humphreys* held discoverable reports of experts who would not testify at trial. The explicit basis for the holding in *Sheppard*—that the reports were important in ensuring an effective cross-examination of the testifying experts—was wholly absent in *Humphreys*. Thus, the decision in *Humphreys* represents a significant extension of the *Sheppard* holding. It appears that this might be an unfortunate liberalization of the rule. A consulting expert, whether employed in the pending law suit or in other unrelated law suits, does not provide any evidence in the trial and, therefore, is not a factor in the outcome of the litigation. The rationale for liberalizing the standards for production of expert reports rests on giving the adverse party an opportunity to adequately prepare for cross-examination of expert witnesses. Yet in the instance of a consulting expert who, by defini-

68. *Id.* (citations omitted).

69. See *Ex parte Sheppard*, 513 S.W.2d 813 (Tex. 1974); *Houdaille Indus., Inc. v. Cunningham*, 502 S.W.2d 544 (Tex. 1973).

70. *Allen v. Humphreys*, 20 Tex. Sup. Ct. J. 469 (July 20, 1977); *Ex parte Sheppard*, 513 S.W.2d 813 (Tex. 1974).

71. *Allen v. Humphreys*, 20 Tex. Sup. Ct. J. 469 (July 20, 1977).

tion, will not be a witness at the trial, this rationale is totally inapplicable. The protective shield for consulting experts, however, may be limited to the pending litigation. The net result of the liberalized discovery authorized in *Humphreys* will be an onslaught of pretrial motions for production and discovery with the attendant burdens, costs, and harassment. More importantly, such a rule imposes a substantial burden on trial courts to investigate the origins of the requested consulting expert reports. This introduces collateral matters to burden further the trial court.

The statements of witnesses obtained in connection with the prosecution or defense of a claim likewise are not discoverable under rule 167. Prior to the 1973 amendment rule 167 specifically excluded the statements of witnesses from those matters subject to production.⁷² As a result of the amendment, the exclusionary provision dealing with statements of witnesses was deleted. Notwithstanding this deletion, the scope of discovery remains circumscribed by the traditional privilege of post-occurrence investigation and communications. Consequently, the right of discovery does not extend to written statements of witnesses in the possession of the other party obtained subsequent to the occurrence and in connection with the prosecution or defense of a claim.⁷³ Clearly, a statement that qualifies under the post-occurrence criteria is protected from discovery.

Aside from the other provisions, rule 167 authorizes any person, whether or not a party, to obtain, upon request, a copy of any statement previously made by that individual which is in the possession, custody, or control of any party. This pre-emptive right, which extends to any individual who gives a statement to a litigant, is unencumbered by the good cause requirement applicable to the remaining provisions of the rule.

Statements and communications prepared or made subsequent to an occurrence and in the course of the prosecution or defense of a claim arising out of such occurrence are protected from discovery. As previously noted, the identity and location of potential witnesses and parties, and the reports of experts to be called as witnesses have been specifically removed from this exempt status by the 1973 amendment. Retained within this traditional privilege, however, are the following: written statements of witnesses; written communications passing between agents, representatives, or employees of either party to a suit; and communications between a party and his agents, representatives, and their employees.⁷⁴ In order to qualify, however, the communications or written statements must be made subsequent to the occurrence or transaction and must be made in connection with the prosecution or defense of the claim.⁷⁵ The standards for this traditional privilege

72. TEX. R. CIV. P. 167 (1970).

73. See Keith, *Texas Rules of Civil Procedure*, 36 TEX. B.J. 401, 403 (1973).

74. See generally *Neville v. Brewster*, 163 Tex. 155, 352 S.W.2d 449 (1961); *Munden v. Chambliss*, 315 S.W.2d 355 (Tex. Civ. App.—Dallas 1958, writ ref'd n.r.e.) (privilege must be asserted before the court).

75. Cf. *Highway Ins. Underwriters v. Griffith*, 290 S.W.2d 950 (Tex. Civ. App.—Austin 1956, writ ref'd n.r.e.) (where suit was based on insurer's refusal to pay judgment rendered against its insureds on Oct. 22, reports made by insurer's agent after accident but before judgment were discoverable).

were recently reaffirmed by the supreme court in *Humphreys*. Delineating the parameters of the privilege, the court declared:

Simply stated, this privilege can be invoked where three factors coexist: (1) the material sought to be discovered is either (a) a written statement by a non-expert witness, (b) a written communication between agents, representatives, or employees of either party to the suit, or (c) written communications between any party and his agents, representatives, or their employees; (2) the statement or communication is made subsequent to the occurrence or transaction upon which the suit is based; and (3) the statement or communication is made in connection with the prosecution, investigation, or defense of the particular suit or in connection with the investigation of the particular circumstances out of which it arose.⁷⁶

The privileged status conferred on post-occurrence investigation and communications is strictly construed. In the event communications or statements are furnished to third persons, the privilege against disclosure is waived.⁷⁷ The privilege is not waived, however, if the privileged matters are obtained without the knowledge of the party⁷⁸ since waiver requires an intentional and knowing relinquishment of a privilege.

Photographs made by a party or by experts employed by a party subsequent to an occurrence are likewise subject, with some qualification, to production under rule 167. The term "written communications" has received a literal construction. Accordingly, photographs have not qualified as "written communications passing between agents, representatives or the employees of either party to the suit or communications between any party and its agents, representatives or their employees."⁷⁹

Frequently, parties and non-party expert witnesses take photographs in connection with the preparation of a written report. Photographs taken by parties or their agents are not protected from disclosure. When photographs are an integral component of the written report of an expert witness they assume the character of the over-all report of the expert. In *Houdaille Industries, Inc. v. Cunningham*, for example, the defendant sought production not only of photographs taken by the plaintiff but also photographs taken by several experts employed by the plaintiff to examine the paving project involved in the litigation.⁸⁰ Concluding that photographs attached to expert witness reports assumed the discovery characteristics of the report, the supreme court commented:

In any event, however, photographs that are a constituent of a bona fide report in writing of an expert take on the discovery character of the written report and are governed by the provisions of Rule 167 applicable

76. 20 Tex. Sup. Ct. J. at 471.

77. In *Dobbins v. Gardner*, 377 S.W.2d 665 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.), the court, in a medical malpractice case, concluded that a doctor who not only sent a letter to his insurance carrier, but a copy to another doctor not associated with him, had waived the privilege.

78. *Gass v. Baggerly*, 332 S.W.2d 426 (Tex. Civ. App.—Dallas 1960, no writ) (no waiver of the privilege in regard to a driver's statement which inadvertently came into possession of the attorney for the plaintiff). Voluntary and intentional disclosure of the communications and statements is essential for a waiver. *Dobbins v. Gardner*, 377 S.W.2d 665 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.). See generally *Smith v. City of Dallas*, 425 S.W.2d 467 (Tex. Civ. App.—Dallas 1968, no writ).

79. *Houdaille Indus., Inc. v. Cunningham*, 502 S.W.2d 544, 549 (Tex. 1973).

80. *Id.* at 545.

thereto, i.e., photographs are subject to discovery, or not, as is the written report of which they are an integral part.⁸¹

The decisions in *Houdaille*, *Shepperd*, *Barker*, and *Humphreys* define generally the parameters for production under rule 167. The guidelines announced in these important decisions provide the fundamental criteria for judging the discoverability of information sought pursuant to that rule.

C. Sanctions

The penalties for refusal to make discovery pursuant to a court order under rule 167 are governed by the provisions of rule 170.⁸² Rule 170 provides alternative sanctions in the event any party, officer, or managing agent of a party refuses to obey an order issued by the court. These penalties may include: (1) a determination that designated facts will be taken as established; (2) a loss of the right to support or oppose designated claims or defenses; (3) a prohibition against introducing into evidence designated documents, or items of testimony; (4) a striking of all or part of the pleadings of a party; (5) an abatement of all proceedings pending compliance with the order of the court; (6) a dismissal of the action or a default judgment against the refusing party; and (7) other orders which may be just.

The sanctions authorized by rule 170 are available only in connection with pre-trial discovery under rule 167.⁸³ In the event the court orders production of documents or things during the course of a trial, the rule 170 sanctions for a refusal to comply are inapplicable.⁸⁴ In the actual trial context, contempt provides the available means for enforcing compliance with the order of the court.

The imposition of penalties is addressed to the sound discretion of the trial court.⁸⁵ In the absence of a clear showing of abuse of discretion, the trial court may elect to assess any of the penalties enumerated under the rule.⁸⁶ Penalties may be imposed, however, only after all parties have been furnished adequate notice of the motion to produce and have been afforded a full and fair opportunity to be heard.⁸⁷ Once the party has been afforded a fair opportunity to be heard and refuses or fails to comply with an order of

81. *Id.* at 550.

82. TEX. R. CIV. P. 170; *See Ramsay v. Santa Rosa Medical Center*, 498 S.W.2d 741 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.), *cert. dismissed w.o.j.*, 417 U.S. 938 (1974).

83. The court in *American Cent. Ins. Co. v. Texhoma Stores, Inc.*, 401 S.W.2d 593, 593 (Tex. 1966), specifically noted that the trial court was not authorized to dismiss a cause with prejudice since the assessment of sanctions for failure to make discovery was confined to pre-trial proceedings.

