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SANCTIONS AVAILABLE TO PARTIES IN
TEXAS DISCOVERY PROCEDURES

by

Alex H. McGlinchey

I. INTRODUCTION

JUSTICE requires, to the extent possible, simplification of a trial to the relevant disputed issues. In Hickman v. Taylor pretrial discovery was described as a device for narrowing and clarifying the basic issues between the parties and ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. In United States v. Proctor & Gamble Co., Mr. Justice Douglas stated: "[M]odern instruments of discovery serve a useful purpose . . . . They together with pretrial procedures make a trial less a game of blind man's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." Texas pretrial procedures afford means of reaching this result.

Texas law provides the practitioner three basic discovery tools other than depositions: the motion for production of documents, authorized by rule 167, written interrogatories to parties, authorized...
by rule 168,7 and requests for admissions of fact, authorized by rule 169. Each of these discovery devices is designed to serve a different involved in the action. The order shall specify the time, place and manner of making the inspection, measurement or survey and taking the copies and photographs and may prescribe such terms and conditions as are just, provided that the rights herein granted shall not extend to the written communications passing between agents or representatives or the employees of either party to the suit, or communications between any party and his agents, representatives, or their employees, where made subsequent to the occurrence or transaction upon which the suit is based, and made in connection with the prosecution, investigation or defense of such claim or the circumstances out of which same has arisen. (Supp. 1967).

7 This rule provides:

At any time after a party has made appearance in the cause, or time therefor has elapsed, any other party may serve upon such party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them or by the attorney for the party, and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within the time specified by the party serving the interrogatories which specified time shall not be less than 15 days after the service of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Whenever a party is represented by an attorney, service of interrogatories and answers to interrogatories shall be made on the attorney unless delivery to the party himself is ordered by the court. True copies of the interrogatories and of any answers shall be served on all other parties or their attorneys at the time that any interrogatories or answers are served, and a true copy of each shall be promptly filed in the clerk's office together with proof of service thereof under the provisions of Rules 21a and 21b. Within 10 days after service of interrogatories a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined and for such additional time as the court may direct.

Interrogatories may relate to any matters which can be inquired into under Rule 186a, but the answers, subject to any objections as to admissibility, may be used only against the party answering the interrogatories. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may take such protective order as justice may require. The number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. The provisions of Rule 186b are applicable for the protection of the party from whom answers to interrogatories are sought under this rule. (Supp. 1963.)

8 This rule provides:

At any time after the defendant has made appearance in the cause, or time therefor has elapsed, a party may deliver or cause to be delivered to any other party or his attorney of record a written request for the admission by such party of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth by the request. Copies of the documents shall be delivered with the request unless copies have already been furnished. Whenever a party is represented by an attorney of record, delivery of a request for admissions shall be made to his attorney unless delivery to the party himself is ordered by the court. The request for admissions must state that it is made under this rule and that each of the matters of which an admission is requested shall be deemed admitted unless a sworn statement is delivered to the party requesting the admissions or his attorney as provided in this rule. Each of the matters of which an admission
need, while discovery in general is designed to narrow the issues, to secure known evidence for trial use, to determine the existence of evidence and how and from whom it may be procured, and to provide fast, inexpensive and effective means of achieving these salient purposes.9

The motion for production of documents, written interrogatories to parties, and request for admissions of fact are "epistolary" discovery devices as opposed to deposition practice, which is confrontory. The epistolary discovery devices are less expensive but frequently, less effective than the confrontory depositions.10

is requested shall be deemed admitted unless, within a period designated in the request, not less than ten days after delivery thereof or within such further time as the court may allow on motion and notice, the party to whom the request is directed delivers or causes to be delivered to the party requesting the admission or his attorney of record a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters. Any admission made by a party pursuant to such request is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding. A true copy of a request for admissions or of a sworn statement in reply thereto, together with proof of the delivery thereof as provided in Rule 21a, shall be filed promptly in the clerk's office by the party making such request or such sworn statement.


Professor James Wm. Moore apparently originated the use of the term "epistolary" to describe the written feature of interrogatory practice under Fed. R. Civ. P. 33 in contrast to the oral or confrontory interrogatory under Fed. R. Civ. P. 31. 4 Moore, Federal Practice § 31.02, at 2152 (2d ed. 1963). Epistolary is equally descriptive of the three written Texas discovery devices.


Deposition practice is presided over by an officer appointed to take the deposition; Tex. R. Civ. P. Ann. 194 (Supp. 1961) provides that depositions shall be taken by "officers authorized to take depositions as set forth in article 3746 of the Revised Civil Statutes of Texas, 1925, as amended, and Article 2324a..." The deponent is questioned by the attorneys of both parties in a manner similar to examination at trial with the presiding officer recording the questions and responses. Developments In The Law—Discovery, 74 Harv. L. Rev. 940, 912 (1961).

Texas deposition practice, which now appears in the Texas Rules of Civil Procedure as rules 176 to 215a, is beyond the scope of this Article. Deposition practice originated as a form of potential evidence rather than a true discovery device. Franki, Discovery, supra note 7, at 479.

The deposition rules prior to 1937 were designed primarily to "secure potential testimony from prospective witnesses in such a way that the contents of the deposition can be used as testimony in or in some similar way in a lawsuit." Masterson, Adversary Depositions and Admissions Under Texas Practice, 10 Sw. L.J. 107 (1936).

In practice the deposition was also used for discovery by agreement of the parties to waive objections until trial; discovery was a secondary objective and "not clearly recognized by the rules. New Rule 186a—Scope of Examination—has changed the concept of the stated purpose of depositions, and now recognizes that depositions may be taken "for the purpose of discovery or for use as evidence in the action or for both purposes." Thode, Some Reflections on the 1937 Amendments to the Texas Rules of Civil Procedure Pertaining to Witnesses at Trial, Depositions, and Discovery, 37 Texas L. Rev. 33, 37 (1958). This addition of rule 186a was declaratory of the evolution under the previous rules. Tex. R. Civ. P. Ann. 258 (Supp. 1964).

They did not contemplate ... the discovery in advance of trial of testi-
The motion for production of documents has as its purpose the production of relevant, nonprivileged documents and tangible things in the possession of one party for inspection, copying or photographing by the movant.\footnote{\textsuperscript{19}}

The purpose of interrogatories to parties is to obtain information within an opposing party's knowledge prior to taking his deposition. The object of requests for admissions of fact is to obtain conscious admissions of uncontroverted matter\footnote{\textsuperscript{10}} and thereby simplify and shorten the trial.

The three discovery devices have certain characteristics in common. Each is limited to parties,\footnote{\textsuperscript{14}} primarily designed to operate prior to trial,\footnote{\textsuperscript{15}} designed primarily to discover information as opposed to obtaining evidence,\footnote{\textsuperscript{16}} free of geographical limitations such as subpoena range,\footnote{\textsuperscript{17}} and enforced by sanctions exclusively applicable to parties.\footnote{\textsuperscript{18}}

... Rule 186a is therefore to a large extent declaratory of what had come to be the practice under the previous rules.

The scope of examination permitted in a deposition has been broadened by rule 186a to cover non-privileged matter:

a. which is relevant to the subject involved in the pending litigation whether it relates to the claim or defense of party;

b. including inquiry into the existence, description, nature, custody, condition and location of any books, documents, or other tangible things;

c. including the identity and location of persons having knowledge of relevant facts;

d. even though the testimony elicited is not admissible at trial, if it is reasonably calculated to lead to the discovery of admissible evidence.

Rule 215a sanctions apply to party or witness, while rule 168 interrogatories are limited to parties. This is one of the many reasons rule 215a sanctions are limited to interrogatories under deposition practice. See text accompanying notes 109-113 infra.
except against the state, which enjoys virtually an immune status from sanctions.  

The basic Texas discovery devices are derived from the Federal Rules of Civil Procedure, their respective source rules being the motion for production of documents, FRCP 34, written interrogatories to parties, FRCP 33, and requests for admissions of fact, FRCP 36.

The motion to produce, as originally adopted, was derived directly from FRCP 34, except that Texas expressly prohibited pretrial discovery of communications or reports incident to handling the case and entry upon land for inspection. The motion to produce was amended in 1957 with two changes based on the 1948 amendment of FRCP 34. The first amendment authorized entry on land for inspection, measuring, surveying or photographing the property. The second change expressly provided rule 186b-protection to the answering party and is in keeping with the FRCP 26(b) provision added to the source rule.

A major distinction exists between rule 168 interrogatories to parties and its source FRCP 33. The former may only be used against the answering party under the Texas practice, whereas the latter may be used to the same extent as federal depositions.

The request for admissions procedure was adopted from FRCP 36 with minor textual change. FRCP 36 was amended, effective 1948, to provide a specific method for an answering party to challenge the propriety of a request and to permit requests for admissions to be served at any time after commencement of the action as contrasted with the rule 169 requirement that appearance must be made prior to submission of requests.

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In the Harrington case, supra at 417, the states' immunity from interrogatories was rationalized in this way:

> We know of no State official or agent who is authorized to answer interrogatories for the State. It is the duty of the Attorney General, under Art. 6036, to institute and conduct this suit, but he is prohibited by Art. 4411, V.T.C.S., from making any admission, agreement or waiver in a suit to which the State is a party which may prejudice the rights of the State. The powers of the Attorney General, thus circumscribed, are not to be enlarged by the courts. The same principle logically applies as well to production of documents and admissions.

20 All textual reference to "FRCP" refer to Fed. R. Civ. P.


23 Id. at 226.


25 Rule 169, supra note 8.
Wilful refusal to comply with discovery requires the imposition of sanctions. Sanctions are seldom, if ever, imposed on a party who has made a good faith attempt to comply with the discovery rules. Unfortunately, there is a small minority of the bar whose mulish disposition is to thwart discovery. Discovery devices are only as good as the willingness of the bar to comply. This accomplishment necessitates a readiness of the trial courts to enforce the applicable sanctions.

