

**PAPER MACHE´, ORIGAMI & DRAFTING DISCOVERY:
CREATIVITY WITH PAPER**

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WRITER'S NOTE: This article was originally published in 1990 for the State Bar Litigation Seminar and is re-printed here without **any updating or revisions**. While the references may be dated, the substance of the paper is still probably useful and instructive with regard to effective discovery drafting techniques. The author strongly recommends that practitioners update any case law cited herein before relying on it.

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PAPER MACHE', ORIGAMI AND DRAFTING DISCOVERY: CREATIVITY WITH PAPER

I. INTRODUCTION

Good drafting techniques can be as important as discovery itself. The information that is obtained through discovery will often be no more clear or specific than the request in response to which it is produced. Specificity and clarity are mandatory, if the information and responses are to be useful at trial. It is important for the litigants to understand what is being asked and answered so that the litigation progresses expeditiously and meaningfully. More importantly, however, since written discovery requests and responses may be read at trial, the jury must understand what has been requested and produced. How well the discovery has been drafted could very well be outcome-determinative.

Much of the growing concern about discovery abuse has focused upon the problems and the gamesmanship encountered in written discovery and what can be done about it. The Texas Supreme Court has recently taken aim at requests for production, emphasizing that overbroad and nonspecific requests may fail to meet muster. Loftin v. Martin, 776 S.W.2d 145 (Tex. 1985). Its next step should be to target evasive, nonspecific responses. On a different front, interest is growing in the concept of pattern discovery requests as a way of eliminating the tremendous amount of time and judicial resources wasted on resolving sophisticated disputes over semantics.¹

Throughout this paper I will try to emphasize that artful and conscientious drafting of discovery requests and responses is an invaluable aspect of a successful litigation and trial strategy. Whenever appropriate, I will try to illustrate the concepts being discussed with examples. These examples often will be taken directly from my own practice and have not been certified or approved by the bench, the bar or any other legal -- or for that matter, illegal -- group. They may, in fact, be subject to valid objections. I offer them here not as forms to be blindly adopted and fed into a word processor, but merely as starting points for creative thought and drafting.

II. DISCOVERY STRATEGY AND SCHEDULING ORDERS

A. Overview

Scheduling orders, while not technically discovery devices, can be a very critical aspect of the discovery process. An order that is carefully planned and drafted will enhance and enforce the discovery strategy and timing that a trial attorney desires to implement. In this regard the importance of a discovery strategy cannot be over-emphasized.

Before undertaking discovery in a case the trial attorney should give considerable thought to what are going to be the key issues, terminology and evidence in the case. It is important to form this understanding as early and as clearly as practicable so that in drafting discovery requests or responses these central themes and terms can be consistently emphasized and repeated.

B. Discovery Strategy

A well-thought-out discovery strategy is fundamental to obtaining meaningful discovery in an efficient and effective manner. Often the timing of a discovery request can be as significant as the request itself. The various discovery devices are designed to augment each other, and a successful discovery strategy will attempt to exploit this concept.

The guiding principal in seeking discovery should always be to obtain information that will lead to admissible evidence at trial. The ultimate goal that every discovery strategy should seek to achieve is the resolution of the dispute by what the facts reveal, not by what facts are concealed. See, Jampole v. Touchy, 673 S.W.2d 569 (Tex. 1984). Arbitrarily engaging discovery merely as an end in itself is wasteful and ineffective. Even worse is the tactic of trying to bludgeon an opponent into submission with onerous discovery requests merely to harass or intimidate, or of attempting to entrap an opponent into making a technical mistake which might cause him to forfeit some vital proof. While craft, thoroughness and tenacity are laudable, gamesmanship is not.

C. Scheduling Orders

1. Even though most trial attorneys recognize and often advocate the importance of a planned and disciplined approach to pre-trial preparation, few of us are successful in sticking with such a game plan. The

¹The State Bar of Texas Administration of Justice Committee has created a subcommittee to look into the desirability and feasibility of such an approach.

successful trial attorney understands, however, that no matter how well crafted a strategy is, it has to be flexible and, when necessary, must adjust to unanticipated circumstances. A scheduling order is a very useful tool in helping to shape and effectuate such a strategy.

The scheduling order forces the trial attorney to make decisions about what he needs, the order in which things need to be obtained and most importantly, when information should be obtained and when it must be divulged. A common thread running through the reported discovery cases is that attorneys often times get into predicaments because they are unprepared and end up reacting to discovery requests rather than responding to them in a deliberate manner in conformance with a theme or strategy.² A scheduling order can help remedy this problem.

2. A sample proposed scheduling order is attached as **APPENDIX A**.

3. Rule 166c, which is often overlooked by attorneys, allows parties to modify the rules of procedure to the needs of their particular case. By conferring early in the litigation about the parties' respective short-term and long-term goals, agreements can be reached regarding, for instance, timing of contention interrogatories, numbers of interrogatories, order and scheduling of depositions, manner of producing documents, designating and obtaining reports and/or depositions of expert witnesses.

4. Trial courts have the discretion to enter scheduling orders to control the manner and timing of discovery, particularly with regard to designation and production of expert witnesses for deposition. Werner v. Miller, 579 S.W.2d 455, (Tex. 1979); Loftin v. Martin, 776 S.W.2d 145 (Tex. 1989); Green v. Lerner, 786 S.W.2d 486 (Tex.App.--Houston [1st Dist.] 1990, n.w.h.).

5. Rule 166 Tex.R.Civ.Proc. has recently undergone significant revision, effective September 1, 1990, granting the trial judge considerably broad discretion to require parties to appear at pre-trial conference to consider, amongst other things:

* * *

²See, Babineaux v. Babineaux, 761 S.W.2d 102, 103 (Tex.App.--Beaumont 1988, no writ). ("The failure of a litigant to utilize diligently the rules of civil procedure for discovery purposes will not authorize the granting of a motion for continuance.")

c. A discovery schedule;

* * *

h. The exchange of a list of direct witnesses, other than rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be called to testify at trial, stating their address and telephone number, and the subject of the testimony of each such witness;

i. The exchange of a list of expert witnesses who will be called to testify at trial,³ stating their address and telephone number, and the subject of the testimony and opinions that will be proffered by each expert witness;

* * *

1. The marking and exchanging of all exhibits that any party may use at trial and stipulation to the authenticity and admissibility of exhibits to be used at trial;

The rule goes on to authorize and require the trial judge to "make an order that recites the action taken at the pre-trial conference . . ."

6. The Texas Supreme Court, in Mackie v. Koslow, 34 Tex.Sup.Ct.J.27 (October 10, 1990), has held that striking pleadings and rendering a default judgment are sanctions available to a trial court for the failure of litigants to engage in an attorney or party conference or failure to submit a joint pre-trial status report, as ordered by the court.⁴ Mackie, *supra* at 30.

7. Keep in mind that some counties have specific local rules that require that all discovery be completed within a certain time before trial.⁵ ("All parties shall complete discovery not less than seven (7) days prior to the date said case is set for trial unless otherwise ordered on motion previously filed." Dallas County

³Compare the phrase "will be called" with the phraseology in Rules 166b2(e)(1) and 166b(6)(b), which only talk about experts who might be called or which a party expects to call.

⁴Decided under the pre-1990 amendments.

⁵Rule 3a Tex.R.Civ.P. was specifically amended in 1990 to provide in subsection 2 that "no time period provided by these rules may be altered by local rules."

Local Rules 1.15.) Therefore, it is a good practice at the outset of a case to inquire whether the court has any standing scheduling orders or guidelines.

III. DEFINITIONS AND INSTRUCTIONS

A. Introduction

1. Believe it or not, but there was actually a time when trial attorneys did not precede every set of discovery requests with a five page set of arcane instructions and definitions. The advent of these now ubiquitous instructions and definitions coincided with attempts by the courts to limit the number of discovery requests that could be served. While definitions and instructions can serve a useful purpose, they are often misused as ammunition of abuse.

2. A sample set of definitions and instructions is contained in **APPENDIX D**.

B. Instructions

1. It is senseless to give instructions in a set of discovery going to a party. The party and his attorney are presumed to know the law.⁶ Setting out the rules in the preface to the questions merely takes up space. Further, if the instructions impose requirements different than the rules, they are probably of no effect. This author is aware of no rule or case that states that a party can unilaterally alter the rules of procedures to suit his own purposes, or that the responding party can waive an objection to such a tactic by not timely objecting. Indeed, it can be inferred from other rules that unilateral, unauthorized attempts to modify the rules need not be considered.⁷ Instructions that make an ordinary set of interrogatories burdensome might even justify the imposition of sanctions. See, **Diversified Products Corp. v. Sport Center Co.**, 42 F.R.D. 3, 4 (D. Md. 1967).

2. Notwithstanding the above-stated limitations, it can be helpful at the beginning of the set of discovery requests to set out proposals for identifying and attempting to voluntarily resolve potential disagreements and disputes concerning the requests. This approach can be used to obtain agreements with

⁶The Texas Supreme Court has recently held that a party is under no obligation to remind his opponent of his duties under the Texas Rules of Civil Procedure. See, **Sharp v. Broadway National Bank**, 784 S.W.2d 669 (Tex. 1990).

⁷See, Rules 3a and 166c.

regard to the number of responses requested or that certain requests that may be deferred because they are premature, or to obtain extensions of time for filing responses and objections.

C. Definitions

1. Definitions of technical terms and terms of art can be particularly helpful in making more understandable a discovery request containing the word or phrase and should be utilized.

2. When requests for production are being served on a non-party, definitions of terms -- such as "the parties," "the occurrence in question," "the product in question," and "the date in question" -- can go a long way toward putting the inquiry into a meaningful context, which will probably result in more direct responses with less delay.

3. There is the occasional problem that arises when the parties disagree about the definition of a term. In such circumstances, the responding party should probably specially except to the definition and preferably offer an alternative definition for consideration. If the dispute cannot be resolved informally, court resolution should probably be sought because, if there is uncertainty about the question during discovery, there is predictably going to be confusion and disagreement about the answer at trial.