84. *Id.* The court may also prohibit the use of evidence obtained in violation of the terms of a rule 167 order. *Day & Zimmermann, Inc. v. Strickland*, 483 S.W.2d 541 (Tex. Civ. App.—Texarkana 1972, writ ref'd n.r.e.).

85. *United States Leasing Corp. v. O'Neill, Price, Anderson & Fouchard, Inc.*, 553 S.W.2d 11 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ); *Texhoma Stores, Inc. v. American Cent. Ins. Co.*, 424 S.W.2d 466 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.).

86. *Thomas v. Thomas*, 446 S.W.2d 590 (Tex. Civ. App.—Eastland 1969, writ ref'd n.r.e.); *Railway Express Agency v. Spain*, 249 S.W.2d 644 (Tex. Civ. App.—Austin 1952), *dism'd*, 152 Tex. 198, 255 S.W.2d 509 (1953).

87. *Thomas v. Thomas*, 446 S.W.2d 590 (Tex. Civ. App.—Eastland 1969, writ ref'd n.r.e.). In *Sears, Roebuck & Co. v. Hollingsworth*, 156 Tex. 176, 293 S.W.2d 639 (1956), the supreme court noted that the penalties provided by rule 170 are harsh and may be imposed only where all parties are given notice of the motion and are provided a fair opportunity to be heard.

discovery, the trial court may, in its discretion, either impose or refuse to impose any of the penalties authorized by rule 170.⁸⁸

Sanctions are designed to secure compliance with the discovery rules. They do not serve the function of unnecessarily punishing erring parties.⁸⁹ Consequently, it is an abuse of discretion for the trial court to dismiss an action with prejudice for a mere deficiency in form where the erring party possessed no notice of the deficiency.⁹⁰ The full impact of the available sanctions entrusted to the trial courts should be reserved for the truly contumacious party. Willful refusal to comply or an attempt to avoid compliance with authorized and legitimate discovery, however, must be handled with some degree of harshness. In the absence of meaningful and swiftly applied sanctions, many parties blithely ignore, and thereby totally frustrate, the legitimate pretrial discovery process.

Occasionally a court refuses to order production for a myriad of reasons. This may precipitate a mandamus action to compel the trial court to order the requested discovery. Mandamus is an extraordinary remedy available only where the party seeking protection demonstrates a violation of a fundamental right that cannot be corrected or redeemed by any other available remedy of law. The unique nature of this remedy is clearly illustrated in *Crane v. Tunks*⁹¹ and *Maresca v. Marks*.⁹² In both cases the supreme court entertained a mandamus proceeding against the trial court for ordering the wholesale discovery of the income tax returns of a party. Concluding that the action of the trial court constituted an abuse of discretion, the supreme court in *Maresca* noted:

It is self-evident that the maximum protection of privacy is unattainable if trial courts do not exercise their discretion to safeguard from discovery those portions of income tax returns which are irrelevant and immaterial, and it is our view that failure to exercise such discretion is arbitrary action. A litigant so subjected to an invasion of his privacy has a clear legal right to an extraordinary remedy since there can be no relief on appeal; privacy once broken by the inspection and copying of income tax returns by an adversary cannot be retrieved.⁹³

Recently, the supreme court, relying on *Crane* and *Maresca*, has entertained mandamus actions for abuse of discretion by the trial court in refusing to order discovery. In *Barker v. Dunham*,⁹⁴ the supreme court issued a mandate ordering the trial court to compel disclosure of certain expert opinions. The court simply relied upon *Crane* and *Maresca* without any discussion. Shortly thereafter, the supreme court again considered a mandamus action when the trial court denied a motion for production of information in *Allen v. Humphreys*.⁹⁵ Relying on *Barker*, the court concluded that a mandamus action was an appropriate remedy for an abuse of discretion by the trial court in *denying* discovery.

88. See, e.g., *Hankins v. Haffa*, 469 S.W.2d 733 (Tex. Civ. App.—Amarillo 1971, no writ).

89. *United States Leasing Corp. v. O'Neill, Price, Anderson & Fouchard, Inc.*, 553 S.W.2d 11, 13 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ).

90. *Id.*

91. 160 Tex. 182, 328 S.W.2d 434 (1959).

92. 362 S.W.2d 299 (Tex. 1962).

93. *Id.* at 301.

94. 551 S.W.2d 41 (Tex. 1977).

95. 20 Tex. Sup. Ct. J. 469 (July 20, 1977).

The use of the mandamus remedy when discovery has been denied ostensibly contravenes the limitation articulated in *Pope v. Ferguson*⁹⁶ that mandamus may not be utilized to correct interlocutory trial court rulings in which the right of appeal exists. This prohibition against the use of mandamus when the remedy of appeal is available is entirely consistent with the supreme court's prior decisions in *Crane* and *Maresca* which granted mandamus to safeguard relators from disclosure of privileged information that had been ordered produced by the trial court. The basis for the mandamus relief in *Crane* and *Maresca* was the fact that relator was afforded no relief by appeal because once the privileged information was produced and made public, it could not be retrieved. This simply is not applicable to a denial of discovery since appeal constitutes an effective and available remedy. This distinction was either overlooked or was impliedly repudiated by the supreme court in *Barker* and *Allen*.

If *Barker* and *Humphreys* represent a liberalization of the mandamus remedy, the supreme court may well anticipate a veritable siege of mandamus actions. Each time a request for discovery is rebuffed by the trial court, another petition for mandamus relief will be filed with the supreme court. Meanwhile the central litigation languishes as the series of mandamus actions is contested. Therefore, the mandamus remedy should properly be invoked to protect parties only when discovery of privileged information is ordered by the trial court and no other effective remedy for protection is available.

II. PHYSICAL AND MENTAL EXAMINATION OF PERSONS UNDER RULE 167a

A. General Considerations

The provisions of rule 167a⁹⁷ constitute an innovation in the Texas practice and are patterned, in substantial measure, after the Federal Rules of Civil Procedure.⁹⁸ Rule 167a provides that when the mental or physical condition of a party or a person under the legal control of a party is in controversy, the court may order the party to submit to a physical or mental examination or produce the person under his control for such an examination. This rule abrogates the landmark case of *Austin & North Western Railroad v. Cluck*,⁹⁹ which rejected the inherent right of a court to order the physical examination of any party.

Good cause is a prerequisite for obtaining a medical or mental examination of a party. This means that the moving party must establish not only that the information requested is necessary and not otherwise available from other sources, but that the examination is material to some issue in the litigation.¹⁰⁰

A cause of action seeking damages for personal injuries satisfies the good

96. 445 S.W.2d 950 (Tex. 1969), cert. denied, 397 U.S. 997 (1970).

97. TEX. R. CIV. P. 167a.

98. FED. R. CIV. P. 35.

99. 97 Tex. 172, 77 S.W. 403 (1903).

100. *Johnson v. Logwood*, 430 S.W.2d 679 (Tex. Civ. App.—Texarkana 1968, writ ref'd n.r.e.); *Texhoma Stores, Inc. v. American Cent. Ins. Co.*, 424 S.W.2d 466 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.).

cause predicate. In *Schlagenhauf v. Holder*¹⁰¹ the United States Supreme Court considered the issue of good cause in connection with a medical examination sought under rule 35, the federal rule after which the Texas rule was patterned. The Court declared:

A plaintiff in a negligence action who asserts mental or physical injury . . . places that mental or physical injury clearly in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury. This is not only true as to a plaintiff, but applies equally to a defendant who asserts his mental or physical condition as a defense to a claim¹⁰²

In addition to the good cause requirement, the movant is obligated to demonstrate that the physical or mental condition of a party is "in controversy" in order to obtain an examination.¹⁰³ This means that the mental or physical condition of a party must be *immediately and directly* in dispute in the litigation and not merely incidentally or collaterally involved.¹⁰⁴ For example, an injured party seeking damages for traumatically caused diminution or loss of eyesight clearly brings the condition of his eyesight into controversy. Conversely, an allegation by the claimant that the defendant failed to keep a proper lookout does not put the condition of defendant's eyesight into controversy. If, however, the claimant alleges that the defendant-employer was negligent in employing a truck driver who was blind by industry standards, then the condition of the driver's eyesight would satisfy the "in controversy" requirement. The "in controversy" requirement expresses a judicial concern for the historic inviolability of an individual's right to the privacy of his person.

Even when the "good cause" and "in controversy" requirements are satisfied, the decision to order an examination is still within the sound discretion of the trial court. The court's discretion serves as a protection to a party whose feelings and reputation might be irreparably injured by an unwarranted disclosure.¹⁰⁵ Of course, the exercise of discretion is not absolute and unfettered. This is particularly true when the court refuses the requested examination, as distinguished from ordering an examination, since discretion is designed to facilitate a full disclosure and not to allow suppression of material facts.

The movant is obligated to provide notice to the person to be examined and to all parties. In an ex parte proceeding, where the only notice of a proposed psychiatric or physical examination is service of a copy of the motion upon the adversary counsel of record, the provision that notice be given "to the person to be examined" is not satisfied.¹⁰⁶ The purpose of the notice requirement is to give the person to be examined prior notice and an

101. 379 U.S. 104 (1964); *accord*, *Lewis v. Neighbors Constr. Co.*, 49 F.R.D. 308 (W.D. Mo. 1969).

102. 379 U.S. at 119.

103. *C.E. Duke's Wrecker Serv., Inc. v. Oakley*, 526 S.W.2d 228 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).