The Supreme Court of Texas has steadfastly held that Texas courts have no inherent powers, either at law or in equity, to originate new processes to aid discovery. The trial courts' authority must be found in the rules and statutes or in such further powers and jurisdiction as are reasonably inferred from the powers and jurisdiction granted.

The sanctions provided for refusal to allow discovery authorize trial courts to make any just order deemed necessary. Such penalties

28 The text of rule 170 is:

If any party or an officer or managing agent of a party refuses to obey an order made under Rule 167 the court may make such orders in regard to the refusal as are just, and among others, the following:

(a) an order that the matters regarding the character or description of the thing, or the contents of the paper, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(b) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony;

(c) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

If a party, after being served with a request under Rule 169 to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making such proof. If in the course of such a hearing it shall appear to the satisfaction of the court that any party or his attorney is arbitrarily refusing to co-operate in disposing of questions of fact as to which there is no basis for bona fide controversy, the court shall tax all expenses of proving such facts, including reasonable attorneys fees, against the party refusing to co-operate, subject to review upon appeal.

29 This Article will not deal with questions of service, verification, failure to answer or the mechanics of initiating discovery. For discussions, see 2A Barron and Holtzoff—Wright, Federal Practice and Procedure §§ 761-803, 831-838 (1961); Franki, note supra; Lane, Rule 169—The Judge's Adjutant, 28 Tex. B.J. 183 (1965); Masterson, Admissions, 13 Tex. B.J. 443 (1910); Masterson, Adverse Depositions and Admissions Under Texas Practice, 10 Sw. L.J. 107 (1956); Spencer, Uses and Abuses of Rule 168—Interrogatories to Parties, 26 Tex. B.J. 919 (1963); and Williams, Pretrial Procedures in the State Courts of Texas, 5 So. Tex. L.J. 261 (1960). Pretrial procedures are found in Tex. R. Civ. P. Ann. § 8 (1955); 3 McDonald, Texas Civil Practice, Ch. 10 (1950).

28 Hastings Oil Co. v. Texas Co., 149 Tex. 416, 234 S.W.2d 389 (1950); Ex parte Hughes, 133 Tex. 105, 129 S.W.2d 270 (1939).

29 Rule 170, supra note 26.
The motion to produce has available a wide range of sanctions for its enforcement, including the following specifically enumerated sanctions: (1) establishing proponent's claim regarding a fact, contents of a paper, or character or description of a thing; (2) prohibiting support or opposition to a claim or defense, or prohibiting the introduction of evidence as to certain matters; (3) striking pleadings; (4) staying proceedings pending compliance with an order; (5) dismissing all or part of an action; and (6) rendering a default judgment.

The lack of an effective sanction emasculates rule 168 interrogatories. The trial court may enter a "just order," but guidelines are necessary for the effectiveness of rule 168 interrogatories.

The request for admissions lacks a truly effective sanction, which fact is the primary reason for its slight use. Should improper sworn denial of a fact be made, the movant must first prove the fact wrongfully denied, and then on motion the court is empowered to reimburse the movant for expenses incurred, including attorney's fees incident to the hearing.

II. PRODUCTION OF DOCUMENTS AND OBJECTS

Trial courts are empowered by rule 167 to order, upon motion, the production, inspection and copying of private documents containing or constituting nonprivileged evidence material to the action under a party's control. Characteristics of the motion to produce not shared by its companion discovery devices are judicial control from inception, with burden on movant to show that discovery should be allowed, and availability during trial as well as before.

To initiate the motion to produce movant files a motion for discovery showing good cause (that it will aid in the preparation of the case) and relevancy (that the item is material evidence). "The motion for discovery must be specific, must establish materiality, and must
recite precisely what is wanted." At the discovery hearing the trial judge first must determine requisite good cause and relevancy and then whether or not the item is privileged. Invasion of privacy, necessarily incident to discovery, is justifiable only because the pursuit of justice eclipses the fundamental right of privacy; however, invasion of privacy must be kept to an absolute minimum.

A. Objection To Discovery Under Rule 167

Opposition by a party to a motion to produce is specifically authorized. As a prerequisite to an order to produce documents movant must establish: (1) their existence, (2) custody, control or possession by a party, (3) good cause, (4) probability of relevance, and (5) nonprivilege. Only opposing claims of failure to show good cause, relevancy or privilege will be considered here.

1. Good Cause

Requisite good cause is manifested "when the court is 'satisfied that the production of the requested document is necessary to enable a party to properly prepare his case, or that it will facilitate proof or progress at the trial.'" Good cause also exists in circumstances which give the court reason to expect that the beneficial objectives of pretrial discovery will be achieved.

In general, movant is required to show that the documents sought: (1) will aid in preparation of the case, (2) are necessary to establish movant's case and are unobtainable from other sources, and (3) must be produced to prevent hardship or injustice.

2. Relevancy

In *Crane v. Tunks* the Supreme Court of Texas declared that the prerequisites to discovery under rule 167 are the filing of a motion with notice to opposing parties, showing good cause, and showing that such things constitute or contain evidence.

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38 Id. at 223.
40 J McDonald, Texas Civil Practice § 10.03 (1950).
42 160 Tex. 186, 328 S.W.2d 434 (1959).
material to a matter in the controversy. The court noted that relev-
ancy and materiality should be shown in the application or petition
asking for the bill of discovery or by the pleading in the main cause.46
Relevancy tests are usually liberally construed.44 However, estab-
lishing relevancy does not open the door to unlimited discovery.
"[T]he discovery procedure clearly does not authorize the examina-
tion and reproduction of information of a highly personal and private
nature not relevant and material to the issues . . . ".45
An insurance investigator's reports and interoffice correspondence
concerning investigation of an accident were sought in a suit to
recover from respondent under a general liability policy for adverse
judgment in favor of a third party. The appellate court in affirming
the granting of discovery reasoned, "These instruments were relevant
to show the intention and construction placed by [respondent] . . .
on its contract of liability insurance before any liability under its
policy had attached . . . ".46
3. Privileged Matter47 Relief is available to a party from "undue
annoyance, embarrassment, oppression, or expense."46 Discovery also
does not extend to written communications passing between agents,
representatives or employees of either litigant, or to communications
between a litigant, his agents or representatives when made subse-
quent to the occurrence of the basis of suit and in connection with
preparation for trial.46
Privilege must be affirmatively asserted in opposition to a motion
to produce.46 In *Hurley v. McMillian*, a personal injury action stem-
ning from an auto collision, respondent in a plea of privilege hearing
failed to assert that the written statement given the insurer's investi-
gator was a privileged communication under the attorney-client re-
lationship. The court held that respondent's failure to claim that the
statement was privileged resulted in a waiver of the privilege.
a. Attorney Work-Product.—The 1947 decision of the United

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43 Id. at 440.
44 See, e.g., *June v. George C. Peterson Co.*, 151 F.2d 963, 967 (7th Cir. 1946), which
held, "if the documents called for are reasonably probable to be material in the case, the
production and inspection of them should be allowed."
45 Maresca v. Marks, 362 S.W.2d 299, 300 (Tex. 1962).
error ref., n.r.e.
47 The privilege of protection from self-incrimination and the use of evidence illegally
obtained are beyond the scope of this Article.
51 268 S.W.2d 229 (Tex. Civ. App. 1954) *error ref. n.r.e.*
States Supreme Court in *Hickman v. Taylor*, together with the opinions of the courts below, clarified some of the uncertainty concerning the attorney-client privilege and work-product of the lawyer. Mr. Justice Murphy in his opinion held the work-product of the lawyer outside the scope of the attorney-client privilege. That privilege was held not to extend to information obtained from a witness by an attorney, "the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client's case; [and] . . . writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories." However, discovery of such material was held to be against public policy unless the movant establishes that the information contained therein can be obtained in no other manner and that undue hardship will otherwise result.

When rule 167 was adopted in 1940, the Supreme Court of Texas was disinclined to await the ponderous federal interpretation of the attorney work-product which was far from certain under the federal rule. Accordingly, the Texas rule specifies that the attorney's work-product is privileged.

Opinions, reports and information of expert witnesses of the adverse party, in counsel's possession, are unattainable by the motion to produce. However, the privilege does not extend to the trial, so "if

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52 329 U.S. 495 (1947).
55 1 McDonald, Texas Civil Practice § 10.03, at 844 (1950). For example, under FRCP 34 witness lists, even if obtained by employees, are discoverable, but its Texas counterpart, as shown in the leading case of *Ex parte Ladon*, 160 Tex. 7, 325 S.W.2d 121 (1959), specifically excludes from discovery communications passing between agents, representatives, and employees of any party subsequent to the transaction or occurrence upon which the suit is based and made in connection with the prosecution, investigation, or defense of the claim. 38 Texas L. Rev. 642, 643 (1960). *Accord*, 9 Tex. B.J. 319 (1946). *Cf.* Perez v. San Antonio Transit Co., 342 S.W.2d 802 (Tex. Civ. App. 1961) *error ref.*, and Dallas Ry. & Terminal v. Oehler, 156 Tex. 488, 296 S.W.2d 717 (1956), where the question was treated as an evidence problem under Tex. R. Civ. P. 177a.

Are statements obtained by a party for use in connection with a previously-completed case subject to discovery in a subsequent suit? This novel question was presented in *Highway Insurance Underwriters v. Griffith*, 290 S.W.2d 950 (Tex. Civ. App. 1956) *error ref. n.r.e.* The trial judge was held to be within his discretion in granting the motion and ordering respondent to produce statements and reports taken by respondent's investigator to determine the nature of the accident. The court found that the statements were relevant to show the intention and construction placed by respondent on its contract of liability insurance before any liability under its policy had attached by reason of the judgment against movant. It apparently reasoned that no attempt was being made to discover the work product of the attorney emanating from this litigation and that the statements were not therefore within the protection of rule 167.

the witness had acquired personal knowledge or opinions relevant to the cause on trial he can properly be called... and those opinions elicited. This is assuming [the risk of]... that expert's backlash.  

b. Privileged Communications

(1) Attorney-Client.—The leading Texas case regarding communications between attorney and client, McGrede v. Rembert National Bank, 8 has been credited with holding “that the determination of the attorney-client privilege is a question for the trial court.”  

