“QUESTIONING GOD”

ISSUES AND TACTICS WHEN A PARTY IS DESIGNATED AS A TESTIFYING EXPERT

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"You ask me if I have a God complex? Let me tell you something: I *am* God."

Dr. Jed Hill

Malice (1993)

"QUESTIONING GOD"
ISSUES AND TACTICS WHEN A PARTY IS DESIGNATED AS A TESTIFYING EXPERT

1. INTRODUCTION

Chapter 74 erects a number of hurdles to the plaintiff seeking to sue a healthcare provider for injuries resulting from medical negligence. One of the more significant hurdles is the restriction on discovery prior to serving a proper expert report against each named defendant. The plaintiff is usually faced with having to find an expert who is willing to base opinions solely upon a medical record that may itself be negligently (or intentionally) deficient, particularly with regard to the operative facts regarding the suspected malpractice. The plaintiff's first goal is to obtain and serve a proper report based upon the available medical records and data and hope to be able to finally depose the defendant care providers so that hopefully the full factual picture may be developed under oath.[1] Once the report hurdle is cleared, then discovery may proceed as in any other case except with one peculiar and unique twist.

Unlike the defendants in most personal injury cases, the defendant doctor (and nurse) almost always is going to also be an expert, either consulting or testifying. While organizations may have specially employed employees who may serve as testifying experts or dual capacity experts (a combination of fact witness and testifying expert), the organization usually has an option of whether it wishes to pursue the route of naming an employee as an expert, or merely retaining an outside expert. The defendant doctor, however, must make a strategic decision whether or not to be an expert, and if so (which usually will be the case) when to make the determination. As will be discussed below, this peculiar procedural quirk can raise a host of strategic and tactical issues.

In most instances, the defendant doctor is going to be designated as an expert witness on the subject of standard of care and maybe on causation if the doctor is qualified to render opinions about causation. The questions that the defense attorney usually must answer (sooner, probably, rather than later) are when to designate the doctor as an expert, on what subject matters, and how little information may be divulged regarding the substance of the expert's opinions and the bases for them.

[1] Even if the trial court finds that the reports are adequate, at least one appellate court has found that if one defendant challenges the trial court's ruling by way of interlocutory appeal, all discovery (presumably only the discovery that may be conducted after a proper report is served) is to be abated until the appellate court (the Texas Supreme Court?) determines that the report is adequate. This means that it could takes months or years after a Plaintiff serves her reports before obtaining meaningful discovery from the defendants.

If the defendant decides to designate herself as a testifying expert, the question arises whether the plaintiff may propound written discovery to the defendant regarding any expert opinions. Indeed, there is the potential for a clever defense attorney to respond to plaintiff's requests for disclosure regarding legal theories and requests for written discovery (interrogatories, requests for production and requests for admissions) that all such discovery is improper under Tex. R. Civ. P. 195.1.

Additionally, there is the issue of deposition testimony. In the first instance, the plaintiff is going to want to know the factual context regarding the incident in question. What data did the doctor have or gather, what was the goal the doctor wanted to achieve, how did the doctor intend to achieve the goal, what did the doctor actually do to accomplish the goal, was the goal accomplished, and if not what happened?

Getting the facts from the defendant doctor may seem like a mundane undertaking, but it can be complicated and controversial. Sometimes there arguably is a fine line between a factual assessment and an assessment that only can be made with scientific training and experience. If the latter is required, then the question is begged whether the question calls for an expert opinion. This then raises the larger issue about whether the doctor is being deposed as a fact witness, an expert witness or both. If the defendant is being produced as an expert, are only the opinions formulated in anticipated of the pending litigation discoverable?

If the expert is being offered for deposition as a fact and expert witness, the argument predictably will arise whether the doctor has provided fair notice of the substance of her expert opinions she intends to offer and produced the supporting data for her opinions a reasonable time prior to the deposition. Does the doctor once designated as a testifying expert have to produce an expert report? Most likely the defendant will claim (with some validity) that she is not a "retained" expert and that as a "non-retained" expert she is not required to produce a report, but need only produce her records. However, what if she intends to offer opinions that are not "reflected" in her records? Could the doctor with regard to these opinions be required to produce a report under Rule 195.5? Or if no report, would the court be within its discretion in ordering more complete disclosure?

If the doctor is designated as a testifying expert, it also raises the issue of privilege regarding what the doctor has been provided by counsel and what the doctor has reviewed (has the doctor, for example, reviewed the work-product of retained experts who have not yet been designated as testifying experts). Review of consulting experts' work-product by a testifying expert potentially opens the consulting expert up to the same scope of discovery as a testifying expert. Additionally, usually all documents, things, and data reviewed by a testifying expert in anticipation of offering forensic opinions are discoverable, as are all communications between the expert, the defendant

and the defendant's attorneys. Does this mean that communications between the doctor and her attorneys lose their protection under the attorney/client privilege if the doctor is designated as a testifying expert? What is the effect on joint defense agreements if the doctor is designated as a testifying expert? Is the privilege afforded such arrangements waived?

Is the defendant doctor subject to a *Daubert/Robinson* challenge if designated as an expert witness? The defendant doctor may not be qualified to offer opinions on certain issues. Further, the doctor's methodology in reaching opinions may not be scientifically reliable, or the underlying data upon which opinions are based may not be reasonably reliable.

Issues, issues, issues. . .

This paper's goal is to discuss and offer opinions (albeit from a plaintiff's attorney's viewpoint) regarding the above issues and more. These are just opinions, and should be considered as such and no more. This is an area that has not been the subject of a lot of judicial interpretation. . . yet.

2. TYPES OF EXPERTS

In discussing the procedural and strategic considerations of designating the defendant doctor as a testifying expert or with regard to confronting such a situation, it is helpful to review the various types of experts recognized by the Texas Rules of Civil Procedure.

Rule 192.7 defines two types of experts:

> c. A *testifying expert* is an expert who may be called to testify at trial.
>
> d. A *consulting expert* is an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert.

While the above definitions are the only two *official* definitions, there are in fact other categories of experts. A clear understanding of the distinctions among these types of experts is important for reducing stress in this area. The definition of testifying expert should not be interpreted literally. Just because an expert may be called as a testifying expert arguably does not actually make the expert a testifying expert until he

or she is "designated" as such. The Texas Supreme Court has recognized that an expert who ultimately may be designated as a testifying expert may retain the characterization and protective cloak of a consulting expert until the time it is appropriate to designate expert witnesses.[2] In this regard, the ambiguous and problematic concept of designating "as soon as practicable" arguably has been eliminated and replaced with a definite time for "designation" under Rules 194 and 195.[3] I say arguably, because at least one case decided soon after the adoption of the 1999 amendments has held that the "as soon as practicable" factor still is relevant.[4]

Notwithstanding the definition of a "consulting expert," even after designation, a "consulting only" expert can be subject to the same scope of discovery as a testifying expert if his or her mental impressions or opinions have been reviewed by a testifying expert.[5] So effectively, there is the "consulting only" or "pure consultant" and the "aiding and abetting consultant."

A. TESTIFYING EXPERTS

It is important to know who is or might be a testifying expert for purposes of disclosure, designation, and discovery requests. Most scheduling orders require that testifying expert witnesses be designated a certain number of days before trial. The rules make clear that the following types of individuals may be considered testifying expert witnesses: parties, retained experts, specially employed experts and experts otherwise under the control of a party.[6] With regard to these types of experts, a party must comply with scheduling orders requiring designation of expert witnesses, and with Rule 194, regarding disclosure. This portion of the paper will discuss the above types of "testifying experts."

Rule 192 sets out the scope of discovery for testifying experts, which will be

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[2]See ***Loftin v. Martin***, 776 S.W.2d 145 (Tex. 1989).

[3] See for example, ***Mentis v. Barnard***, 870 S.W. 2d 14 (Tex. 1994)**,** interpreting "as soon as practicable requirement, prior to January 1, 1999.

[4] ***Snider v. Stanley***, 44 S.W.3d 713 (Tex. App. – Beaumont 2001, pet. denied) The Court found that the defendant did not designate his testifying expert **as soon as he was retained**, **employed, or otherwise in their control,** but that he instead waited until thirty days before trial. The Court therefore held that the defendant's expert was not disclosed reasonably promptly and upheld the expert's exclusion.

[5]See **Rule 192.3(e).**

[6]See **Rule 195.3**

discussed in detail in another section of this paper. The rule provides a great deal of latitude for discovery pertaining to testifying expert witnesses. The same scope of discovery pertains to consulting experts whose mental impressions or opinions are reviewed by a testifying expert. The limitation on discovery imposed by Rule 195 pertains to what discovery devices or tools may be used to obtain the discovery.

The disclosure requirements of Rule 194 pertain only to a "testifying expert." See Rule 194.2(f). If the testifying expert is "retained by, employed by, or otherwise subject to the control of the responding party," then the responding party must produce documents provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and the expert's current resume and bibliography. If a party intends to call as a testifying expert an individual who is *not* retained, employed by or otherwise under the party's control, these disclosure requirements do not pertain to such an individual. Instead, the disclosure requirement for such experts is satisfied by producing "documents reflecting such information." An example would be the incident report of an investigating officer or the office records of a treating physician.

I believe there is still is an open question regarding whether the disclosure requirements apply to a consulting expert whose mental impressions and opinions are reviewed by a testifying expert. The above rule specifically applies to "testifying experts." However, Rule 192.3(e) provides that the same scope of discovery that applies to a testifying expert also applies to a consulting expert whose mental impressions or opinions have been reviewed by a testifying expert. This could become an issue if a defendant doctor chose not to be a testifying expert on her own behalf, but her mental impressions or opinions were reviewed by a testifying expert which almost certainly would always occur.

Rule 195 deals with discovery regarding testifying expert witnesses. This rule should be read in conjunction with Rule 192. The latter defines the scope of discovery, while the former discusses more the means by which discovery may be obtained. Rule 195 provides that only the following tools may be used to obtain discovery of testifying experts: request for disclosure under Rule 194, oral depositions and requests for reports. Interestingly, Comment 1 to Rule 195 makes clear that the rule does not pertain to consulting experts whose work-product has been reviewed by a testifying expert.

> 1. This rule does not limit the permissible methods of discovery concerning consulting experts whose mental impressions or opinions have been reviewed by a testifying expert. *See* Rule 192.3(e).