104. *See Schlagenhauf v. Holder*, 379 U.S. 104 (1964). *See also* *Stuart v. Burford*, 42 F.R.D. 591 (N.D. Okla. 1967); *Wadlow v. Humberd*, 27 F. Supp. 210 (W.D. Mo. 1939).

105. *See, e.g., Hardy v. Riser*, 309 F. Supp. 1234, 1241 (N.D. Miss. 1970). *See also* *Bucher v. Krause*, 200 F.2d 576 (7th Cir. 1952), *cert. denied*, 345 U.S. 997 (1953).

106. *See, e.g., Liechty v. Terrill Trucking Co.*, 53 F.R.D. 590, 591 (E.D. Tenn. 1971).

opportunity to be heard in opposition before the order for mental or physical examination is issued by the court.¹⁰⁷

Rule 167a further requires that an order for examination "shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made." In exercising its discretion the trial court must: (1) set forth the specifications of the examination;¹⁰⁸ (2) designate the time of examination;¹⁰⁹ (3) determine the examination site;¹¹⁰ (4) define the conditions and scope of the examination;¹¹¹ (5) outline the permissible number of examinations;¹¹² (6) determine whether the examined party's attorney or physician may be present at the examination;¹¹³ (7) appoint the examining physician;¹¹⁴ and (8) determine the number of examining physicians.¹¹⁵

For purposes of a physical or mental examination, a litigant need not occupy the status of an opposing party. The right to a physical or mental examination, upon showing of good cause, extends to any party, including a co-defendant.¹¹⁶ Further, the parents or guardian of a minor claimant may be ordered to produce the minor plaintiff for an examination. The addition of the provision "or a person under the legal control of a party" to the federal rule was, in fact, specifically intended to effect this result.¹¹⁷ The legal control contemplated by this rule, however, is ostensibly confined to persons who are parties and in all likelihood does not extend to non-parties.¹¹⁸

The procedure under this rule must be initiated by one other than the party to be examined.¹¹⁹ In addition, absent other compelling considerations, the moving party is entitled to an examination by a physician of its own choosing.¹²⁰ This is not, however, an absolute right.¹²¹ The selection of an examin-

107. *See, e.g.*, *Lindsey v. Escudé*, 179 So. 2d 505, 506-07 (La. Ct. App. 1965).

108. *See, e.g.*, *Schlagenhauf v. Holder*, 379 U.S. 104 (1964); *Main v. Tony L. Sheston-Luxor Cab Co.*, 249 Iowa 973, 89 N.W.2d 865 (1958).

109. *See, e.g.*, *Randolph v. McCoy*, 29 F. Supp. 978, 979 (S.D. Tex. 1939).

110. *See, e.g.*, *Baird v. Quality Foods, Inc.*, 47 F.R.D. 212, 213 (E.D. La. 1969); *Pierce v. Brovig*, 16 F.R.D. 569, 570 (S.D.N.Y. 1954).

111. *See, e.g.*, *Klein v. Yellow Cab Co.*, 7 F.R.D. 169, 170 (N.D. Ohio 1944).

112. *See, e.g.*, *Lewis v. Neighbors Constr. Co.*, 49 F.R.D. 308, 309 (W.D. Mo. 1969); *Vopelak v. Williams*, 42 F.R.D. 387, 389 (N.D. Ohio 1967).

113. *See, e.g.*, *Gonzi v. Superior Court*, 51 Cal. 2d 586, 335 P.2d 97 (1959) (party's attorney allowed to be present at examination).

114. *See, e.g.*, *Stuart v. Burford*, 42 F.R.D. 591, 592-93 (N.D. Okla. 1967).

115. *See, e.g.*, *Bowing v. Delaware Rayon Co.*, 38 Del. 206, 190 A. 567, 568-69 (Super. Ct. 1937).

116. *See Schlagenhauf v. Holder*, 379 U.S. 104 (1964).

117. Advisory Committee's Explanatory Statement, Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 487, 529 (1970).

118. *See Kropp v. General Dynamics Corp.*, 202 F. Supp. 207 (E.D. Mich. 1962) (court recognized the absence of power to compel persons not parties to submit to an examination). *But cf. Schlagenhauf v. Holder*, 379 U.S. 104, 115-16 (1964) (person to be examined must be a party but need not be an adverse party vis-à-vis party seeking the examination). *See also Dinsel v. Penn. R.R.*, 144 F. Supp. 883 (W.D. Pa. 1956). In *Dinsel* the court held that it had authority to order an examination of an employee of defendant where the plaintiff alleged that defendant employer was negligent in permitting the employee to perform work requiring good vision. The employee, however, was not a party to the suit. *Dinsel* has been criticized as contrary to the policy of the rule. 4A MOORE'S FEDERAL PRACTICE 35-16 n.5 (1970). *See generally* Advisory Committee's Explanatory Statement, note 117 *supra*.

119. *C.E. Duke's Wrecker Serv., Inc. v. Oakley*, 526 S.W.2d 228 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).

120. *See, e.g.*, *Liechty v. Terrill Trucking Co.*, 53 F.R.D. 590 (E.D. Tenn. 1971).

121. *See id.*; *Stuart v. Burford*, 42 F.R.D. 591 (N.D. Okla. 1967); *The Italia*, 27 F. Supp. 785 (E.D.N.Y. 1939).

ing physician falls within the ambit of judicial discretion.¹²²

An order for a physical or mental examination does not foreclose the court from ordering additional examinations.¹²³ Generally, a second court ordered examination is warranted when (1) a party suffers multiple injuries calling for analysis by separate specialties; (2) a change in the condition of the injured party occurs subsequent to the initial examination; or (3) the physician examining the party requires consultation with other physicians in order to reach a diagnosis.¹²⁴ These additional examinations are governed by the sound discretion of the trial court. Since the purpose of rule 167a is to provide both parties with an opportunity to fully evaluate the physical or mental condition in issue, the court should exercise its discretion liberally in favor of a sufficient number of examinations to provide the jury with adequate and comprehensive information.

Rule 167a provides that an examinee must receive on request a copy of a detailed written report of the examining physician setting out his findings, including tests, diagnoses, and conclusions. Nevertheless, the written report required under this rule apparently does not extend to or encompass the physician's office notes.¹²⁵ Thereafter, the party moving for the examination is likewise entitled, upon request, to receive from the examinee any like report of any examination previously or subsequently made of the same condition, unless the examined party shows he is unable to obtain it. The duty of the examinee to give the moving party all previous and subsequent medical reports, however, arises only if the examinee first requests and receives a report. Thus, to qualify for a reciprocal exchange of medical reports, it appears necessary that the examinee request and receive delivery of the written report of the physician examining the party pursuant to the order of the court.¹²⁶

The provisions of the rule apply to examinations made pursuant to agreement of the parties as well as those undertaken in compliance with the order of the court. Similarly, the rule does not pre-empt the right of a party to discovery of a report of a treating physician or the taking of a deposition of the physician in accordance with other rules.¹²⁷

Unlike its federal counterpart, the Texas rule expressly provides that in the event no examination is sought, either by agreement or under the rule, the party whose physical or mental condition is in controversy shall not comment to the court or jury (1) on his willingness to submit to an examination; (2) on the right of the other party to request a physical or mental examination or to move for a court order for such physical or mental

122. See *Leach v. Grief Bros. Cooperage Corp.*, 2 F.R.D. 444 (S.D. Miss. 1942); *The Italia*, 27 F. Supp. 785 (E.D.N.Y. 1939).

123. See *Vopelak v. Williams*, 42 F.R.D. 387 (N.D. Ohio 1967).

124. See, e.g., *Mayer v. Illinois N. Ry.*, 324 F.2d 154 (7th Cir. 1963), cert. denied, 377 U.S. 907 (1964); *Stuart v. Burford*, 42 F.R.D. 591 (N.D. Okla. 1967); *Vopelak v. Williams*, 42 F.R.D. 387 (N.D. Ohio 1967); *Marshall v. Peters*, 31 F.R.D. 238 (S.D. Ohio 1962); *Hildyard v. Western Fasteners Inc.*, 33 Colo. App. 396, 522 P.2d 596 (1974) (recognizing the three bases for a second examination).

125. See *Weir v. Simmons*, 233 F. Supp. 657 (D. Neb. 1964).

126. In *Hardy v. Riser*, 309 F. Supp. 1234 (N.D. Miss. 1970), the court emphasized the necessity of a request by the examinee plus delivery of the report as necessary to invoke reciprocity.

127. TEX. R. CIV. P. 167b(2). See generally *Leszynski v. Russ*, 29 F.R.D. 10 (D. Md. 1961).

examination; or (3) on the failure of the other party to move or request a mental or physical examination.¹²⁸ This prohibition was designed to eliminate the practice of the plaintiff commenting to the jury that he has always been ready and willing to submit to any requested medical examination if the opposing party contested the extent or effect of the injury. The mandatory nature of this prohibition was recognized in *C. E. Duke's Wrecker Service, Inc. v. Oakley*.¹²⁹ The attorney for the plaintiff stated to the jury that "don't you know they would have got their own doctor, any doctor in this county . . . or anywhere they wanted to go to examine her if they disputed [the plaintiff's physical condition]." ¹³⁰ Concluding that this argument presented reversible error, the appellate court observed: "The appellants were entitled to prepare their case for trial on the assumption that the trial court would not permit the introduction of such evidence. They were not required to anticipate that the trial court would fail to follow a *mandatory* rule of procedure."¹³¹

B. Sanctions

Rule 167a fails to provide any sanctions for the refusal of a party to submit to a physical or mental examination ordered by the court. The provisions of rule 170 and rule 215a¹³² were not amended to govern the failure to comply with a court order under rule 167a. The federal rule, which is the pattern for rule 167a, provides specific sanctions for the failure to comply with a court ordered examination.¹³³ It would, therefore, appear that the only remedy available is a contempt action against the refusing party. Significantly, federal rule 37(b)(2)(D) prohibits use of a contempt action for failure to comply with an order for a physical or mental examination.

