TACTICAL USE OF DISCOVERY AND CLAIMS OF PRIVILEGE

AS A SWORD AND A SHIELD

Advanced Evidence and Discovery Course 1990-91

State Bar of Texas

Professional Development Program

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PREFACE: A MYTHOLOGICAL PARABLE.

It came to pass that Perseus needed to obtain the head of Medusa. The tyrant of the island upon which Perseus and his mother lived was trying to make a move on Perseus' mother. Plans for the wedding feast were announced. The tyrant made it clear to Perseus that what he wanted more than anything else was the head of a Gorgon as a wedding present. Being impecunious, Perseus set out to get the head of Medusa. This was not an easy task for Medusa was one of the Gorgons

And they are three, the Gorgons, each with wings

And snaky hair, most horrible to mortals.

Whom no man shall behold and draw again

The breath of life,

for the reason that whoever looked at them was turned instantly to stone. It was clear that no man unaided could kill Medusa. The other two Gorgons were immortal thus their heads were not on the shopping list.

Two deities came to the aid of Perseus, Hermes and Pallas Athena. Hermes gave Perseus a sword to attack Medusa with--one which could not be bent or broken on the Gorgon's scales, no matter how hard they were. This was a wonderful gift no doubt. However, what was the good of a sword when the creature to be struck by it could turn the swordsman into stone before he was within striking distance? Luckily, Pallas Athena also aided Perseus. She took off the shield of polished bronze which covered her breast and held it out to Perseus. "Look into this when you attack the Gorgon," she said. You will be able to see her in it as a mirror, and so avoid her deadly power."

With the help of Hermes, Perseus was able to extort the location of Medusa's home from the Gray Women by holding the eye the three shared hostage. Then, once again aided by Hermes, Perseus journeyed to the island where the Gorgons dwelled. By great good fortune, the three Gorgons were all asleep when Perseus found them. However, Medusa awoke as Perseus approached. Medusa looked upon Perseus but more importantly upon his shield. Upon seeing her own reflection, she was turned to stone. Perseus then used Hermes' sword to cut off the head.

Upon returning to the tyrant's island, Perseus learned that his mother was hiding out in a temple because she refused to marry the tyrant. Perseus also learned that the tyrant was holding a banquet and that all the men who favored him were in attendance. Perseus immediately went to the banquet. Once he had the attention of everyone at the banquet, Perseus pulled Medusa's head from the special wallet which held it. Every one in attendance was turned to stone where they sat. Perseus appointed a benevolent tyrant to rule the island and then returned to Greece. Everybody, with the exceptions of Medusa, the tyrant and his cronies, lived happily ever after.

THE MORALS OF THE STORY:

I. INTRODUCTION.

1. A shield can be a more potent weapon than a sword; and, 2. When it comes to wedding presents, it is best to register at Neimans.

An uncritical reading of the various opinions dealing with the use of discovery as "a sword and a shield" might conclude that it cannot be done. Notwithstanding the substantial body of case law to the contrary, discovery and claims of privilege can be used as both a sword and a shield. Indeed, it is often in the clients best interest to use or attempt to use discovery and claims of privilege as both a sword and a shield.

This paper will concentrate on the tactical use of discovery requests and claims of privilege as tactical weapons in litigation. It will specifically address precluding the presentation of evidence for failure to supplement pursuant to Texas Rules of Civil Procedure 166b(6) and 215(5).

II. PRESENTING AND EXCLUDING EVIDENCE PURSUANT TO TEXAS RULES OF CIVIL PROCEDURE 166(B)(6) and 215(5).

This section of the paper will be divided into two portions. The first will examine the tactical considerations regarding Rules 166(b)(6) and 215(5) relatively unencumbered by the underlying law. The second section will present the legal aspects and case authority underlying the tactical considerations.

A. Tactical Considerations in excluding your adversaries evidence and presenting your own.

At trial, a primary objective is to control the flow of evidence. In theory, the more evidence you can prevent your opponent from presenting the better off you are. Likewise, you need to make every effort to see that you are able to present your case to the jury. During the pretrial phase of a case, your discovery requests and responses form the prerequisites for what evidence you can and can present and exclude at trial.

1. Interrogatories.

Virtually every attorney asks his opponent to identify his experts and persons with knowledge of relevant facts. These are very important interrogatories. For purposes of introducing or excluding evidence, they are the most often invoked and litigated interrogatories. In fact, almost every case addressing the duty to respond and supplement centers on one or both of these interrogatories. However, other types of interrogatories can also be used to control the flow of evidence.

Contention interrogatories can be used to limit your opponents ability to present evidence. Contention interrogatories ask the opposing party to set forth the basis of particular claims or defenses. They are particularly useful when presented in combination with other interrogatories. The following examples will illustrate this point.

EXAMPLE ONE:

Set forth in detail the facts and circumstances surrounding your claim set forth in ¶ III of your Petition for Removal. Identify each and every person with personal knowledge of the facts and circumstances

surrounding the allegations set forth in ¶ III of your Petition for Removal. Identify each and every document which evidences or relates to the allegations set forth in ¶ III of your Petition for Removal.