> Information concerning purely consulting experts, of course, is not discoverable.

I have been unable to reconcile why the scope of discovery for a consulting expert whose work-product has been reviewed is the same as that for a testifying expert, but the limitations pertaining to a discovery of and about a testifying expert are not similarly applicable. *See* ***In re TIG Insurance Company***, 172 S.W.3d 160 (Tex. App.—Beaumont 2005, no pet.) which holds that Rule 195.1 limitations do not apply to consulting plus experts (consultants whose mental impressions or work-product have been reviewed by a testifying expert).

B. IN-HOUSE EXPERTS

Under Rule 194.1(f)(4), an in-house expert who is going to be a testifying expert presumably would be a testifying expert who is "employed by, or otherwise subject to the control of the responding party". Therefore, in addition to the information required of all testifying witnesses, the party would also have to produce for this expert all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony and the expert's current resume and bibliography.

Barker v. Dunham, 551 S.W.2d 41, (Tex. 1977), involved the question of whether an officer and regular employee of a party defendant should be treated as an expert witness. The Texas Supreme Court held that the rules do not draw a distinction between an expert who is a regular employee and one who is temporarily specially employed to aid in the preparation of a claim or defense***. Barker v. Dunham***, 552 at 43; S*ee also* ***Jones & Laughlin Steel, Inc. v. Schattman***, 667 S.W.2d 352 (Tex. App.–Fort Worth 1984, orig. proceeding). This holding is essentially carried over and codified in the 1999 amendments to the Texas discovery rules.

There are similar tensions that exist with regard to the in-house expert as with respect to the party expert. As with the party expert witness, the facts known by the "in-house expert" cannot be shielded from discovery. Rule 192.3(e)(3) provides that a party may discover from a testifying expert the facts known by the expert that relate to or form the basis or the expert's mental impressions and opinions formed or made in connection with the case in which discovery is sought, *regardless of when and how the factual information was acquired*. Therefore, a party cannot shield facts known by an in-house expert by claiming she is a consultant. ***Giffin v. Smith,*** 688 S.W.2d 112 (Tex. 1985) (per curiam); S*ee also* ***Dallas v. Marion Power Shovel Co.***, 126 F.R.D. 539 (1989); ***Lapenna v. Upjohn Co.***, 110 F.R.D. 15, 20 (1986), and Graham, *Discovery of*

Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part One, An Analytical Study, 1976 U. ILL. L.R. 895, 942.

C. THE DUAL CAPACITY EXPERT

In ***Axelson, Inc. v. McIlhany***, 798 S.W.2d 550 (Tex. 1990), the Texas Supreme Court distinguished two types of experts: (1) the specially employed in-house expert whose experience has been in the area giving rise to the complaint; and (2) the specially employed in-house consultant whose area of experience is unrelated to the matters giving rise to the lawsuit. In the first instance, the Court held that an active participant in the events or activities material to the subject matter of the lawsuit *may never be a "consulting only expert*," and therefore his opinions and factual knowledge are both subject to discovery. In the latter instance, the employee whose area of experience is unrelated to the activities giving rise to the lawsuit may serve as a "consulting only expert," but even then the facts of which he has knowledge are discoverable. ***Facts are never protected****,* whether they are known by a testifying or consulting only expert. ***Giffin v. Smith****,* 688 S.W.2d 112 (Tex. 1985); ***In re American Home Products,*** 985 S.W.2d 68, 74 (Tex. 1997).

In re Bell Helicopter Textron, 87 S.W.3d 139 (Tex. App. – Fort Worth 2002, orig. proceeding) dealt with a motion to disqualify plaintiff's lawyers because they had retained as a consulting expert an ex-employee of Bell Helicopter who had been involved in the company's litigation decision-making. Plaintiffs claimed that the individual previously had been designated as a testifying expert on behalf of Bell and any privilege that Bell might have had was waived. The court found that this argument would only be true if the consultant had been designated as a testifying expert with regard to the model helicopter involved in the pending litigation. There was no evidence that the individual previously had been designated as a testifying expert with regard to the model helicopter in issue and therefore there was no waiver. The court held that the law firm had to be disqualified because there was no way to wall off knowledge that the consultant might have had based on confidential communications while working for Bell. Noteworthy for this discussion is the court's holding that even though the consultant could not testify as a testifying expert, the witness could offer testimony as a fact witness about facts that were gained first hand that were not protected by the attorney/client privilege:

> Accordingly, while factual information about the model 412 aircraft that Vale knows first-hand because of her employment with Bell may be discoverable because she has been or should be designated as a fact witness, Vale's knowledge about Bell's litigation strategies, attorney work-product, and privileged communications is not discoverable based on her

fact-witness status.

In re Bell Helicopter Textron, 87 S.W.3d supra at 151.

In re Energy Transfer Partners, L.P. Not Reported in S.W.3d, 2009 WL 1028056 (Tex.App.-Tyler 2009) involved a compressor station built by Energy. Some neighbors complained about the noise. Energy responded that it would investigate the complaint. Upon receiving a promise from Energy that the "results" of the testing would be shared with them, the neighbors allowed a consulting company hired by Energy to conduct sound testing on the neighbors' property. The testing was conducted, but the results were never shared. A group of neighbors filed suit against Energy and sent a request for production that sought "reports relating to sound at or around the subject pump station." Defendant agreed to produce non-privileged documents responding to the request. The production did not include the report of the consultant because Energy asserted that the consultant was a consulting expert hired in anticipation of litigation and that the report and consultant's conclusions therefore were protected. The trial court found that the "raw data" was discoverable but not the consultant's opinions that were formulated in anticipation of litigation.

The appellate decision centers first on whether the consultant was a consulting expert. The court conducts a ***National Tank Co. v. Brotherton*** analysis and finds that in examining the "totality of the circumstances", Energy proved that it anticipated litigation when it hired the consultant and that the consultant's work was done in anticipation of litigation (even if there were other ostensible purposes for the report). Energy conceded that the consultant was a "dual capacity witness," one who possessed both expert opinions and knowledge of relevant facts. ***Axelson, Inc. v. McIlhaney,*** 798 S.W.2d 550, 555 (Tex. 1990). Interestingly, the appellate court used this concession to overrule plaintiffs' argument that Energy had waived the consulting expert exemption by identifying the consulting expert.

The opinion next focuses on the implied finding that Energy had waived the consulting expert privilege by "agreement/consent" in that Energy had agreed to share the "results" of the testing. The appellate court concludes that there was no agreement to share the specific sound test or the consultant's conclusions drawn from the test.

> Moreover, Energy Transfer's promises to provide "what we find" and that "the results" of the sound tests are not sufficiently definite to encompass the privileged report and information.

There is one argument that does not appear to be raised or considered by the

appellate court. In ***Axelson, Inc. v. McIlhaney,*** 798 S.W.2d supra at 555 (which is cited by the appellate court as authority for the "dual capacity" rule, see above) the Texas Supreme Court upheld a trial court finding that individuals designated as consultants could not be deposed about their conclusions; however, they could as fact witnesses, be deposed about the facts they possessed.

> Axelson sought only factual discovery from Biel, Fowler and Hill regarding the condition of wellhead equipment in addition to the condition of Axelson's relief valve. The trial judge limited the scope of discovery from these consulting-only experts to the Axelson valve. The trial judge abused his discretion in refusing discovery of these facts because the exemption for consulting-only experts does not extend to facts known to them. In ***Axelson, Inc. v. McIlhaney,*** 798 S.W.2d supra at 555.

Similarly, in this instance, one could ask why in Energy the trial court was found to have abused its discretion in allowing discovery of the "raw data" which arguably would be considered the core "factual" data compiled by the consultant. It is difficult to reconcile this holding with the holding in ***Axelson.***

D. NON-RETAINED EXPERTS

The non-retained expert is the individual such as an investigating officer or a treating health care professional who is qualified to offer scientifically reliable expert opinions, or opinions based upon extensive experience, but who is not "otherwise under the control" of any party. As stated above, with regard to this type of expert Rule 194 provides the requirement to disclose their identity, the subject matter of their testimony, their impressions and opinions and a brief summary of the basis for them may be satisfied by producing "documents reflecting such information." Rule 194 does not address depositions of non-retained experts and the comments to Rule 195 specifically state that the rule does not pertain to non-retained experts.

> 2. This rule and Rule 194 do not address depositions of testifying experts who are not retained by, employed by, or otherwise subject to the control of the responding party, nor the production of the materials identified in Rule 192.3(e)(5) and (6) relating

> to such experts. Parties may obtain this discovery, however, through Rules 176 and 205.

The issue that remains to be sorted out in this regard is whether a party has a duty to disclose the non-retained expert's opinions and impressions of which he is aware, but which are not in the individual's documents (i.e. notes and/or reports). For instance, what happens if a party designates a non-retained expert on subject matters that are not reflected in the records that are disclosed for that expert (i.e. a treating physician is designated on the subject of causation, but no information is provided about the substance of the opinions and nothing is contained in the treating physician's records regarding causation). Presumably, subject to comment 1 to Rule 195,[7] an opposing party might be able to move under Rule 195.5 to have the opinions of the non-retained expert that are not "reflected" in the expert's records reduced to tangible form:

> **195.5 Court-Ordered Reports.** If the discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert have not been recorded and reduced to tangible form, the court may order these matters reduced to tangible form and produced in addition to the deposition.

Another issue that will no doubt arise concerns whether and/or when a non-retained expert ceases to be non-retained. In other words, if a non-retained expert agrees to offer opinions that aid a particular party, although such opinions are not part of the individual's notes or records generated in the ordinary course of his practice or business, should the witness still be considered as not under the control of any party? Is "retained" solely a function of the exchange of money?

Rule 195.6 provides that when a party takes the oral deposition of an expert witness "retained" by the opposing party, all reasonable fees charged by the expert for time spent in preparing for, giving, reviewing, and correcting the deposition must be paid by the party that retained the expert. This rule only pertains to "retained" experts, and presumably does not pertain to parties, specially employed experts, or experts otherwise under the control of a party.

[7] The comment says that the deposition rules do not apply to non-retained experts, but it leaves open whether the report requirement similarly does not apply.