4. An interesting question is how broadly a party can define a generic term before it becomes vulnerable itself to the objection of being overbroad.

a. For instance, in **Loftin v. Martin**, 776 S.W.2d 145 (Tex. 1989), the Texas Supreme Court held that a request for all documents relevant to a particular issue in the lawsuit was vulnerable to the objection of being overbroad. The court pointed out that the request did not focus on a particular type or category of documents. Could the attorney have overcome this deficiency by merely defining the term "document" to include every conceivable type item? The answer is probably "no" because, while specific documents might in fact be mentioned in the definition, the request is in no way narrowed by the definition. Cf., **Mole v. Millard**, 762 S.W.2d 251 (Tex.App.--Houston [1st Dist.] 1988) (orig. proc.).

b. In **County of Dallas v. Harrison**, 759 S.W.2d 530 (Tex.App.--Dallas 1988, no writ), it was held that a request for production of **photographs did not include videotapes**. Consider whether the use of definitions might have saved the request, if the request had been for all "photographic films and prints" and defined this term to include photographs, slides,

videotapes, movie film and electronically or digitally stored photographic materials.

D. Agreements

1. Rule 166c provides that, unless the court orders otherwise, the parties may by written agreement modify the procedures for how discovery is conducted.

2. It is important that, if in response to instructions or proposals set out in a set of discovery the rules are modified (e.g., an extension of the response deadline), the agreement be expressly set out in writing, signed by all parties and filed with the court.⁸

3. Precision is important in drafting such agreements. For instance, if an extension of time is agreed to for discovery responses, it should be made clear that such agreement does or does not pertain to objections.

IV. REQUESTS FOR ADMISSION

A. Drafting Considerations

There is no other type of request more difficult to draft than a good request for admission. Overbroad requests, constructed with disjunctive or conjunctive phrases, will accomplish nothing. A similar outcome, unfortunately, is also predictable if the request is too specific. To compound the drafting conundrum, the request must be drafted in such a way that, if admitted, the admission has some understandable meaning to a jury.⁹

B. Relevancy and Scope

1. Under amended Rule 169(1), requests for admissions may relate to any matter discoverable under Tex.R.Civ.P. 166b. Further, Rule 166b provides that it is not ground for objection that a request propounded pursuant to Rule 169 relates to statements or opinions of fact or of the application of law to fact or mixed questions of law and fact or that the documents referred to in a request may not be admissible at trial. Tex.R.Civ.P. 166b(2)(a).

⁸Rule 11 Tex.R.Civ.P. See, Valley Industries, Inc. v. Cook, 767 S.W.2d 458 (Tex.App.--Dallas 1988, err. denied).

⁹While requests for admission do not have to be read to a jury to be admissible, nothing prevents them from being read, and it can oftentimes be effective to do so.

2. The following requests were held to be permissible in a Jones Act case, under the 1984 amendments allowing inquiry into opinions and contentions:

- The plaintiff was not injured on board the F/V Jason Wade.
- On or about September 4, 1984, the F/V Jason Wade was seaworthy.
- The F/V Jason Wade's owners, operators, captain and crew were not negligent on or about September 4, 1984.

See, Laycox v. Jaroma, Inc., 709 S.W.2d 2, 3-4 (Tex.App.--Corpus Christi 1986, writ ref'd n.r.e.); see, also, Shaw v. National County Mutual Fire Insurance Co., 723 S.W.2d 236 (Tex.App.--Houston [1st Dist.] 1986, no writ).

3. A party is not required to admit or deny a pure proposition of law or facts of which he has no reasonable means of knowing. Gaynier v. Ginsberg, 715 S.W.2d 749 (Tex.App.--Dallas 1986, writ ref'd n.r.e.). A party cannot be forced to admit the authenticity of a physician's records or that such records pertained to the patient. Some of the more specific holdings in the case are as follows:

- a. Where a request asks a party to admit to having made a statement, an answer that the respondent cannot recall is complete and sufficient.
- b. A party cannot be forced to admit a proposition of law; i.e., that a statement concerned the party's state of mind, at the time it was made.

4. More often than not the problem the trial judge will have with a request for admission is not whether it is relevant, but whether the device is being properly used. This is pretty much a discretion call, since there is very little, if any, guidance in this regard from the case authorities and the rule. Some trial attorneys and judges adopt a pragmatic approach in attempting to limit the applicability of requests for admission, expressing the attitude that requests for admission should really be limited merely to proving the genuineness of documents and that other discovery devices should be used for ferreting out factual disputes, opinions and contentions. This approach, however, is needlessly restrictive and finds no support in the rule or the case authorities. The scope of discovery under Rule 169 is as broad as that under any other discovery device; and there is nothing in the rules that limits its application, save for the examples cited above.

C. Tactical Considerations

1. Despite the broad scope of inquiry under Rule 169, it is permissible (although strongly discouraged), subject to the provisions of Rule 215(4), to deny a request merely to put the matter in issue at trial.¹⁰ It is not, therefore, uncommon for a responding party to deny matters that even seemingly appear undeniable. To combat this tactic, interrogatories and requests for production may be used in conjunction with the requests for admission to obtain more complete information.

a. If the respondent denies a request, a corresponding interrogatory should request that he state all facts he knows or believes to exist relevant to such denial.

b. Another interrogatory should request all individuals with knowledge of facts relevant to such denial.

c. An interrogatory should be propounded for the identification of all types and categories of documents and things relevant to such denial, followed by a request for production for all such items.

2. Rule 169, effective September 1, 1990, now permits service of requests for admission at any time "after the commencement of the action." Presumably, this means that a plaintiff may now serve requests for admission with his original petition.

a. It is probably doubtful that as a matter of routine the plaintiff will elicit many substantive concessions by serving requests with the petition; however, there could be instances, such a claim involving unliquidated damages, when requests with the petition are served and a defendant defaults, where the plaintiff might be in a position to request that the requests be deemed admitted and avoid having to put on evidence of damages at the default hearing. See, Laycox v. Jaroma, 709 S.W.2d 2, (Tex.App.--Corpus Christi 1986, writ ref'd n.r.e.).

b. A more practical benefit of serving requests for admission with the petition would be the effective elimination of general denial practice. By serving requests for admission, asking the defendant to admit each of the plaintiff's allegations, the defendant would be forced to admit or deny each specific allegation. This might be useful in narrowing issues, particularly regarding whether the right defendant has been served and whether venue is proper.

3. Combining the broad scope of discovery with the goal of narrowing issues, a trial attorney can draft requests for admission to eliminate the potential for being surprised at trial.

a. Assuming a litigant sends an interrogatory asking for all individuals with knowledge of facts relevant to the subject matter of the lawsuit and the responding party responds with few or no individuals, requests may be sent the responding party to admit that it has listed all individuals with knowledge of relevant facts and that the individuals it has listed are the only ones that it is aware of with such knowledge.

b. The responding party always has the ability to request leave to amend a response; but, where no showing has to be made to supplement the above-mentioned interrogatory answer, the responding party would have to prove good cause and no prejudice to the opposing party before it should be allowed to amend the response to the request for admission. See, Rule 169(2).

c. The above example works equally well with documents that are identified or produced in response to interrogatories or requests for production.

4. Requests for admission may also be used to require greater completeness or responsiveness in responding to other forms of discovery. For example, recently I was engaged in a products liability case with a large manufacturer that had been involved in other similar cases for over a decade. Over the course of that time, it had generated in excess of 500,000 documents, all of which it alleged had been placed in its "reading room" for inspection by plaintiff's attorneys. The defendant proceeded to answer all interrogatories and requests for production by saying that the answers or documents could be found in the "reading room." Rule 168(2)(b) allows a party to refer a litigant to business records in answer to an interrogatory, provided "the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served." I reasoned that, if I could demonstrate that the burden was not "substantially the same," I could then force the defendant to have to narratively respond to my requests. Accordingly, I sent the defendant a detailed set of requests, asking whether the defendant had computerized retrieval capability with which it could identify and retrieve documents in the reading room.¹¹ The defendant after three successful motion to compel hearings finally unequivocally admitted the requests. From that point forward it was no longer permitted to respond to a request or interrogatory by

¹⁰For instance, under Rule 215(4)(c) a party may move for expenses incurred in making proof when an opponent fails to admit a request.

¹¹See, APPENDIX B.

stating the answer or document could be found in the "reading room." See, also, **American Bankers Ins. Co. of Florida v. Caruth**, 786 S.W.2d 427 (Tex.App.--Dallas 1990, n.w.h.).

5. Requests may be used to expose weaknesses in an opponent's case or defense. For instance, consider a case in which the plaintiff has alleged \$50,000 in medical expenses as a result of the occurrence. The following requests may be used to expose how the defendant intends to defend against the allegation, while at the same time potentially forcing the defendant to admit the point:

- o **Admit that the defendant is aware of facts relevant to the plaintiff's allegation¹² that he has incurred \$50,000 in reasonable medical expenses for medical services that were necessary to provide the plaintiff for the injuries he has alleged to have sustained as a result of the occurrence in question.¹³**
- o **Admit that the defendant is aware of no individuals with knowledge of facts relevant to the plaintiff's allegation that he has incurred \$50,000 in reasonable medical bills for medical services that were necessary to provide proper care to the plaintiff for the injuries he has alleged to have sustained as a result of the occurrence in question.**
- o **Admit that the defendant is aware of no documents relevant to or containing information relevant to the plaintiff's allegation that he has incurred \$50,000 in reasonable medical bills that were necessary to provide proper care to the plaintiff for the injuries he has alleged to have sustained as a result of the occurrence in question.¹⁴**

¹²I generally try to use the term "alleged" in my requests to avoid the evasive response that the defendant denies the plaintiff sustained an injury because of the defendant's negligence.

¹³ If the defendant admits that it is aware of facts, then an interrogatory can be sent or a deposition question posed asking of which specific facts the defendant is aware.

¹⁴By using negative and positive requests, different goals are achieved. If the opponent admits that he is aware of individuals with knowledge of facts and has not timely

- o **Admit with regard to the \$50,000 in medical expenses which the plaintiffs alleges to have incurred as a result of the occurrence in question that: (answer each subpart separately)**
 - o **The expenses were incurred by the plaintiff.**
 - o **The expenses were reasonable at the time they were incurred.**
 - o **The expenses were for medical services which were necessary to provide the plaintiff proper care for the injuries he has alleged to have sustained as a result of the occurrence in question.¹⁵**

6. Requests may be drafted to eliminate a claim or defense even though the opposing party refuses to stipulate the point. For instance, if the defendant is alleging unavoidable accident, this means that neither party to the lawsuit was responsible for the occurrence. A defendant will generally plead this as an alternative defense, which is proper and noncommittal. However, if the defendant is served with requests asking it to admit that the plaintiff was negligent and that the plaintiff's negligence was a proximate cause of the occurrence, the defendant is faced with a difficult dilemma. It can either admit the requests, in which case its defense of unavoidable accident is eliminated, or it can deny the requests which will eliminate a defense of comparative negligence.