EXAMPLE TWO:

Set forth the factual basis for your claim that Plaintiff is estopped from seeking or collecting a deficiency on the Note. Identify each and every person with knowledge of the facts relevant to your claim that Plaintiff is estopped from seeking or collecting a deficiency judgment on the Note. Identify each and every document which evidences or relates to your claim that Plaintiff is estopped from seeking or collecting a deficiency on the Note.

The foregoing interrogatories, when presented in combination, should apprise you of the factual basis of opposing claims as well as the sources of relevant information. Such responses, when taken in combination with Rules 166(b)(6) and 215(5) can give you a basis for excluding any evidence or witnesses which were not disclosed to you.

In some narrow circumstances, an interrogatory directed at the legal basis of a claim can also be useful. However, such requests may be met with objections under the attorney work product doctrine. However, such objections can be responded to with the due process considerations which attach to a party's right to know the basis of the claims asserted against him. "Set forth the statutory basis for your claim that your are entitled to attorney's fees for prosecuting your conversion claim" is an example of such an interrogatory.

Interrogatories such as the foregoing could also be used to force opposing parties to make limited offers of their evidence. A timely objection at trial based on an interrogatory response should entitle you to an instruction as to what a particular document or witness may testify to or what issues the evidence relates to. It is also an open question as to whether interrogatory responses could be used as the basis for estoppel arguments on appeal based on no evidence or insufficient evidence points. Depending on the case, such appellate considerations might be worthy of serious consideration.

While it has not been ruled upon, it may be possible to exclude witnesses due to the failure of an opposing party to disclose evidence regarding biases the witness might have. An interrogatory directed at such concerns might read as follows:

State whether the State of Texas, the District Attorney, the Rockwall County Criminal District Attorney's Office, or any other officer or agent of Rockwall County or the State of Texas has entered into any plea bargain, Mary Carter agreement; agreement regarding immunity or partial immunity or other agreement not to prosecute with John Smith in the past 3 years with respect to civil or criminal liability.

Failure to disclose such information in response to an appropriate request could be argued as a basis for excluding that witnesses testimony.

2. Requests for Production.

Parties have a duty to supplement responses to requests for production just as they do interrogatory responses. However, cases involving failure to produce documents are very rare. In order to avail yourself to such objections, you will need to be prepared to present evidence that the document(s) in question were not produced. As the matter has not been litigated, it is uncertain whether you would have to introduce every document which was produced into the record or whether you could prove such matters up through

testimony. However, if you had a specific interrogatory which called for the identification of such a document and it was not identified, you would have an easier predicate to lay for the exclusion of the document.

B. The Weapons: Texas Rules of Civil Procedure 166b(6) and 215(5).

Texas Rules of Civil Procedure 166b(6), 215(5) and 215(3) set forth a party's duty to supplement discovery responses and the consequences for failure to do so.

6. **Duty to Supplement.** A party who has responded to a request for discovery that was correct and complete when made is under no duty to supplement his response to include information thereafter acquired, except the following shall be supplemented no less than thirty days prior to the beginning of trial unless the court finds that good cause exists for permitting or requiring later supplementation. a. A party is under a duty to reasonably supplement his response if he obtains information upon the basis of which:

1. he knows that the response was incorrect or incomplete when made;

2. he knows that the response though correct and complete when made is no longer true and complete and the circumstances are such that failure to amend the answer is in substance misleading: or

b. If the party expects to call an expert witness when the identity or the subject matter of such expert witness' testimony has not been previously disclosed in response to an appropriate inquiry directly addressed to these matters, such response must be supplemented to include the name, address and telephone number of the expert witness and the substance of the testimony concerning which the expert witness is expected to testify, as soon as is practical, but in no event less

than thirty (30) days prior to the beginning of trial except on leave of court.

On its face, the foregoing rule seems to be relatively straight forward. A Party must supplement its discovery responses (interrogatories, production and admissions) reasonably unless the newly acquired information is merely cumulative with what has already been disclosed. The duty to supplement is an affirmative one. *Boothe v. Hausler*, 766 S.W.2d 788, 789 (Tex. 1989). Failure to supplement should result in the exclusion of the concealed evidence or information pursuant to Texas Rule of Civil Procedure 215(5). However, it appeared that the Texas Supreme Court was calling into question the interrelationship between Rules 166(b)(6) and 215(5).

Stafford's showing of good cause for failing to supplement was principally that she expected the case to settle and that she first contacted Tusnstill on the day of trial. We do not agree that the trial court was within its discretion in admitting the testimony on such a showing. Tex. R. Civ. P. 215(5). The duty to supplement discovery responses imposed by Rule 166b(6)(a) exists independent of, and without modification by, the exclusionary sanction which Rule 215(5) imposes on the breach of that duty. The two rules cannot be read together to support the proposition that a party must supplement only when that party reasonably expects the case to go to trial.