The definition of "retained" is important because of Rule 195.7 dealing with Cost of Expert Witnesses. This rule states that when a party takes the oral deposition of an expert witness retained by the opposing party, all reasonable expenses of the expert must be paid by the party that retained the expert. I have heard anecdotal reports of defense attorneys noticing the plaintiff's treating physicians and then trying to obtain a court order requiring the plaintiff to pay all the physicians reasonable charges. This is not what was contemplated by the rules committee or the rules. Simply because a plaintiff retains the services of a physician as a care provider does not automatically mean that the plaintiff, as a party to the litigation, has retained the services of the physician as an expert witness. Similarly, simply because there is a patient/physician relationship between the plaintiff and his treating physician does not mean that for purposes of deposing the physician that he is considered "under the control" of the plaintiff. Absent further direction from the Texas Supreme Court or the appellate courts, I believe that "retained" in this context means that separate and apart from fees paid for care and treatment, the party and/or his attorney or representative has paid (or promised some form of remuneration to) the care provider to participate in the litigation as an expert witness. Otherwise, the physician should be treated as a non-retained expert, not under the control of any party. In this regard, if the non-retained expert is to be treated as an expert witness and not as a fact witness, the party noticing the deposition of the non-retained expert should be responsible for paying any reasonable fees and expenses submitted by the witness. Rule 191.1 permits a trial court for good cause to modify the allocation of fees and expenses.

E. PARTY/EXPERTS

A party, especially a health care professional in a medical malpractice lawsuit, may be an expert witness on the party's own behalf. In such an instance, at least one court has recognized that the party should be treated the same as a retained expert. (See ***Tinkle v. Henderson,*** 777 S.W.2d 537, 539 (Tex. App.–Tyler 1989, writ denied).)

> Appellees also failed to properly identify either of the defendants, Dr. B.W. Henderson or Dr. A.W. Jorgenson, as expert witnesses. We are aware of no exception for parties to the general rule of exclusion of the testimony of unnamed experts. Therefore, this testimony, in the absence of a showing and a finding by the trial court, also should have been automatically excluded until such time as the trial court found that good cause existed for its admission. We conclude that the improper admission of the expert testimony was an error of such a nature as would reasonably

> cause, and probably did cause, rendition of an improper verdict

If the above holding in ***Tinkle v. Henderson*** is correct (and there has been no opinion in the nearly twenty years since it was handed down holding that it is not) what are its consequences? The questions that this paper attempts to address are whether ***Henderson*** is right and that the defendant doctor and nurse designated as an expert witness should be treated the same as any other testifying expert, or whether defendants designated as testifying experts should be treated differently from other testifying experts. For instance, should the designation period be different; should the designation requirements be different; should the defendant have to produce a report for any of the defendant's mental impressions or opinions; if a report requirement is applied should it be limited; what should be the affect on the deposition schedule of designating a defendant as an expert; should the defendant be deposed in a bifurcated manner as a fact witness and then as an expert; should the opposing party be denied the benefit of full disclosure of the defendant's opinions before being forced to take the defendant's deposition; should the scope of discovery from a defendant designated as a testifying expert be modified to protect work-product and communications otherwise protected by the attorney/client privilege or should it be accorded a special category of testifying expert, with certain limitations.

3. DESIGNATING, DISCLOSING AND DEPOSING TESTIFYING EXPERTS

A general review of designation rules and requirements is helpful to set the stage for our discussion concerning considerations in designating a defendant doctor or nurse as a testifying expert.

Tex. R. Civ. P. 195.2 provides that unless otherwise ordered by the Court, a party must designate experts – that is, furnish information requested under Rule 194.2(f) – by the *later* of the following dates: 30 days after the request is served, or with regard to all experts testifying for a party seeking affirmative relief, 90 days before the end of the discovery period. All others experts must be designated 60 days before the end of the discovery period.

The parties and the court may alter the above deadlines by order or by agreement under Tex. R. Civ. P. 191.1. As a practical matter, most trial courts now issue their own discovery control plans or docket control orders that require that for parties seeking affirmative relief, experts shall be designated on a date certain prior to the end of the discovery period and that all other experts are to be designated no later

than thirty days thereafter. The parties, with leave of court, also may enter into a Level III control plan that may further modify or refine the designation requirements. Further, the trial court may modify any deadlines at any time and must do so in the interest of justice. Tex. R. Civ. P. 190.5.

Rule 195.2 interfaces directly with Rule 194.2. Under Tex. R. Civ. P. 195.2, "designated" is defined to mean "furnish information *requested*" under Rule 194.2(f). Rule 194 disclosure is not self-activating. Therefore, in order to activate the deadlines in a discovery control plan under Rule 195, a party must send a request for disclosure. Whereas Rule 195.2 pertains to *when* "designation" shall occur, Rule 194.2(f) defines "designation." Rule 195.2 states that designation means "furnish information requested under Rule 194.2(f)."

There is no requirement that parties automatically produce expert reports. Rule 195.3 offers an inducement to the party seeking affirmative relief to timely produce reports, and Rule 195.5 provides a method of obtaining court-ordered reports, upon motion. The timing of expert depositions is keyed to whether a party seeking affirmative relief furnishes a report:

> Rule 195.3 (a) (1) *If no report furnished*. This subsection provides that if a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions is not produced when the expert is designated,[8] then the party must make the expert available for deposition reasonably promptly after the expert is designated. If the deposition cannot–due to the actions of the tendering party–reasonably be concluded more than 15 days before the deadline for designating other experts, that deadline must be extended for other experts testifying on the same subject.

While the rule does not impose a report requirement on the parties who are not seeking affirmative relief, most discovery control plans require some type of reciprocity. If the party seeking affirmative relief produces a report, usually the other parties are required to produce like/kind reports no later than thirty days thereafter. However, not all discovery control plans contain this reciprocal provision and the party seeking affirmative relief needs to be conscientious about seeking such a provision if it wants

[8]As defined in Rule 195.2.

reports from the other parties.[9] Reports generally must meet certain criteria set out in the rule, with regard to containing the following information: the expert's factual observations, tests, supporting data, calculations, photographs and opinions.

A more problematic issue that often arises with regard to the report requirement is whether reports will be required of non-retained experts. As previously discussed, Rule 194.2(f)(3) does not require a party to disclose the general substance of a non-retained expert's mental impressions and opinions. The disclosure requirement in this regard for non-retained experts is satisfied by producing the non-retained expert's records reflecting the expert's mental impressions and opinions. A defendant doctor or nurse would not be considered a non-retained expert (unless perhaps designated by a co-defendant). To the extent a party must fully disclose for a testifying expert under the party's control, it stands to reason that the party himself or herself, if designated as a testifying expert, must fully disclose in compliance with the requirements applicable to a testifying expert set out in Tex. R. Civ. P. 194.2(f).

In many instances when a party (typically a defendant physician or nurse in a medical malpractice case) designates herself as a testifying expert, the disclosure is less than revealing. Usually what is provided is that the "defendant will testify based upon her education, training and experience that she followed the standard of care with regard to all aspects of the care she provided the plaintiff, that she committed no violation of the standard of care that was a proximate cause of plaintiff's alleged injuries." If this type statement were provided as an affidavit in support of a motion for summary judgment, it would likely be found deficient. (See discussion of summary judgment affidavits, below). Similarly, this type disclosure is woefully inadequate and should be challenged as insufficient.

A defense expert in a medical malpractice case served the following letter setting out the expected scope of his testimony:

> I have had the opportunity to review the following records, depositions, and documents. 1) medical records of . . . 2) plaintiff's original petition. 3) deposition of . . . 4) plaintiff's expert opinion of . . . . I am a Board Certified OB-Gyn and have been in private practice of Obstetrics and

[9] I recommend that at the outset of the case, as part of the discovery control plan, the parties agree that "designation" shall include, for each testifying expert under the control of the respective parties, producing a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions.

> Gynecology in Abilene, Texas for the past 25 years. I have reviewed the above listed records and based upon my training and years of clinical experience, I find the care provided for [plaintiff] to be within the standard of care expected for physicians caring for pregnant women.

The Austin Court of Appeals in ***Mauzey v. Sutliff,*** 125 S.W.3d 71 (Tex.App.-Austin, pet. denied) held that although the expert's letter "barely suffices as an expert's report," it falls short of satisfying the spirit of full evidentiary disclosure. Unfortunately, the plaintiffs failed to adequately protect themselves. The appellate court observed that once the district court ruled in advance of trial that he would allow the expert to testify, the plaintiffs could have done more to determine the extent of the expert's proposed testimony. Under these circumstances, the district court did not abuse its discretion in allowing the testimony at trial.

The Austin court issued the following admonition, "we urge trial courts to carefully consider such matters and ensure that a pretrial expert report fully discloses the breadth and substance of the expert's mental impressions and their basis. We also urge trial courts to exercise their discretion in a manner that allows a case to be fully developed before the jury."

4. SCOPE OF DISCOVERY AND PRIVILEGES

As mentioned above, the scope of discovery for all experts designated as testifying experts (and for all consulting experts whose work-product or mental impressions are reviewed by a testifying expert) is prescribed by Rule 192(f):

> **(e)** ***Testifying and consulting experts.*** The identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable. A party may discover the following information regarding a testifying expert or regarding a consulting expert whose mental impressions or opinions have been reviewed by a testifying expert:
>
> (1) the expert's name, address, and telephone number;

(2) the subject matter on which a testifying expert will testify;

(3) the facts known by the expert that relate to or form the basis of the expert's mental impressions and opinions formed or made in connection with the case in which the discovery is sought, regardless of when and how the factual information was acquired;

(4) the expert's mental impressions and opinions formed or made in connection with the case in which discovery is sought, and any methods used to derive them;

(5) any bias of the witness;

(6) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of a testifying expert's testimony;

(7) the expert's current resume and bibliography.

While a thorough discussion of the general scope of discovery of and from testifying experts is beyond the scope of this particular paper, our focus with regard to the discussion of the defendant doctor/nurse designated as a testifying expert will be subparts (5) any bias of the witness and (6) all documents, tangible things reviewed by a testifying expert. The scope of discovery in these regards as applies to a defendant designated as a testifying expert may be very problematic.

A. DISCOVERY OF FACTS AND THINGS REVIEWED BY A TESTIFYING EXPERT

1. GENERAL RULE

There usually is not a privilege that pertains to documents and things that a testifying expert reviews or prepares in connection with the testimony that he/she intends to offer in a case. ***In re Family Hospice, Ltd.***, 62 S.W.3d 313 (Tex. App. – El Paso 2001, orig. proceeding) involved an allegation of wrongful death resulting from nursing home negligence. The discovery issue dealt with whether a testifying expert's notes and thought processes may be protected as non-core work-product.