(2) Husband and Wife.—The statute for civil cases provides, “The husband or wife of a party to a suit or proceeding, or who is interested in the issue to be tried, shall not be incompetent to testify therein, except as to confidential communications between such husband and wife.”  

Presumably, except in cases of confidential communications, discovery would also be allowed.

(3) Reports to the Government Under Statutory Requirements.—Attempts to secure information from federal income tax returns have been presented to the Texas Supreme Court on two occasions. The rule is now clear that income tax returns are subject to discovery to the extent of relevancy and materiality shown.  

5 Steely and Gayle, supra note 12, at 225; Friedenthal, Discovery and Use of an Adverse Party's Expert Information, 14 Stan. L. Rev. 455, 488 (1962):

Neither the attorney-client privilege nor the work product doctrine should be extended to cover expert information which they normally would not protect. If such discovery is to be denied, it should be done on the ground that disclosure would be unfair under the particular facts of the case. Blanket refusals to require information to be divulged are improper, and, at the very least, discovery should be permitted when good cause can be shown. Whether or not the unfairness objection should itself be eliminated, so that expert information would be treated just like any other, is still to be determined.


The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.


51 Maresca v. Marks, 362 S.W.2d 299, 300 (Tex. 1962). The discoverability of income tax returns is summarized as follows:

The problem was considered by this court in Crane v. Tunks, 160 Tex. 182, 328 S.W.2d 434, and it was held that income tax returns are not wholly privileged documents but are subject to discovery to the extent of relevancy and materiality which must be shown. It was further held that the trial judge abused his discretion "on failing to examine the income tax return and to separate the relevant and material parts from the irrelevant and immaterial
Numerous Texas statutes provide a promise of secrecy of information which individuals and organizations are required to report to the appropriate departments of government. "It is necessary to examine the provisions of the statute in each instance to determine the extent of the protection afforded. In order to cover the necessary situations a uniform rule should be adopted." (4)

(4) Physician-Patient.—Texas has no statute creating the privilege, and our courts have invariably denied its recognition. Chief Justice Calvert's opinion in Neville v. Brewster pointed out that if a doctor's "records are privileged it is only because of a privilege established by the proviso in Rules 167 and 186a. The records were not privileged at common law and have not been made so in this state . . ." (5)

(5) Voluntary Waiver of Privileged Communication.—In a malpractice case the physician-defendant sent a letter detailing facts.

parts." . . . In Neville v. Brewster, Tex., 352 S.W.2d 449, 451, we said that "[i]t was incumbent upon the court to exclude those matters which were irrelevant and yet afford to the adversary all information that might be relevant and material to his cause of action." Accord, Lower Nueces River Water Supply Dist. v. Sellers, 323 S.W.2d 324 (Tex. Civ. App. 1959) error ref. n.r.e., records kept to prepare income tax return were held subject to discovery upon a proper showing of relevancy and cause; Martin v. Jenkins, 381 S.W.2d 115 (Tex. Civ. App. 1964) error ref. n.r.e., 384 S.W.2d 123 (Tex. 1964).


Veterans' records are privileged under federal statute, 38 U.S.C. §3301 (1919); and were so held in the Texas decision of Burdick v. York Oil Co., 364 S.W.2d 766 (Tex. Civ. App. 1963) error ref. n.r.e. See also Steely and Gayle, Operation of the Discovery Rules, 2 Hous. L. Rev. 222, 224 (1964).


63 163 Tex. 115, 352 S.W.2d 449 (1961).

64 Id. at 451. Plaintiff did not raise the question of privilege in the trial court as required by rule 186b and thereby precluded showing any abuse of discretion by the trial court.

65 377 S.W.2d 666 (Tex. Civ. App. 1964) error ref. n.r.e., the court added as a practical reason for allowing the letter in evidence that "the intentional communication of a privileged document to a third person should have the effect of waiving its privileged nature to obviate the necessity of calling such third person to testify as to the contents of a document when the original is available in the hands of a party to the cause." Cf., Note, 16 Baylor L. Rev. 202 (1964) in which a hypothetical situation is posed: Suppose Dr. A is requested by Dr. B to send all available information regarding the diagnosis and treatment of a particular patient that Dr. A formerly treated. Suppose also that at the time of this request that litigation is pending between (sic.) Dr. A and his former patient. Would Dr. A not be reluctant to send any information that might be privileged to Dr. B if he knew that the...
of the case to the claims department of his insurer with a copy to the physician who subsequently attended plaintiff. This letter was presumably excluded by the trial court on the theory that it was a privileged communication in preparation of the defense. The court of civil appeals, in a first-impression opinion, reasoned that the voluntary and intentional disclosure of the letter to someone other than an agent or representative was implied waiver of the privilege and reversed the trial court. Guiding principles utilized in reaching its decision were that the privileged status of an attorney-client communication may be waived by the client and that the privileged communication exception must be strictly construed, since it obstructs the search for truth.

B. Judicial Enforcement Powers

Once it has been determined that discovery in the particular case is proper, the effective operation of the motion to produce is dependent on the sanctions available in rule 170. The trial court is authorized to issue just orders enforcing its valid discovery orders.

The first enforcement order the court is authorized to make is found in rule 170 (a), which provides for "an order that the matters regarding the character or description of the thing, or the contents of the paper, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order . . . ." No case granting such an order is reported in Texas; however, rule 170 (a) closely parallels its source-sanction FRCP 37 (b) (2) (i), under which several cases enforcing the federal penalty are reported, including Oregon-Washington Railroad & Navigation Co. v. Strauss & Company. In that case respondent failed to produce records as ordered, and the court held that respondent's intentions concerning a questioned grain shipment were as movant alleged.

The court also is permitted to make "an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony . . . ." In Railway Express Agency v. Spain the respondent failed to comply with an order to

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same might be used against him in pending litigation? Id., at 204.

It is proposed that an exception to the waiver principle be granted to physicians when they are diagnosing the same patient. Id. at 209.


69 Tex. R. Civ. P. 170 (b).

70 249 S.W.2d 644 (Tex. Civ. App. 1952), no opinion rendered on appeal, 152 Tex. 196, 255 S.W.2d 509 (1953).
produce the maintenance record of a truck. During trial the respondent unsuccessfully attempted to introduce the maintenance record into evidence. In upholding the exclusion, the court of civil appeals stated: "Sec. (b), Rule 170, T.R.C.P., authorizes a court to prohibit introduction in evidence of documents which are not produced as ordered. The trial judge exercised his discretion and punished [respondent] . . . as he was empowered to do under this Rule and we find no abuse of discretion in such action.""

A trial court is also allowed to render "an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party . . ." In Dunlap v. Chase respondent filed a plea of privilege, but movant filed a motion for production of books and records without controverting the plea of privilege. Respondent failed to comply with the discovery order, contending that until a controverting plea was filed his prima facie right to transfer deprived the court of power to order discovery. The trial court, citing rule 170 as authority, overruled the plea of privilege on the basis of the respondent's non-compliance with the order, and this action was affirmed on appeal.

The portion of rule 170(c) quoted above is taken verbatim from FRCP 37(b)(2)(iii). Sanctions comparable to those provided by rule 170(c) have been upheld in numerous federal decisions."

III. INTERROGATORIES TO PARTIES"

The interrogatory, which became effective in Texas on September 1, 1962, is the newest tool in the arsenal of discovery procedures. A noted legal scholar has said that "interrogatories are used chiefly

71 Id. at 653.
72 Tex. R. Civ. P. 170(c).
74 A part of the claim was stricken in In re Societa Italiana De Armamento, 210 F. Supp. 444 (D. La. 1962); proceedings were stayed in Zalutuka v. Metropolitan Life Insurance Company, 108 F.2d 405 (7th Cir. 1939); and a judgment by default was rendered against respondent in Bernat v. Pennsylvania Railroad Co., 14 F.R.D. 465 (E.D. Pa. 1953). Movant in the Bernat case asserted that a default judgment was the only adequate penalty to assess the disobedient party, but the court stated:

In a case where the refusal to produce a document makes it impossible for the plaintiff to prepare or present his case, a default judgment would be the proper remedy. However, the rule provides for a number of consequences of varying degrees of severity, and I think it is clearly intended that the Court should fit the penalty to the nature and effects of the refusal. Of course, in refusing to obey the order of the Court the defendant takes a calculated risk, but it is plain that it was not intended that he should automatically incur a default judgment in every case. Ibid.

75 A distinction must be kept in mind between written interrogatories under rule 168 and depositions on written interrogatories under rule 192. All references to "interrogatories" are meant to denote rule 168 interrogatories.
to obtain simple facts, to narrow the issues by obtaining admissions from the adverse party, and to obtain information needed in order to make use of the other discovery."

Interrogatories offer an alternate discovery device for use in lieu of or in conjunction with the request for admissions of fact or depositions. The interrogatory asks a question requiring a narrative answer in contrast with the request for admissions which is an imperative statement requiring a "yes" or "no" answer. It is readily evident that the interrogatory is broader in scope, more flexible and less time consuming than requests for admissions. Written interrogatories are normally a more economical means of procuring discovery than an oral or written deposition, although they are frequently less effective than either form of deposition since the adverse party will answer with less spontaneity, and, having all the interrogatories before him, may frame his answers to defeat disclosure. The interrogatory answer can be used only against the answering adverse party compared with the more general use permitted of depositions. "Rule 168 is a great shortcut for the development of evidence that a diligent lawyer would eventually obtain anyway, but by the use of very expensive and time-consuming deposition procedures. Also, another great advantage is that interrogatories avoid multiplicity of requests."