Rainbo Baking Co. v. Stafford, 787 S.W.2d 41, 42 (Tex. 1990). *Rainbo Baking* seemed to raise a question as to whether Rule 166(b)(6) operated independently from 215(5) particularly with respect to the good cause exception to Rule 215(5). However, two weeks later, the Supreme Court read the Rules together and applied the good cause exception to Rule 166(b)(6). *Sharp v. Broadway National Bank*, 784 S.W.2d 669 (Tex. 1990). The Courts of Appeals have also continued to interpret the two rules together. *See NCL Studs, Inc. v. Jandl*, 792 S.W.2d 182 (Tex. App.--Houston [1st Dist.] 1990, no writ); *Gonzalez v. Stevenson*, 791 S.W.2d 250 (Tex. App.--Corpus Christi 1990, no writ); *K-Mart Corp. v. Grebe*, 787 S.W.2d 122 (Tex. App.--Corpus Christi 1990, writ denied). However, pursuant to the September 1, 1990 amendments, the new notice and hearing requirement of Rule 215(3) may be imputed into Rule 215(5). However, it would seem that the same rationale which prompted the inclusion of the notice and hearing requirement into Rule 215(3) would also require its inclusion into Rule 166(b)(6). Thus, the amendment to Rule 215(3) may have muddied the application of Rule 166(b)(6).

As noted above, Rule 215(5) is often read and interpreted in conjunction with Rule 166(b)(6). This is because Rule 166(b)(6) does not contain a provision setting forth what penalties may be imposed for failing to meet its requirements. Thus, it is

necessary to refer to Rule 215(5) and Rule 215(2) in turn in order to determine the available range of penalties. Rule 215(5) provides:

A party who fails to respond to or supplement his response to a request for discovery shall not be entitled to present evidence which the party was under a duty to provide in a response or supplemental response or to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter, unless the trial court finds that good cause sufficient to require admission exists. The burden of establishing good cause is upon the party offering the evidence and good cause must be shown in the record.

The requirement of supplementation is mandatory, unless good cause is shown for late supplementation. The purpose of the Rule is laudable. The Supreme Court's intention was "to encourage full discovery of the issues and facts prior to trial so that parties could make realistic assessments of their respective positions. It was [their] hope that this would facilitate settlements and prevent trial by ambush." *Gee v. Liberty Mutual Fire Insurance Col*, 765 S.W.2d 394, 396 (Tex. 1989). In spite of the seeming simplicity of the rule, it is not as simple as it looks.

1. The consequences of failure to timely supplement discovery responses can be severe.

Virtually every reported case addressing failure to seasonably supplement discovery responses had dealt with identification and designation of persons with knowledge and expert witnesses. However, the same principal applies to other forms of discovery. Simply stated a party who breaches the duty to supplement an interrogatory loses the opportunity to offer the testimony of a witness who is a subject of the interrogatory. *Clark v. Trailways, Inc.* 774 S.W.2d 644 (Tex. 1989); *Boothe v. Hausler*, 766 S.W.2d 788 (Tex. 1989). The sanction is automatic and the party opposing the offer is not required to request, or to take a continuance if it is offered. *Guiterrez v. Dallas Independent School District*, 729 S.W.2d 691 (Tex. 1987). A trial court can allow exception to the foregoing rule only when the proponent of the evidence shows good cause to excuse its failure to supplement seasonably. *Id*.; Tex. R. Civ. P. 215(5).

2. What is good cause for failure to reasonably supplement discovery responses?--good question.

Texas appellate courts have been very reluctant to find or sustain a finding of good cause for failure to seasonably supplement discovery responses. In *Johnson v. Gulf Coast Contracting Services, Inc.*, the

Beaumont Court of Appeals reluctantly affirmed the trial court's finding that there was good cause for late identification of a fact witness. 746 S.W.2d 327 (Tex. App.--Beaumont 1988, writ denied). In *Johnson*, a hearing was conducted outside the presence of the jury wherein it was established that:

Appellee, a Louisiana company, had been inactive since 1983, with no telephone listing since 1985. Appellee was in liquidation, and a search for its president had gone on for months. The president testified that he had not maintained an office at the company's official location since 1983 and that his staff did not associate him with Appellee because he was in Baton Rouge (100 miles away). Appellee's counsel stated that as soon as they found Appellee's president, the information was given to Appellant.

Johnson, 746 S.W.2d at 329. Faced with the foregoing facts, the Beaumont court reluctantly overruled the point of error noting "We cannot conclude that the trial court 'acted without reference to any guiding rules and principles.'" *Id*.

The Dallas Court of Appeals has also sustained a trial court's finding that good cause had been shown such that it would allow the use of a previously undesignated expert. *Ellsworth v. Bishop Jewelry & Loan Co*., 742 S.W.2d 533 (Tex. App.--Dallas, 1987, writ denied). In *Ellsworth*, the Dallas court held that because one of the plaintiff's experts had gone into matters which were not disclosed in an interrogatory response, the defendant had just cause to call a previously unidentified expert for rebuttal testimony.

Good cause for failing to disclose the identity of an expert witness was found in *Tri-State Motor Transit Co. v. Nicar*, 765 S.W.2d 486 (Tex. App.--Houston [14th Dist.] 1989, no writ). Appellee identified Dr. Hayden as an expert in response to another parties interrogatories, not Appellants. The case was specially set for June 8, 1987. However, Appellant's counsel was involved in another trial and was unavailable so the trial was delayed. Dr. Hayden was unavailable when the trial was resumed. Appellee was forced to call Hayden's associate, Dr. Hart. Appellant was given an opportunity to depose Dr. Hart which it did. Dr. Hart's testimony was based on Dr. Hayden's report. The Houston Court first held that Appellant should have resorted to the responses to the interrogatories of other parties. The Court then went on to find that there was good cause for calling Dr. Hart as opposed to Dr. Hayden. Strangely, the Court's finding of good cause based on the delay and prior commitment of Dr. Hayden is supportable. However, it reasoning regarding cross use of interrogatory response runs contrary to the Supreme Court's focus of the good cause examination on why the information was not supplied to the requesting party as opposed to the effects on the requesting party. For this reason, the continued vitality of that portion of the *Tri-State Motor*'s holding may now be incorrect law. *See Sharp v. Broadway National Bank*, 784 S.W.2d 669 (Tex. 1990).