The nursing home sent plaintiffs a request for disclosure pursuant to Rule 194 of the Texas Rules of Civil Procedure. Plaintiffs designated an RN as their testifying expert. The nursing home issued a notice of deposition for the nurse along with a subpoena *duces tecum.* Reportedly, it was learned during the deposition that the nurse was withholding documents responsive to the disclosure and subpoena *duces tecum*. Plaintiffs then for the first time asserted a non-core work-product privilege for the documents requested in the notice. The trial judge granted the nursing home's motion to compel, in part. The court ordered production of some notes made regarding review of interrogatories and requests for production, but protected others from discovery as non-core work-product. The nurse had also prepared questions to ask the nursing home witnesses and had supplied what she considered the proper answers. The court ordered the nurse's responses produced, but protected the questions as work-product.

The appellate court appeared to have little trouble with this issue, holding as follows:

> Because the documents in question are the product and/or documentation of the mental impressions of a testifying expert and because the Texas Rules of Civil Procedure provide that any information regarding a testifying expert's mental impressions or opinions are discoverable *regardless of when and how the information was acquired,* we hold that the ruling of the trial court constitutes a clear abuse of discretion. See Tex.R. Civ. P. 192.3(e) (3), (4), and (6). [emphasis added]

The emphasized portion of the ruling should be most concerning to a defendant doctor/nurse who is designated as a testifying expert because it highlights a definite tension between the attorney/client privilege and the historic scope of discovery with regard to a testifying expert. See also ***In re Jobe Concrete Products,*** 101 S.W.3d 122 (Tex.App.-El Paso 2002).

2. DISCOVERY OF FACTS AND THINGS REVIEWED BY A PARTY/EXPERT

The determination of whether a defendant doctor or nurse is to be designated as a testifying expert is one that likely should be made as soon as practicable; the earlier the better. The characterization of the defendant as a testifying expert could critically impact how and what documents are provided to the defendant, with whom the defendant communicates, and what documents are reviewed by the defendant with or without his/her attorney's knowledge. If the general rule is applied to the defendant/testifying expert that anything that is reviewed, prepared by, or provided to the testifying expert relevant to the expert's opinions and mental impressions to be expressed in the case is discoverable, a failure to protect various work-product documents could result in inadvertent and very prejudicial waiver. I have been unable to find any Texas case that expressly comes out and says that this rule would not apply to a defendant designated as a testifying expert. Granted, there would be an obvious tension between protecting attorney/client privilege and allowing full discovery of a testifying expert. However, arguably the same rule and rationale would apply in this situation as with regard to a party seeking affirmative relief potentially waiving attorney/client privilege merely by filing a lawsuit.[10] If the defendant wishes to not risk waiving attorney client communications and work-product, then the defendant has the choice not to designate himself/herself as a testifying expert. See, ***In Re Christus Spohn Hospital Kleberg***, 222 S.W.3d 434 (Tex. 2005) discussed below.

I have been able to find several cases that may inform this issue. ***Aetna Casualty & Sur. Co. v. Blackmon***, 810 S.W.2d 438 (Tex. App.–Corpus Christi 1991, orig. proceeding) involved an in-house employee who was designated as a testifying expert. The court held that it was undeniable that the designation of the employee as a testifying expert waived any privilege that attached to any documents *relied* upon in forming his opinions. However, implicit in the court's decision is that items not relied upon in forming the basis of opinions may retain their exemption. The petitioner in ***Blackmon*** failed to segregate the requested documents into categories relating to the subject matter of the expert's anticipated testimony; therefore, the court held that waiver had occurred with respect to privileges that might have attached. The ***Blackmon***

[10] ***Republic Ins. Co. v. Davis,*** 856 S.W.2d 158 (Tex.,1993).

decision did not address the issue of documents *reviewed* by a testifying expert and therefore, may be of limited precedential value with regard to the new rule which is couched in terms of whether the testifying expert *reviewed* the mental impressions or opinions of the consulting expert.[11]

It is noteworthy that ***Blackmon*** was decided interpreting Tex. R. Civ. P. 166b, prior to its amendment in 1990. Rule 166b(2)(e)(1) was amended in 1990 to provide that the same information discoverable concerning a testifying expert is discoverable concerning a consulting expert **"if the consulting expert's opinion or impressions have been *reviewed* by a testifying expert"** (emphasis added). The prior rule was that to obtain this type of discovery the testifying expert had to have ***relied in whole or in part*** upon the consulting expert's work-product. Prior to 1990, if the testifying expert merely reviewed the consultant's work-product then only the identity and location of the consultant were discoverable. As pointed out by the Texas Supreme Court in ***In Re Christus Spohn Hospital Kleberg***, 222 S.W.3d 434 (Tex. 2005), Tex. R. Civ. P. 192, which replaces 166b, now requires production of documents and things "provided to or reviewed by a testifying expert."

The Texas Supreme Court has made clear that a party may waive privilege by providing privileged matters to a testifying expert. While the party may be able to get back privileged matters under the snapback provision, if the documents have been provided to or reviewed by a testifying expert, the party must make a decision either to protect the privilege and lose the expert or keep the expert and waive the privilege. ***In Re Christus Spohn Hospital Kleberg***, 222 S.W.3d 434 (Tex. 2005) was a medical malpractice mandamus proceeding, in which the defendant hospital sought to recover privileged documents that were mistakenly provided to its designated testifying expert witness. The documents were also disclosed to the opposing side when the expert was designated.

An additional issue arose of whether the expert had relied upon the documents in formulating her opinions, reviewed the documents or not reviewed the documents.

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[11] Justice Castillo of the Corpus Christi Court of Appeals, in his concurring opinion in ***Formosa Plastic Corporation v. Kajima International, Inc.*** 216 S.W.3d 436, 476 (Tex. App. – Corpus Christi 2006) cites ***Aetna Cas. v. Blackmon*** for the following holding:

> *see* ***Aetna Cas. & Sur. Co.v. Blackmon****,* 810 S.W.2d 438, 440 (Tex. App. – Corpus Christi 1991, orig. proceeding) holding that designation of party employee as testifying expert waived attorney-client, work-product, and party communication privileges as to the privileged information the expert relied on in forming mental impressions and opinions related to case).

Plaintiff argued that it did not matter since what the expert chooses not to review may be as significant as what she chooses to review. The Texas Supreme Court notably observed that Tex. R. Civ. P. 192.3(e)(6) which amended prior rule 166b, now mandates discovery of documents "that have been provided to, [or] reviewed by" a testifying expert. The Court also observed that notwithstanding the documents in question were work-product, by giving them to the testifying expert they would lose their exemption from discovery under Tex. R. Civ. P. Rule 192.5.

The Court attempted to balance protection of work-product against the potential unfairness to the plaintiff of allowing defendant to provide the documents to its testifying expert, but disallowing plaintiffs from being able to see the documents and cross examine the expert about them. It held that Tex. R. Civ. P. 193.3(d) (the snapback provision) applied but that if the documents were returned, the expert could not rely upon them. The hospital could either get back its privileged documents and designate a new testifying expert, or it would not get back its privileged documents. It could not have it both ways:

> We conclude that Rules 192.3(e)(6) and 192.5(c)(1) prevail over Rule 193.3(d)'s snap-back provision so long as the expert intends to testify at trial despite the inadvertent document production. That is, once privileged documents are disclosed to a testifying expert, and the party who designated the expert continues to rely upon that designation for trial, the documents may not be retrieved even if they were inadvertently produced.
>
> We hold that the inadvertent nature of the production in this case preserved the privilege under Rule 193.3(d) and entitled the hospital to recover the documents upon realizing its mistake, provided the hospital's designated expert does not testify at trial. The hospital has not attempted to name another testifying expert, instead indicating an intent to rely upon the expert to whom the documents were disclosed. So long as the hospital stands upon its testifying expert designation, Rule 192's plain language and purpose and the policy considerations that surrounded its amendment compel the

> conclusion that the documents may not be snapped back.

In Re Christus Spohn Hospital Kleberg, 222 S.W.3d supra at 440-441 (Tex. 2005)

In ***D.N.S v. Schattman,*** 937 S.W.2d 151, (Tex. App. – Ft. Worth 1997, orig. proceeding), a physician defendant sought mandamus to prevent a trial judge from requiring him to turn over a patient narrative report he had prepared for and sent to his professional liability carrier in anticipation of litigation. Mandamus relief was granted. The plaintiff suffered an on the job injury and went to a physician for care. The physician conducted a drug screen as was required if he was providing care for a work related injury. The drug screen revealed that the patient had opiates in his system, which the plaintiff explained were from taking medications for anxiety. The physician passed this information on to the employer who fired the plaintiff. Plaintiff brought a claim of wrongful termination against the employer and the employer designated the physician as a testifying expert. A couple of months after the defendant was designated as a testifying expert, the plaintiff sent the physician a healthcare liability notice of claim letter to the doctor pursuant to article 4590i, section 1.03(a)(4). *See Tex. Rev. Civ. Stat. Ann. art.* 4590i §1.03(4) (Vernon Pamph.1997). The physician forwarded the notice of claim letter to his professional liability carrier who requested that he prepare and forward also a patient narrative report. The physician complied by sending an eight page narrative report. The plaintiff then amended his lawsuit and brought the physician in as a party defendant, claiming a host of things, including fraud, slander and conspiracy.

In the course of discovery, plaintiff requested that the doctor defendant produce "all factual observations (regardless of when the factual information was acquired), documents, ... reports, ... or other materials prepared by an expert or for an expert in anticipation of the expert's testimony at trial and deposition testimony." Plaintiff also requested "all ... reports ... prepared by an expert or for an expert in anticipation of the expert's testimony at trial and deposition testimony." The doctor's initial response was that no experts had yet been designated, but later on, the plaintiff settled with and dropped the employer from the case, leaving only the physician, who then designated himself as an expert. Now our issue begins to take shape.

The court notes that the physician answers the interrogatory in a very extensive and detailed manner and that he was then deposed for nearly 800 pages. Anytime you read this type of description in a discovery case, you know the court is getting ready to protect the responding party. This case holds to form.