Neither the Texas nor federal rules contain a provision concerning the number of interrogatories which may be served. The guide in determining objections to interrogatories should be whether they were reasonable in the particular case and not their number. The trial courts of one Texas metropolitan district are understood to use as a rough rule of thumb that ten questions are the maximum reasonable number of interrogatories. The federal rule seems the preferable guide.

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77 See text accompanying notes 124-125 infra.
78 4 Moore, Federal Practice ¶ 33.02, at 2259 (2d ed. 1963): "[T]he replies are customarily prepared under the immediate supervision of counsel, who 'are sometimes quite resourceful in their ability to devise noninformative answers.'" See also, Developments in the Law—Discovery, 74 Harv. L. Rev. 940, 959-60 (1961).
81 A member of the Dallas Bar has advised that in practice Dallas courts shift the burden to the movant to justify interrogatories in excess of ten, although such policy probably would be denied. Compare Caldwell-Clements, Inc. v. McGraw-Hill Pub. Co., 12 F.R.D. 531 (S.D.N.Y. 1952), involving an alleged conspiracy in restraint of trade and monopolization in the publishing business. Movant submitted interrogatories filling fifty-three pages and by respondent's computation involving 9,769 separate paragraphs and requiring more than 293,000 answers. Respondent made a general objection to all the
Interrogatories are initiated by movant’s serving written questions on respondent. Thus this is a self-executing discovery device with respondent answering each question separately and fully, in writing, under oath. Should respondent deem an interrogatory objectionable, provision is made for the filing of written objections with notice of hearing. This is the first time the trial judge becomes involved in this discovery procedure, in contrast with judicial control from the outset under the motion to produce.

Rule 168, as other discovery devices, should be given a broad and liberal interpretation to achieve the proper ends of discovery. Nevertheless, the interrogated party should not have to give opinions, contentions or conclusions as to matters of law, or make research and compilation of information not readily known to him. Neither should this liberal interpretation extend to compelling answers from a respondent who declines to answer on the basis of possible self-incrimination.

Normally, a party will not be required to answer interrogatories if he either has no information or cannot obtain information by due inquiry. Therefore, a problem arises in determining what constitutes “due inquiry” by the respondent.

First, it should be pointed out that the question of due inquiry is a matter solely within the court’s discretion. Tests based on expense or effort have proven inconclusive, since they are relative standards which vary with each fact situation and group of adver-

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interrogatories that in the aggregate they submit him to “oppression, undue annoyance, and expense.” Id. at 534. The court, despite a determination that 264,000 of these answers were readily available to movant, rejected any objection based solely on the number of interrogatories. “No doubt these interrogatories impose some burden on [respondent]. . . . Interrogatories generally do, but the burden here is far from constituting such hardship as to require striking the entire set of interrogatories on the basis of annoyance, expense and oppression. Further consideration of the objection of annoyance and oppression will be given, however, where appropriate to particular interrogatories.” Id. at 535.

Interrogatories are “self-executing” in that they may be served and, under ideal conditions, answered without resort to the court.

82 Rule 168, supra note 7.
83 Rule 167, supra note 6.
84 There is nothing mandatory about the discovery provisions of the Rules. On the contrary, the purpose and intent is evident throughout to leave their application to the discretion of the trial court—not, of course, an absolute discretion but one controlled and governed, not only by statutory enactments and the well established rules of common law, but also by considerations of policy and of necessity, propriety and expediency in the particular case at hand. United States v. Kohler Co., 9 F.R.D. 289, 291 (E.D. Pa. 1949).
88 See note 103 infra.
89 Newell v. Phillips Petr. Co., 144 F.2d 338 (10th Cir. 1944).
saries. A more realistic guide is whether the matter is involved in the preparation of respondent's own case. It would be unreasonable to require respondent to prepare his adversary's case or to research and compile data equally available to movant. However, in instances requiring examination of data supplemented by unrecorded knowledge of respondent answers are more readily compelled.

A. Answers Contrary To Rule 168

There are few reported Texas cases dealing with rule 168. The adaptation of a rule from the federal rules is presumed to be in the context of the decisions construing the source rule. These cases logically divide into (1) unresponsive and (2) evasive answers to interrogatories. The former generally contain surplusage, whereas the latter fail to answer the precise question posed. "Answers to interrogatories must be complete, explicit and responsive."

1. Unresponsive Answers

Rule 168 provides that interrogatories shall be answered separately, fully, in writing and under oath. Unresponsive answers were given in a federal case arising over allegedly defective synthetic glue used in the manufacture of chairs. Movant

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94 See Byers Theatres, Inc. v. Murphy, 1 F.R.D. 286 (W.D. Va. 1940).
97 See Ex parte Odom, 133 Tex. 137, 271 S.W.2d 796 (1954).
98 See Byers Theatres, Inc. v. Murphy, 1 F.R.D. 286 (W.D. Va. 1940).
99 Sikes Co. v. Swift & Co., 9 F.R.D. 19 (W.D.N.Y. 1959). Other examples of unresponsive answers in that case are:

Interrogatory 3(c)—"State upon what particular items of plaintiff's line of furniture the same (synthetic glue) was used, describing each item by trade name or other description." Answer—"Office chairs." Interrogatory 3(d)—"State what part or parts of each were joined with said synthetic glue." Answer—"Initially all parts, except seats." Interrogatory 3(e)—"State whether any part or parts of any such items were joined by any adhesive or glue other than said synthetic glue and, if so, what part or parts were so joined." Answer—"Initially seats, and later all parts except Bank of England top and arm assembly."

The answer to Interrogatory 3(c) is not "fully" made. The complaint alleges and realleges "That plaintiff is and at all times herein mentioned has been engaged in . . . manufacturing and selling an extensive line of office furniture, including particularly a chair known as the 'Bank of England' . . . that the plaintiff is one of the largest producers of office chairs in the country and one of the largest producers of office chairs of the 'Bank of England' type."

The term "office chairs" is indeterminate. It may mean all office chairs or only some. If it means only the "Bank of England" type, plaintiff must say so. If it comprises other types, plaintiff must designate each of these types by trade name or other description. The complaint does not limit the allegations of defective glue to the "Bank of England" type. The uncertainty of 3(c) invades 3(d) and 3(e), which are further obscured by the adverb "initially." Plaintiff in these two answers must give dates and, if the revised answer to 3(c) specifies lines of furniture other than "Bank of England"
by interrogatory asked what tests, trials or experiments were made of the glue and the dates and names of the testing personnel. Respondent answered that tests were made under the supervision of movant's representative Cox starting about the time of the first order; however, the response continued "[respondent] commenced the use of said glue in production under the direction and supervision of said representatives of [movant] . . . and in reliance upon their representations, warranties and statements that the said glue was suitable for use in the business of [respondent]. . . ." The quoted portion of respondent's answer was unresponsive. Interrogatory 18(d) asked the amount and volume of business transacted by respondent with each of its customers during the preceding years. Respondent answered that the information was unknown and further that it was "unable to state specifically the loss of business from any particular source." The trial court likewise held this answer wholly unresponsive, since movant did not inquire about respondent's losses but about its business during the three years prior to the first loss, and decreed that respondent must answer this interrogatory.

Answers were also held unresponsive in a 1957 federal decision. Respondent was asked (1) the date of acceptance of a shipment, to which respondent answered, "the bill of lading shows the goods were receipted for October 31, 1950," and (2) if a dock receipt was issued at the time of receipt of the shipment, to which respondent replied that "a search is being made for any dock receipt given." The court directed respondent to answer these interrogatories, and if the requested information be unavailable, respondent should answer under oath setting forth in detail the efforts made to obtain the information.

In a workmen's compensation case interpreting the equivalent federal rule, respondent's answer that he had "received workmen's compensation" was held unresponsive to an interrogatory asking whether respondent had agreed to accept payments other than workmen's compensation.

Under federal interrogatory practice it has been held that neither making records available to the moving party, nor stating that upon completion of a survey data will be furnished, is adequate answer type of office chairs, these dates must be separately stated for each line. Id. at 21. (Also of interest are the answers to 5(b), 5(c), 6(a), 8(a), 9(a), 9(d), 10(e), 13(a), 18(a), 18(b), 18(c) and 21.


to an interrogatory seeking specific figures. 2

Answers should fairly meet the essence of the interrogatories or consist of written objection thereto with notice of early hearing.

2. Evasive Answers Interrogatory answers shall be direct, without evasion, and in accord with the available information, after due inquiry. Otherwise, the issues of the trial are not simplified, and discovery becomes useless.

In a wrongful death action arising from a pedestrian-auto accident movant’s interrogatories asked (i) whether movant’s taxi or another vehicle struck decedent, (ii) if it was claimed that both vehicles struck decedent, which vehicle first struck decedent, and (iii) if it was claimed that both struck the decedent simultaneously, a description of the decedent’s position at the time she was struck. Respondents’ answer and objections said they were not present at the time and place of their mother’s death so therefore had no knowledge of the cause, and accordingly were unable to answer movant’s interrogatories. Respondents’ answers were held an evasion and proper answers were ordered made. The court reasoned that these interrogatories asked what respondents claimed, not for detailed facts of the accident. Surely respondents “know what they claim. One of the principle purposes of interrogatories is to make the claims known.”