The San Antonio Court of Appeals held that there was good cause for not identifying an expert witness in response to an interrogatory where the expert had been identified in a pre-trial order twenty-six days prior to trial. *Mercy Hospital v. Rios*, 776 S.W.2d 631 (Tex. App.--San Antonio 1990, writ denied). As with *Tri-State Motor*, the continued vitality of this holding is strongly questioned by the *Sharp v. Broadway National Bank* ruling.

The Houston Court of Appeals for the First District has carved out a non-good cause exception to the automatic exclusion doctrine. The Houston court has taken the position that a party witness may testify as a fact witness even though the party has not been identified in response to a proper discovery request. *NCL Studs v. Jandl*, 792 S.W.2d 182, 186 (Tex. App.--Houston [1st Dist.] 1990, no writ). The Jandl opinion seems hardly supportable in view of the Supreme Court's unequivocal holding that

"A party is entitled to prepare for trial assured that a witness will not be called because opposing counsel has not identified him or her in response to a proper interrogatory. Thus, even the fact that a witness has

been fully deposed, and only his or her deposition testimony will be offered at trial, is not enough to show good cause for admitting the evidence when the witness was not identified in response to discovery."

The Supreme Court's analysis focuses not on potential effects non-disclosure may have on the adverse party but rather on the explanation the offering party has for its failure to comply with the rules. Under such an analysis, what explanation can an offering party provide for failing to identify a party to the lawsuit?

Numerous courts have refused to find that good cause was established such that failure to timely supplement discovery was excusable. Indeed, the Texas Supreme Court has noted some concern about the paucity of cases in which good cause has been found.

Our goal in promulgating Rules 166b and 215(5) and our prior opinions interpreting these rules was to encourage full discovery of the issues and facts prior to trial so that parties could make realistic assessments of their respective positions. It was our hope that this would facilitate settlements and prevent trial by ambush. Both of our opinions in *Gutierrez* and *Youngblood* state the sanction announced in *Morrow*. However, neither of these cases mention the trial court's discretion in considering the good cause exception. **Strict interpretation of the language in *Gutierrez* and *Youngblood* has caused application of the sanction to be mechanical, leaving no room for discretion. We therefore reaffirm our holding in *Morrow* and once again point out that the sanction of automatic exclusion of testimony of an undisclosed witness is subject to a good cause exception.** If the trial court, in its discretion, finds that good cause exists to allow the evidence, such should be admitted.

Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394, 396 (Tex. 1989)(emphasis added). Because there are so few cases which have found that good cause was established, the only way to describe what constitutes good cause is through inductive reasoning. Therefore, a number of cases which have held that good cause was not established are discussed below.

- *Sharp v. Broadway National Bank*, 784 S.W.2d 669 (Tex. 1990) is the Texas Supreme Court's most recent pronouncement on the good cause issue. A little more than a year before, trial, Appellants served interrogatories on Appellee inquiring as to the identity of expert witnesses. Appellee responded that none were designated at the time. Appellee never supplemented the interrogatory responses. Twenty-six days before trial, Appellants received a notice of deposition from the Appellee regarding a witness Appellee intended to call at trial on the issue of attorney's fees. That witness was deposed and Appellants' counsel participated in the deposition. On the day of trial, Appellee announced that it intended to call its trial counsel, the deposed witness and another attorney on the issue of attorney's fees. Appellants objected to the admission of expert testimony from any of those witnesses on the grounds that they had not been identified in answers to interrogatories. Appellee contended that the testimony should be allowed because there was good cause for not answering. Alternatively, Appellee moved for a continuance. After a long hearing the Trial Court allowed trial counsel and the deposed witness to testify. The Court of Appeals held that the Trial Court erred in allowing the testimony of trial counsel and the undeposed witness. However, it held that it was not error to allow the deposed expert to testify. Finding that the evidence which should have been excluded was cumulative, the Court of Appeals affirmed the judgment of the Trial Court. The Texas Supreme Court reversed the Trial Court's judgment and modified the Court of Appeals ruling holding:

1. Absence of surprise, unfairness, or ambush does not alone satisfy the good cause exception. 2. Identification of witnesses in response to discovery must be in writing. This is to avoid problems regarding who said what when. 3. The fact that a witness' identity is known to all parties is not itself good cause for

failing to supplement. "A party is entitled to prepare for trial assured that a witness will not be called because opposing counsel has not identified him or her in response to a proper interrogatory. Thus, even the fact that a witness has been fully deposed, and only his or her deposition testimony will be offered at trial, is not enough to show good cause for admitting the evidence when the witness was not identified in response to discovery." 4. Objection to the offer of the deposition at trial is sufficient to preserve error. 5. The fact that a witness will testify only about attorney fees does not excuse proper identification in discovery. 6. Inadvertence of counsel is not good cause.