7. Admissions may be used to prove a Motion for Summary Judgment. See, **Laycox v. Jaroma**, *supra*. In the crash of Delta 1141 litigation, Delta Air Lines offered to stipulate liability in return for the plaintiffs agreeing to drop their claims for punitive damages. Many of the plaintiffs did not consider this acceptable,

supplemented answers to interrogatories naming them, such individuals may be potentially stricken. If he admits he knows of no individuals, he would then have to prove good cause and no prejudice to be able to later amend.

¹⁵Question whether these requests could arguably be said to be outside the opponent's knowledge. **Gaynier v. Ginsberg**, 715 S.W.2d 749 (Tex.App.--Dallas 1986, writ ref'd n.r.e.). If so, the opponent may be hard pressed to show a basis for producing rebuttal evidence on this issue at trial.

since the stipulation did not go far enough. Instead, the plaintiffs sent Delta requests for admissions asking it to admit responsibility and the violation of various standards. These requests resulted in obtaining admissions from Delta which then served as the basis of successful motions for summary judgment. See, **APPENDIX C** attached.

8. Requests for admission may and should be used to confirm the authenticity of certain documents or to verify that all the documents a party has produced in response to a previous request for production constitute a complete response. When using this device, however, be sure to attach the documents in question, unless they have been previously produced and marked as exhibits, in which case the exhibit numbers may be used instead for reference. See, Rule 169(1) Tex.R.Civ.P.

D. Responding and Objecting to Requests for Admission.

1. It is not ground for objection that a request for admission propounded pursuant to Rule 169 related to statements or opinions of fact or the application of law to fact or mixed questions of law and fact of that the documents referred to in a request may not be admissible at trial. Tex.R.Civ.P. 166b(2)(a).¹⁶

2. If an objection to a request for admission is lodged, the reason must be stated and the objection must be served within the time provided for responses. Tex.R.Civ.P. 169(i).

3. Admissions qualified with the phrase, "to the best knowledge and belief," are subject to being deemed admitted. **McIntyre v. Sawicki**, 353 S.W.2d 953 (Tex.Civ.App.--Eastland 1962, writ ref'd n.r.e.).

4. A request may be deemed admitted when a denial is found not to have been made in good faith or fails to fairly meet the substance of the request. **U.S. Fire Insurance Co. v. Maness**, 775 S.W.2d (Tex.App--Houston [1st Dist.] 1989, writ ref'd).

5. Evasive, self-serving statements, inappropriately used to qualify a response, may be stricken and result in the admission being deemed admitted. **Lowe v. Employers Cas. Co.**, 479 S.W.2d 383 (Tex.Civ.App.--Fort Worth 1972, no writ).

6. A "preliminary statement" preceding a response, even if not stricken, will be held to be inadmissible as hearsay at trial. **Morehead v. Morehead**, 741 S.W.2d 381, 382 (Tex. 1988).

V. REQUESTS FOR PRODUCTION

A. Introduction

Documents and other visual or physical items will usually be some of the most compelling and persuasive evidence at trial. This is because juries tend to believe what they see. Documents and things generally are most persuasive when they are offered against the party who generated them. In this respect, they can be the most damning of all admissions. Recognizing the trial significance of physical evidence, underscores the significance of requests for production. What the jury sees will in large part be dependent upon what the trial attorney has obtained through discovery. And what the trial attorney obtains will be a function of how well his requests are drafted.

B. Requesting Documents and Things

1. Scope

a. Rule 167(1)(a) allows any party to request another party:

[T]o produce and permit the party making the request, or someone acting on his behalf, to inspect, sample, test, photograph and/or copy, any designated documents or tangible things which constitute or contain matters within the scope of Rule 166b which are in the possession, custody or control of the party upon whom the request is served. (Emphasis added.)

b. Scope Defined by Rule 166b.

A party may request to have produced any of the documents and things designated in Rule 166b. This includes:

. . . all documents (including papers, books, accounts, graphs, charts, photographs, electronic or videotape recordings, and any other data compilations from which information can be obtained)...and any other tangible things which constitute or contain matters relevant to the subject matter in the action.

¹⁶Although Rule 166b(2)(a) provides that a party receiving an interrogatory requesting an opinion or contention may move for a protective order deferring an answer until a later time, there is no such provision for a request for admission directed to an opinion or contention. If faced with such a request at the outset of a case, this should not stop a party from at least trying to get such relief.

2. Breadth.

a. The Texas Supreme Court, in **Loftin v. Martin**, 776 S.W.2d 145 (Tex. 1989), has emphasized that, while the scope of discovery under Rule 167 remains quite broad, requests for production must be drafted specifically. The request for production that was the center of attention in **Loftin** was as follows:

. . . all notes, records, memoranda, documents and communications made that the carrier contends support its allegations [that the award of the Industrial Accident Board was contrary to the undisputed evidence.]

The carrier objected to the request on the ground that it was vague, broad and unclear. The court agreed with the carrier that the request was vague, and found that, while the plaintiff was entitled to see the evidence against him, he was required to formulate his request for production with a certain degree of specificity. Supra at 403. It can be inferred from the decision that the degree of specificity the Court alludes to requires identifying a particular class or type of document. Supra at 403.

b. No Fishing.

Justice Spears, writing for the majority of the court, pointed out that the 1966 General Commentary to Rule 167 Tex.R.Civ.P. quoted with approval the following from Steely and Gayle, "Operation of the Discovery Rules," 2 Houston L. Rev. 222, 223, (1964):

Unlike interrogatories and depositions, Rule 167 is not a fishing rule. It cannot be used simply to explore. You are permitted to fish under deposition procedures, but not under Rule 167. The Motion for Discovery must be specific, must establish materiality, and must recite precisely what is wanted. The Rule does not permit general inspection of the adversary's records.

Loftin, supra at 148.¹⁷

¹⁷While every trial attorney who has ever received a request such as the one involved in **Loftin** will doubtless applaud the result the court has reached, the court's analysis is somewhat troubling. Justice Spears apparently based the holding on the reasoning in an article written twenty-five years ago when parties had to demonstrate "good cause" and materiality for a request for production. The court fails to reconcile the present rule with the prior rule requiring showings of materiality and good cause. Further, the court fails to explain why requests for production should be treated differently than any other discovery device.

3. The Implications of **Loftin v. Martin**.

It is one thing to recognize that requests must be drafted with specificity; it is quite another to actually do it. Unfortunately, the Supreme Court provided no examples in **Loftin** of what it considered to be a proper, specific request. All we know is that the request that was at issue was found deficient because it did not request a particular class or type of document. What does that mean? What, for instance, comprises a class of documents?

a. Class of Documents.

(1) One recent case has held that, if the request for production is for a "category" of documents and the responding party objects to producing certain documents because of a claimed privilege or exemption, it is not necessary for the responding party to specify the "particular items" for which protection is being sought. **Green v. Lerner**, 786 S.W.2d 486 (Tex.App.--Houston [1st Dist.] 1990, no writ).

(2) Comment: Although the **Green** holding might be a logical interpretation of the rules, it is difficult from a practical standpoint to see what is achieved by preventing the requesting party from knowing what items are the subject of the request for protection. Of course, if the **Green** holding is approved, it is just one more reason for drafting requests as specifically as possible.

b. Types of Documents.

(1) It would seem that, if the **Green** holding is indeed correct, the safest thing to do would be to request specific types of documents, whenever feasible. Requesting specific documents, however, is not without its risks.

(a) The perils of specificity are brought home by the decision in **County of Dallas v. Harrison**, 759 S.W.2d 530 (Tex.App.--Dallas 1988, no writ). In that case the Dallas Court of Appeals addressed the issue of whether photographs and videotapes are in the same category or in different categories under Rule 167(1)(c) in trying to decide whether a request for photographs includes a request for videotapes. The court held that they are two separate items and consequently a request for one is not going to be considered a request for the other.

(b) In **Ramirez v. Volkswagen of America, Inc.**, 788 S.W.2d 700 (Tex.App.--Corpus Christi 1990, writ denied), the plaintiff served Volkswagen with the following request:

All written or other documentation, photographs and reports including, but not limited to, documentation of testing, factual observations, test, supporting data and calculations of the area, persons and or vehicle and objects **involved**,

either made before, at the time of or after the time of the events in question in your possession and/or in the possession of your experts.

During trial, Volkswagen offered into evidence some tests of a "Volkswagen Type 2 vehicle," and the plaintiff objected because such items had not been previously produced in response to the above request. The court admitted the evidence, observing that, while the request for production was limited to "tests . . . of the **vehicle . . . involved**," (Emphasis added by court.) the offered evidence related to a vehicle other than the actual one involved. Ramirez, supra at 706.

(2) Recall that, earlier in the paper, under the discussion about definitions, the issue was raised whether the Loftin requirement of specificity could be avoided merely by defining the term "documents" to include everything that Rule 167 has defined it to mean. It is uncertain whether the Texas Supreme Court is going to allow attorneys to meet the specificity requirement it has promulgated by merely defining terms broadly. It is doubtful, since it would be difficult to reconcile such an approach with the philosophy that requests for production are not a device for fishing. The more likely interpretation that will be given Loftin is that a request must be confined to a particular type or class of document.

4. Potential Problems and Complying with Loftin v. Martin.

a. The practical problem posed by the Loftin decision, particularly with regard to plaintiffs, is that early in discovery it difficult to know what specific types of documents exist. This problem can become even more frustrating when the responding party has developed unique identifying names and titles for items, apart from how they may be generically referred to in the industry. A related problem is the "Rambo" tactic of a witness refusing (often on advice of counsel) to answer a question until every term is specifically and precisely defined. By requiring specificity without providing examples for guidance, the Texas Supreme Court may have unintentionally lent support to these practices. In an attempt to lighten the burden of discovery and bring clarity to the process, the Supreme Court may be opening Pandora's box just enough to release the demons of sophistry and hypertechicality, two creatures which must be shackled and exiled if the primary objective of the Texas Rules of Civil Procedure is to be achieved. See, Rule 1 Tex.R.Civ.P.

b. One approach to complying with Loftin is to use interrogatories to identify what should be sought. See, Limas v. DeDelgado, 770 S.W.2d 953

(Tex.App.--El Paso 1989) (orig. proc.). I have begun experimenting with the technique of using interrogatories to identify the specific classes and types of documents I might want to initially obtain. An example of a set of interrogatories utilizing such approach is set out as **APPENDIX D**.