Responses to interrogatories concerning movant’s state of health were held evasive in Smith v. Aetna Life Insurance Company. Movant, a doctor, sought to enforce an accident income policy repudiated by respondent on the grounds of fraudulent application and disability resulting from disease rather than accident. Movant, by interrogatory, sought to determine respondent’s allegations as to the nature of his alleged brain or nervous disease with details as to the medical terms commonly used, date of his first affliction, progress at time of application, and names, addresses, and dates of any claimed attending physicians. Respondent did not challenge the propriety of the interrogatory. Respondent’s answers alleged that movant had a disease or diseases of the brain or nervous system “symptomized by extreme nervousness and neurotic tendencies, and an abnormal way

The opinion noted that: "Almost two and one-half years have passed since the original interrogatories were served. No request has been received from [Respondent] . . . for an extension of time for answering the interrogatories concerning which he had stipulated."
103 See Uinta Oil Ref. Co. v. Continental Oil Co., 226 F. Supp. 493 (D. Utah 1964);
of life, the basic diagnosis of which is not known to [respondent] . . . .” The disease “included a neurotic condition and abnormalities of the brain or nervous system, causing excessive nervousness and other abnormalities, the exact nature of which is unknown to this [respondent] . . . .” He further contended that movant's condition at time of application was advanced to a marked degree, otherwise respondent disclaimed knowledge of application, or names or dates of treating physicians. The court in rejecting these answers reasoned:

[S]ince [respondents] . . . refuse either to give the asserted condition a name, or otherwise to indicate the “basic diagnosis,” whatever that means [movant] . . . is entitled to know at least what the alleged manifestations of the condition were, or are believed to have been. Such information would enable [movant] . . . to undertake to show (a) that there were no such manifestations, or (b) if there were, that they were not symptomatic of brain or nervous disease. The latter, of course, would be a subject of expert testimony, and he is entitled to know in advance of trial, whether he is required to provide himself with a witness who is competent to testify on the subject.106

B. Judicial Enforcement Powers

Even if answers to interrogatories have been found improper there are no effective sanctions to enforce interrogatories under rule 168. Although some courts may find ways to close this loophole, there is no substitute for a properly-drafted sanction. Current studies107 offer hope of early correction of this anomaly in Texas pretrial discovery procedure.

FRCP 33, from which rule 168 is adapted, finds its requisite sanctions in FRCP 37(a) and (d). On motion and notice in a proper case a federal trial court may compel answers and grant recoupment of the reasonable expense incurred, together with attorney's fees incident thereto. The other sanctions which may be applied against a party who wilfully fails to answer an interrogatory are to strike pleadings, dismiss the action, or enter a default judgment. Also, penalties of varying degrees apply to passive or active degrees of disobedience.

The limited sanctions available to enforce interrogatories are discussed in Uses and Abuses of Rule 168—Interrogatories to Parties:

It is interesting to note that the sanctions of Rule 170 for refusal to make discovery under these companion Rules (167 and 169) have not been made applicable to the newly adopted Rule 168 . . . . Just what authority a court has in case of a party's refusal to answer proper

106 Id. at 555.
107 Steely and Gayle, supra note 79, at 231.
interrogatories under this Rule is not clear. It is assumed that Rule 215a, adopted along with Rule 168, does not apply to these interrogatories to parties. The mention of "written interrogatories" appears to refer to those authorized by Rule 189, that is depositions taken on written interrogatories. It would, however, seem reasonable that in passing on objections the court could make appropriate orders in both directions under this new Rule.  

It is certain that the design of the framers of rule 215a was to provide means of compelling answers to oral depositions and depositions on written interrogatories. The only ground that can be urged for including Rule 168 interrogatories under Rule 215a is found within the vague contours of subdivisions (b) and (c) thereof. Subdivision (a) of rule 215a provides that a party may apply for an order "to the court in which the action is pending or to the district court in the district where the deposition is taken . . . ." Subdivision (a) relates to depositions and is susceptible of no other interpretation.

The language of subdivision (b) provides penalties available should a party or witness refuse to comply with an order entered pursuant to rule 215a. Accordingly, no relation to Rule 168 can be found in the last sentence, which enumerates as an additional sanction "those permitted by Rule 170."

The strongest case for applying rule 215a sanctions to interrogatories is found in subdivision (c), which is an adaptation of FRCP 37(d). It is clear that FRCP 37(d) is applicable to both depositions and interrogatories submitted under FRCP 33; however, rule 215a provides that the sanction is to enforce "oral depositions or . . . answers to written interrogatories or cross-interrogatories under these rules . . . ." The last paragraph of the rule contains language also implying that the rule is effective only to enforce depositions of any witness "who is to [give] his oral deposition or answers to written interrogatories or cross-interrogatories under these rules [and who] . . . may be punished as for contempt of the court in which the action is pending or of the district court in the district in which such depo-

109 Tex. R. Civ. P. 215a. Refusal to Answer Question or Interrogatory; Consequences.
110 See Tex. R. Civ. P. Ann. 281 (Supp. 1964), the author in his comments says:
   Looking now to Rule 215a, it will be seen that its objective is to place under
   the control of the court the matter of dealing with witnesses and parties who
   refuse to make pretrial disclosure by deposition, and to provide an effective
   and expeditious procedure for coping with the problem. . . . (Emphasis added.)
111 Tex. R. Civ. P. 215a(a). (Emphasis added.)
112 Ibid.
tion or answers are to be taken . . ." The language emphasized above is foreign to rule 168 interrogatories because they (1) would not be oral and (2) are extrajudicial in nature so that no district court jurisdiction attaches to the place of answering.

Rule 215a is located within section 9, "Evidence and Deposition," of the Texas Rules of Civil Procedure; this is further evidence that its effect is limited to deposition practice and should not be stretched to include a discovery device such as rule 168 interrogatories.

IV. REQUEST FOR ADMISSIONS OF FACT

The request for admissions may be directed to any other party and should consist of a written demand for admission of the genuineness of any relevant document or of the truth of any relevant matter set forth in such request. The request for admissions must include a designated period, not less than ten days, for the answering party to serve sworn reply. The binding effect on the answering party is limited to the capacities in which he is addressed.

The request for admissions is not a true discovery device since the moving party knows the facts or possesses the documents inquired about and actually is attempting to obtain conscious admission of a matter that in good faith should not be controverted. Requests for admissions of ultimate issues are not contemplated. The admissions practice is designed to dispense with the necessity of proof as to undisputed issues. "This purpose is met when the request lists evidentiary matters. Of course, many times when all evidentiary matters are admitted, the ultimate issue will stand undisputed. But this does not alter the purpose of this procedure."

Each request for admissions should consist of a categorical statement that a specific fact is true. Examples of sufficiently leading requests are:

"Your name is John Jones and you are the defendant in this case. "At the time of the collision between defendant's truck and the car driven by Vernice Gibbens on September 30, 1950, Wayne Lawler was the agent or employee of Montgomery Trucking Company."
In Texas the request for admissions was the most frequently used discovery device prior to the advent of rule 168. The interrogatory has largely replaced the request because it is "so much broader, more flexible, and more convenient to use." The actual problem lies in the misuse of the request for admissions.

If parties insist, as they generally do, on asking their opponents to admit as facts, dates and events about which there is room for doubt or argument, of course the endeavor to obtain admissions breaks down; but if the demand is limited to facts not really in dispute, that is, which can be admitted cleanly, or subject to some simple qualification, I find that it is generally acceded to, and the power which the Court has of throwing the costs on any one who has increased them by declining reasonable admissions is not forgotten.

An answer to requests for admissions pursuant to rule 169 must be (1) an admission, (2) a sworn statement denying specifically, or (3) a sworn statement explaining the inability to deny or admit. Abuses occur in the area of the qualified answer, which may be categorized as (i) unresponsive or (ii) evasive.

A. Answers Contrary To Rule 169

Unsatisfactory answers may be divided into (1) unresponsive answers and (2) evasive answers, the latter being further subdivided into (a) equivocations, (b) refusal to admit or deny, and (c) a contention that the admission requested is a matter of law. As with interrogatories unresponsive answers normally contain self-serving surplusage, while evasive answers avoid meeting the substance of the requests. Often, the problems stem from improper or poorly-drafted requests for admissions.

1. Unresponsive Answers The unresponsive or self-serving response to a request for admissions is an attempt to circumvent the purpose of discovery and, in addition, to admit unobtrusively evidence favorable to respondent. This normally involves a conscious or active disobedience by respondent.

Requests should be a statement of fact to which admission is requested, so worded that it can be answered "yes" or "no." Rule 169, supra note 8.

An unresponsive answer fails to fairly meet the substance of the request. Frequently, the unresponsive answer takes the form of a self-serving declaration. Precise definitions of unresponsive, or evasive answers are non-existent, leading to confusion in the courts' opinions. Strictly speaking, either a "yes" or "no" answer to a request for admissions is unresponsive. The "request" is in reality an imperative involving a statement of fact: "admit..."
169 permits qualification in the response to include explanatory or qualifying language. It is in this area that abuses are common.

The problem of the unresponsive answer was first dealt with in Texas in Mosby v. Texas & Pacific Railway. Movant, suing for personal injuries, sought admissions that the derailment had been caused by a rail breaking. Movant requested admissions: (1) that the particular train was derailed, (2) that movant was the conductor, (3) that the train was in interstate commerce, (4) that the train was running sixty miles per hour, and (5) that under the American Experience Tables a man of sixty would have a life expectancy of 14.10 years. Respondent’s answer was a narrative rather than an answer to each item separately, as required by the rule:

[Movant] at the time of said accident was the conductor on the freight train involved in said accident; that three freight cars and a caboose were derailed due to the breaking of a rail, which resulted from a fissure in the rail, no part of which fissure extended to the outer portion of the rail, and which fissure was not discoverable...it being a latent, unseeable defect...

Said accident occurred on February 8, 1941, about three miles west of Allamore, Texas...said train was running about sixty miles per hour, and was moving in interstate commerce.

That said rail broke in two places, at both of which places there were fissures as above described.

[Respondent] has not examined the American Experience Table of Mortality, and it is not a matter connected with its business, and it neither denies nor affirms [movant’s]...statement...but demands strict proof thereof.