Rule 167a provides that the court may order a party to deliver a report of physical or mental examinations under terms that the court deems just.¹³⁴ If the physician fails or refuses to prepare a report of the results of an examination, the court is authorized to exclude the testimony of the physician when offered at the trial. When confronted with a claimant unwilling to comply with a court ordered examination, perhaps the court may prohibit the claimant's physicians from testifying at the trial. This procedure appears to be the only alternative available to enforce rule 167a discovery orders in the absence of a specific amendment to either rule 170 or rule 215a.

III. INTERROGATORIES TO PARTIES UNDER RULE 168

A. General Considerations

Rule 168¹³⁵ provides that any time after appearance in a cause, a party may serve written interrogatories to be answered by the adverse party. The party

128. See *C.E. Duke's Wrecker Serv., Inc. v. Oakley*, 526 S.W.2d 228 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).

129. *Id.*

130. *Id.* at 234.

131. *Id.*

132. TEX. R. CIV. P. 215a.

133. FED. R. CIV. P. 37(b)(2)(D).

134. See generally *Chastain v. Evannou*, 35 F.R.D. 350, 353 (D. Utah 1964).

135. TEX. R. CIV. P. 168.

is required to specify a time for the filing of answers. Under the recent amendment to rule 168, effective January 1, 1978, the minimum time allowed the answering party has been extended from fifteen to thirty days after the service of interrogatories.¹³⁶

The answering party is obligated to supplement answers to interrogatories when subsequently obtained information demonstrates that: (1) the answer was incorrect when made; or (2) the answer although correct when made is no longer true and the failure to amend the answer would constitute a knowing concealment.¹³⁷ A party may also be obligated to amend or supplement answers pursuant to an order of the court. This provision effectively overrules the decision in *Coca Cola Bottling Co. v. Mitchell*,¹³⁸ in which the court announced that the plaintiff was under no duty to advise the defendant by supplemental answers to interrogatories of additional doctors consulted by the plaintiff subsequent to answering interrogatories. Therefore, after proper service of the interrogatories, a party must update and correct answers with current information as new witnesses are located and additional expert witnesses are employed. The duty to supplement, of course, depends on the nature and scope of the interrogatories. Interrogatories requesting the names of all experts expected to be called at trial and the subject matter about which they are expected to testify undoubtedly impose on the adverse party a duty to supplement prior to trial. All too frequently the duty to supplement is interpreted to require, as a predicate, the filing of a supplemental set of interrogatories. This erroneous presumption is generated by the failure to recognize the effect of the recent modifications of rule 168. In fact, rule 168 establishes a continuing duty to supplement in the event that additional information makes an original answer incorrect or misleading.

The opposing party is obligated to identify any individuals expected to be called as expert witnesses. The interrogatory, however, must specifically request the identity of experts expected to be called at trial. An interrogatory that merely requests the names of *any and all* witnesses expected to be called at trial is insufficient to require the answering party to provide the names either of experts or other witnesses expected to testify.¹³⁹ It is thus vitally important that the interrogatory limit the scope of inquiry to *experts* expected to be called as witnesses.

Occasionally, a party realizes that an answer to an interrogatory already filed is erroneous. The trial court possesses the prerogative, upon proper request, to permit a party to withdraw a previously filed answer to an interrogatory and to substitute a modified or amended answer. If an answer is changed, however, the adverse party may utilize the former answer as a basis for impeachment.¹⁴⁰ Inconsistent statements made in response to pre-

136. See TEX. R. CIV. P. 168.

137. *Meyerland Co. v. Palais Royal of Houston, Inc.*, 557 S.W.2d 534 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).

138. 423 S.W.2d 413 (Tex. Civ. App.—Corpus Christi 1967, no writ).

139. *Meyerland Co. v. Palais Royal of Houston, Inc.*, 557 S.W.2d 534 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).

140. *Thomas v. International Ins. Co.*, 527 S.W.2d 813 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.).

trial discovery occupy no different status for impeachment purposes than inconsistent written statements made by a party prior to the lawsuit.

If answers to interrogatories may be ascertained from the business records of the party and the burden of finding the answers is substantially the same for the party serving the interrogatories as for the party served, it is sufficient to specify the records from which the answers may be obtained and to afford the serving party an opportunity to examine and inspect such records. Prior to the 1973 amendment, rule 186b provided the only protection against incurring the expense required in searching through voluminous records. The new provision was designed to alleviate the onerous burden imposed on parties who would otherwise be compelled to search voluminous records for the benefit of others.¹⁴¹

Compliance, of course, requires the answering party to designate the specific records or documents that contain the information sought to be elicited by the interrogatories.¹⁴² The answering party must demonstrate that the burden of obtaining the information from the records would be substantially the same for both the serving party and the party served.¹⁴³ This provision in actual practice is really more of a palliative than a workable alternative to exhaustive search of voluminous records. It is rare indeed that a party is willing to give the adversary carte blanche to roam through private business records and documents. In all likelihood, therefore, the limitations authorized under rule 186b will remain the most effective protection.

The answers to interrogatories must now be signed by the individual making the answers. If the party is a corporation or other legal entity, the officer or agent furnishing the information must sign the answer. This provision supersedes rule 14 which authorizes the attorney of record for a party to sign affidavits in behalf of the client.

The rule expressly requires a party to file written objections to the interrogatories that are not answered. The time allowed an answering party to file written objections has been extended by the recent amendment to rule 168, effective January 1, 1978, from ten to fifteen days after service.¹⁴⁴ The failure to file objections in accordance with the provisions of the rule jeopardizes the right to test the propriety of the information sought in the interrogatory.¹⁴⁵ It has been suggested that the failure to file timely objections does not waive the protection accorded privileged matters.¹⁴⁶ Most privileges, however, may be waived. Arguably, a failure to promptly object as required by rule 168 represents a conscious choice to surrender the privilege and thereby constitutes a waiver. This is consistent, for example, with the rule that failure to designate an expert as a consultant who will not

141. See also FED. R. CIV. P. 33(c).

142. See, e.g., *Budget Rent-A-Car of Mo., Inc. v. Hertz Corp.*, 55 F.R.D. 354 (W.D. Mo. 1972); *In re Master Key*, 53 F.R.D. 87 (D. Conn. 1971).

143. See *Thomason v. Leiter*, 52 F.R.D. 290 (N.D. Ala. 1971).

144. See TEX. R. CIV. P. 168.

145. See, e.g., *Davis v. Romney*, 53 F.R.D. 247 (E.D. Pa. 1971); *Bohlin v. Brass Rail, Inc.*, 20 F.R.D. 224 (S.D.N.Y. 1957); *Champion Mobil Homes v. Rasmussen*, 553 S.W.2d 237 (Tex. Civ. App.—Tyler 1977, no writ).

146. See, e.g., *Cleminshaw v. Beech Aircraft Corp.*, 21 F.R.D. 300 (D. Del. 1957). *But see* *Champion Mobil Homes v. Rasmussen*, 553 S.W.2d 237 (Tex. Civ. App.—Tyler 1977, no writ).

be called as a witness waives the right to assert the privilege of non-disclosure otherwise accorded a consultant.¹⁴⁷

Another amendment to rule 168, effective January 1, 1978, recommends that the answering party set out each answer in a space to be provided immediately following each interrogatory.¹⁴⁸ In this manner the document filed as an answer can be understood without referring to the original set of interrogatories. This procedure parallels the federal practice and simplifies the procedure for introducing the interrogatories and answers into evidence during trial. Answers to interrogatories filed with the clerk of the court do not automatically become part of the record. Therefore, information contained in answers to interrogatories, in order to constitute evidence of probative value, must be formally introduced. The use of rule 168 is limited to pre-trial proceedings. Consequently, rule 168 may not be employed on a motion for a new trial, or other post-trial matters.¹⁴⁹

B. *Information Discoverable Through Interrogatories*

The scope of discovery authorized by rule 168 is coextensive with discovery permitted under rule 186a. Both the latitude of discovery and the limitations on disclosure are demonstrably affected by the provisions of rule 186a.

The identity and location of any potential party or witness possessing relevant information is discoverable. Previously, the identity and location of witnesses or potential parties obtained during a post-occurrence investigation were privileged. The recent modification of rule 168 effectively overrules *Ex parte Hanlon*,¹⁵⁰ in which the supreme court declared that the name and address of a witness obtained by a claims investigator subsequent to an accident and in connection with the defense of a claim was protected from discovery. This reflects a movement by the supreme court to discourage the traditional adversary philosophy of trial by ambush and to encourage a fair and balanced search for the truth.