(1) The above technique is particularly useful in a complex case, such as a product liability claim, and may not be necessary in a simpler action, such as a motor vehicle collision, in which there will be little mystery about what pertinent documents to seek.

(2) In the event this technique is to be utilized, prior to sending out the interrogatories, an agreement with the responding party or an order of the court should be obtained, allowing for the enlargement of the permissible number of responses that may be elicited. It would stand to reason that if, rather than sending out a burdensome "fishing net" set of requests for production, a party were to utilize interrogatories so that the responding party could merely identify what, if any, items in its possession were specifically responsive, the court should be inclined to give wide latitude to the number of "identification interrogatory" responses that may be allowed.

5. Purpose.

One of the purposes of the request/response procedure is to substantially reduce court involvement in the discovery process.

6. Procedure.

a. Instead of filing a motion for production, the procedure for the party seeking production is to file a request on another party, which specifies a reasonable time, place and manner for making the production or inspection, or performing the related acts. Effective September 1, 1990, the request must be filed with the court and served upon every party to the action.

b. The party upon whom the request is served has thirty (30) days in which to file a written response and any objections to the request. The time for making the response may be lengthened or shortened by the court on a showing of good cause. Effective September 1, 1990, the response, but not necessarily the responsive documents, must be filed with the court and served upon every party to the action.

c. In Limas v. DeDelgado, 770 S.W.2d 953 (Tex.App.--El Paso 1989) (orig. proc.), interrogatories were served requesting that the responding party:

. . . attach all reports and opinions of your attorney or subject to your control, from such expert witness or potential expert witness you

expect to call at the trial of the above entitled and numbered cause.

The testimony of the responding expert witness was allowed at trial although no documents were attached to the answers to interrogatories. The court found no abuse of discretion, reasoning that the wrong procedure was utilized in the attempt to procure the documents and that a request for production under Rule 167 should have been employed instead.

d. Rule 167 allows a plaintiff to serve requests for production with the citation and original petition. In such instances, the party served with the request will have fifty (50) days after service within which to serve written responses and objections.

C. Responding to Requests for Production

1. Specificity.

a. The Texas Supreme Court, in **Loftin v. Martin**, only addressed the specificity required of a request; nothing was written regarding the specificity required of a response. There is no question that an overbroad request can be frustrating and burdensome; however, equally frustrating and dilatory is the unresponsive, nonspecific response.

b. Comment: One of the major frustrations with requests for production is that the requirements for the written response are so minimal as to make the written response of virtually no value at all. Rule 167(1)(d) provides as follows:

The party upon whom the REQUEST is served shall serve a written RESPONSE which shall state, with respect to each item or category of items, that inspection or other requested action will be permitted as requested . . .

The problem which all too frequently arises is that the responding party merely responds by saying "we will make available whatever documents and things are in our possession," or "we will make the documents in our possession available for inspection," or "we have documents responsive to the request, which we will make available for inspection." These type answers, while arguably in compliance with the rule, provide no meaningful information that advances the ball. The requesting party has to make arrangements to inspect the documents, and only then will he find out what is and is not being produced.

The Texas Supreme Court should consider amending Rule 167(1)(d) to require that the written response "fairly meet the substance of the request" (See, Rule 169.), meaning that, if the request asks for "all maintenance logs regarding preventative

maintenance performed on the machine in question for the months of June, July, and August 1988," the response should state "the defendant has been unable to this point to locate any logs in response to this request" or "no such logs were kept," or "such logs were kept at one time but were destroyed in the ordinary course of business, in 1989, as part of a longstanding document retention policy," or "we have been able to locate a requested log only for the month of August, 1988." Such an amendment would mean that written responses would then provide meaningful information regarding what is in the possession of the respondent and what is not, what will be made available and what will not.

The requirement imposed by **Loftin**, that requests be specific, solves only part of the problem. Until litigants are required to respond to specific requests with like specificity, delay and abuse will continue to pervade the discovery process.

2. Possession.

a. A party is required upon receipt of a proper request to produce for inspection and copying discoverable documents and things in its possession. The documents or things to be produced or inspected must be within the possession, control or custody of the party served with the request. **Texhoma Stores, Inc. v. Am. Cent. Ins. Co.**, 424 S.W.2d 466 (Tex.App.--Dallas 1968, writ ref'd n.r.e.); **In Re W. R. M.**, 534 S.W.2d 178 (Tex.App.--Eastland 1976, no writ). The right of custody and control, rather than physical possession or geographical location, constitutes the most important consideration in determining the right of production. See, e.g., **Sales, Pre-Trial Discovery in Texas**, 31 S.W.L.J. 1034 (1979); **Bifferator v. States Marine Corp.**, 11 F.R.D. 44, 46 (D.C. N.Y. 1951) (F.R.C.P. 34). The documents or other matters to be produced need not be within the jurisdictional boundaries of the court. See, generally, **Buckley v. Vidal**, 50 F.R.D. 271 (D.C. N.Y. 1970) (F.R.C.P. 34); Cf., **Hastings Oil Co. v. Texas Co.**, 234 S.W.2d 389 (Tex. 1950); and **Robb v. Gilmore**, 302 S.W.2d 389 (Tex.App.--Fort Worth 1957, no writ). By "control" of the party, it is meant not only that he directly controls or personally possesses the document or thing sought, but also includes those items over which he exercises indirect control and thus has access to such items. Documents relating to a foreign corporation that are in the actual possession of an American subsidiary have been held to be discoverable. **Dobbins v. Kawasaki Motor Corp., USA**, 362 F.Supp. 54 (D. Or. 1973); **Reeves v. Pennsylvania R.R. Co.**, 80 F.Supp. 107 (D. Del. 1948). The opposing party's tax records are discoverable although not in the care or custody of the

party, since he does "control" them in the sense that he has the right to obtain them. **Mareska v. Marks**, 362 S.W.2d 299 (Tex. 1962). Further, it has been held that material evidence, not otherwise privileged, which the party has turned over to his attorney is subject to discovery. See, **Ex Parte Knollenburg**, 123 Tex. 126, 62 S.W.2d 37 (1934); see, also, **United States v. I.B.M. Corp.**, 60 F.R.D. 650 (D.C. N.Y. 1973). Actual ownership of the item is not required; simple possession is sufficient. **United States v. National Broadcasting Corp.**, 65 F.R.D. 415 (C.D. Cal. 1974), appeal dismissed, 95 S.Ct. 1668 (1976).

b. The 1988 amendments expanded the concept of possession to include "superior right to compel." A party that has a superior right to that of the requesting party to compel the production of an item from a third party (including an agency, authority or representative) is considered to have possession of the item.

3. Options.

a. The party who produces documents is given the option to produce them as they are kept in the usual course of business or to organize and label them to correspond with the categories in the request.

b. The responding party should avoid engaging in the abusive tactic of producing massive piles of papers (the "boxcar production") and the tactic of scrambling or burying key documents ("shuffling the deck"), rather than producing documents in their original form or in an otherwise orderly state. Both practices have been denounced and could be grounds for sanctions. See, **American Bankers Ins. Co. of Florida v. Caruth**, 786 S.W.2d 427 (Tex.App.--Dallas 1990, n.w.h.): and see, also, Kaminsky, "Proposed Federal Discovery Rules for Complex Civil Litigation," 48 Fordham L. Rev. 907, 974 (1980).

4. Destructive Testing.

A new protective provision has been added to Texas Rule 167 which provides for notice, a hearing, and prior approval by the court if the testing sought or the examination of the matters produced is likely to cause destruction or material alteration of an article. See, Tex.R.Civ.P. 167(1)(g). In keeping with the Federal Rules, broad discretionary powers rest in the trial court in the implementation of this and other provisions of the new rule.

5. Authorizations.

a. Medical Authorizations.

Rule 166b(2)(h) provides that any party alleging physical or mental injury and damages "shall be required, upon request, to produce or furnish an authorization permitting full disclosure of medical

records not theretofore furnished to the requesting party, which are reasonably related to the injury or damages asserted." Recently, in **Mutter v. Wood**, 744 S.W.2d 600 (Tex. 1988), the Texas Supreme Court held that the trial judge abused her discretion by requiring the plaintiffs to sign a medical authorization requiring absolute and total waiver of the patient/physician privilege. The court observed that the plaintiffs had properly requested that the physician not be questioned out of their presence. (This had been accomplished by setting out this restriction in the medical authorization provided by the plaintiff.) This opinion evidences strong disapproval of the practice of conducting ex parte communications with an opponent's treating physician. It should be noted that the party is permitted under this rule to produce the records in lieu of furnishing a medical authorization to the opposing side. In **Batson v. Ramsey**, 762 S.W.2d 717 (Tex.App.--Houston [1st Dist.] 1988, orig. proc.), the relator complained that the medical authorization he was being requested to sign was defective for the same reasons as the one in **Mutter**. The appellate court disagreed, holding that the authorization was restricted to 1) records; 2) from a specific doctor's office, and 3) relating to a specific condition (alcohol or drug use by the relator). **Batson, supra** at 721.

b. Comment: While Rule 166b(2)(h) allows for the production of a medical authorization from any party alleging physical or mental injury, there is no provision in our Rules of Procedure for requiring an authorization to produce any other types of records such as income tax returns, social security wage earning verifications, employment or school records. But see, **Martinez v. Rutledge**, 492 S.W.2d 398 (Tex.Civ.App.--Dallas 1979, err. ref'd 1980).

6. Objections.

a. Burdensome Requests.

In many instances the issue raised in a discovery request for documents is not that the documents do not exist or are irrelevant, but that it would be burdensome for the responding party to have to gather and produce the documents. The question has been addressed in several recent cases dealing with the issue of whether prior similar claims are discoverable. There is an apparent consensus in the decisions that information regarding other similar claims may be relevant and discoverable when there are allegations of a continuing pattern or practice or unfair course of dealing;¹⁸ however, there is less clarity regarding when a

¹⁸Also, see, **John Deere & Co. v. May**, 773 S.W.2d 369 (Tex.App.--Waco 1989), regarding admissibility of prior judgments on the issue of notice.

responding party has to actually produce documents in response to the request. Scrivner v. Casseb, 754 S.W.2d 354, 357 (Tex.App.--San Antonio 1988, no writ); Aztec Life Insurance Co. of Texas v. Dellana, 667 S.W.2d 911 (Tex.App.--Austin 1984, no writ); and Lunsman v. Spector, 761 S.W.2d 112, 114 (Tex.App.--San Antonio 1988, no writ).