- In *Rainbo Baking*, the Texas Supreme Court stated in dicta that the trial court had abused its discretion in allowing an improperly identified witness to testify where the basis for the finding of just cause was that the proponent expected the case to settle and that [the witness] was first contacted on the day of trial. *Rainbo Baking Co. v. Stafford*, 787 S.W.2d 42 (Tex. 1990).

- The Texas Supreme Court found that the trial court erred in finding that there was good cause to admit the testimony of a witness where the witness was not contacted about testifying approximately 10 days prior to trial, gave no reports other than an initial investigative report [the witness in question was an accident investigation officer for the Mexican Federal Police), and the witness frequently moved to various locations in Mexico following the accident in question. *Clark v. Trailways*, 774 S.W.2d 644, 647 (Tex. 1989). The Supreme Court noted "[t]hese facts, however, do not permit a reasonable inference that [the proponent] was unable to comply with the discovery request by [the opponent] or seasonably supplement its answers to those requests. Lira's testimony fall short of indicating [the proponent's] good faith efforts to locate [the witness] or her inability to anticipate the use of his testimony at trial, which could otherwise support a finding of good cause to permit the testimony of an unidentified witness."

- The Texas Supreme Court was not persuaded by arguments that the proponent had no duty to supplement and that it would suffer great harm if the testimony were not allowed into evidence. *Boothe v. Hausler*, 766 S.W.2d 788 (Tex. 1989).

- Lack of surprise does not constitute good cause for failing to supplement discovery responses. In *Morrow v. H.E.B., Inc*., the Texas Supreme Court reversed the court of appeals and affirmed the trial courts refusal to allow a witness to testify where an interrogatory was not supplemented to include the witness' address. Prior to trial, plaintiff set interrogatories to defendant asking for the names and addresses of employees who had come to the aid of plaintiff after the accident. Defendant named the witness in question; however, the only address given was "Missouri." Three weeks prior to trial, defendant located the witness in San Antonio and contacted him by phone; however, it did not supplement its interrogatories. Defendant offered to allow plaintiff to take the witness' deposition prior to his testimony. Additionally, defendant argued that plaintiff would not be surprised. Due to defendant's failure to supplement, the trial court refused to allow the witness to testify. The court of appeals reversed finding that there would have been no surprise to plaintiff and thus the trial court abused its discretion. The Supreme Court reversed. "The court of appeals in its opinion recites much of the evidence which shows there was no surprise. Lack of surprise would show that there was no good cause to exclude the testimony [of the witness]; however, this is the inverse of the standard . . . . It is incumbent upon the part offering the testimony to show good cause why it should be included." *Morrow v. H.E.B., Inc*., 714 S.W.2d 297, 298 (Tex. 1986).

- *Braniff, Inc. v. Lentz* presented the Forth Worth Court of Appeals with an interesting fact situation. Staff Ground Services was a subcontractor of Braniff's. The plaintiff was an employee of Staff Ground Services. The witness in question (Mr. Knoll) was an employee of Staff Ground Services at the time of the accident. The plaintiff called Knoll as his first witness. Defendant objected arguing that Knoll's address had not be disclosed in response to an interrogatory. Plaintiff's counsel responded that it spent two days trying to find Knoll and that he had to hire an investigator to find him. The trial court allowed Knoll to testify. The Court of Appeals reversed the trial court. In his appellate brief, plaintiff further argued that the defendant could not have been surprised because Knoll gave it daily reports for four months which he worked for Staff Ground Services. Based on the facts above, the Court of Appeals reversed holding that good cause had not been established and that the trial court abused it discretion in allowing the testimony. *Braniff, Inc. v. Lentz*, 748 S.W.2d 297 (Tex. App.--Fort Worth 1988, writ denied).

- In *Hall Construction Co. v. Texas Industries, Inc.*, the Dallas Court of Appeals held that actual knowledge of a potential witness did not constitute good cause to justify failure to timely supplement discovery responses. In attempting to show good cause, the proponent of the unidentified witnesses argued that neither of the two witnesses had actual knowledge of certain of the relevant facts and that one of the subject witnesses had verified a set of interrogatory responses and the other had executed an affidavit in the cause. The Dallas Court of Appeals reversed and held that no good cause was shown by the proponent. *Hall Construction Co. v. Texas Industries, Inc*., 748 S.W.2d 533 (Tex. App.--Dallas 1988, no writ).

- "Any argument that appellants' experts were recently discovered is insufficient to constitute good cause." *Stoll v. Rothchild*, 763 S.W.2d 437, 441 (Tex. App.--Houston [14th Dist.] 1988, writ denied).

- Interrogatories regarding witnesses were sent to Fischer, Appellee's attorney of record at the time the interrogatories were propounded. Appellee never responded to the interrogatories. At the good cause hearing, Appellee argued that his trial counsel never received the interrogatories and that Appellant had not proven proper service. The trial court did not reach the question of good cause finding that proper service was not proven. Appellee obtained judgment against Appellant. The Thirteenth Court of Appeals reversed. First it held that sufficient proof of proper service was presented. It then found that good cause was not established based on trial counsel's testimony that he never received the interrogatories. Ultimately, the Court of Appeals reversed the judgment below finding that the evidence which should have been excluded "was not cumulative and concerned a material issue dispositive of the case." *Gonzalez v. Stevenson*, 791 S.W.2d 250, 254 (Tex. App.--Corpus Christi 1990, no writ).