It is, however, important to distinguish between witnesses possessing relevant information and those witnesses, other than expert witnesses, that a party intends to call at the trial. In *Employers Mutual Liability Insurance Co. v. Butler*,¹⁵¹ prior to voir dire examination, the plaintiff requested, and the trial court ordered, defense counsel to supply the names of all witnesses that the defendant intended to *call at the trial*. During the trial, the defendant attempted to call as a witness an individual whose name was not furnished to the plaintiff and the trial court refused to permit defense counsel to call the previously unidentified individual as a witness. In condemning the trial court action, the court of civil appeals observed:

Recent amendments to that and other rules now clearly permit, with certain limitations the discovery of 'persons, including experts, having

147. *Barker v. Dunham*, 551 S.W.2d 41 (Tex. 1977).

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

149. *Vega v. Royal Crown Bottling Co.*, 526 S.W.2d 729 (Tex. Civ. App.—Corpus Christi 1975, no writ); *Ana-log, Inc. v. City of Tyler*, 520 S.W.2d 819 (Tex. Civ. App.—Tyler 1975, no writ).

150. 406 S.W.2d 204 (Tex. 1966).

151. 511 S.W.2d 323 (Tex. Civ. App.—Texarkana 1974, writ ref'd n.r.e.).

knowledge of relevant facts.' See Rules 167, 168, 170, 186a and 215a. There is a recognized distinction, however, between 'persons having knowledge of relevant facts' and 'witnesses who will be called [to testify] at the trial.' . . . According to the great weight of authority, pre-trial rules such as ours which permit the discovery of 'persons having knowledge of relevant facts' (fact witnesses), do not authorize compelling a party to reveal the witnesses he expects to call at the trial (persons by whom he expects to prove his cause of action) Various reasons have been advanced in the cases for this rule. It has been suggested that the forced revelation of the witnesses counsel expects to use at the trial would violate the 'work product' exemption recognized by almost all discovery rules, because counsel's decision in this respect is actually a part of his trial strategy It has also been mentioned that contrary interpretation would be difficult to equitably enforce, as so many unpredictable and uncontrollable circumstances dictate the use or non-use of a witness at the trial which do not affect the identity of 'persons having knowledge of relevant facts.'¹⁵²

Under the provisions of rules 167 or 168, a party must disclose the identity of all persons possessing knowledge of *relevant* facts. A party is not, however, obligated to disclose the identity of witnesses, other than expert witnesses, expected to be called at the time of trial. Such disclosure not only would transgress the work product privilege,¹⁵³ but also would unnecessarily interfere with counsel's tactics and strategy as the trial unfolds.

The mental impressions and opinions of experts utilized solely for consultation and who will not be called as witnesses at the trial also remain privileged. The federal rule likewise exempts from discovery the mental impressions, opinions, and conclusions of consulting experts.¹⁵⁴ The federal rule provides, however, that discovery may be obtained upon a showing of "exceptional circumstances" under which it is impractical for the party seeking discovery to obtain factual opinions on the same subject by other means.¹⁵⁵ The Texas rule does not incorporate the "exceptional circumstances" provision of the federal rule. The supreme court, however, has judicially formulated a second type of good cause denominated "an especially rigorous showing of good cause."¹⁵⁶ In adopting the "especially rigorous showing of good cause" standard, the supreme court has acknowledged that reports prepared by consulting experts for other pending lawsuits could be deprived of the existing privilege and subjected to discovery.¹⁵⁷ The judicial adoption of the "especially rigorous showing of good cause" standard ostensibly injects into the Texas rules a form of the "exceptional circumstances" standard of the federal rules.

The recent decision in *Allen v. Humphreys*,¹⁵⁸ although involving the production of documents under rule 167, creates some confusion on the

152. *Id.* at 324 (citations omitted).

153. TEX. R. CIV. P. 186a. See generally *Lopresti v. Wells*, 515 S.W.2d 933 (Tex. Civ. App.—Fort Worth 1974, no writ). See also *Meyerland Co. v. Palais Royal of Houston, Inc.*, 557 S.W.2d 534 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).

154. FED. R. CIV. P. 26(b)(4)(B).

155. *Id.*

156. *Allen v. Humphreys*, 20 Tex. Sup. Ct. J. 469, 472 (July 20, 1977); *Ex parte Shepperd*, 513 S.W.2d 813, 817 (Tex. 1974).

157. See text accompanying notes 61-71 *supra*.

158. 20 Tex. Sup. Ct. J. 469 (July 20, 1977).

extent of the privilege shielding consulting expert reports and tests from other forms of discovery. Clearly, the test and survey results of an expert employed as a consultant in the pending action are protected from discovery.¹⁵⁹ Individuals protected by this privilege include officers and employees of a party who are designated as consultants for purposes of the pending action.¹⁶⁰ In *Humphreys*, however, the supreme court has nullified the privileged status of test results, conclusions, and opinions of consulting experts prepared in other litigation that is not pending. The basis for nullifying this privilege is premised on the fact that such tests or examinations were not made subsequent to the occurrence in question and were not undertaken in connection with the prosecution or defense of the pending action;¹⁶¹ hence, the tests or examinations are not technically within the ambit prescribed by the rules.

The real basis for protecting from disclosure the observations, opinions, and conclusions of a consulting expert, however, is the fact that the consultant does not provide any evidence in the trial of the case and is not a factor in the litigation. The same rationale applies with equal vigor to the observations, opinions, and conclusions of consulting experts in other similar litigation that has previously been terminated. Qualification of the consulting expert opinion privilege introduces into the discovery process an unneeded degree of uncertainty and an invitation to become embroiled in collateral issues. Either a consulting expert is a consultant or he is an expert expected to be called as a witness at the trial. It is unfortunate that the court has now created a hybrid, for purposes of discovery, who is neither a consulting expert nor a testifying expert. The opinions and conclusions of such a hybrid expert may now be discovered under either a motion to produce or interrogatories requesting all pertinent data prepared by the consulting expert for other litigation upon a showing of especially good cause.

The substance of written statements of witnesses that are obtained subsequent to an occurrence and made in connection with the prosecution or defense of a claim remain protected from disclosure. Post-occurrence statements and communications which are made in connection with the investigation, prosecution, or defense of a claim are accorded a qualified privilege and are not discoverable under either rule 168 or rule 186a. As a caveat, however, rule 167 entitles any person, upon request, to obtain a copy of a statement given by him to any party in the litigation.

Disclosure of the legal contentions of a party are not contemplated by rule 168. Contentions involve ultimate conclusions of fact and law which are beyond the ambit of a pre-trial discovery.¹⁶² Inquiry into the contentions of a

159. TEX. R. CIV. P. 186a; *accord*, *Ex parte Shepperd*, 513 S.W.2d 813 (Tex. 1974); *Houdaille Indus., Inc. v. Cunningham*, 502 S.W.2d 544 (Tex. 1973).

160. *Barker v. Dunham*, 551 S.W.2d 41 (Tex. 1977).

161. 20 Tex. Sup. Ct. J. at 472.

162. *Cf. Sanders v. Harder*, 148 Tex. 593, 227 S.W.2d 206 (1950) (rule designed to eliminate matters about which there is no real controversy); *White v. Watkins*, 385 S.W.2d 267 (Tex. Civ. App.—Waco 1964, no writ) (rule extends only to matters of fact and hence does not include opinions, conclusions, or subjective intent); *Gore v. Cunningham*, 297 S.W.2d 287 (Tex. Civ. App.—Beaumont 1956, writ ref'd n.r.e.) (rule does not contemplate admissions to points of law). *But see Steely & Gayle, Operation of the Discovery Rules*, 2 HOUS. L. REV. 222, 230 (1964), in which the authors adopt a contrary position.

party under the federal practice is authorized by the express language of rule 33.¹⁶³ Unlike federal practice, in Texas the special exceptions provide the procedural vehicle for compelling a party to particularize contentions and to clarify imprecisely formulated allegations. Pre-trial determination of evidentiary facts, and not conclusory allegations, undergirds the discovery process.

Rule 168 is explicit in requiring an answering party to identify each person expected to be called as an expert witness at the trial and to state the subject matter concerning which the expert is expected to testify. Prior to 1973, the identity of expert witnesses and their opinions, conclusions, and findings were shielded from discovery.¹⁶⁴ Good cause is not a prerequisite for obtaining information on expert witnesses. The scope of discovery under rule 168, however, is probably limited to the name of the expert and the subject matter on which he will testify.

Similarly, the work product of an attorney is protected against discovery. The work product doctrine was incorporated in the recent amendment to rule 186a which, of course, extends to rule 168. The work product doctrine was articulated by the Supreme Court in *Hickman v. Taylor*,¹⁶⁵ in which the plaintiff sought to discover from the attorney representing the defendant memoranda of interviews and written statements of survivors of a tugboat accident. Although the Supreme Court declared that the information developed by the defense attorney was not encompassed within the attorney-client privilege, the court concluded that public policy compelled protection of the attorney's files against unwarranted incursions by the opposing party. In defining the work product immunity, the Supreme Court stated: "This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case as the 'work product of the lawyer.'" ¹⁶⁶ In *Richards-Wilcox Manufacturing Co. v. Young Spring & Wire Corp.* the court observed: "[A]ttorney's work product can generally be defined to encompass writings, statements or testimony which would substantially reflect or invade an attorney's legal impressions or legal theories as to a pending or reasonably anticipated litigation. An attorney's legal impressions and theories would include his tactics, strategy, opinions and thoughts."¹⁶⁷

It has been argued that the work product immunity may be waived by disclosure of the subject matter to a third party.¹⁶⁸ In view of the public policy rationale designed to prevent unjustified incursions into an attorney's

163. FED. R. CIV. P. 33(b) specifically provides that an interrogatory is not objectionable because it involves an "opinion" or "contention."