(1) In Aztec, supra, an insurance company's own claim files were held discoverable.

(2) However, in Scrivner, supra, the respondent City produced an affidavit that other similar complaints were not indexed by the City and that it would be burdensome to produce the documents. The court held that the actual pleadings from other lawsuits were not required to be produced because they could be obtained from public records.

(3) In Lunsman, supra, an affidavit was also filed by the respondent stating that the files of the lawsuits that were being sought were located in various offices throughout the country. The court held that the plaintiffs were entitled to know of other similar claims to establish an unfair course of dealing but the request for the actual pleadings was overly burdensome.

b. Relevancy.

The request should be narrowed to a relevant time period. General Motors v. Lawrence, 651 S.W.2d 732 (Tex. 1983);¹⁹ however, the request does not have to be confined to the specific product or items involved in the litigation. Jampole v. Touchy, 673 S.W.2d 569 (Tex. 1984); and Independent Insulating Glass/Southwest, Inc. v. Street, 722 S.W.2d 798 (Tex.App.--Fort Worth 1987, writ dismissed). The scope of discovery does not have to be confined to the pleadings. See, Stevenson v. Melady, 1 F.R.D. 329 (S.D. N.Y. 1940); and United States v. American Tel. & Tel. Co., 461 F.Supp. 1314 (D. D.C. 1978); but cf., Lindsey v. O'Neill, 689 S.W.2d 400, 402 (Tex. 1985) (holding that it is not an abuse to limit discovery to the issues pleaded). The scope may even be broadened if gross negligence is alleged. General Motors v. Lawrence, supra, (concurring opinion, Justice Ray).

c. Requests Are Confined to Existing Things.

A Rule 167 request for production cannot be used to require a party to generate something that does not exist; for example, a list of potential witnesses.

Loftin v. Martin, supra, at 146; McKinney v. National Union Fire Insurance Company of Pittsburgh, Pa., 772 S.W.2d 72 (Tex. 1989).

d. Expert Reports.

If a party wants an opponent's expert witness to reduce to tangible form his opinions and conclusions, it is not enough to merely send a request for production. If the party does not respond or objects, the requesting party must file a motion and obtain a court order. Loftin v. Martin, 776 S.W.2d 145 (Tex. 1989).

e. Timeliness of Objections.

After the date on which answers are to be served, objections are waived unless an extension of time has been obtained by agreement or order of the court or good cause is shown for the failure to object within such period. Rule 166b(4) [effective September 1, 1990].

f. Improper Requests/Special Exceptions.

It has been indicated by members of the Texas Supreme Court that the required procedural steps necessary for preserving an objection to a request for production under Rule 166b(4) are activated only by a proper discovery request. McKinney v. National Union Fire Insurance Company of Pittsburgh Pa., 772 S.W.2d 72 (Tex. 1989) (McKinney II). Although Gutierrez v. Dallas I.S.D., 729 S.W.2d 691 (Tex. 1987), concerned improper interrogatories, it is reasonable to infer that, if a party sends an improper request for production, the responding party must specially except to it within the time period for responding to the requests, at the risk of waiving the objection.²⁰

6. Supplementation Requirement.

Failure to timely supplement a request for production can result in the automatic exclusion of the unproduced documents and things at trial. Lopez v. Foremost Paving, Inc., 796 S.W.2d 473 (Tex.App.--San Antonio 1990, appl. for writ filed); and Wilson v. Snead Site Preparation, Inc., 770 S.W.2d 840 (Tex.App.--Houston [14th Dist.] 1989). Along these same lines, a testifying expert's testimony could be limited or excluded for failing to produce an ordered report. Ramirez v. Volkswagen of America, 788 S.W.2d 700 (Tex.App.--Corpus Christi 1990, writ denied).

7. Non-Parties.

Rule 167(5) grants the court authority to order production from a person, organizational entity,

¹⁹In this regard, it is recommended that the definitions of the request always contain the term "designated time period." The term should be defined to include a particular time period unless otherwise stated. See, APPENDIX D.

²⁰See, APPENDIX E.

government agency, or corporation who is not a party to the suit. However, in order to achieve such discovery, the movant must give notice to all parties plus the non-party and then file a motion setting forth with specific particularity the request and the necessity for such discovery. The court then has a hearing on the motion in which all parties and the non-party from whom discovery is sought shall be given the opportunity to assert objections to the motion for discovery. **Tex. Education Agency v. Anthony**, 700 S.W.2d 192 (Tex. 1985). There is no comparable federal rule that permits production from a non-party. Rule 34(c) Fed.R.Civ.P. provides, however, that "this rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land."

8. Tactical Considerations: Specific Requests.

In drafting requests for specific documents and things, the best advice is to track the rules and case authority as closely as possible. Also -- although I personally have a very hard time following this advice -- try not to make the requests long and complicated. Some attorneys adhere to the belief that a request cannot be comprised of more than one sentence. This is wrong; requests should be comprised of as many sentences as it takes to make the request clear. Sometimes it is helpful to add an explanation to a request, explaining the parameters and purpose for them. The following examples are offered to illustrate these concepts:

a. Expert Reports.

- o For each and every expert witness that the defendant has employed -- specially or in the ordinary course of business (including its agents, representatives, employees and vice-principals) -- and who may testify at trial in this cause, please produce the following things in the defendant's "possession":
- o The expert's current and complete biography or curriculum vitae, including all bibliographies of completed works which he has authored or co-authored, or to which he has contributed, whether or not such works have been generally published.
- o All "reports," including, but not limited to, all drafts and revisions of such reports (whether on hard copy or electronically stored). The term

"report" as used herein includes all documents (memoranda, notes, correspondence, charts and graphics) containing the expert's factual observations, as well as all opinions and all supporting data or material which the expert has reviewed and/or relied upon in formulating his opinions and mental impressions relevant to the subject matter of this lawsuit. In this regard, the term "reports" also encompasses all "learned treatises" (works of scientific value in the field of the expert's area of expertise) the expert has reviewed and/or relied upon in forming his opinions relevant to the subject matter of this lawsuit.

- o All tests, photographs, movie and/or videotape film, and/or image-recording films of any nature; diagrams; sketches; graphs; computer-assisted calculations and recreations; and/or models and mock-ups generated by or provided to the expert relevant to his involvement in the instance case and/or relevant to the testimony he may give at trial.
- o For any consulting expert whose work produce has been reviewed by an expert who may testify on your behalf at trial, please similarly produce all the above-requested items.

b. Investigation.

- o All investigative and/or incident "reports" generated by or on behalf of the defendant prior to its being aware of an outward manifestation from the plaintiffs of an intent to bring the instant lawsuit relevant to the following:
- o The subject matter of the instant lawsuit;
- o The "incident in question";
- o The defendant's personnel (agents, representatives, officers and employees) that were on the premises in question at the time of the incident;
- o The policies, procedures, guidelines and/or regulations that were applicable to the activities taking place on the

premises in question at the time of the incident in question, which were material to the incident in question;

- o Potential witnesses regarding the incident and/or the circumstances that existed on the premises immediately prior to, during and/or after the incident.
 - o In addition to the above "reports," the following things generated (during the same prescribed time period) in conjunction with the above-referenced investigations and/or investigation reports are requested: all notes, memoranda, written communications, electronically stored data and communications, photographs, movies, videotapes, models, reenactments, audiotapes, written statements and tests.
- c. **Insurance Policies.**
- o All insurance agreements and/or policies -- including, but not limited to, primary, umbrella and excess policies (and including all endorsements, schedules and amendments) applicable to the date, incident or claims in question (regardless of whether on a claim made or occurrence basis) potentially obligating the insurance carrier(s) to pay a potential judgment in this case for the claims asserted against the defendant. [It is requested that the defendant make the above documents available for inspection in their original, unexpurgated form.]
 - o In the event the claim is being handled by the insurance carrier(s) on reservation(s) of rights, please produce all communications from the carrier(s) relevant to such reservation(s).
 - o In the event the pertinent policies are aggregate policies and the annual aggregates have been reduced, please produce all settlement documents and/or agreements relevant to the payment of such claims, reducing such aggregates.
 - o In the event the carrier(s) of any pertinent policies have given the defendant notice of financial impairment

or potential financial impairment, please produce all written communications from the carrier(s) relevant to such notice.

D. Sanctions.

1. Production of meaningless documents that are non-responsive to a request may result in sanctions. **American Bankers Ins. Co. of Florida v. Caruth**, 786 S.W.2d 427 (Tex. App.--Dallas 1990, n.w.h.)
2. Failure to timely respond or supplement a response will result in the withheld evidence being stricken. **Wilson v. Snead Site Preparation, Inc.**, 770 S.W.2d 840 (Tex. App.--Houston [14th Dist.] 1989).

VI. INTERROGATORIES

A. Introduction

Interrogatories are by far the most flexible and forgiving written discovery device for obtaining information. An interrogatory may be drafted in such a way as to obtain virtually any type of information a trial attorney might want to obtain in preparing for trial. This is not to say, however, that interrogatories do not have limitations or that they should be exclusively used to develop a case. The question, oftentimes, is not whether the interrogatory can be drafted to elicit particular information, or how it should be drafted, but whether an interrogatory should be the device used to seek the information.²¹ The drawback to interrogatories is that, just as attorneys are the ones that usually draft them, it is attorneys who usually prepare the answers. Unfortunately, this means that, more often than not, a well-crafted interrogatory will merely inspire a well-crafted (read that, evasive or non-responsive) response. Despite this limitation, interrogatories are a useful discovery device that can play an important role in advancing a discovery and trial strategy. Effective drafting techniques will take these advantages into consideration.

²¹The main problem with interrogatories is that, no matter how well crafted, they tend to reveal the attorney's strategy and thought process. This may sometimes be tactfully disadvantageous. Depositions are usually a better device for obtaining explanations. Interrogatories are excellent for obtaining factual data.

B. Timing

1. Request.

a. The First-Strike Capability.

Rule 168 permits a plaintiff to serve interrogatories with the original petition. In such an instance the responding party has fifty (50) days from the date of service within which to file responses and objections. There are perhaps a number of reasons why plaintiffs would want to send out interrogatories with their petition, a very good one being to simply to get it done. On a tactical level, however, serious thought should be given to what the goal is in seeking early information. If the goal is merely to put the defendant on the discovery defensive, then the strategy is at best a short-sighted one because the defendant can send out discovery -- which will have to be answered by the plaintiff before the defendant's answers are due -- before its answer date. In short, the tactic of being first, just to be first, is a petty weak strategy.

b. Limitations on Early Requests.