Plaintiff filed a motion to compel, to which the doctor responded by tendering for in camera review various documents for which he asserted privilege, including the narrative report submitted to his carrier upon receipt of plaintiff's notice of healthcare liability claim letter. The doctor also submitted an affidavit in which he set out the

circumstances under which the letter was written, and concluded the affidavit with the following statement: “None of the documents contained in the attached exhibits form the basis of any of my expert medical opinions in this case.”

After in camera review of the documents, the court found that the letter contained facts of which the doctor apparently was aware; thus the court concluded as follows:

> Clearly, this falls within Rule 166b2(e)(1) as facts known to an expert or which relate to or form the basis of his impressions and opinions. While this is exempt from discovery under Rule 166b(3) while [Dr. S.] is a party and fact witness, once he becomes an expert he loses that portion of confidentiality that falls within material discoverable from or about any expert.

D.N.S v. Schattman, 937 S.W.2d 154.[12]

The Fort Worth Court of Appeals begins its discussion by observing that the only other case at the time to have addressed this issue was ***Aetna Casualty & Sur. Co. v. Blackmon***, 810 S.W.2d supra. While the Corpus Christi Court of Appeals had stated in Aetna that “We are unwilling at this time to hold that the designation of a person as an expert witness automatically waives all such privileges,” ***Aetna Casualty & Sur. Co. v. Blackmon***, 810 S.W.2d supra at 440, the Fort Worth Court of Appeals treats this as a holding that the designation of a person as an expert witness does not automatically waive all such privileges:

> We agree with the Corpus Christi court that the designation of a party as an expert witness ***does not automatically waive*** the party-communication privilege. We also agree that if a party-expert relies on a privileged document as the basis for that expert's testimony, the privilege is waived. [emphasis added]

[12] The rule provided in part as follows:

> (1) In General. A party may obtain discovery of the identity and location ... of an expert who may be called as an expert witness, the subject matter on which the witness is expected to testify, the mental impressions and opinions held by the expert and the facts know to the expert (regardless of when the factual information was acquired) which relate to or form the basis of the mental impressions and opinions held by the expert....
>
> (2) Reports. A party may also obtain discovery of documents and tangible things including all tangible reports, physical models, compilations of data and other material prepared by an expert or for an expert in anticipation of the expert's trial and deposition testimony....

Tex. R. Civ. P. 166b(2)(e)(1),(2) (Vernon 1997).

D.N.S v. Schattman, 937 S.W.2d 156.

The Fort Worth Court next focused on the party communications exception under Rule 166b, which provided that party communications involving an expert were not excepted from discovery if such communications were "otherwise discoverable" under b(2)(e). The following discussion is important to understand the court's decision:

> Under rule 166b(2)(e)(1), a party may discover an expert's mental impressions and opinions and the facts known to an expert, regardless of when the factual information was acquired, but only if the facts "relate to or form the basis of the mental impressions and opinions held by the expert." Tex. R. Civ. P. 166b(2)(e)(1). Under rule 166b(2)(e)(2), a party may discover a report prepared by an expert, but the report must have been prepared "in anticipation of the expert's trial and deposition testimony." Tex. R. Civ. P. 166b(2)(e)(2).

D.N.S v. Schattman, 937 S.W.2d 157. The court concludes that Tex. R. Civ. P. 166b(2)(e)(2) pertains to tangible things prepared by or for and expert (i.e. reports), while Tex. R. Civ. P. 166(2)(e)(1) pertains to intangible data and information (i.e. facts known and mental impressions). Thus it finds that only Rule 1662(e)(2) applies to the letter. ***D.N.S v. Schattman,*** 937 S.W.2d 157-158.

> Therefore, the trial court abused its discretion by ruling that the narrative report was discoverable under rule 166b(2)(e)(1) [footnotes omitted]. Were we to apply rule 166b(2)(e)(1) and its broader scope of discovery to the narrative report, the result would be a fishing expedition for all of a party-expert's privileged communications. In every case with a party-expert, virtually every attorney-client and party communication that touches even remotely on the facts of a case would be discoverable, practically resulting in an automatic waiver of all privileges ***158** in every case with a party-expert. Such a result would not only emasculate privileges, it would also violate the prohibition against fishing expeditions in discovery. [citations omitted]. Moreover, that result would have a chilling effect on the attorney-client relationship [footnotes omitted] and the insurer-insured relationship.[footnotes omitted].

See also, ***In Re State Farm Mutual Automobile Insurance Company,*** 100 S.W.3d 338, 342 (Tex.App. – San Antonio 2002, orig. proceeding). The court goes on to point out that even if it were proper to apply rule 166b(2)(e)(1), there was not evidence that that the document in question formed the basis of the party/expert's mental impressions and opinions or that the party expert had relied upon the report in the formulation of his opinions. ***D.N.S v. Schattman,*** 937 S.W.2d 158.

In 1999 the Texas discovery rules were amended and in many regards, completely re-written. The party communication rule was subsumed in the Work-product Rule, 192.5. [See Tex. R. Civ. P. 192, Comment 8]. The scope of discovery pertaining to testifying experts is now found in Tex. R. Civ. P. 192.3(e). Arguably, the intangible/tangible dichotomy discussed in ***D.N.S v. Schattman*** still exists but with modifications that may alter the above holding in ***Schattman***. First, Rule 192.3(e)(3) specifically limits the discovery of facts and opinions to those that are "formed or made in connection with the case in which the discovery is sought." Opinions that do not meet this criteria (i.e. opinions that are ***not*** formed or made in connection with the case in which the discovery is sought) arguably may be beyond the scope of discovery. The rule carries forward the concept and provision that facts known by the expert that relate to or form the basis of the expert's mental impressions [are discoverable] "regardless of when and how the factual information was acquired." This means that if a party/expert obtained facts from conversations with his/her attorney, that arguably such communications, at least with regard to the communication of facts, would not be privileged or exempt from discovery. It is, however, Tex. R. Civ. P. 192.3(e)(6) that may have the more significant affect on the above ruling in ***D.N.S v. Schattman and Aetna Casualty & Sur. Co. v. Blackmon***. Whereas old rule 166b talked in terms of "reliance" upon documents and things, Tex. R. Civ. P. 192.3(e)(6) now allows discovery of documents and tangible things (including data compilations) that have been "provided to," "reviewed by," or prepared by or for the testifying expert in anticipation of the expert's testimony:

> (6) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of a testifying expert's testimony;

So the question now, under Tex. R. Civ. P. 192.3(e) is whether if something is provided to or reviewed by a party/expert in anticipation of the party/expert's testimony, whether that information, data or tangible thing may successfully be protected from discovery. I believe a strong argument can be made that by providing the information to party/expert the information, data or thing becomes discoverable regardless of whether the party/expert reviews it or relies upon in the formulation of the his/her opinions.

I believe one holding in ***Schattman,*** however, may still survive after the 1999 amendments to the Texas discovery rules. The second half of the Fort Worth Court of

Appeals analysis dealt with whether the report by the doctor to his insurance carrier was a report prepared in anticipation of his testimony as a testifying expert or merely in anticipation of litigation. The court believed that there was an important distinction between the two. The doctor when he prepared the report to his insurance carrier was not a party to the litigation, much less a designated testifying expert. He was not preparing a report in anticipation of providing expert testimony. The court found this fact dispositive in holding that the report was not discoverable.

> An obvious distinction exists, however, between a report prepared by a prospective defendant "in anticipation of litigation" and a report "prepared by an expert ... in anticipation of the expert's trial and deposition testimony.". . . we have held, it is unquestionable that on its face the narrative report was not an expert's report prepared in anticipation of testimony in any respect.

D.N.S v. Schattman, 937 S.W.2d 158.

While the above holding should still pertain to documents, data and things provided to or prepared by a party/expert, it is going to be critical for the party/expert to meticulously document when the materials were received relative to when it was determined that the party/expert would be a testifying expert. Lack of attention to detail or casualness in this regard could result in inadvertent waiver, as it probably is the burden of the party/expert attempting to protect materials from disclosure to prove that such materials were not provided or reviewed in anticipation of the party/expert testifying as a testifying expert.

The above interpretations appear to be affirmed in the third and most recent case to deal with this issue of protecting information and materials provided to a party/expert is ***In Re State Farm Mutual Automobile Insurance Company,*** 100 S.W.3d 338 (Tex.App. – San Antonio 2002, orig. proceeding). The factual background is somewhat important. The case arises out of a car wreck. The plaintiff brought suit, took a default judgment and then obtained a turnover order to sue the defendant's insurance carrier for failure to defend. State Farm had two adjusters who investigated the case who at first it designated as non-retained experts and then de-designated. The court found that the designation was for an improper purpose (i.e. hiding testimony) so it disallowed the de-designation. Plaintiffs then sought the adjusters' investigation:

> Produce any memoranda, reports, letters, witness statements, or any other materials which document or describe your investigation regarding whether Cody Jones was covered under the policy in

> question in connection with the accident in question; and
>
> Produce all memoranda, reports, letters, or other documents which set forth or contain any evidence which you contend supports your decision to deny coverage to Code Jones for the accident in question.

Similar to the holding in ***D.N.S. v. Schattman***, the court found that this was a request for tangible things and Tex. R. Civ. P. 192.3(e)(6) rather than 192.3(e)(3) was applicable. ***In Re State Farm Mutual Automobile Insurance Company,*** 100 S.W.3d at 343. The adjuster provided an affidavit and the following portion of which was found to be dispositive of the issue:

> I did not receive, review, or prepare any of the documents described in State Farm's privilege log in anticipation of testifying as to any opinions in this case. I first learned I might testify in this case in 2002. I have formed no opinions in anticipation of testifying in this case. I have not relied on any of the documents described in State Farm's privilege log, which have been provided only to State Farm employees and attorneys and not to any third parties, to form any opinion I may have been expected to express at trial...[FN3]
>
> FN3. Please note that in his response, Farias states: "Lucas Farias agrees with State Farm that the experts had not relied on any privileged documents to form any trial opinion."

The documents in question were found to have been created in relation to the original suit in which the plaintiff obtained a default and not in relation to the plaintiff's case against that defendant's insurance company for failure to defend. Thus they were not generated for the lawsuit in question and according to the adjuster's uncontroverted affidavit, the documents were not "provided to, reviewed by, or prepared by or for [him] in anticipation of [his] testimony ..." in this lawsuit. Based upon these findings the court held that State Farm did not waive the privilege in relation to the documents by designating the adjuster as an expert witness, and the trial court abused its discretion by ordering State Farm to produce the documents in question.