- In *NCL Studs, Inc. v. Jandl*, the Houston Court of Appeals, First District, held that 1) counsel's late entry into the case was not good cause; 2) designation of the witnesses two days before trial was not good cause; 3) oral designation of witnesses is insufficient and does not constitute good cause; and, 4) the fact that the undisclosed witness was a signatory to a key document does not constitute good cause. Surprisingly, the Houston Court did find that the fact that one of the undisclosed witnesses was a named party to the suit was good cause for not identifying the witness in response to an interrogatory. *NCL Studs, v. Jandl*, 792 S.W.2d 182 (Tex. App.--Houston [1st Dist.] 1990, no writ).

3. Rebuttal witnesses and the duty to supplement.

You can use an unidentified/undesignated witness as a rebuttal witness under certain circumstances. If you could not anticipate calling the rebuttal witness prior to trial, then you can call the witness despite the fact that he or she has not been identified. *Gannett Outdoor Co. v. Kubeczka*, 710 S.W.2d 79 (Tex. App.--Houston [14th Dist.] 1986, no writ). However, if the use of the rebuttal witness could have been anticipated prior to trial, then such witness must be identified consistent with Rules 166b(5) and 215(5). *Ramos v. Champlin Petroleum Co*., 750 S.W.2d 873 (Tex. App.--Corpus Christi 1988, writ denied).

C. The application and mechanics of Rules 166(b)(6) and 215(5).

1. Opposing the introduction of undisclosed evidence or unidentified witnesses.

It should come as no surprise that you must object to the introduction of testimony of an unidentified witness. As the Supreme Court has noted, "[b]y failing to object when an undisclosed witness is offered at trial, a party waives any complaint under rule 215(5) as to the admission of testimony from that witness." *Clark v. Trailways, Inc*., 774 S.W.2d 644, 647 (Tex. 1989). A pretrial motion objecting to a witness will not satisfy the objection requirement. *Id*. This is directly contrary to an earlier (3 months) opinion of the Texas Supreme Court where it stated "The trial court expressly overruled Liberty Mutual's motion to exclude all previously unidentified witnesses under Rule 215(5); therefore, error was preserved before the court of appeals as to all four witnesses." *Gee v. Liberty Mutual Fire Insurance Co*., 765 S.W.2d 394, 396 (Tex.

1989). The objection should be reasonably specific. *See Braniff, Inc. v. Lentz*, 748 S.W.2d 297 (Tex. App.--Fort Worth 1988, writ denied). It is probably best to introduce the interrogatory response in question into the record as an exhibit if the discovery request and subject response is not already on file with the court. Alternatively, you should read it into the record in order to properly preserve the error.

Additionally, you should raise the issue of exclusion of undisclosed evidence in your motion in limine. If you get an early ruling from the Court, you probably have a better chance of keeping the witness our down stream. Likewise, you should probably complain of undisclosed evidence in your motion for new trial. This is particularly true in view of the fact that your abuse of discretion point involving the good cause finding will almost certainly have to be coupled with a no evidence/insufficient evidence point.

Should a hearing be held regarding good cause, it is in your best interest to seek the Court to make an expressed ruling on the record. This may serve to narrow the scope of an eventual appeal. Likewise, in non-jury cases, you should try to make the trial court make findings of fact and conclusions of law regarding his good cause finding. However, the inclusion of such findings may not strictly be proper.

2. Making a showing of good cause.

There is some uncertainty as to how a showing of good cause should be made from an evidentiary perspective. The Houston Court of Appeals has intimated that the individual answering the interrogatories is the most appropriate witness to establish good cause. *Walsh v. Mullane*, 725 S.W.2d 263, 264 (Tex. App.--Houston 1986, writ ref'd n.r.e.). However, most other courts have been satisfied, or at least not questioned testimony from an attorney. The Houston court also implied that an expressed judicial finding of good cause was necessary. *Id*. The Fort Worth Court of Appeals seems to have followed the Houston court. *Braniff, Inc. v. Lentz*, 748 S.W.2d 297, 300 (Tex. App.--Fort Worth 1988 writ denied)(" . . . Rule 215(5) requires that the trial court make an affirmative finding of good cause.")(footnote omitted). *Contrast Ellsworth v. Bishop Jewelry & Loan Co*., 742 S.W.2d 533, 734 (Tex. App.--Dallas 1987, writ denied)(holding that an "implied finding of good cause" was sufficient). While the question has not been squarely addressed, the trend seems to be in favor of holding that implicit findings of good cause are sufficient. The applicable rules do not seem to require an expressed finding one way or another. Rather, it provides that the proponent bears the burden of establishing good cause and evidence of good cause must be contained in the record. Thus, it appears that a ruling one way or another regarding the testimony will preserve error. Nonetheless, those practicing in Houston and Fort Worth are admonished to review the appropriate case authority.