Poor timing of a request can sometimes impair its usefulness. If, for instance, a plaintiff serves only a bare-bones petition accompanied by a set of interrogatories requesting the defendant's contentions, it is predictable that all that is going to be netted is a return set of objections and requests for protection. Contention interrogatories at the inception of a case are probably vulnerable to an objection that they are premature, and requests for production that the answers be deferred until additional factual discovery has been completed.²²

(1) Rule 166b(2)(a) allows a party receiving a contention or opinion interrogatory to seek an order from the court that such an interrogatory "need not be answered until after designated discovery has been completed or until a pretrial conference or other later time."

(2) It is also worth pointing out in this discussion that asking a defendant in the first set of interrogatories to admit that it manufactured the "product in question," without specifically identifying the product in a set of definitions, is probably a hopeless endeavor. If such an interrogatory is going to be propounded, the term "product" should be as precisely defined as feasible, with as much information as the plaintiff has (serial number, incident reports, manuals, photographs, etc.) being

attached to the definition as appendices and incorporated into the definition by reference. The same specificity considerations would similarly apply to other terms such as the "incident" or "transaction" in question.

c. Information to Be Sought in Early Requests.

(1) Plaintiff.

An early set of interrogatories, served with the petition or shortly after the defendant has filed an answer, can be useful in answering important questions so that the plaintiff knows he is on the right track and can establish some early discovery targets. Useful interrogatories in this regard would be ones that elicit whether the defendant has been properly named and sued, the financial ability of the defendant (assets and/or insurance) to pay a potential judgment, individuals who are believed to have knowledge of facts regarding the lawsuit in general or about specific issues, individuals employed by the defendant in the ordinary course of its operations who might have expertise in specific areas relevant to the issues in the case, and types and categories of documents that might be relevant to or contain information relevant to particular issues in the case.

(2) Defendant.

An early set of interrogatories sent out by the defendant should in a number of respects mirror the types of requests served by the plaintiff. Useful interrogatories in this regard should attempt to identify all the potential plaintiffs and what special or quantifiable damages they are claiming, the total amount of damages the plaintiffs are seeking, individuals who may potentially have knowledge of facts relevant to the plaintiffs' allegations, other entities with whom the plaintiffs have entered into agreements with regard to the occurrence giving rise to the lawsuit or the lawsuit itself, and types and categories of documents in the plaintiffs' possession that contain information relevant to the plaintiffs' allegations.

(3) Types and Categories of Documents.

After the Texas Supreme Court's ruling in Loftin v. Martin, 776 S.W.2d 145 (Tex. 1990), I have attempted to refrain from sending out requests for production until after I have sent out interrogatories asking the respondent to identify pertinent types and categories of documents.²³ Basically, this approach results from a recognition that oftentimes the plaintiff does not know what types or

²²See, Rule 166b(2) and In Re Convergent Technologies Securities Litigation, 108 F.R.D. 328 (N.D. Cal. 1985) (interpreting Rule 33(b) Fed.R.Civ.P., which is virtually identical in wording to Rule 166b regarding scope of discovery extending to opinions and contentions.)

²³An example of such a set of interrogatories is attached as **APPENDIX D**. The rationale behind this approach is discussed in detail under the section on Requests for Production.

categories of documents in the defendant's possession are relevant to the issues in the case. Moreover, even when he does, the defendant may have unique names or descriptions for such documents. In both cases, the plaintiff, if he sends out a generic set of requests, is probably going to be met with the objection that the requests are overbroad and nonspecific. See, Loftin, supra. Once I get back the answering party's responses identifying the pertinent documents, I merely send out a request for production, attaching the interrogatory responses and asking the opposing party to produce all such documents in its possession. See, Limas v. DeDelgado, 770 S.W.2d 953 (Tex.App.--El Paso 1989) (orig. proc.).

2. Responses:

a. Interrogatories Served With the Petition.

A defendant has fifty (50) days from the date it is served within which to serve responses, absent a stipulated agreed extension (read, written agreement) from the party serving the interrogatories or an order extending the time for responding, entered in response to a request for protection served by the responding party within the original time period. See, Rule 166b(4) (effective September 4, 1990).

b. Normal Response Time.

A party being served with interrogatories normally has thirty (30) days from the date the interrogatories are served within which to file responses, objections, requests for protection or motions seeking an extension of time. Failure to serve objections or requests within this time period are waived unless an extension has been obtained by agreement or order of the court. Rule 166b(4) (effective September 4, 1990).

c. Request for Protection: Insufficient Discovery.

In some instances, when a defendant is served with interrogatories at the same time it is served with the original petition, it may have insufficient knowledge to understand what is being alleged or insufficient knowledge with which to adequately formulate a response, particularly if the interrogatory is asking for an opinion or contention.

(1) Rule 166b(2)(a) provides that in such a circumstance:

... the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

(2) Given the admonition by the Texas Supreme Court that, prior to being able to seek court intervention on a discovery dispute, the parties must

demonstrate that they have attempted to informally resolve the matter, it is suggested that as soon as the contention interrogatories are identified the respondent consider serving a response such as follows:

Response: Defendant requests that the plaintiff agree to enter into a protective order agreement with regard to this interrogatory, permitting the defendant to defer answering the interrogatory until such time as factual discovery in the case has been completed and/or until such time as defendant's expert witnesses are designated and their opinions disclosed. Subject to receiving a response to this request, defendant objects to the above interrogatory on the basis that it is premature and the defendant has not as yet completed sufficient discovery to be able to meaningfully respond to it.

Notwithstanding the above approach, unless an agreement is obtained (in writing), a protective order granting such relief must be obtained within the time period for responding to the interrogatory.

C. Number of Answers

1. The rule provides that, absent leave of court, no more than thirty (30) answers may be sought in one set of interrogatories. There is also the limitation that no more than two sets of interrogatories may be served by a party to any other party, except by agreement or as the court may permit after hearing upon the showing of good cause. Discretion is placed in the court for reducing or enlarging the number of interrogatories or sets of interrogatories. Many federal districts' local rules provide a limitation of twenty (20) interrogatories.²⁴

2. In Lone Star Life Insurance Company v. Street, 703 S.W.2d 426 (Tex.App.--Fort Worth 1986, opinion withdrawn on other grounds, 715 S.W.2d 638), Lone Star filed a motion to quash and for protective order relative to a set of interrogatories containing seventeen (17) interrogatories and a number of subparts. The appellate court observed that Lone Star's motion, under the particular facts, was not

²⁴This rule has helped to eliminate the use of the long-form set of interrogatories with multiple subsections. Significantly, the Supreme Court, in anticipation of the dispute as to what constitutes one interrogatory, did not limit the number of questions as such, but rather limited the questions so as to not require more than thirty (30) answers.

frivolous and held that Rule 168(6) requires that the trial judge hold a hearing on a motion to quash or a motion for protective order whenever a party seeking discovery asks questions which the recipient objects to as calling for more than thirty (30) answers.

D. Composite Information

1. One of the most important advantages of interrogatories is that they call for the party to answer. In the case of a corporation, association or partnership, there may be more than one individual who has knowledge of pertinent information and no one person is capable of answering all questions. In responding to interrogatories, the organization must gather all the pertinent information and provide a composite answer.

2. Although there have been no holdings of the Texas Supreme Court on the issue of composite knowledge, Rule 168 has been patterned after Rule 33 Fed.R.Civ.P.; therefore, it can be assumed that Texas courts would enforce the federal courts' interpretation of Rule 33 Fed.R.Civ.P. that a corporate party is required to answer interrogatories based upon its "composite" knowledge. See, e.g., **General Dynamics Corp. v. Selb Manufacturing Co.**, 481 F.2d 1204 (8th Cir. 1973), cert. denied, 414 U.S. 1162 (1974); 4A Moore, *Federal Practice*, Sec. 33.26; and Boyd, "Paper Discovery: Use of Interrogatories and Requests for Admission," *Advanced Civil Discovery for the 1980's* (University of Houston Law Center, 1982).²⁵

3. Oftentimes a party will want to learn more than merely the composite knowledge of an organization; they will want to identify who in the organization is most knowledgeable on certain issues. The answer to this question might be finessed by asking about individuals, including employees, consulting experts²⁶

²⁵Caveat: Some writers in this field have noted that there remains some doubt as to whether a corporation must disclose the identities of everyone assisting in the preparation of answers (**United States v. National Steel Corp.**, 26 F.R.D. 599, 600 (S.D. Tex. 1960)), or whether it must reveal the source of particular information. See, **B&S Drilling Co. v. Halliburton Oil Well Cementing Co.**, 24 F.R.D. 1, 4-5 (S.D. Tex. 1959); see, also, Haycock and Herr, "Interrogatories: Questions and Answers" 1 Rev. of Lit. No. 3, 263 at 291-292 (Fall 1981).

²⁶ **Axelson v. McIlhany**, 34 Tex.S.Ct.J. 56 (October 24, 1990).

and agents (including attorneys)²⁷ having knowledge of facts relevant to the subject matter of the lawsuit, or even a particular issue in the lawsuit. However, an additional or alternative approach might be to ask a concluding interrogatory such as follows:

Example:

State the name, address and telephone number of each individual with knowledge of facts relevant to the answers to the foregoing interrogatories you have given (setting out the respective interrogatory answers as to which each such individual has knowledge of relevant facts).

Assuming that the above example is held to be unobjectionable, an additional inquiry might be made regarding documents:

Example:

"Identify" each and every "document" (stating the title, if any, and nature of the document, who generated it, to whom it was designated and the date of each such occurrence) in your "possession" relevant to each answer you have given to each of the foregoing interrogatories (setting out the respective interrogatory to which each such document relates).

a. **Comment:** I have found the above interrogatories to be quite controversial with opposing counsel, but generally approved by trial judges. They are derived from my attempts to correlate important specific information with particular potential witnesses, while avoiding the objection that I am seeking to invade attorney work product and communications protected by the attorney/client privilege in asking the opposing party to "identify everyone who participated in answering these interrogatories." The interrogatory does not ask specifically what information was "communicated" by anyone, merely which individual possesses knowledge or relevant facts. Further, the interrogatory does not ask what documents "support" contentions or what will be used at trial (both of which probably bring

²⁷ **Texas Dept. of Mental Health and Mental Retardation v. Davis**, 775 S.W.2d 467 (Tex. App.--Austin 1989) (orig. proc.).

objectionable invasions of the attorney work product exemption), but merely what documents are or contain information relevant to the answers. Such a request is both "relevant" and specific to a particular issue.

b. **Caveat:** The above request might be vulnerable to an objection that, with regard to documents, it is overbroad, notwithstanding it is an interrogatory and not a request for production. See, **Loftin v. Martin**, 776 S.W.2d 145 (Tex. 1989). In an attempt to preempt and draft around this objection, I have experimented with the following interrogatory:

Example:

"Identify" (by the stating the title of the document, who generated it, to whom it was sent and on what date) all types and categories of documents and things in "your" "possession" relevant to and/or containing information relevant to each answer "you" have given to each of the foregoing interrogatories (identifying the respective interrogatory to which each such type or category of documents relates).