B. DISCOVERY OF BIAS

The Texas Supreme court has looked disfavorably on discovery of experts solely for the purpose of impeachment. The question for this paper is whether the policy considerations behind these decisions apply to party/experts the same as they do for retained testifying experts. A key rationale behind the rule is that to allow broad discovery into the personal affairs of forensic experts would discourage qualified experts from participating in litigation, which would be to the determent of the search for truth. See, ***Ex parte Shepperd***, 513 S.W.2d 813, 816 (Tex. 1974), discussed below. This rationale would not seem to apply to a Defendant/expert; therefore, it is arguable that this line of cases does not apply to a Defendant/expert. It appears to be uncharted territory.

The seminal Texas case on this subject is ***Russell v. Young***, 452 S.W.2d 434 (Tex.1970). Dr. James Sharp was the Plaintiff's treating physician. The Defendant issued a notice for his deposition along with a subpoena *duces tecum* requiring him to produce certain medical, accounting and financial records. The subpoena reportedly was in regard to the doctor's possible bias and prejudice. Following a motion to quash hearing, here are some of the items the doctor was ordered to produce:

> (2) All appointment books maintained by relator during 1969;
>
> (3) All statements, listings, ledgers or other books showing the accounts receivable of relator during 1969;
>
> (4) All deposit slips or tickets showing deposits into bank accounts of relator during 1969;
>
> (5) All statements, listings, ledgers, journals, or other books showing receipt of payments, either in cash, by check or any other means during 1969;
>
> (6) All statements of account or bills for services rendered during 1969;
>
> (7) All accounting ledgers, journals or other books of account of relator maintained during 1969; and
>
> (8) All financial statements showing income and expenses of relator during 1969.

A petition for writ of mandamus was filed and the Texas Supreme Court made the following ruling:

> The question to be decided is whether the records of a potential witness in a lawsuit are discoverable prior to trial in instances where the potential witness is not a party to the lawsuit ***and whose credibility has not been put in issue*** and where the records do not relate directly to the subject matter of the pending suit and ***are sought to be discovered for the sole purpose of impeachment of such witness by showing his bias and prejudice.*** We hold that under such circumstances, such records are not discoverable. [emphasis added].

Russell, 452 S.W.2d at 435. The Court offered the following rationale for its decision:

> Relator [Dr. Smith] has not yet taken the witness stand nor has his deposition been introduced into evidence because there has not yet been a trial; relator's records cannot possibly have impeachment value because there is nothing yet to impeach and there may never be anything to impeach, depending upon the contents of the testimony, if any, which is introduced during the trial of the lawsuit. *See,* ***United States v. Certain Parcels of Land, etc.***, 15 F.R.D. 224 (D.C.S.D.Cal. 1953).

Russell, 452 S.W.2d at 437.

As will be seen by the discussion below, the holding in ***Russell v. Young*** continues to be the law in Texas. It is questionable, however, whether the above rationale still provides the adequate basis for this legal concept. In Texas, we now have designation of experts. Also, there is a circular logic that is difficult to reconcile. If the party cannot obtain discovery relevant to impeachment, how will the party impeach the witness at trial? The more plausible basis for the ruling and the policy is that courts simply are disinclined to allow intrusive discovery from a potential expert that is not relevant to an issue in the case other than for impeachment ("[T]here is ... a limit beyond which pre-trial discovery should not be allowed." ***Russell***, 452 S.W.2d at 437).

The rationale for the **Russell** holding was clarified more in ***Ex parte Shepperd***, 513 S.W.2d 813, 816 (Tex. 1974):

> [a]llowing discovery orders of that kind would permit witnesses to be subjected to harassment and might well discourage reputable experts from accepting litigation employment.

The discovery sought in ***Shepperd*** was not of the personal financial records of the expert, but the condemnation appraisal reports prepared by expert appraisers. The Court observed that the credibility of the appraisers would definitely be in issue, and that the reports were not sought solely for impeachment. However, noting that the reports concerned other tracts which were the subject of other continuing litigation, the Court held that "an especially vigorous showing of good cause would be required before a party to

one pending action could obtain reports immune from discovery in another pending action to which they primarily relate." ***Ex parte Shepperd***, 513 S.W.2d at 817.

The holding in ***Russell v. Young*** was reiterated by the Texas Supreme Court in ***Walker v. Packer***, 827 S.W.2d 833 (Tex. 1992). However the court distinguished and allowed discovery for the purpose of establishing bias. The court noted that the holding in Russell should not be applied mechanically, but on a case by case basis, depending on the precise nature of the discovery request and the context in which it is requested.

> FN6. We do not decide whether the documents were properly discoverable, only that the trial court erred in denying discovery based solely on ***Russell.*** If the Walkers sought the documents solely to attack the credibility of Dr. Gilstrap by showing that his deposition testimony was untrue, for instance, the information would probably not be reasonably calculated to lead to the discovery of admissible evidence. *See* Tex. R. Civ. Evid. 608(b). ("Specific instances of the conduct of a witness [other than criminal convictions], for the purpose of attacking ... his credibility, may not be ... proved by extrinsic evidence.").

Walker v. Packer, 827 S.W.2d at 839.

Recall that in ***Russell,*** the Texas Supreme Court noted that at the discovery stage, the witness' credibility had not yet been put in issue. This consideration was a focus of the court in ***Walker.*** In ***Walker,*** the Plaintiffs did not seek financial or tax information from the witness, but instead were seeking a policy from the doctor/expert's employer hospital restricting employee/doctors from testifying on behalf of Plaintiffs. Presumably, Plaintiffs believed that such evidence would undermine the credibility of the witness by exposing a bias. The expert testified that he knew of no such policy. ***Walker v. Packer***, 827 S.W. 2d at 837. Plaintiffs sought the deposition of the hospital agent who presumably possessed the policy and the hospital moved to quash. The Plaintiff's attorney then in another case took the deposition of a physician who testified that there was in fact a policy and that each hospital employee doctor had received a copy of it. The Plaintiffs renewed their request from the hospital for the controversial policy. The court observed that this case was different from Russell in that plaintiffs did not seek global discovery for impeachment, but sought a very limited type of discovery. "The Walkers are not engaged in global discovery of the type disapproved in ***Russell;*** they narrowly seek information regarding the potential bias suggested by the witness' own deposition testimony and that of his professional colleague. ***Walker v. Packer***, 827 S.W. 2d at 839. The Court notes that discovery is allowed when it may lead to admissible evidence and that bias is admissible under Tex. R. Evid. 613(b), but that evidence of bias is not admissible if the witness "unequivocally admits such bias or interest" at trial. The court noted that the witness in question had not admitted any bias, but rather has flatly denied it. Given this situation, the court held such evidence should

be discoverable.

> The trial court erred in failing to apply the foregoing rules to determine whether the documents were discoverable. Instead, the trial court simply read Russell as an absolute bar to discovery, even though the circumstances here are quite distinguishable. In so doing, the trial court misapplied the Russell holding. We expressly disapprove such a mechanical approach to discovery rulings.

In ***Kupor v. Solito,*** 687 S.W.2d 441 (Tex.App. [14 Dist.]1985, no writ), the Defendant argued that discovery regarding credibility should be disallowed under the holding in **Russell v. Young**, but the court rejected the argument, finding that there was no evidence that the Plaintiffs sought the discovery ***solely*** for impeachment:

> The cases cited are distinguishable in that both cases show the information sought was *solely* for impeachment purposes. There has been no such admission in Relator's case; to the contrary, the record indicates the plaintiffs sought this information for other purposes *in addition* to use for impeachment. Thus Relator cannot claim the answers are nondiscoverable because he has failed to prove the information was sought solely for impeachment.

Kupor v. Solito, 687 S.W.2d at 443.

Olinger v. Curry, 926 S.W.2d 832 (Tex. App-Fort Worth 1996, orig. proceeding) involved discovery from an examining expert retained by an insurance carrier in an uninsured motorist case. The Plaintiff sought to prove that Dr. Olinger was biased by seeking his tax returns and various financial records. The court noted the following testimony from Dr. Olinger:

> Dr. Olinger admitted that approximately 90% of his expert consultation services had been provided for defendants as opposed to personal injury plaintiffs. He also testified that "the success [of the party who retains him to testify] ... is not my concern." ***Olinger v. Curry***, 926 S.W.2d at 833.

The court found that this testimony did not put Dr. Olinger's credibility in issue. Therefore, federal income tax returns could not lead to admissible evidence under Rule 613(b). See Tex. R. Civ. Evid. 613(b) (extrinsic evidence of bias is not admissible if the witness "unequivocally admits such bias or interest.").

In 1999, the Texas Supreme Court adopted new rules of discovery. At the last moment before the 1999 amendments to the Texas discovery rules were promulgated,

the Court inserted into the scope of discovery provisions in Rule 192.3(e) the category of "any bias of the witness." This change created some controversy about whether the historical scope of discovery regarding experts had been expanded, particularly with respect to the long recognized doctrine that discovery solely for impeachment is proscribed.[13] Unfortunately, the Texas Supreme Court provided no commentary with regard to this provision.

One of the first cases to interpret the new provisions was ***In re Doctors Hospital of Laredo,*** 2 S.W.3d 504 (Tex. App. --San Antonio 1999, orig. proceeding). This case involved the consulting expert exemption and the scope of discovery relating to bias. A medical malpractice action was brought against hospital regarding a child's birth. The trial court ordered medical experts' depositions and ordered discovery of experts' income tax schedules and one expert's calendars. The Hospital filed petition for writ of mandamus. This opinion centered on the interpretation of Rule 192.3 of the discovery rules. The trial court construed the rule to permit the deposition of a consulting witness and to permit the production of a testifying witness's income tax schedules and appointment calendars. The San Antonio Court of Appeals issued a conditional writ of mandamus holding that: (1) the hospital properly re-designated a doctor from testifying expert to consulting expert, and thus trial court abused its discretion in ordering doctor's deposition, and (2) the new discovery rules, which provide for discovery of any bias evidence of testifying witness, do not allow discovery of personal financial records and appointment books of nonparty witnesses. We will focus on the second ruling.