Movant at the trial introduced the admission, together with evidence of respondent’s negligence. Respondent contended that movant was bound by these admissions that the accident was a result of a latent defect, and, accordingly, that respondent was entitled to an instructed verdict. The appellate court held respondent’s unresponsive surplusage to be an explanation rather than an answer and not binding on movant. “If the rule be extended and held to embrace the surplusage, unresponsive, and voluntary statements of the adverse party, as the pencil is yellow.” An answer of “no” would be taken to mean that the respondent denied that the pencil is in fact yellow, but logically could as well mean that he is responding negatively to the command to admit. If an argument based on the semantics of admissions were made to a court it would undoubtedly scoff. However, no inherent vice in the law requires that it be written unintelligibly. Mellinkoff, The Language of the Law 424 (1964).

126 Masterson, supra note 120, at 121.
party and hold him who seeks the admissions bound thereby, the rule is at once rendered altogether useless and worthless."

The unresponsive qualifying portion of an offered addition to an answer was excluded in an auto-truck collision case. Movant requested respondent to admit that she or her husband had commented that there were a great number of lights ahead on the highway, and had speculated on the possibilities of a wreck. Original counsel for respondent answered this question affirmatively. Subsequently, respondent sought to add the following qualification "with the further addition that [she] . . . would testify that her husband had started to stop, that is, that he had let up on the foot feed, but had not applied the brake." The appellate court affirmed rejection of the latter statement, since the request was fully answered and the offered qualifying addition was not responsive to the question.

Unique responses were elicited in Wilkinson v. Paschall. The unresponsive answers were held not binding on movant, but no adequate remedy was afforded, apparently due to movant's lack of pursuit. One request asked if respondent had ever seen movant drink whiskey, to which respondent answered, "I have never been associated with or around [movant] . . . and was not acquainted with him until 14 days after be got drunk and run over the cow on the night of October 3d, 1946." (Emphasis added.) The trial court held the first request immaterial and the answer thereto not detrimental, and presumably no sanction was applicable. The answer was held unresponsive to the question, improper and shown upon the trial of the case to be hearsay. The admission requested apparently was proven at the trial. Accordingly, the amount of damage was the added expense in offering proof. Apparently, movant filed no motion for reimbursement of his expense, so no sanctions were imposed.

In summary, the party making the unresponsive answer cannot introduce it at either pretrial or trial. Upon motion of the requesting party at either pretrial or trial, the court should strike the unresponsive part of respondent's answer. However, should movant tender the undiluted answer, he may be bound thereby until it is expunged from the record.

119 Id. at 58. See also Note, 27 Texas L. Rev. 562 (1949).
120 Cruse v. Daniels, 293 S.W.2d 616, 622 (Tex. Civ. App. 1956) error ref. n.r.e. Movant's request no. 2 asked if respondent would testify substantially to the effect that "I do remember that prior to the collision and as we drove on the highway East of Sudan, either [my husband] . . . or I one mentioned that there were a great number of lights in the road and that perhaps there might have been a wreck."
122 Rule 170(c), supra note 26, provides that movant "may apply to the court for an order requiring the other party to pay him the reasonable expenses in making such proof" and, unless motion for reimbursement is made, the expenses are deemed waived.
123 Masterson, supra note 120.
2. Evasive Answers  Evasive answers generally are less than a complete answer to the request. Evasive answers may be the product of conscious disobedience or, too frequently, neglect on respondent’s part.

a. Equivocations.—The amendment of FRCP 36 was designed to prevent an objection to a part of a request from delaying answers to the remainder of the request.\(^{124}\) While language similar to FRCP 36 as amended is not found in rule 169, a like result has been reached by Texas courts in *Bowman Biscuit Company of Texas v. Hines*,\(^{125}\) in which movant requested admission that the unbroken packages of Apricot Puff cookies in question were delivered to respondent on or about October 5, 1948. Respondent answered that “delivery date of such ‘Apricot Puff’ cookies to [respondent] . . . was September 24, 1948.” The court held that only a portion\(^{126}\) of the request had been answered, and no denial was made of the balance, nor qualification of the unanswered part showing it could neither be admitted nor denied. Accordingly, the entire question was deemed admitted.

b. Refusal to Admit or Deny.—“This defendant cannot either admit or deny” is an often tried and invariably ineffective response unless substantiated by a statement detailing the respondent’s inability to answer. This answer, or variations of it, has been held to result in admissions.

The leading case, *Montgomery v. Gibbens*,\(^{127}\) treats the matter so well that no doubt should exist as to the ineffectiveness of such answers. Movant requested admissions from respondent that he was the owner of the truck involved in a collision and that the driver was his agent or employee and at the time was acting within the scope of his employment. Respondent’s answer to request No. 5 concerning scope of employment is representative: that he “cannot truthfully either admit or deny the matters set forth in request No. 5 for the reason that he has no actual personal knowledge of any collision between any one of his trucks and a car driven by [movant] . . . and for that particular reason cannot swear to said statements con-

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\(^{124}\) Moore, *op. cit.* supra note 122, \(\S\) 36.01 at 2703-04. The following language was added to accomplish this purpose: “A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party deny only a part or a qualification of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder.”

\(^{125}\) 240 S.W.2d 467, 470 (Tex. Civ. App. 1951), rev’d on other grounds, 151 Tex. 370, 251 S.W.2d 153 (1952).

\(^{126}\) Can a partial answer be made to a proper request for admission? It cannot if the procedure for obtaining admissions of fact is limited in use to obtaining admission of a single fact as to which there is no real dispute and which the adverse party can admit cleanly, without qualification. 4 Moore, *op. cit.* supra note 122, \(\S\) 36.04.

The trial court held that this and similar answers to the other requests were evasive and not in keeping with rule 169. In making its holding, the court said:

[Respondent] certainly had knowledge or the ability to acquire knowledge of whether the driver of the truck in question, was his employee on September 30, 1950. The questions of whether the truck involved was owned by [respondent] and whether [the driver] was in the course of his employment were likewise matters about which [respondent] should have been in position to ascertain the facts by reasonable inquiry. [Respondent] was required to affirm or deny the requested admissions or to 'set forth in detail the reasons' for not so doing. Such reasons themselves may not be fickle but must be based upon reason. To refuse to admit or deny the above requests for the stated reason that he did 'not know of his own knowledge anything about the collision' was an evasion of rather than a reply to such request and did not comply with the rule.\textsuperscript{[129]}

In \textit{Sanchez v. Caroland}\textsuperscript{[140]} the court noted that rather peculiar answers had been returned to requests seeking confirmation that respondent's truck at the time of the accident was under the control of one of his employees, acting in the course of employment. Respondent's curious response was that he could not "truthfully either admit or deny" because the request was too general, a "fishing expedition," and that no connection was shown between respondent and either

\textsuperscript{[129]} Id. at 314. Other requests for admissions and respondent's answers were:

2. That on September 30, 1950 [respondent] owned a truck which was involved in a collision with an automobile driven by [movant].

2. [Respondent] alleges that he cannot truthfully either admit or deny the matters contained in Paragraph 2 of said request for the reason that he does not know of his own knowledge anything about any collision with an automobile driven by [movant].

4. That at the time of the collision between [respondent's] truck and the car driven by [movant] on September 30, 1950, [respondent's driver] was an agent or employee of [respondent].

4. [Respondent] cannot truthfully admit or deny the matters contained in paragraph 4 of said request for the reason that he does not know of his own knowledge anything about a collision between any of his trucks and a car driven by [movant] on September 30, 1950, and therefore he cannot swear to the statements and admissions shown in paragraph 4.

5. That at the time referred to in question 4 [respondent's driver] was acting within the scope of his agency or employment to [respondent].

5. (Answer quoted in text.) Ibid.

\textsuperscript{[140]} Id. at 315.

\textsuperscript{[124]} 274 S.W.2d 114 (Tex. Civ. App. 1954). Respondent's answer was:

[H]e cannot truthfully either admit or deny... because the facts to date do not disclose any relationship between [respondent]... and the unnamed driver of said truck. That this request... is not specific enough to identify the driver with whom the relationship of the agent or employee is inquired about and the said request for admissions must be specific so that [respondent]... can intelligently comply with said request for admissions and should not be a "fishing expedition." That as previously stated in this answer... there are no facts to date, showing the presence of [respondent]... at said scene of said accident. Id. at 116.
the truck driver or the scene of the accident. The court held, "if a trial court is not free to treat this character of answer as an admission of the facts sought to be admitted, the purposes of Rule 169 would be defeated," and concluded with the aphorism, "a response should be candid."141

c. Distinction Between Matters of Law and Fact.—Rule 169 provides for the demand for admissions of matters of fact. There is no authority for a demand of an admission of matters of law.142

Matters of fact ordinarily denote what was done, the events that occurred and the conditions that existed prior to institution of the proceeding, while a matter of law generally signifies the rules by which acts, events, writing and conditions are tested.143 Questions for determination by the jury are proper subjects for requests for admissions, while questions for determination by the court are normally not.

This fundamental is graphically demonstrated in Caddo Grocery & Ice v. Carpenter.144 Respondent was asked if he was "engaged in the business of the manufacturing of or making and selling sandwiches." His response recited that the request was made under rule 169 and that, accordingly, he "is not required to answer the request that involves questions of law and that said interrogatory No. 3 involves a question of law and that for this reason this defendant neither admits nor denies said interrogatory." The court, in adjudging this request as admitted, reasoned that the requests in question were not demands for admissions of matter of law. Certainly respondent "knew whether he himself or someone acting for him and with his authority manufactured sandwiches under the names inquired about, whether he authorized their sale to Caddo or whether he sold them himself, and also whether they were sold for human consumption."145 Respondent had sufficient knowledge or could readily obtain information to enable him to admit or deny the request.