164. See, e.g., *State v. Ashworth*, 484 S.W.2d 565 (Tex. 1972); *Shirley v. Dalby*, 384 S.W.2d 362 (Tex. Civ. App.—Texarkana 1964, writ ref'd n.r.e.).

165. 329 U.S. 495 (1947).

166. *Id.* at 511.

167. 34 F.R.D. 212, 213 (N.D. Ill. 1964). See generally *In re Murphy*, 560 F.2d 326 (8th Cir. 1977).

168. Cf. *McCullough Tool Co. v. Pan Geo Atlas Corp.*, 40 F.R.D. 490 (S.D. Tex. 1966) (while resting decision on other grounds, court agreed that qualified privilege waived when attorney allowed third parties to view notes).

files, any waiver of the privilege should be dependent upon a conscious and deliberate choice.

The rules of discovery, including interrogatory practice, apply with equal effect to the state. In *Texas Department of Corrections v. Herring*¹⁶⁹ the plaintiff, a prisoner at the Texas Department of Corrections at Huntsville, received a facial injury in a basketball game and subsequently lost the sight of his eye as the result of alleged inadequate medical care and treatment. The plaintiff served written interrogatories on the Department of Corrections through the attorney general. The attorney general, representing the Texas Department of Corrections, moved to strike the interrogatories on the basis that rule 168 did not apply to the state. The state relied on article 4411 which provides that "no admission, agreement or waiver made by the Attorney General, in any action or suit in which the State is a party shall prejudice the rights of the State." Overruling a prior court of civil appeals' opinion¹⁷⁰ the supreme court declared:

Article 4411, the statute relied on by the Court of Civil Appeals in *Harrington* [385 S.W.2d 411], prohibits the Attorney General from making any 'admission, agreement, or waiver' that prejudices the State; yet Rule 168 operates only to clarify *facts*. This court does not believe that the State will be in any way prejudiced by a full revelation of the *facts* involved in a case; the Attorney General will not be called upon to make admissions, agreements and waivers. The Department of Corrections argues that Rule 168 does not refer specifically to the State. However, other rules of civil procedure referring only to 'parties' have been applied to the State. *Bednarz v. State*, *supra*. Extensive authority supports the proposition that the State is bound by the rules of civil procedure *unless* special provisions provide otherwise.¹⁷¹

The supreme court thus recognized that requiring the state to respond to interrogatories under rule 168 was not inconsistent with and did not contravene the prohibitions imposed by article 4411. When the state is a party, the Rules of Civil Procedure are, therefore, to be applied to the state as they would be to any other entity.¹⁷²

C. Sanctions

Upon the refusal of a party to answer an interrogatory, rule 168 authorizes the movant, upon reasonable notice, to apply to the courts for an order compelling answers to any interrogatory. The rule further provides that the court is authorized to award reasonable expenses, including a reasonable attorney's fee, in connection with obtaining the order. If a party further

169. 513 S.W.2d 6 (Tex. 1974). See also *Lowe v. Texas Tech Univ.*, 540 S.W.2d 297 (Tex. 1976); *Mokry v. University of Texas Health Science Center*, 529 S.W.2d 802 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.).

170. *Harrington v. State*, 385 S.W.2d 411 (Tex. Civ. App.—Austin 1964), *rev'd on other grounds*, 407 S.W.2d 467 (Tex. 1966), *cert. denied*, 386 U.S. 944 (1967).

171. 513 S.W.2d at 8 (emphasis in original). Two justices dissented, arguing that since all interrogatories must now be answered by the party and rule 168 contains no provision for the state or its agent to sign, the rule does not apply to the state. *Id.* at 10 (Walker, J., and Greenhill, C.J. dissenting).

172. See generally *Texas Co. v. State*, 154 Tex. 494, 281 S.W.2d 83 (1955) (recognizing that when the state becomes a party, same rules of procedure that govern other litigants apply); *Bednarz v. State*, 142 Tex. 138, 176 S.W.2d 562 (1943).

refuses to comply with the order of the court compelling answers to any interrogatory, the sanctions of rule 215a(a) and (b) apply.

Under rule 215a(a) the court is authorized to award reasonable costs and expenses in connection with obtaining the motion and order. This merely reiterates the sanctions incorporated in rule 168. Rule 215a(b), however, authorizes the court to impose any of the sanctions enumerated in rule 170.¹⁷³ These penalties include: (1) ordering that designated facts be established in accordance with the claim of the party obtaining the order; (2) prohibiting a party from supporting or opposing designated claims or defenses; (3) prohibiting a party from introducing designated evidence or testimony; (4) striking a party's pleadings; (5) abating all proceedings; (6) dismissing the cause of action or rendering a default judgment; or (7) entering any other order which may be just.¹⁷⁴

If a party refuses or fails to make any response to interrogatories following proper service, except for good cause, the court is authorized to impose the penalties provided in rule 215a(c). Rule 215a(c) authorizes the trial court to: (1) strike the pleadings of the refusing party; (2) dismiss the cause of action or proceeding; (3) prohibit a party from presenting grounds for relief or defense; (4) enter a default judgment against the refusing party; or (5) make any other order which may be just.¹⁷⁵ The application of these sanctions may be avoided only by a demonstration of good cause. In this context good cause requires a showing of excusable neglect rather than a conscious defiance or disregard of the obligation imposed by the rules.

The sanctions for refusal to answer interrogatories under rule 168 are available only for refusal to comply with pre-trial discovery orders. In *Employers Mutual Liability Insurance Co. v. Butler*¹⁷⁶ the plaintiff sought, and the trial court ordered, defense counsel to disclose the names of all witnesses expected to be called during the trial. When the defendant attempted to call a witness whose name had not been supplied to plaintiff's counsel, the trial court refused to permit the defendant to call the witness. In disapproving the trial court action, the appellate court noted:

Even if the Texas discovery rules authorize the forced revelation of the witnesses by whom a party expects to prove his case, as distinguished from persons having knowledge of relevant facts, the coercive measures given by those rules to the trial court to enforce the discovery, such as *the exclusion of items of proof* or the dismissal of the action, are applicable only to pre-trial proceedings, and they are not applicable to orders made in the course of the actual trial.¹⁷⁷

As earlier noted, a party is obligated by rule 168 to identify each person

173. See generally *Pena v. Williams*, 547 S.W.2d 671 (Tex. Civ. App.—San Antonio 1977, no writ).

174. TEX. R. CIV. P. 170, 215a(b).

175. *Id.* 215a(c).

176. 511 S.W.2d 323 (Tex. Civ. App.—Texarkana 1974, writ ref'd n.r.e.).

177. *Id.* at 325 (emphasis in original); *accord*, *American Cent. Ins. Co. v. Texhoma Stores, Inc.*, 401 S.W.2d 593 (Tex. 1966). In *Sherrill v. Estate of Plumley*, 514 S.W.2d 286 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.), the appellate court concluded that the trial court improperly excluded a document which a party refused to identify in interrogatories because this sanction is available only after the party seeking discovery obtains an order compelling answers to the interrogatory and the answering party then fails to comply with the order of the court.

expected to be called as an expert witness and to state the subject matter concerning which the expert is expected to testify. Furthermore, the answering party is obligated to supplement answers to interrogatories if he obtains information upon the basis of which he knows: (1) the answer was incorrect when made; or (2) the answer although correct when made is no longer true and the failure to amend the answer would constitute a knowing concealment.¹⁷⁸ Frequently, a party answers interrogatories naming all experts intended to be called as witnesses. Subsequently, and prior to trial, additional expert witnesses are employed but the answering party fails to file supplemental answers identifying the additional experts. This results in the opposing party proceeding to trial unaware of the eventual participation of one or more additional expert witnesses in the trial. In this situation neither a contempt action by the trial court nor a motion for mistrial would appear to provide adequate protection for a failure to comply with the mandate of the rule.¹⁷⁹

Upon service of proper interrogatories, the requesting party is entitled to receive the identity and the subject matter of each expert witness the opposing party expects to call as a witness at the time such expert witness is initially employed. Because rule 168 specifically imposes on the answering party the continuing duty to supplement answers,¹⁸⁰ a failure to supplement violates this obligation and authorizes the trial court to employ the sanctions embodied in rule 215a(b), including: prohibiting the party from utilizing the expert witnesses not identified; striking all or a portion of the pleadings of a party; or abating the proceedings until the interrogatories have been properly supplemented. If, however, the sanctions authorized by rule 215a(b) are not available in these circumstances at the trial stage under the rule announced in *Butler*, the purpose and intentment of the amendment to the rules is totally frustrated. At present, the obligation to supplement imposed by the rule is routinely circumvented with relative impunity. Therefore, in the absence of judicial clarification of this obligation, further amendment of the rules certainly appears warranted.