Two experts were noticed for depositions by the Plaintiff. One expert had been de-designated as a consultant. The Plaintiff subpoenaed the income tax schedules of both experts, and the calendars of the remaining testifying expert. The trial court ordered produced the schedules showing income from medico-legal consulting and the calendars for a three year period. The court held that the trial court had abused its discretion in ordering the production of the requested documents:

> Citing ***Russell v. Young***, 452 S.W.2d 434 (Tex.1970), the hospital contends that income tax schedules and calendars of nonparty witnesses are not discoverable to show bias. In response, the plaintiffs claim this case was overruled by the new discovery rules***. We disagree that new rule 192.3 overruled Russell.*** Unlike former discovery Rule 166b (2) (e), new Rule 192.3(e) (5) specifically provides that a "party may discover ... any bias of the [testifying] witness."Tex. R. Civ. P. 192.3(e) (5). We have found no historical commentary that would suggest the rule drafters intended to overrule Russell and its progeny. [footnote omitted]. ***We***

[13] See ***Russell v. Young***, 452 S.W.2d 434 (Tex.1970) and ***Walker v. Packer***, 827 S.W.2d 833 (Tex. 1992)

> ***therefore read the rule to permit discovery of bias evidence, other than the personal financial records and appointment books of nonparty witnesses.*** By ordering the production of these personal records, the trial court abused its discretion. [emphasis added]

In re Doctors Hospital of Laredo, 2 S.W.3d at 507.

Chief Justice Harberger dissented, noting that one well-known commentator believes that rule 192.3 "probably may" overrule ***Russell.*** *See* Michol O'Connor, et al., **O'CONNOR'S TEXAS RULES CIVIL TRIALS** 309 (1999); *see also* Sam Johnson, Scope of Discovery Under the 1999 Revisions to the Texas Discovery Rules, UNIV. HOUS. LAW FOUND., **CIVIL DISCOVERY UNDER THE NEW RULES** C, C-9 (1998) (describing change in rule concerning evidence of expert bias and concluding documents to impeach expert may be discovered upon showing of special circumstances indicating impeachment is possible).

> I would agree with these commentators that a serious question exists as to whether the broad language in ***Russell*** remains the absolute law. I concur in the result the majority reaches, though, not because of the language in ***Russell***, but because ***the trial court in this case failed to explore other methods of obtaining the information contained in Dr. Grossman's income tax schedules before ordering their production***. See ***El Centro del Barrio, Inc. v. Barlow***, 894 S.W.2d 775, 780 (Tex. App.--San Antonio 1994, orig. proceeding) (stating tax returns are not material if the same information can be obtained from another source); see also ***Olinger v. Curry***, 926 S.W.2d 832, 834-35 (Tex. App.--Fort Worth 1996, orig. proceeding) (holding tax returns not discoverable where doctor admitted to potential bias in deposition); ***Kern v. Gleason***, 840 S.W.2d 730, 738 (Tex. App.--Amarillo 1992, orig. proceeding) (asserting party seeking production must show information unavailable from another source). Less intrusive methods for the discovery of bias exist, such as through depositions as demonstrated in ***Olinger.*** Protection of privacy is of constitutional importance, and a trial court abuses its discretion by requiring the disclosure of tax returns when the same information can be obtained from another source. ***Sears, Roebuck & Co. v. Ramirez***, 824 S.W.2d 558, 559 (Tex.1992); ***El Centro del Barrio, Inc***., 894 S.W.2d at 780***. In this case, there was no showing that the information the plaintiffs sought to obtain was unavailable from another source, or that the other potential sources of such information, i.e,***

> ***interrogatories, requests for admission, depositions, etc., had been pursued before seeking discovery of the tax returns.***

In re Doctors Hospital of Laredo, 2 S.W.3d at 507-508.

Two important considerations may be gleaned from the majority opinion and dissent in ***In re Doctors Hospital of Laredo***: 1) the party seeking the discovery on bias must be able to show that it has attempted to obtain private information by less intrusive means than requesting financial records and tax returns; and 2) while personal information such as financial records and tax returns are going to be afforded protection from discovery, a party may be allowed to obtain other evidence of bias through discovery. This then raises the following questions: 1) will discovery of bias be given greater latitude in depositions and interrogatories than in requests for production; and 2) what other types of information relevant to bias may be discoverable?

The appellate court ***in In re Dolezal***, 970 S.W.2d 650 (Tex. App. – Corpus Christi 1998, orig. proceeding) held that discovery of patient lists and contracts between a chiropractor and various attorneys and law firms was irrelevant to the claims at issues and should not be allowed. In 2005, the Beaumont Court of Appeals reiterated that an expert's personal financial information is off limits as to discovery***.*** ***In re Weir***, 166 S.W.3d 861 (Tex. App. – Beaumont 2005, orig. proceeding) the San Antonio Court of Appeals in ***In re Makris***, 217 S.W.3d 521 (Tex.App.-San Antonio,2006) disallowed the discovery of personal financial documents and also expert reports and correspondence from other related cases. **In *In re Plains Marketing*** 195 S.W.3d at 782 (Tex. App. – Beaumont 2006), the Beaumont Court of Appeals rejected a request for production of hard copies of all reports expert witness had prepared as a medical expert for 10 years observing that there had not been a demonstration of relevancy:

> In the instant case, Rawls does not specify what information contained in Dr. Levine's medical examination reports prepared for various unrelated lawsuits would show his bias or prejudice with regard to Rawls or her cause of action against realtors.

In re George Wharton**,** 226 S.W.3d 452 (Tex. App.- Waco 2005, orig. proceeding) agreed with the San Antonio court in **In re Doctor's Hospital of Laredo** that ***Russell*** (discovery of personal financial records of a non-party solely for impeachment is proscribed) was not overruled by the promulgation of Rule 192.3(e)(5). The main support for this holding was found in the comments to the 1999 Amendments:

> "The scope of discovery, always broad, is unchanged." *Explanatory Statement Accompanying the 1999 Amendments to the Rules of Civil Procedure Governing*

Discovery 977 – 978 S.W2d (Tex. Cases) xxxv (Tex. Nov. 9, 1998) (emphasis added)

If a party seeks to obtain documents from a non-party expert for impeachment purposed, the party seeking discovery must first present evidence "raising the possibility that there is bias." *See* ***Walker v. Packer***, 827 S.W.2d 833, 838 (Tex. 1992 (orig. proceeding). The reports that Dr. Wharton, an adverse examining physician retained by the Defendant, had generated in other cases also were sought in ***In Re George Wharton.*** The fact situation is not clearly developed in the opinion, but the court suggests that there had not yet been a declaration that Wharton would be called as a testifying expert at trial (Wharton was retained to perform a medical examination of the Plaintiff on behalf of the defense). Consequently, since no declaration had been made about whether Wharton would be called as an expert witness at trial, Wharton's credibility was not placed in issue. It may be inferred from the decision, however, that if an expert is designated as a testifying expert, the expert's reports from other cases may be discoverable on the issue of credibility*. See,* ***In re George Wharton*****,** 226 S.W.3d at 458-9 *(concurring opinion)*. However, consider Chief Justice Gray's concurring opinion in which states the scope of discovery still should be limited, even if an expert is designated to testify at trial. (citing Justice Harberger's concurrence in ***In re Doctor's Hospital of Laredo***).

5. WRITTEN DISCOVERY

A recurring theme of this paper with regard to designating a physician/nurse party as a testifying expert is the importance of timing. This is borne out with regard to written discovery. If a party defendant designates him/herself as a testifying expert in response to requests for disclosure and interesting question arises as to whether the opposing party may serve upon the party/expert written discovery in the form of interrogatories, requests for production and requests for admission. Rule 195.1 dealing with "Permissible Discovery Tools," provides as follows:

> **Permissible Discovery Tools.** A party may request another party to designate and disclose information concerning testifying expert witnesses only through a request for disclosure under Rule 194 and through depositions and reports as permitted by this rule.

Does this mean that as a tactic a defendant physician/nurse could designate him/herself as a testifying expert and thereby prevent the plaintiff in a medical malpractice case from propounding to the expert any written discovery. A literal interpretation of the rule might appear to lead to this conclusion, but I think that such an interpretation would

neither comply with the intent or construction of the rule. Much the same way a court may disallow de-designating a testifying expert if it finds that the de-designation of the expert as a consulting on expert is for an improper purpose (i.e. to hide facts) I believe a court could in the interest of fair administration of justice disallow the designation of a party as a testifying expert, by finding that such a designation could not be used to prevent written discovery and deny the discovery of facts. See, ***In Re State Farm Mutual Automobile Insurance Company,*** 100 S.W.3d 338, 341 (Tex.App. – San Antonio 2002). ***See also Jampole v. Touchy***, 673 S.W.2d 569, 573 (Tex.,1984 disapproved on other grounds) ("we note that the ultimate purpose of discovery is to seek the truth, so that disputes may be decided by what the facts reveal, not by what facts are concealed."). Additionally, if the party were to object to discovery on the basis that he/she is protected from responding to written discovery as a testifying expert, the opposing party could request that the party reduce all his/her opinions to tangible form under Tex. R. Civ. P. 195.1. I believe the purpose of the rule is to avoid the expense of having to respond to written discovery about expert witnesses when such information may more efficiently be provided in a report or an oral deposition provided by the testifying expert. While the party can be designated as a testifying expert and as such be treated the same as any other testifying expert, the same policy considerations arguably do not and should not apply. I have yet to have a party raise this objection; however, it does demonstrate some of the tension that is created when a party designates himself or herself as a testifying expert. It is with regard to depositions that I have seen more tactical maneuvering.

6. DEPOSITIONS

As stated above the only permissible tools for obtaining discovery about a testifying expert is through requests for disclosure, oral depositions and reports as permitted by Tex. R. Civ. P. 195.1. It is important to note that only "oral" depositions of testifying experts are allowed. No provision is made for taking a deposition of a testifying expert by a deposition on written questions. Presumably, such a tool is unavailable for discovering information about an expert, as Rule 195.4 makes clear, discovery may be obtained "only" through disclosure under Rule 194, by oral deposition of the expert and by a report prepared by the expert under Rule 195.