Response that the request is a question of law standing alone is not in conformity with rule 169.146

In Kansas City Title Insurance Company v. Atlas Life Insurance Company147 the requests sought admission that respondent had an agent and representative in Dallas County from 1954 to 1959.

141 Ibid.
142 Hester v. Weaver, 252 S.W.2d 214, 216 (Tex. Civ. App. 1952) error ref.
145 Id. at 473-74.
147 Ibid.
respondent in its narrative answer recounted that it was an underwriter of title insurance and that persons issuing such policies operated under a contract of limited authority. Standing alone, neither respondent’s opinion that the question cannot be answered yes or no, nor his conclusion that the question calls for an answer of law and fact, constitutes an acceptable reply under the rule. To be within the rule a response other than an admission or denial must detail why the respondent cannot truthfully admit or deny.

B. Judicial Enforcement Powers

FRCP 36 was initially intended to operate extrajudicially with the parties admitting or denying at their pleasure. The only sanction for improper denial was the taxing of expenses incurred in proving the matter at trial.148 Through amendment and interpretation, it is now well established that both FRCP 36 and its Texas counterpart, rule 169, although self-executing in their inception, are subject to judicial control on hearing of respondent’s objections or of movant’s requests that certain answers be deemed admissions.

No method of objecting to requests is provided in rule 169, although specific provision therefor was added by amendment149 to its counterpart, FRCP 36. Texas courts have held that if respondent desires to avoid making the admission requested, he must within the designated time for answer serve written objections and notice of their early hearing. Objection may be made on the ground that some or all of the requested admissions are (i) privileged, (ii) irrelevant, or (iii) otherwise improper in whole or in part.150 It seems clear that under rule 169 the trial court has discretion as to the time for hearing and ruling upon such objections, as well as related matters.151 Such objections ideally would be considered at pretrial152 but in practice are usually resolved when offered as evidence.153

The most common sanction for failure to answer a proper request is to deem the matter in question admitted.154 Persuasive argument for the additional sanction of compelling proper answer to requests for admissions is that:

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149 Id. § 831.
150 Sanders v. Harder, 148 Tex. 593, 227 S.W.2d 206 (1950).
151 Masterson, infra note 120, at 124.
153 Masterson, infra note 120, at 124.
It is the party requesting admissions who often seeks an additional judicial remedy in the form of an order to compel further answers. Nothing in the rules expressly authorizes the court to make such an order, but it is difficult to see why it should not be able to do so. If the only sanction for disobedience of an order compelling more adequate answers was to deem the request admitted, as the court could have done initially, the effect of such an order would be merely to give the answering party a second chance to comply with the rule. Although such a procedure would further inject the court into the operation of Rule 36, it seems only reasonable, in view of the recipient party’s right to object to the requests and the court’s reluctance to penalize him for not answering, to give the requesting party this additional means of obtaining a proper admission or denial.  

Rule 170(c) provides for taxing reasonable expenses incurred by a false denial against the offending party. There is only one reported Texas case assessing expenses against a recalcitrant party, but there are several federal decisions which have granted very adequate awards.  

In Garrison v. Warner Brothers Pictures, Inc. respondent in good faith denied one request for admissions. Later, but still eighteen months before trial, he notified movant that his previous denial had been a mistake. Neither attorney’s fees nor costs were allowed under FRCP 37(c).  

Rule 170(c) is the only sanction available should a party improperly deny a fact under the provisions of rule 169.  

V. IMPROVEMENT OF TEXAS DISCOVERY PROCEDURES  
A. The Current Rules  
1. Motion to Produce  
By judicious application of the varied and rather severe sanctions available, should a rule 167 order be violated, a firm and fair judge can successfully enforce proper discovery.

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157 Akins v. McKnight, 13 F.R.D. 9 (N.D. Ohio 1952); expenses of $3,100 were taxed to the party improperly denying the request rather than taxing all the parties of whom requests were made. In making its holding the court reasoned:  
[Movant] seeks to impose liability for any expenses allowed, upon counsel for plaintiff and the corporate plaintiff, as well as upon plaintiff Akins, who alone denied the request.  

Rule 37(c) provides for the assessment of expenses in a proper case only against a person serving sworn denials. The sanction of the Rule is a drastic one and should not be extended beyond its terms. Accordingly, only plaintiff Akins will be held liable for the present expenses. Id. at 11.  
158 226 F.2d 354 (9th Cir. 1955).  
In *Personal Injury Litigation in Texas* these sanctions are enumerated as follows:

(a) Order the matters to be taken as established in accordance with the claim of the party obtaining the order.

(b) Deny the refusing party the right to support or oppose designated claims and excluding certain testimony.

(c) Strike pleadings or parts thereof, or stay further proceedings until the order is obeyed, dismiss the action or render a default judgment.

(d) Assess reasonable expenses incurred in making proof where the disobedient party should have admitted the same, such reasonable expenses to include reasonable attorney’s fees.

(e) Make any other orders in regard to the refusal that appear to be just.

These penalties carry a punch. They are much more likely to secure compliance from a recalcitrant party than would the contempt penalty alone.

2. Interrogatories The court has power to pass on objections and undoubtedly can make appropriate orders under rule 168. Beyond this limited power, a trial court is currently powerless to enforce discovery under rule 168. Rule 215a sanctions perhaps can be stretched to apply, although this seems unwarranted.

3. Request for Admissions Indications are that the available sanctions under this discovery procedure are seldom enforced by trial judges. As noted earlier, *Mims v. Houston Fire & Casualty Insurance Company* is the only reported Texas case where the rebelling party was taxed for expenses, and even there the action was by the appellate court, not the trial court.

B. Suggested Amendments

Procedural rules are the tools of the legal profession; their betterment leads to a more effective and efficient end product—justice. Former Attorney General Cummings pointed out the legal profession’s proclivity to procrastination and resistance to change:

[T]he public will not indefinitely entrust to the legal profession those functions which the legal profession does not effectively discharge. If our laws and our legal machinery become antiquated and unserviceable, we, as lawyers, must set our own house in order or confess judgment in the face of the charges which have been made against us.

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161 Ibid.
162 See text accompanying notes 107-108 *supra*.
163 See text accompanying notes 109-113 *supra*.
The sources of the Texas pretrial procedure rules discussed in this paper are FRCP 33, 34 and 36.108 At the time of the adoption of the Texas Rules of Civil Procedure, Judge Robert W. Stayton candidly observed that when procedural rules are adopted which depart from the federal rules an explanation is in order. "The federal rules were the subject of such great care at the hands of so able a committee and give promise of so widespread an adoption that it would seem almost an eccentricity to depart from them at all and disappoint the hope of the profession as a whole that they would be the pattern of a nationwide reform."109 Texas did not adopt the federal rules verbatim, nor have all the intervening amendments thereto been adopted. The ideal policy would be adoption of the federal rules unless some reason peculiar to Texas practice dictates departure.

The demonstrated willingness of the Texas Supreme Court to change and modify the rules as deficiencies are noted is their strength and promise for the future.110

1. Motion to Produce The 1957 amendment of rule 167, based on FRCP 34, as amended, added to the similarity of those rules.111 Subsequently, the motion to produce has functioned smoothly, but revision seems warranted to improve its usefulness.

Unshackling the motion to produce, by eliminating the prerequisite of showing the court good cause and relevancy, is long overdue. These requirements represent the antithesis of the pretrial discovery policy, embodied in the interrogatory and admissions procedures, that routine extrajudicial discovery should be available as a matter of right. The discoverability of such material would remain the same,112 the only innovation being a shifting of the burden to the answering party to invoke the court's control, if required.113 Presently, every motion to produce involves an already overextended court. This is not the case under the companion discovery procedures where there is judicial intervention only in the event of contest. A study of the application of FRCP 34114 revealed that sixty per cent of the motions are granted and in addition that the opposing parties acquiesce in a number of other instances even though they are not

108 See text accompanying notes 20-21 supra.
111 See text accompanying notes 21-22 supra.
113 Ibid.
required to do so. These figures indicate that a shifting of the burden to the answering party would relieve the court in a majority of motions to produce. This should result in a corresponding saving of time for both counsel, who would be freed of court appearances except in contested matters.

2. Interrogatories The major distinction between rule 168 and its source, FRCP 33, is the availability of the answers to interrogatories as evidence. Rule 168 provides that answers may be used only against the party answering, while under the federal rule, answers may be used against any party to the same extent as a deposition. In view of the requirement that copies of the interrogatories and any answers must be served on all other parties the purpose for this limitation remains obscure. The utility of the interrogatory procedure is materially diminished, often requiring the use of other discovery procedures to insure the availability of interrogatory answers as evidence at the trial. Consideration should be given to allowing use of interrogatory answers to the same extent as depositions may be utilized.

Interrogatories frequently are not answered within the required period of fifteen days. Extension of the answering period to thirty days and of the objection period, which seems needlessly compressed, to twenty days has been suggested as better serving the ends of proper answers. This should also eliminate the all too frequent time-acquiring objection.

Insuring that interrogatory answers are current at the time of trial is a major problem under both the Texas and federal practices. The movant may include an interrogatory or statement that the questions are of a continuing nature. At least one state and one federal district have provided by rule that there is a continuing duty to assure the truth of interrogatory answers. The continuing

173 Ibid.
174 Masterson, Adversary Depositions and Admissions Under Texas Practice, 10 Sw. L.J. 107, 132 (1956); compare with rule 169 limitations. Professor Masterson cited the following example: "Suppose there is one P and two D's, or, two P's and one D? Clearly judicial admissions made by one party are not binding on any of the other parties, and this includes a situation where one sues or is sued in several capacities and admits in only one of them. Krasa v. Derrico, 193 S.W.2d 891 (Tex. Civ. App. 1946)."
175 Rule 168, supra note 7.
176 Speck, supra note 172.
177 Developments in the Law—Discovery, supra note 170, at 963.
duty to assure the truth of interrogatory answers following initial response should be provided for in rule 168.