D. Appellate considerations.

The standard governing a court's decision to allow or disallow a witness to testify is that of abuse of discretion. This is because the determination of good cause is within the discretion of the trial court. *Morrow v. H.E.B., Inc*., 714 S.W.2d 297, 298 (Tex. 1986). It is probably not sufficient to assert merely that the trial court erred in admitting or disallowing the testimony. *See Shenadoah Associates v. J & K Properties, Inc.*, 741 S.W.2d 470, 489 (Tex. App.--Dallas 1987, writ denied).

Regardless of whether the testimony is admitted or excluded, you must establish that the error was reasonably calculated to and did lead to the rendering of an incorrect verdict. *Gee v. Liberty Mutual Fire Insurance Co*., 765 S.W.2d 394, 396 (Tex. 1989). The harmless error rule applies. Generally, the appellate courts will not find reversible error based on erroneous evidence rulings where the evidence in question is cumulative and not controlling on a material issue dispositive of the case. *Id*. Thus, if your testimony is excluded, you should make an offer of proof pursuant to Texas Rule of Evidence 103. You should also join your abuse of discretion point of error with an insufficient/no evidence point as that is the issue upon which the appeal will ultimately turn.

Even assuming you followed every procedural prerequisite for excluding evidence due to your opponents failure to reasonably respond to and supplement your discovery requests, there is virtually no relief from erroneous rulings. This is because the appellate courts apply the harmless error standard to such cases.

Almost invariably, the appellate courts have found that the error was harmless because the evidence was cumulative.

The end result may seem unfair. Any inquiry into cumulative evidence requires that the court of appeals second guess the jury and/or evaluate the credibility of the witnesses. Further, as the standard is structured, the presumption is that the other evidence on the same point would be believed by the jury to the exclusion of any controverting evidence. Essentially the standard ignores the fact that cumulative evidence is introduced in the first place because it is more effective and persuasive. Justice Kilgarlin has noted that the adoption of the harmless error standard was probably necessary but that "it has the potential of destroying any hope of crystallizing the law as to unidentified witnesses . . . " Kilgarlin, "Sanctions: Is the Cure Worse Than the Disease?" *Advanced Evidence & Discovery Course*, State Bar of Texas, 1989.

III. PREVENTING CLAIMS OF PRIVILEGE FROM BEING USED AS A SWORD.

A. The *Ginsberg* Principle.

A party may not seek affirmative relief on the one hand and refuse to disclose the basis of its claims on the other under the pretext of claims of privilege. "A plaintiff cannot use one hand to seek affirmative relief in court and with the other lower an iron curtain of silence against otherwise pertinent and proper questions which may have a bearing upon his right to maintain his action." *Pavlinko v. Yale-New Haven Hospital*, 470 A.2d 246, 251 (Conn. 1985), *adopted by Texas Supreme Court, Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105 (Tex. 1985). This principle is also found in the federal courts. *See United States v. Nobles*, 422 U.S. 225, 239-40 (1975). The party resisting discovery must choose between its claims for affirmative relief and its claims of privilege. Indeed, the principle is much more developed in federal jurisprudence than it is in Texas state jurisprudence. The *Ginsberg* Principle is particularly antithetical to the investigative privilege. It would be refreshing to seek aggressive attacks on the investigative privilege based upon it.

The starting point in examining the use of privilege as a sword and a shield under Texas law must begin with *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105 (Tex. 1985). In *Ginsberg*, the plaintiff was seeking to avoid the effect of a previously executed deed and attempting to avoid a plea of limitation. Plaintiff claimed that the first deed had been forged and that she had been fraudulently tricked into signing the second deed because she could not recall signing it. During deposition, plaintiff also testified without objection that she had undergone psychiatric treatment for depression and that the treatment included numerous shock treatments. Defendant sought to compel the production of the medical records regarding the psychiatric treatment. The records were produced for in camera inspection. The trial court found that the records be produced holding that they were likely to be relevant and discoverable. The records revealed that Plaintiff told her psychiatrist that the property in question had been sold almost ten years prior to her filing suit. The Texas Supreme Court ruled that Plaintiff's attempted to use the privilege as an offensive weapon as opposed to a defensive one. Specifically, the Court found that the Plaintiff had invoked the jurisdiction of the court to seek affirmative relief; yet, attempted to deny the opposing party the benefit of evidence which would materially weaken or defeat her case through the assertion of privilege. The Texas Supreme Court held that this was an impermissible practice.

Although the "*Ginsberg* Principle" would seem to have wide application, there has been relatively little case law decided under it. However, there have been a few cases which should be examined.

In *DeWitt & Rearick, Inc. v. Ferguson*, the El Paso Court of Appeals held that the attorney-client privilege could not be used as a sword and a shield. 699 S.W.2d 692 (Tex. App.--El Paso 1985, orig. proceeding). In *DeWitt*, Plaintiffs entered into a real estate commission contract with a group of agents. At or about the same time, they entered into another real estate commission contract with Defendants. The first group of real estate agents brought suit against the sisters claiming unpaid commissions. Plaintiff's, on advise of

counsel, settled the claims of the first group of agents. Thereafter, Plaintiff brought suit against the Defendant, the other party to the second real estate commission contract. Plaintiff brought suit under the Texas Real Estate License Act and the Deceptive Trade Practices Act. During discovery, Plaintiffs testified that they settled the suit with the first group of real estate agents on the advise of counsel. However, Plaintiffs declined to discuss or reveal what advise their attorneys had given them claiming the attorney-client privilege. The El Paso Court of Appeals rejected such use of privilege and held that the Plaintiffs had to choose between maintaining privilege and maintaining their lawsuit. A similar result was reached in *Parten v. The Honorable William H. Brigham*, 785 S.W.2d 165 (Tex. App.--Fort Worth 1989, orig. proceeding).