The provisions of rule 168 seem to create an anomalous situation in the application of sanctions. When a party fails to answer one or more interrogatories or interposes insupportable objections, sanctions may be invoked only after the moving party files a motion and obtains an order compelling an answer and the answering party fails or refuses to comply with this order. However, when a party fails to make any response to the interrogatories, the moving party, under the literal language of rule 168, is entitled to seek sanctions without the necessity of obtaining an order of the trial court compelling answers to the interrogatories. In view of the harsh penalties provided by rule 215a(c), it is submitted that the imposition of sanctions requires an order of the court compelling answers. A party should be

178. TEX. R. CIV. P. 168, 186a.

179. See *Texas Employers' Ins. Agency v. Thomas*, 517 S.W.2d 832 (Tex. Civ. App.—San Antonio 1975, no writ), for an example of the dilemma and the frustration occasioned by the existing hiatus.

180. See *Allright, Inc. v. Yeager*, 512 S.W.2d 731 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.) (court emphasized the continuing duty imposed by the rule).

entitled to a court order outlining precisely the obligations for discovery before incurring the extremely harsh penalty of dismissal of his cause of action or the exclusion of highly critical evidence. The requesting party, of course, is entitled to attorneys' fees and costs incurred in obtaining the necessary order.

The selection and assessment of penalties is addressed to the sound discretion of the trial court.¹⁸¹ In the absence of a clear abuse of discretion, the selection and imposition of penalties by the trial court will not be disturbed on appeal.¹⁸² It is important to emphasize, however, that sanctions are designed to secure compliance with discovery procedures and not to punish the erring party. The imposition of sanctions when a party has attempted to comply with a discovery order after the time allowed by the rule,¹⁸³ or the imposition of sanctions not specifically authorized,¹⁸⁴ constitutes an abuse of discretion.

The assessment of sanctions requires appropriate notice and an opportunity to be heard.¹⁸⁵ Otherwise the avowed purpose of sanctions, to encourage compliance and not to punish, is frustrated. The trial court possesses a degree of latitude and discretion in selecting the particular sanction to be exercised after a hearing.¹⁸⁶

IV. REQUEST FOR ADMISSIONS UNDER RULE 169

A. General Considerations

Rule 169¹⁸⁷ provides that at any time after the defendant has made an appearance in a cause a party may deliver a written request for the admission either of the genuineness of relevant documents or the truth of any relevant facts set forth in the request. A period of not less than ten days after delivery of such request for admissions may be designated as a time in which the answers must be made.¹⁸⁸

Rule 169 is applicable to any party in a civil lawsuit, including the State of Texas. In *Lowe v. Texas Tech University*¹⁸⁹ the attorney general, representing Texas Tech, contended that article 4411, prohibiting the attorney general from prejudicing the rights of the state by admissions, exempted the state from application of rule 169. Categorically rejecting this contention, the supreme court commented:

181. See, e.g., *Ebeling v. Gawlik*, 487 S.W.2d 187 (Tex. Civ. App.—Houston [1st Dist.] 1972, no writ) (notwithstanding the harshness of the sanctions, failure to comply with the court's order entitles the trial court to exercise discretion in imposing authorized sanctions); *Hankins v. Haffa*, 469 S.W.2d 733 (Tex. Civ. App.—Amarillo 1971, no writ); *Fisher v. Continental Ill. Nat'l Bank & Trust Co.*, 424 S.W.2d 664 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.).

182. *Hankins v. Haffa*, 469 S.W.2d 733 (Tex. Civ. App.—Amarillo 1971, no writ). See generally *Meyer v. Tunks*, 360 S.W.2d 518 (Tex. 1962).

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

184. *Rainwater v. Haddox*, 544 S.W.2d 729 (Tex. Civ. App.—Amarillo 1976, no writ).

185. See, e.g., *Hough v. Johnson*, 456 S.W.2d 775 (Tex. Civ. App.—Austin 1970, no writ).

186. *Hankins v. Haffa*, 469 S.W.2d 733 (Tex. Civ. App.—Amarillo 1971, no writ).

187. TEX. R. CIV. P. 169.

188. See *Taylor v. Lewis*, 553 S.W.2d 153 (Tex. Civ. App.—Amarillo 1977, no writ), where a request for admissions "within ten days after service" was deemed defective for not following the requirement of the rule.

189. 540 S.W.2d 297 (Tex. 1976).

In *Herring*, we made clear that the State is not exempt from these rules of procedure but is subject to them as any other litigant. We reasoned that Rule 168 of the procedural rules operates to clarify facts; that the State will not be prejudiced by a revelation of the facts involved in a case; and that the Attorney General in responding to interrogatories seeking to elicit such facts will not be called upon to make admissions, agreements or waivers contrary to art. 4411. Of course, the State enjoys the same procedural rights under these rules as any other litigant with respect to the filing and hearing of written objections to interrogatories upon whatever basis; in addition, the Attorney General may raise for ruling the further objection that any called for admission, if made, would prejudice the rights of the State and hence would be ineffective under the provisions of art. 4411.¹⁹⁰

The failure either to admit or deny specifically the truth of requested facts or the genuineness of relevant documents may result in the facts being deemed admitted or the document being deemed genuine.¹⁹¹ A refusal to admit a fact or the genuineness of a relevant document based on lack of knowledge is not permissible if the information is readily available.¹⁹² Thus, an evasive response justifies the fact being deemed admitted by the court.¹⁹³

Frequently answers to requests for admissions are filed late. Extensive discretion, of necessity, is conferred on the trial court to determine whether to deem the requested facts admitted.¹⁹⁴ The refusal to deem a fact admitted when answers have been filed beyond the time designated is subject to review only for an abuse of discretion.¹⁹⁵ Ordinarily, an abuse of discretion exists only when the legal position of the requesting party is irreparably prejudiced.

This rule authorizes the court to allow the answering party to withdraw and file an amended response to the requested admission. Authorization to permit withdrawal and amendment of an answer is predicated, however, on a determination by the court that: (1) the presentation of the merits of the action will be subserved; and (2) the withdrawal or amendment will not prejudice the action or defense on the merits of the party who obtained the admission. The burden of establishing that the merits will be subserved rests on the answering party while the burden of establishing prejudice is imposed

190. *Id.* at 301.

191. *Firemen's Relief & Retirement Fund v. Fontenot*, 446 S.W.2d 365 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.); *Lowe v. Texas Dep't of Pub. Safety*, 423 S.W.2d 952 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.); *O'Connor v. City of Dallas*, 337 S.W.2d 741 (Tex. Civ. App.—Texarkana 1960, writ dism'd); *Masten v. Masten*, 165 S.W.2d 225 (Tex. Civ. App.—Fort Worth 1942, writ ref'd).

192. *Watson v. Godwin*, 425 S.W.2d 424 (Tex. Civ. App.—Amarillo 1968, writ ref'd n.r.e.); *McPeak v. Texas Dep't of Pub. Safety*, 346 S.W.2d 138 (Tex. Civ. App.—Dallas 1961, no writ). In *Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co.*, 490 S.W.2d 818 (Tex. 1972), the supreme court stated that no abuse of discretion was presented where the trial court deemed requests admitted because the information was readily available from a transcript of another trial.

193. *Drake v. Texas Dep't of Pub. Safety*, 393 S.W.2d 320 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.); *McPeak v. Texas Dep't of Pub. Safety*, 346 S.W.2d 138 (Tex. Civ. App.—Dallas 1961, no writ) (court has authority to deem request admitted without a motion); *Montgomery v. Gibbens*, 245 S.W.2d 311 (Tex. Civ. App.—Eastland 1951, no writ).

194. *Smith v. City of Dallas*, 404 S.W.2d 839 (Tex. Civ. App.—Dallas 1966), *aff'd*, 425 S.W.2d 467 (Tex. Civ. App.—Dallas 1968, no writ); *Masten v. Gower*, 165 S.W.2d 901 (Tex. Civ. App.—Fort Worth 1942, no writ).

195. *Bickel v. American Trust Life Ins. Co.*, 468 S.W.2d 873 (Tex. Civ. App.—Eastland 1971, writ ref'd n.r.e.).

on the party who obtained the admissions.¹⁹⁶ Due notice and a hearing on a motion to withdraw and amend are essential. Since facts admitted under rule 169 constitute binding judicial admissions that may not be controverted at trial, it is important for the trial court to ascertain that the merits will be served by allowing an amended answer.

Any evidentiary fact admitted under rule 169 is conclusively established against the admitting party.¹⁹⁷ Once a fact is admitted or the genuineness of a document is acknowledged under rule 169, either specifically or by court order deeming the fact admitted, the admitting party may not introduce controverting evidence at the trial or during any other legal proceeding related to the action.¹⁹⁸ The introduction of contradictory evidence is permissible only in the event permission has previously been obtained from the court to withdraw the prior admitted fact.¹⁹⁹ Any evidence presented during the trial inconsistent with a fact previously admitted under rule 169 will not be considered as probative evidence either in the trial or on appeal.²⁰⁰ A rule 169 admission is sufficient to support a summary judgment, a directed verdict, or a judgment on the verdict of a jury.²⁰¹

Because of the binding effect of admissions, the use of admitted facts in other contexts is severely curtailed. Admissions may not be utilized either in a prior or subsequent proceeding against the answering party.²⁰² Moreover, admissions are not admissible against and not binding on other parties in a multiple party lawsuit.²⁰³ Similarly, an admission of a party acting in one capacity is not binding on the same party occupying other legal capacities in the pending action.²⁰⁴

The requesting party may file a motion to determine the sufficiency of the answers or the reasons for the denial or failure to answer requests for admissions. On the basis of the hearing, the trial court may either deem the requests admitted or order the responding party to serve a more responsive amended answer. The court may also order that the final disposition of the

196. *See, e.g.*, *Sprouse v. Texas Employers' Ins. Ass'n*, 459 S.W.2d 216 (Tex. Civ. App.—Beaumont 1970, writ ref'd n.r.e.); *English Freight Co. v. Preston*, 203 S.W.2d 657 (Tex. Civ. App.—Galveston 1947, no writ).