E. Option to Produce Records

1. Rule 168(2) provides an option to narratively answering an interrogatory, where it can be shown that the answer may be derived or ascertained from:

. . . public records; or

from the business records of the party upon whom the interrogatories have been served, or from an examination, audit or inspection of such business records; or

from a compilation, abstract or summary based on such business records;

and

"the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served."

If the above requirements are satisfied: It is sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained, and if applicable, to afford the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies,

compilations, abstracts or summaries. (Emphasis added.)

2. **Threshold Considerations under Rule 168(2).**

a. The answer must be capable of being derived or ascertained from the records.

b. The burden of ascertaining the answer is the same for both parties.

c. The records containing the information are specified.

d. The specification of records provided shall include sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answers may be ascertained.

3. **Federal Case Law.**

a. As with most of the recent amendments to the Texas Rules of Civil Procedure regarding scope of discovery, there have been few decisions dealing with the mechanical application of Rule 168(2). Since Rule 168(2) is similar in wording and intent to Fed.R.Civ.P. 33(c), one can turn to the federal cases for guidance. See, generally, **Daiflon, Inc. v. Allied Chem. Corp.**, 534 F.2d 221 (10th Cir.), cert. denied, 429 U.S. 889, 97 S.Ct. 239 (1976).

b. Rule 33(c) was held not applicable where the responding party did not specify where the answers could be found in the records made available. **Rainbow Pioneer #44-18-04A v. Hawaii Nevada Inv. Corp.**, 711 F.2d 902 (9th Cir. 1983).

c. It has been held that Rule 33(c) is not an available alternative if an interrogatory can be responded to more readily and conveniently by written answer. See, **Compaquie Franchise D'Assurance v. Phillips Petroleum Co.**, 105 F.R.D. 16 (S.D. N.Y. 1984).

4. **Texas Case Law.**

a. In **Firestone Photographs v. Lemaster**, 567 S.W.2d 273 (Tex.App.--Texarkana 1978, no writ), a case decided long before the 1988 amendments, it was held that the trial judge did not abuse his discretion in denying the defendant's request that, in response to interrogatories, the plaintiff be required to travel to the defendant's offices in Ohio and inspect the pertinent documents, where there was no evidence preserved for review demonstrating that the burden of inspecting and locating the information would be substantially the same on both parties. Supra at 278. This would seem to suggest that the burden is on the responding party to prove the

applicability of this alternative means of responding to interrogatories.²⁸

b. In two recent cases it has been held that, where a party requests information regarding prior lawsuits and the responding party demonstrates that compliance with the request would be overburdensome, it is an adequate response to give only sufficient information to allow the requesting party to be able to locate the public documents in the District Clerk's office. See, Scrivner v. Casseb, 754 S.W.2d 354 (Tex.App.--San Antonio 1988, no writ); and Lunsman v. Spector, 761 S.W.2d 112 (Tex.App.--San Antonio 1988, no writ).

c. In American Bankers Ins. Co. of Florida v. Caruth, 786 S.W.2d 427 (Tex. App.--Dallas 1990, n.w.h.), American Bankers originally responded to the plaintiffs' interrogatories and requests for production that information requested was contained in excess of 30,000 boxes containing numerous files in a warehouse. Further, American Bankers alleged that the only way to access the information was to manually inspect each of the files in each of the more than 30,000 boxes in their warehouse in Florida. American Bankers' computer staff was then deposed, which revealed that American Bankers had a sophisticated data base and computer that contained and could produce a great deal more information than was requested by the plaintiffs. American Bankers later conceded that all the requested discovery could be generated by the computer in approximately forty hours. The court sanctioned American Bankers \$4,500 for its intentional withholding of documents and production of "worthless" documents which amounted to no production at all. When American Bankers still did not produce the documents, its pleadings were stricken.

F. Strategy

1. Interrogatories are most useful for identification of issues, parties, potential fact and expert witnesses and physical evidence.²⁹ Another significant, though more problematic, use is for ferreting out contentions and the potential evidence that supports them. Both of

²⁸However, compare Daiflon, supra, a federal court decision, wherein it was held that the party seeking to compel narrative answers must prove that the burden of searching the responding party's records is heavier on him than on the responding party.

²⁹This is also referred to by one noted author in the field as "scanning." See, M. A. Dombroff, Discovery §4.06 at 112 (1987).

these uses can help facilitate early evaluation of the case and potentially lead to early settlement.³⁰ A final important use of interrogatories is for defining the universe, or establishing the parameters, for what issues, witnesses and documentary evidence may be offered at trial.

2. Always keep in mind that interrogatories and the responses to them can be read to the jury and must be read to be considered as evidence. However, they can only be used against the party answering them, and the responding party cannot read them to bolster his case. See, Soobitsky v. Continental Trailways Tours, Inc., 502 S.W.2d 902 (Tex.Civ.App.--El Paso 1973, writ ref'd n.r.e.).

G. Tactical Considerations: Specific Interrogatories

1. Contentions and Opinions.

a. Contention interrogatories can be effectively used to obtain not only an adversary's position on potential trial issues, but information regarding the evidence which might be relevant or probative on such points. Rule 166b(2) specifically states that "it is also not ground for objection that an interrogatory propounded pursuant to Rule 168 involves an opinion or contention that relates to fact or the application of law to fact . . ." Tex.R.Civ.P. 166b(2)(a). The author has been unable to locate any Texas cases that particularly focus on this issue in the context of interrogatories; however, the scope of discovery in Rule 166b(2) applies to all the discovery devices and contention inquiries that have been held to be permissible in oral depositions³¹ and requests for admission.³² There is no reason to believe a different rule would apply to interrogatories.

1) Example:

Interrogatory No. : With respect to the contentions set out in paragraph X of the Defendant's Answer, "identify" (set out the title, date generated, by whom and to whom sent) each type and category of documents and things relevant to your contention that

³⁰See, Klenk, "Using and Abusing Interrogatories," 11 Litigation 25 (1985).

³¹Williamson v. O'Neill, 696 S.W.2d 431 (Tex.App.--Houston [14th Dist.] 1986, no writ).

³²Laycox v. Jaroma, Inc., 709 S.W.2d 2 (Tex.App.--Corpus Christi 1986, writ ref'd n.r.e.).

the plaintiff had previous knowledge, warning or notice of the alleged defective condition of the product in question.

2) **Example:**

Interrogatory No. : With respect to the contentions set out in paragraph III of Defendant's Counterclaim, set forth all facts relevant to the Defendant's position or contention that the Plaintiff's claims brought under the provisions of the Texas Deceptive Trade Practices Act are "groundless and brought in bad faith," or were brought for the purposes of harassment of Counter-Defendants.

3) **Example:**

Interrogatory No. : With respect to the contentions set out in paragraph III of Defendant's Counterclaim, "identify" (complete name, last known address and telephone number) all individuals with knowledge of facts relevant to the Defendant's contention, position or opinion that Plaintiff's claims brought under the provisions of the Texas Deceptive Trade Practices Act are "groundless and brought in bad faith," or were brought for the purposes of harassment of Counter-Defendants.³³

b. As a counterbalance to broadening the scope of discovery to include opinions and contentions, Rule 166b(2)(a) provides that:

... the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

c. An additional precaution that the responding party can take is to request an agreement in the preliminary response:

Example:

Response: Plaintiff requests that the defendant agree to enter into a protective

order agreement with regard to this interrogatory, permitting the plaintiff to defer answering the interrogatory until such time as factual discovery in the case has been completed and/or until such time as plaintiff's expert witnesses are designated and their opinions disclosed. Subject to receiving a response to this request, plaintiff objects to the above interrogatory on the basis that it is premature and the plaintiff has not as yet completed sufficient discovery to be able to meaningfully respond to it.

d. Since the rule allowing inquiry into opinions and contentions is relatively new in Texas, there is not real precedent for determining how "contention interrogatories" are actually to be handled. A constant question arises regarding when such questions are appropriate and answers should be required. For a recent federal case discussing this problem with respect to Federal Rule 33(b), which is virtually identical in wording to Rule 166b regarding scope of discovery extending to opinions and contentions, see, In Re Convergent Technologies Securities Litigation, 108 F.R.D. 328 (N.D. Cal. 1985), wherein it was held that, while contention interrogatories were proper, a party ordinarily should not be compelled to answer them until after substantial completion of its own discovery, absent the requesting party's convincing justification (i.e., narrowing of issues) of early answers. The analysis of this case should be applicable and helpful when this issue surfaces under our rules.

2. **Potential Witnesses.**

A party may obtain the name, address and telephone number of all individuals having knowledge of facts relevant to the subject matter of the lawsuit. Rule 166b(2)(d) Tex.R.Civ.P.

a. **Requests.**

(1) The identity of ALL individuals with knowledge of relevant facts is discoverable regardless of whether they are parties, employees or consultants. Rule 166b(3)(d). See, Griffin v. Smith, 688 S.W.2d 112, 113 (Tex. 1985); Axelson v. McIlhany, 34 Tex.Sup.Ct.J. 56 (October 24, 1990). An attorney should be careful about verifying interrogatories, as this practice may get him deposed. See, City of Houston v. Harrison, 778 S.W.2d 916 (Tex.App.--Houston [14th Dist.] 1989) (orig. proc.); Borden, Inc. v. Valdez, 773 S.W.2d 718 (Tex.App.--Corpus Christi 1989, no writ); and Gilbert McClure Enterprises v. Burnett, 735 S.W.2d 309 (Tex.App.--Dallas 1987, no writ).

³³See, City of Houston v. Harrison, 778 S.W.2d 916 (Tex.App.--Houston [14th Dist.] 1989 (orig. proc.)) (regarding discoverability of investigation underlying allegations).