Cantrell v. Johnson is a very troubling precedent. 785 S.W.2d 185 (Tex. App.--Waco 1990, orig. proceeding). *Cantrell* concerns use of the attorney-client privilege offensively. The Court of Appeals departs rather dramatically from the traditional analysis of such questions and engages in a balancing test of sorts weighing the need to protect the attorney-client privilege against the requesting parties need for the evidence. The Court of Appeals almost conceded that the evidence sought was relevant to the defense of the plaintiff's claims. The Waco Court goes so far as to suggest that *Ginsberg* does not apply to the attorney-client communication. *Cantrell*, 785 S.W.2d at 189-90. It is the authors' opinion that the approach taken by the Waco court is incorrect. Hopefully, it is a precedent which will not be followed.

B. Expanding the Ginsberg Principle.

The foregoing Texas cases are premised on a waiver/estoppel theory. This may be part of the reason why this issue has arise so seldom in Texas case law. It is possible to expand the Ginsberg Principle beyond the realm in which it has been applied in Texas. However, in order to do so, it is necessary to explore and expand the basis of the *Ginsberg* Principle. The following federal precedents provide an excellent basis for expanding *Ginsberg*.

The first hurdle which must be overcome is identifying cases where *Ginsberg* issues exist. It may be difficult to determine whether a claim of privilege is being used offensively against you. As such problems often arise with respect to experts, aggressive discovery regarding experts may be necessary. For example, you are entitled to discover not only what materials the testifying expert may have relied upon, you are also entitled to know what materials the expert discarded or discounted. Such access is essential to effective cross examination. "Documents considered but rejected by the testifying expert in reaching his opinions may be equally necessary for effective cross-examination. . . . **In fact, the documents considered but rejected by the expert trial witness could be even more important for cross-examination than those relied upon by him.**" *Eliasen v. Hamilton*, 111 F.R.D. 396 (N.D. Ill. 1986). The *Eliasen* court specifically refused to limit the allowable scope of discovery to documents relied upon by the testifying expert. This result was reiterated by the United States District Court for the Eastern District of Missouri in *Heitman v. Concrete Pipe Machinery*, 98 F.R.D. 740 (E.D. Mo. 1983). In *Heitman*, the court ordered the production of a non-testifying experts report which was part of the "in put" of a testifying expert in order to provide for effective cross examination of the testifying expert. *Delcastor, Inc. v. Vail Associates* presents a nearly identical fact situation and holding. 108 F.R.D. 405 (D. Colo. 1985).

"Plaintiff's calling of such witnesses [testifying experts] in the trial of this case in any capacity would constitute a waiver of any privileged communications relating to the matters in issue. . . . If plaintiff intends to call them as fact or expert witnesses, we will allow discovery of any matters in their knowledge related to the matters in issue." *Nick Istock, Inc. v. Research-Cottrell, Inc*., 74 F.R.D. 150 (W.D. Pa. 1977). A similar ruling *was re*ached in *United States of America v. IBM* wherein the United States was ordered to produce documents considered by its testifying experts. 72 F.R.D. 78 (S..D.N.Y. 1976).

Generally, the battle cry when seeking what would otherwise be privileged documents sounds in the need for effective cross-examination and due process. Professor Wigmore eloquently stated the importance of confrontation in our adversarial legal system.

For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience.

5 *Wigmore on Evidence* § 1367.

A party cannot reveal the documents to a testifying expert on one hand, and refuse to disclose them to opposing counsel on the other. Instead, if Plaintiff intends to call such experts at trial, then it must produce the documents and testimony in question seasonably. *Nick Istock, Inc. v. Research-Cottrell, Inc*., 74 F.R.D. 150 (W.D. Pa. 1977)("Plaintiff's calling of such witnesses [testifying experts] in the trial of this case in any capacity would constitute a waiver of any privileged communications relating to the matters in issue. . . . If plaintiff intends to call them as fact or expert witnesses, we will allow discovery of any matters in their knowledge related to the matters in issue."). A similar ruling was reached in *United States of America v. IBM* wherein the United States was ordered to produce documents considered by its testifying experts. 72 F.R.D. 78 (S..D.N.Y. 1976). Therefore, a party should be forced to make a choice, either produce the requested documents or undesignate the testifying experts. Such a course of action is necessary to protect a defendant's rights to effective cross-examination.

An argument can be made that the foregoing principles apply with particular force where a governmental agency is the adversary. Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action threatens to seriously injure an individual, and the reasonableness and propriety of the action depends on factual determinations, the evidence underlying the governments case must be disclosed to the individual so that he has an opportunity to show that it is untrue. "We have formalized these protections in the requirements of confrontation and cross-examination." *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959). The foregoing authority, in combination with the attendant due process considerations can make for very effective argument. Experience has shown, particularly when litigating against the Attorney General's office, that governmental agencies will share and obtain information with other attorney generals' offices and then try to claim that it is privileged. Be aware of this tactic and use the arguments above to defeat it.