197. TEX. R. CIV. P. 169 specifically declares that "any matter admitted under this rule is conclusively established as to the party making the admission."

198. *Brooks v. Eaton Yale & Towne, Inc.*, 474 S.W.2d 321 (Tex. Civ. App.—Waco 1971, no writ); *Houston Shoe Hosp. v. State*, 423 S.W.2d 624 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ); *Hill v. Caparino*, 370 S.W.2d 760 (Tex. Civ. App.—Houston 1963, no writ).

199. *Houston Shoe Hosp. v. State*, 423 S.W.2d 624 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ); *Thornell v. Equitable Life Assurance Soc'y of the United States*, 385 S.W.2d 716 (Tex. Civ. App.—Texarkana 1964, no writ).

200. *Thornell v. Equitable Life Assurance Soc'y of the United States*, 385 S.W.2d 716 (Tex. Civ. App.—Texarkana 1964, no writ); *Weaver v. Weaver*, 171 S.W.2d 898 (Tex. Civ. App.—Fort Worth 1943, writ ref'd w.o.m.).

201. *Red Top Taxi Co. v. Snow*, 452 S.W.2d 772 (Tex. Civ. App.—Corpus Christi 1970, no writ); *Carpenter v. Globe Leasing, Inc.*, 421 S.W.2d 413 (Tex. Civ. App.—Fort Worth 1967, no writ); *Hill v. Caparino*, 370 S.W.2d 760 (Tex. Civ. App.—Houston 1963, no writ); *Burnett v. Cory Corp.*, 352 S.W.2d 502 (Tex. Civ. App.—Dallas 1961, writ ref'd n.r.e.). *See generally* *Few v. Charter Oak Fire Ins. Co.*, 463 S.W.2d 424 (Tex. 1971).

202. *Phillips v. Latham*, 433 S.W.2d 775 (Tex. Civ. App.—Eastland 1968, writ ref'd n.r.e.), *cert. denied*, 396 U.S. 830 (1969).

203. *Bryant v. Kimmons*, 430 S.W.2d 73 (Tex. Civ. App.—Austin 1968, no writ); *Davis v. Coastal States Petrochem. Co.*, 405 S.W.2d 854 (Tex. Civ. App.—Houston 1966, no writ); *H. Richards Oil Co. v. W.S. Luckie, Inc.*, 391 S.W.2d 135 (Tex. Civ. App.—Austin 1965, writ ref'd n.r.e.).

204. *Krasa v. Derrico*, 193 S.W.2d 891 (Tex. Civ. App.—San Antonio 1946, no writ).

requests for admissions be determined at a pre-trial conference or at some designated time prior to trial.

Requests for admissions are designed to establish uncontroverted evidentiary facts prior to trial. Rule 169 was neither designed nor intended to secure admissions involving ultimate conclusions of law. In *Kirby v. Spitzenberger*²⁰⁵ the court emphasized that requests for admissions could not be utilized to force a party to admit the absence of any cause of action or grounds of defense.

Answers to requests for admissions may only be used against a party and cannot be utilized as probative evidence to support the admitting party's position.²⁰⁶ Although this rule is well established, the courts frequently permit parties to read into evidence before the jury their own answers both to requests for admissions and interrogatories. This is permitted most frequently at hearings on motions for summary judgment. Yet a party's own answers to requests for admissions of facts will neither support nor defeat a summary judgment in the absence of independent evidence of probative value.²⁰⁷

The trial court is accorded essentially unlimited discretion to extend the time for filing answers to requests for admissions even after the time prescribed for filing has expired.²⁰⁸ The grant of an extension of time will not be set aside in the absence of a clear showing of an abuse of discretion.²⁰⁹ If the trial court authorizes an extension of time to answer requests for admissions, it may not thereafter revoke the extension in the absence of a showing of "good cause" for such revocation.²¹⁰ Rule 169 was not designed as a trap for the unwary but as a tool for the fair disposition of litigation with a minimum of delay.²¹¹

Answers to requests for admissions of facts may be considered even if the answers are not formally introduced into evidence.²¹² Admitted facts, like stipulations of the parties, are conclusive against a party after the admissions are filed with the court. Nevertheless, the better practice is to introduce admissions into the factual record for the purpose of bringing to the attention of the court and jury facts which are important to the ultimate issues in the action.²¹³ Unlike answers to requests for admissions of facts, answers to interrogatories under rule 168 must be formally introduced to

205. 514 S.W.2d 95 (Tex. Civ. App.—Eastland 1974, writ ref'd n.r.e.); *accord*, Sanders v. Harder, 148 Tex. 593, 227 S.W.2d 206 (1950).

206. *Sympson v. Mor-Win Producers, Inc.*, 501 S.W.2d 362 (Tex. Civ. App.—Fort Worth 1973, no writ).

207. *Id.*

208. *Bynum v. Shatto*, 514 S.W.2d 808 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.); *Schindler v. AG Aero Distribs., Inc.*, 502 S.W.2d 581 (Tex. Civ. App.—Corpus Christi 1973, no writ). The request for an extension may be oral rather than written. *See Bynum v. Shatto, supra*, at 810-11.

209. *See generally Meyer v. Tunks*, 360 S.W.2d 518 (Tex. 1962); *Fisher v. Continental Ill. Nat'l Bank & Trust Co.*, 424 S.W.2d 664 (Tex. Civ. App.—Houston [14th Dist.] 1958, writ ref'd n.r.e.).

210. *Schindler v. AG Aero Distribs. Inc.*, 502 S.W.2d 561, 584-85 (Tex. Civ. App.—Corpus Christi 1973, no writ).

211. *Taylor v. Lewis*, 553 S.W.2d 153, 160 (Tex. Civ. App.—Amarillo 1977, no writ).

212. *Insurance Co. of N. Am. v. Fire Ins. Exch.*, 508 S.W.2d 703 (Tex. Civ. App.—Waco 1974, no writ).

213. *Id.*

qualify as a part of the record.²¹⁴ Answers to interrogatories, however, do not constitute binding judicial admissions.

Unlike rule 168, which was modified to require the party to sign the answers to interrogatories, rule 169 remains unchanged. The attorney of record may answer the requests for admissions provided the answers are sworn to as true and correct.²¹⁵

B. Sanctions

The penalties imposed for failure to answer requests for admissions are governed by the specific provisions of rule 169. The failure to answer requests for admissions or to demonstrate an inability to answer results in the specified facts being deemed admitted.

Rule 169 further authorizes the court to determine the sufficiency of the answers to requests for admissions or the reasons for not admitting or denying the matters requested. The penalties enumerated in rule 215a(a), providing for award of expenses and attorneys' fees, govern motions to determine the sufficiency of the answers.

Additional sanctions are incorporated in rule 170. Rule 170 provides for the award of reasonable expenses, including attorneys' fees, in the event that: (1) a party denies a fact or the genuineness of a document that is proven true or genuine at the trial; or (2) a party arbitrarily refuses to cooperate in disposing of issues not in bona fide controversy and expenses are incurred in proving them at the trial.²¹⁶ Although sound in theory, the implementation of these sanctions is difficult, if not practically impossible.

The assessment of expenses and attorneys' fees as a penalty for failure to make sufficient answers to requests for admissions is addressed to the sound discretion of the trial court.²¹⁷ In the absence of a clear abuse of discretion, the award of expenses and attorneys' fees will not be disturbed.²¹⁸

V. CONCLUSION

The recent amendments to the Texas Rules of Civil Procedure have noticeably liberalized the scope of permissible pre-trial discovery. Despite this liberalization, the Texas rules, unlike their federal counterparts, retain a reasonable balance and impose sensible restraints against unnecessary and unwarranted fishing expeditions.²¹⁹

214. *Richards v. Boettcher*, 518 S.W.2d 286 (Tex. Civ. App.—Texarkana 1974, writ ref'd n.r.e.).

215. *H.E. Butt Stores, Inc. v. Vera*, 516 S.W.2d 287 (Tex. Civ. App.—San Antonio 1974, no writ).

216. *Mims v. Houston Fire & Cas. Ins. Co.*, 362 S.W.2d 880 (Tex. Civ. App.—Texarkana 1962, no writ).

217. See *Fisher v. Continental Ill. Nat'l Bank & Trust Co.*, 424 S.W.2d 664 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.), for an excellent review of enforcing sanctions for failure to make discovery. See also *Hankins v. Haffa*, 469 S.W.2d 733 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.).

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

219. See generally *Bryan v. General Elec. Credit Corp.*, 553 S.W.2d 415 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ); *Texhoma Stores, Inc. v. American Cent. Ins. Co.*, 424 S.W.2d 466 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.).

Under the existing rules, any information relevant to the issues in a pending action is generally discoverable. Discovery of collateral matters, except in the confused area of consulting experts, is generally proscribed by the limitations incorporated in the pre-trial discovery rules. This balance expedites the disposition of litigation with a corresponding limitation on unnecessary costs and harassment. The area of greatest confusion remains in the interpretation and application of the rules. Perhaps more effort should be devoted to insuring a uniform application of the present rules.