Interrogatories have yet to reach their zenith of utility, a fact which is equally true of discovery in general. Local experimentation designed to make the interrogatory more useful has produced encouraging results. A local bar committee formulated a series of seventy interrogatories, for use primarily in tort actions and designed to "reduce the amount of work required of the Judges and of counsel in discovery within the scope of these interrogatories." The interrogatories were tailored by the Committee in such fashion as to elicit the maximum amount of relevant, pertinent and non-objectionable information. We quote a few:

"5. Have you or has anyone acting in your behalf obtained from any person or persons any report, statement, memorandum, or testimony concerning the accident involved in this cause of action?"

"6. If so, what is the name and last known address and present whereabouts, if known, of each such person?"

"7. If so, when, where, and by whom was each such report, statement, memorandum, or testimony obtained or made?"

"8. If so, where is each located?"

"9. What is the name and last known address and present whereabouts, if known, of each person whom you or anyone acting in your behalf knows or believes to have witnessed said accident?"

"10. What is the name, last known address, and present whereabouts, if known, of each person whom you or anyone acting in your behalf knows or believes to have any relevant knowledge of the conditions at the scene of the accident existing prior to, at, or immediately after the same?"

This series of interrogatories is presumably permissive, but its use is "encouraged by the court's readiness to rule that non-conforming interrogatories are objectionable." Such court-approved interrogatories should provide a degree of uniformity in interrogatory practice, thus saving both the court's time and the time of counsel in preparing and answering interrogatories.

3. Requests for Admissions  Rule 169 would be materially improved by revision in keeping with the 1948 amendment of FRCP 36.

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182 Developments in the Law—Discovery, supra note 170, at 960.
183 Id. at 184-86.
185 Ibid.
187 Amendments to the federal rule were offered because:

There has been considerable difference of judicial opinion as to the correct
The adaptation of rule 168 in 1962 with substantial variance in terminology from its source, FRCP 33, indicates that such broad revision is improbable.

Vital changes needed in rule 169 are (1) the addition of a definite procedure for challenging the propriety of a request for admissions, (2) clarification that an objection to a part of a request withholds answer only to the questioned portion, and (3) clarification that a denial should accurately reflect the party's position and fairly meet the substance of the requested admission.

Provision for questioning the propriety of a request should be added to bring rule 169 into conformity with FRCP 36 and rule 168. The latter rule provides that "within 10 days after service of interrogatories a party may serve written objections thereto together with a notice of hearing on the objections at the earliest practicable time." An amendment providing a similar method of objecting could be added to the last part of the fifth sentence of rule 169; the following is submitted with new language emphasized:

the party to whom the request is directed delivers or causes to be delivered to the party requesting the admission or his attorney of record either (1) a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny these matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part, together with a notice of hearing the objections at the earliest practicable time.

In order to preclude any doubt that an objection to a part of a request does not remove the requirement for answering the remainder of the question and to insure that an answering party's denial accurately reflects his position, language from FRCP 36 following the above-proposed objection procedure could be added to rule 169:

If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the

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188 See text accompanying notes 190-192 infra.
190 Rule 168, supra note 7.
request. A denial shall fairly meet the substance of the requested ad-
mission, and when good faith requires that a party deny only a part
or a qualification of a matter of which an admission is requested, he
shall specify so much of it as is true and deny only the remainder.\textsuperscript{192}

4. Rule 170—Sanctions for Noncompliance with Discovery The sanction rule should be amended to establish one set of broad sanc-
tions so the trial judiciary will have an appropriate penalty readily
available for any infraction of pretrial discovery. Such a broad new
sanction is proposed as rule 170 in the Appendix.

Rule 170,\textsuperscript{193} adapted from FRCP 37, at present contains sanctions
to enforce discovery under rule 167, "Motion to Produce," and rule
169, "Request for Admissions." Apparently through oversight, sanc-
tions for non-compliance with rule 168 were omitted.\textsuperscript{194} The motion-
to-produce sanctions\textsuperscript{195} commence rule 170 and conclude with the first
sentence of paragraph (c). The remaining two sentences of paragraph
(c) of rule 170\textsuperscript{196} contain the ineffective enforcing sanctions for
rule 169.\textsuperscript{197}

Major revision of the sanction rule to add clear, broad and flexible
enforcement provisions applicable to rules 167, 168 and 169 is
needed. Among these broad powers, the courts should be given the
additional sanction of directing the arrest of any party or agent of
a party who wilfully disobeys an enforcing order of the court; this
would be similar to the power granted under FRCP 37(b) (2) (iv).

The courts should be granted specific power to tax expenses against
the actual rebelling party, agent or attorney. This should prove a
sobering effect on the head-strong advocate.

Finally, a section should be added providing that neither an ob-
jection to a request for discovery nor a motion that the claim of the
moving party be established shall be heard unless the moving party
has certified to the court in writing that he has been unable through
consultation with opposing counsel to resolve the question raised by
such objection or motion.\textsuperscript{198}

Maximum flexibility is provided in the proposed rule. The court
is not limited to stereotyped sanctions: "the court in addition to

\textsuperscript{192} Ibid.
\textsuperscript{193} Rule 170, supra note 26.
\textsuperscript{194} See text accompanying note 108 supra.
\textsuperscript{195} See text accompanying notes 67-74 supra.
\textsuperscript{196} See text accompanying notes 157-159 supra.
\textsuperscript{197} See notes 278-85 infra and accompanying text.
fine or imprisonment for contumacious disobedience, may, within
reason, use as many and as varied sanctions as are necessary to bal-
ance the scales of justice against any weight or advantage to the dis-
obedient party."

VI. Conclusion

Texas law provides three epistolary discovery devices for the
practitioner: the motion for production of documents, written inter-
rogatories to parties, and requests for admissions of fact. In general,
discovery is designed to narrow the issues, to secure known evidence
for trial use, to determine existence of evidence, and to provide an
inexpensive and effective means of achieving these purposes.

Discovery makes it possible for the court to define the actual con-
troversy by eliminating issues not seriously contested, disclosing the
relevant evidence, exposing fraudulent claims and defenses, and im-
proving the opportunities for settlement by acquainting the parties
with the values of the case. These objectives are widely applauded in
the abstract but meet with resistance in practice.

Effective discovery requires sanctions insuring compliance with
discovery efforts. Discovery procedures and their catalysts, sanctions,
should be improved, utilized and enforced in the interest of justice.

Appropriate sanctions must be added to insure answer to inter-
rogatories. The duty to assure the continuing truth of interrogatory
answers should be provided, and provision should be made to increase
the periods for answering and objecting to interrogatories to thirty
and twenty days respectively. The motion to produce should be
amended to provide for extrajudicial inception, thereby simplifying
the procedure and effecting a saving of the court’s limited time. The
admissions’ sanction should be strengthened and clarified in
keeping with companion pretrial procedures.

Discovery can be improved by: (1) the bar’s artful drafting of
discovery procedures and candid response in meeting the substance
of the discovery, (2) the trial judiciary’s fair and impartial enforce-
ment of appropriate sanctions, and (3) the Texas Supreme Court’s
continued prompt amendment of pretrial procedures when experi-
ence dictates.

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APPENDIX

RULE 170. NONCOMPLIANCE WITH DISCOVERY; CONSEQUENCES

(a) If any party or an officer or managing agent of a party does not comply with a request for discovery under Rules 167, 168, or 169, the proponent of the request may on reasonable notice to all persons affected thereby apply to the court for:

(1) any just order to compel discovery authorized by the respective rules;

(2) an order establishing for the purposes of the action the claim of the party obtaining the order;

(3) an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing in evidence designated documents or things or items of testimony;

(4) an order striking out pleadings or parts thereof, or staying further proceedings until discovery is made, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(5) in lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders.

(b) If the motion is granted and if the court finds that the noncompliance was without substantial justification the court shall require the non-complying party and the attorney or party advising the noncompliance or either of them to pay to the requesting party the amount of the reasonable expenses incurred in obtaining the order, including attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the requesting party or the attorney advising the motion or both of them to pay to the non-complying party or

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1 Proposed rule 170 is drawn from existing rule 170 and FRCP 37. Section (a) of the proposed rule is adapted from FRCP 37(b) (2) and rule 170(a), (b) and the initial portion of (c). In the source rules these sanctions were limited to the motion to produce.

Section (b) of the proposed rule is drawn from FRCP 37(a), (c), and (d) and the last portion of rule 170(c). These sanctions, under the sources, were applicable to interrogatories and requests for admissions. See text accompanying notes 193-199 supra.

2 Adapted from FRCP 37(b) (2).

3 Adapted from FRCP 37(b) (2), and rule 170.

4 Styling change to rule 170(b) broadens its scope to encompass the epistolary discovery devices.

5 Styling change to rule 170(c) broadens its scope to encompass the three epistolary discovery devices.

6 Fed. R. Civ. P. 37(b) (2) (iv).
witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.  

(c) Neither an objection to a request for discovery nor a motion that the claim of the moving party be established shall be heard unless the moving party has certified to the court in writing that he has been unable through consultation with opposing counsel to resolve the question raised by such objection or motion.

Fed. R. Civ. P. 37(a), plus adaptations from FRCP 37(c) and (d), and rule 170(c). Power to tax expenses against the actual rebelling party should prove a sobering effect on the head-strong advocate.


Courts are frequently called upon in contested discovery matters in protracted cases to hear argument directed at relatively minor objections to interrogatories, motions to produce and the like. Frequently, if objecting counsel had made known to his opponent the specific ground of his objection, a change in the interrogatories or in the motion for production could have been agreed upon, thus saving the court's time. Many objections, of course, must ultimately be ruled on by the court. But by having counsel confer in advance, the chaff of detail may be stripped away by their mutual agreement, thus leaving the real issues for decision by the court.
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