(2) It is a proper purpose of this type inquiry to flush out the universe of individuals who could potentially be called as witnesses. However, it is improper to ask a party for a "witness list" ("all individuals the party will call as witnesses at trial"). **Gutierrez v. Dallas Independent School District**, 729 S.W.2d 691 (Tex. 1987).

(3) Be careful to always ask the general question (*i.e.*, "relevant to the subject matter of the lawsuit"). There have been instances where trial attorneys have asked only a specific question, directed to a particular issue (*i.e.*, "all individuals who are witnesses to the occurrence"), and thereby were held to have failed to lay the proper predicate for learning of everyone with knowledge of facts relevant to all issues in the lawsuit. See, **Phaup v. Boswell**, 731 S.W.2d 625 (Tex.App.--Houston [1st Dist.] 1987, no writ); and **Robledo v. Grease Monkey, Inc.**, 758 S.W.2d 834 (Tex.App.--Corpus Christi, 1988, writ denied) (holding that such interrogatories should be construed liberally).

(a) In **Robledo v. Grease Monkey, Inc.**, 758 S.W.2d 834 (Tex.App.--Corpus Christi 1988, writ denied), an interrogatory was served asking for the identity of witnesses who had "seen, heard or known about the alleged occurrence." The court rejected the argument that this interrogatory inquired about "witnesses with knowledge of relevant facts," and allowed an undesignated witness to testify on matters outside those delineated in the interrogatory.

(b) In **Farm Services, Inc. v. Gonzales**, 756 S.W.2d 747 (Tex.App.--Corpus Christi 1988, no writ), a question involved whether the trial court committed error in allowing the plaintiff's wife to testify because she had not been designated in response to an interrogatory propounded by the defendant, seeking the identities:

. . . of all persons having knowledge of relevant facts surrounding the incident of on or about June 15, 1984, which allegedly resulted in the alleged injuries suffered by you and which form the basis for the [lawsuit].

The court held that the interrogatory should be interpreted liberally to include all facts concerning the exposure, not just those leading up to the incident. **Farm Services, Inc. v. Gonzales**, *supra* at 751.

(c) While the analysis used to reach the holding in **Lunsman v. Spector**, 761 S.W.2d 112 (Tex.App.--San Antonio 1988, no writ), is not totally clear, the result is in keeping with the mainstream of recent decisions on the points. The interrogatory in question asked:

Please identify by name, complete address and telephone number, each and every person . . . to have any knowledge of any fact or record relating to this cause of action or any factual disputes which may arise in connection with these proceedings.

The court sustained an objection to the interrogatory observing that it "did not inquire into a wrongful course of action." The peculiar passage in this opinion then follows:

It asked for any information associated with "this cause of action." This is clearly too broad. (Emphasis added.)³⁴

(d) Finally, be sure you make this type inquiry in interrogatories, and not solely in requests for production. One case has held that a party would only have to respond to a request for production to the extent that there was already a list of names, which is rarely going to be the case. **McKinney v. National Union Fire Insurance Company of Pittsburgh, Pa.**, 32 Tex.S.Ct.J. 306 (April 8, 1989). The better practice is to use interrogatories to identify potential witnesses.³⁵

b. Responding to Interrogatories.

(1) Absent a demonstration and finding of good cause, failure to timely provide the address of an individual possessing knowledge of relevant facts should result in the exclusion of that individual as a witness. **Boothe v. Hausler**, 766 S.W.2d 788 (Tex. 1989); and **Clark v. Trailways**, 32 S.Ct.J. 415 (May 31, 1989).

(2) Failure to list an individual who has knowledge of facts adverse to your position may result in you being precluded from proving that point. See,

³⁴**Comment:** Nowhere in the decision does the court ever acknowledge that Rule 166b allows for the discovery of all individuals with knowledge of facts relevant to the subject matter of the lawsuit. The effect of the above language is to narrow the scope of discovery prescribed by the rules set out in the rule, since relevancy to "this cause of action" surely is no broader than "the subject matter of the lawsuit." This court, however, was correct in holding that the rule restricts the discovery to individuals with knowledge of relevant facts and that "knowledge of potential future factual disputes" was clearly an overbroad inquiry.

³⁵See, APPENDIX D. See, also, **Limas v. DeDelgado**, 770 S.W.2d 953 (Tex.App.--El Paso 1985) (orig. Proc.).

City of San Antonio v. Fulcher, 749 S.W.2d 217 (Tex.App.--San Antonio, 1988, no writ).

(3) Be sure not to interpret an interrogatory requesting all individuals with knowledge of facts relevant to the subject matter of the lawsuit to mean only the ones you intend to call at trial. The question is not directed to trial strategy, but to identification. **Tinkle v. Henderson**, 777 S.W.2d 537 (Tex.App.--Tyler 1989, writ denied).

(4) It is unsettled whether a party may rely on the interrogatories and answers of other parties to the same lawsuit. For instance, if a defendant who subsequently settled had propounded interrogatories to a co-defendant asking about individuals with knowledge of facts relevant to the lawsuit, and the nonsettling defendant never responded and the plaintiff never separately propounded such an interrogatory, would the nonsettling defendant be prevented from putting on fact witnesses at trial in its defense against the plaintiff? One case has held that you may rely on the interrogatories served by the other party, and the nonsettling defendant's witnesses should be excluded. **Smith v. Christley**, 755 S.W.2d 525 (Tex.App.--Houston [14th Dist.] 1988, error denied). Another court, however, has held the contrary. **Austin Ranch Enterprises, Inc. v. Walls**, 760 S.W.2d 703 (Tex.App. --Fort Worth 1988, no writ). See, also, **Lacy v. Tigor Title Insurance Co.**, 794 S.W.2d 781 (Tex.App.--Dallas 1990, appl. for writ pending).

3. Expert Witnesses.

a. Interrogatories are an effective tool for learning whom an adversary may call as expert witness at trial, on what subject matter the expert is expected to testify, what opinions the expert has formulated and the factual basis for such opinions.

Example:

INTERROGATORY NO. : Identify the name and address of all individual(s) Defendant may call as expert witness(es) at trial and for each such individual, please state:

A. The subject matter on which the witness is expected to testify;

B. All factual observations, test results, supporting data, learned treatises (medical books, journal articles, texts or other publications) and opinions which the witness intends to, has or may use to support his opinions and conclusions relative to the case, or upon which the witness has based or will

base his or her testimony presented at trial, including the identity of each consulting expert whose opinions or data has been referred to, reviewed by and/or relied upon by the expert witness; the complete title and author of each learned treatise reviewed, referred to and/or relied upon by the witness in forming and/or corroborating his or her opinions regarding the subject matter of this lawsuit; and the complete work product of all consultants whose work produce has been reviewed and/or relied upon, in whole or in part, relative to the expert's involvement in this case and/or in formulating his/her opinions relative to the subject matter of this lawsuit.

b. Even if the expert is merely a consultant, if he has knowledge of relevant facts, the facts he has knowledge of are discoverable. **Griffin v. Smith**, 688 S.W.2d 112 (Tex. 1985); and **Axelson v. McIlhany**, 34 Tex.Sup.Ct.J. 56 (October 24, 1990).

c. Prior to September 1, 1990, if the expert relied upon a consulting expert's work product, in whole or in part, in forming his opinions, the identity of the consultant and his work product had to be revealed. This continues to be the rule; however, the rule has been broadened.

d. Under Rule 166b(3)(e), Tex.R.Civ.P., effective September 1, 1990, if an expert witness reviews the work product of a "consultant-only expert," the identity and work product of the consultant is discoverable to the same extent as that of a testifying expert.

e. Finally, if there has been a proper interrogatory regarding expert witnesses and the adversary does not identify such experts "as soon as practical" and no later than thirty (30) days before trial, the expert shall be prevented from testifying. Disclosure that meets the thirty (30) day requirement may still not be sufficient. See, **Builder's Equipment Co. v. Onion**, 713 S.W.2d 786 (Tex.App.--San Antonio 1986, no writ); but, see, **Mother Frances Hospital v. Coats**, 796 S.W.2d 566 (Tex.App.--Tyler 1990) (disapproving holding in **Onion**).

H. Rule 215: Sanctions/Interrogatories

Failure to answer interrogatories within the prescribed time period and inadequate responses may result in harsh sanctions. In **City of Houston v. Arney**, 680 S.W.2d 867 (Tex.App.--Houston [1st Dist.] 1984, no writ), the appellate court affirmed the order of the trial court which struck the defendant's answer after failing to answer interrogatories compelled by a previous court order. In **Jarrett v.**

Warhola, 695 S.W.2d 8 (Tex.App.--Houston [14th Dist.] 1985, writ ref'd), the trial court dismissed the plaintiff's cause of action in part for the plaintiff's failure to completely and timely respond to interrogatories and discovery orders. The Supreme Court refused the writ of error application and adopted the Court of Appeals' opinion concerning sanctions upon discovery abuse. In **Bosnich v. National Cellulose Corporation**, 676 S.W.2d 446 (Tex.App.--Houston [1st Dist.] 1984, no writ), the appellate court approved the trial court's sanctions of striking a party's pleadings for failing to timely and completely answer interrogatories. In a recent decision, the Fort Worth Court of Appeals held that the trial judge does not have to first employ less harsh sanctions before striking pleadings and that subsequent supplementation of the interrogatory answers precludes the imposition of sanctions. **Skinner v. Grimes Iron & Metal**, 766 S.W.2d 550 (Tex.App.--Fort Worth 1989, no writ).

be more gratifying, since, if it is properly crafted and effectively executed, the trial attorney should wind up with more than just paper.

VII. SUPPLEMENTATION

There are several basic considerations that should be kept in mind in preparing supplementation of discovery, from a drafting perspective.

A. In Writing

The Texas Supreme Court has made it emphatically clear that supplementation of discovery must be in writing. **Sharp v. Broadway National Bank**, 784 S.W.2d 669 (Tex. 1990).

B. Formality

Until the Texas Supreme Court clarifies the format written supplementation should take, it is probably prudent to adhere to formal discovery formats. See, **Stiles v. Royal Insurance Co. of America**, 1990 WL _____, ____ S.W.2d ____ (Tex.App.--Dallas 1990) (not yet reported).

C. Duty

A party is under no duty to remind an opponent of a need to supplement. **Sharp v. Broadway National Bank**, *supra*.

VIII. CONCLUSION

Having watched people make things by origami³⁶ and from papier mache', I am convinced that trying to construct a case from written discovery requires just as much creativity and skill. The results can be just as tangible and rewarding. Indeed, written discovery may

³⁶Japanese art of folding paper into decorative shapes