Rule 195.4 specifies the scope of discovery that is permitted by oral depositions, but it could have simply referred to the entire scope of discovery delineated by Rule 192(3)(e). The rule specifically states that the following information and things may be discovered concerning "the subject matter on which the expert is expected to testify":

a. The expert's mental impressions and opinions,

b. The facts known to the expert (regardless of when the factual information was acquired) that relate to or form the basis of the testifying expert's mental impressions and opinions, and

c. Other discoverable matters, including documents not produced in disclosure.

There is nothing in the rules regarding experts that deposition questions to experts about their mental impressions and opinions have to be couched in the same recommended format as contention interrogatories to a party.[14] Presumably, an expert may on oral deposition be asked simply to provide all his/her opinions that she has formulated in anticipation of testifying in the case and then be asked to state the factual basis for each such opinion. As discussed elsewhere in this paper, facts are never protected, regardless of when or how the factual information was acquired. Tex. R. Civ. P. 192.3(e)(3).

This phrase "other discoverable matters" basically means that the a deposition may inquire into all the matters within the scope of discovery delineated in Rule 192(3)(e). The interesting part of this provision is the phrase, "*including documents not produced in disclosure*." b. Recall that Rule 195.1 and 195.4 specifically state that the only tools for obtaining information about expert witnesses are requests for disclosure, oral depositions and reports. If that is true, then how does a party obtain documents not produced in disclosure? The rule contemplates that a request for production that is part of a notice, while in the nature of a request for production, is actually something different. Therefore, so long as the request for production accompanying the notice conforms to the scope of discovery authorized by Rule 192(3)(e) and with Rule 199.2(b)(5), it will be considered proper.

Question whether the expert witness may be interrogated about opinions or impressions that do not relate to the subject matter on which he is expected to testify. For instance, if a witness is designated on the subject matter of standard of care, would it be permissible to question the expert about causation, or would this be "fishing," and vulnerable to an instruction not to answer based upon the fact that the question is "clearly beyond the scope of discovery." [15] Similarly, question whether the witness could be instructed not to answer questions about facts known to the expert that do not relate to or form the basis of the testifying expert's mental impressions and opinions. This raises an interesting question, which dovetails with the discussion about

[14]See Comment 1 to Rule 197.

[15]See, comment 4 to Rule 199.

Daubert/Robinson, below, about what would happen if a party physician/nurse were to designate him/herself as a testifying expert on only a specific issue such as standard of care and not on causation. Would this prevent an opposing party from questioning the defendant about causation? Once again, the answer likely will boil down to whether the court has discretion to tailor discovery to the peculiarities of the situation presented in a particular case. I believe the trial court has such discretion and that a trial court most likely would allow broader discovery of a party expert than of a retained expert. See Tex. R. Civ. P. 191.1 and Tex. R. Civ. P. 195, Comment 3.

What should happen if a party defendant physician/nurse designates him/herself as a testifying expert and then objects that he/she should not have to give opinion testimony of any type until after the party seeking affirmative relief has completely designated his testifying experts and either tendered such experts for deposition or produced reports? For example, assume a medical malpractice case in which the defendant doctor is being deposed at the outset of the case. Assume further, the defendant was propounded a request for disclosure more than 30 days prior to his deposition. Should the defendant be required to set forth all his opinions at the time of this deposition? If the defendant decides to divulge all his opinions at the time of the deposition, should he be allowed to express opinions and mental impressions that have not been previously disclosed in response to the plaintiff's request for disclosure? Should the plaintiff's attorney have to cross examine the physician without any prior delineation of the defendant's expert opinions? Should the plaintiff's attorney be allowed to reserve interrogation of the defendant regarding the defendant's expert opinions to a later date, after the defendant has fully disclosed his impressions, opinions and a summary of the factual basis for them? Should the plaintiff be allowed more than 6 hours to depose the defendant, if the defendant is going to also offer expert testimony?

Recently, I have encountered this tactic. Plaintiff issued a notice for the defendant doctor's deposition at the outset of the case. The defendant doctor objected to the notice on the basis that Plaintiff had not yet designated experts or set out her medical/legal theories against the doctor. The doctor complained that she should not have to divulge her opinions until after the plaintiff had designated her experts and tendered the experts' reports or tendered the experts for deposition. I countered that I am at least permitted to take the deposition of the party/expert regarding the party/expert's factual knowledge. I was amenable to deferring taking the defendant's deposition as a testifying expert; however, that would mean that I was entitled to fully depose the party/expert twice (for up to 6 hours each). We have yet to reach an agreement on the applicable protocol or procedure.

Arguably, the defendant should not be allowed to have her cake and eat it too. The plaintiff should be allowed to take the defendant's deposition early in the case, at least to obtain full discovery of the defendant's knowledge of relevant facts, the defendant's contentions, and the factual basis for them. Even in those situations in which a party has designated an individual as a consulting only expert, courts have allowed the opposing party to depose the consultant regarding the expert's factual knowledge. *See,* ***Axelson, Inc. v. McIlhany***, 798 S.W.2d 550 (Tex. 1990) (discussed above under Dual Capacity Experts). If the defendant is going to offer expert testimony, then it is reasonable to assume the defendant might want to defer offering such opinions until time of designation after the plaintiff's experts have been designated. However, in such an event, the defendant, at the time of designation, should have to provide the plaintiff the same information as would any other testifying expert and the plaintiff should be allowed to fully depose the defendant as an expert witness.

In the above situation, the question appears open about whether the plaintiff would be entitled to get a report from the party/ expert pursuant to Rule 195.5 prior to plaintiff's designation deadline or whether the defendant would be allowed to wait until its designation deadline to fully disclose. It seems unfair to allow the defendant to designate herself as a testifying expert, but not require full disclosure. This would allow the defendant to effectively shield the plaintiff from finding out the defendant's opinions and the factual bases for them until after plaintiff designated.

Another tactic I have encountered is for the defendant to state at her deposition that "of course" she is going to provide expert testimony on her own behalf and plaintiff is entitled to completely depose her "now" regarding all opinions she has. Plaintiff need only ask. The problem with this tactic is that the plaintiff is entitled to have an outline of what the party /expert's opinions are and the factual bases for them before having to cross examine the party/expert. This tactic is unfair because it provides the plaintiff no advance notice.

Yet another tactic, which actually is a corollary to the above tactic is to produce the defendant for deposition and then at the end of the discovery period and argue that plaintiff has already had an opportunity to depose the defendant regarding the defendant's anticipated expert testimony. The strategy is the same; only present the party/expert for deposition once. The strategy is flawed, however, because in either event, it does not afford the opposing party proper and timely notice of the anticipated expert testimony so that the opposing party may prepare and conduct an effective cross examination. The burden should be on the party resisting the discovery to seek a protective order. However, if you are the party who is the brunt of the above tactics, it may be prudent to seek a protective order requiring 1) that the defendant/expert be

required to fully disclose and/or produce a report under Tex. R. Civ. P. 195.5; 2) that you be allowed to depose the expert regarding her factual knowledge and then again when the party fully discloses her expert opinions.

7. COURT ORDERED REPORTS.

Rule 195.5 allows a court to order a testifying expert to reduce to writing opinions and mental impressions not otherwise in writing. If a docket control order is entered that requires the party seeking affirmative relief to produce a report, but not the defendant, the Plaintiff may avail herself of this rule to require the defendant to produce reports from one or more of its testifying experts. This rule is virtually identical to its predecessor, Rule 166b(2)(e)(4). There is an important difference between the new and the old rules. The new rule makes clear that the court may order the report produced "in addition to the deposition." Arguably this means that a party could file a motion to have the report produced before *or after* the deposition of the expert takes place.

Why would a party move to have a report produced after the expert's deposition? Assume an expert produces a skeletal report that does not contain all the opinions he intends to offer in the case. Assume further that at the deposition of the expert, the tendering party instructs the expert not to respond to the question,[16] " please state all the opinions you intend to offer in this case," or the witness simply is evasive and will not give an unequivocal response, choosing instead to give the answer, "I may have additional opinions, depending upon the questions propounded to me." If a party is unable within the time limitations of the expert's deposition to cover all the expert's opinions and the bases for them, the party might have two options: 1) the party could move for the court to expand the time limitation under Rule 191.1 or 2) the party could move for the court to order the responding party to have the expert reduce to tangible form all the factual observations, tests, supporting data, calculations, photographs, and/or opinions of the expert that have not been recorded and reduced to tangible form.

The report requirement is a sensitive issue when a defendant designates herself as a testifying expert. I have observed that some defense attorneys will seek to limit the report requirement in the DCO to only "retained experts," arguing that it is infeasible to require non-retained experts (i.e. treating physicians) to produce reports regarding their opinions and the bases for them. I generally agree that non-retained experts should not have to produce reports because it is difficult to obtain a report (or a legally adequate report) from an individual who not under the party's control. The issue, however, is not

[16] Claiming that the question is abusive. See Rule 199.5(f) and comment 4 to Rule 199.5.

usually about whether a non-retained expert should have to produce a report, but who falls into the category of non-retained experts. The defendant predictably will argue she is not a retained expert so she should be considered a non-retained who does not need to produce a report. I do not believe this position is valid. Rule 194 is instructive with regard to a retained expert, a party must disclose the general substance of the expert" s mental impressions and opinions and a brief summary of the basis for them, ***but*** if the expert is not retained by, employed by, ***or otherwise subject to the control of the responding party,*** the party need only disclose the documents reflecting such information. If an expert otherwise under the control of a party is not considered a non-retained expert, then similarly, the party herself should be not be considered non-retained.

The plaintiff should request a provision in the DCO that excludes from the automatic report requirement (leaving open the right to seek a report under Rule 195.5) non-retained, non-party testifying experts. There is no valid practical or policy reason why a defendant/testifying expert should be excluded from the report requirement. While it is understandable that it may be very difficult as a practical matter to obtain a report from a non-party, non-retained expert, there is no such concern with regard to the defendant/testifying expert. On the other hand, the opposing party is entitled to know what opinions the defendant is going to offer and the bases for them without having to take the defendant's deposition. However, a report from the party/testifying expert should not foreclose the plaintiff's right to also depose the defendant/expert.

8. ADVERSE MEDICAL EXAMINATIONS

What should happen if a defendant physician in a medical malpractice case designates herself as a testifying expert on the issue of causation and then as a party requests an adverse medical examination (often inappropriately called an "independent medical examination") by a physician on the issue of injury and causation. Should such an examination be granted as a matter of right? Maybe not.

What would be the good cause for a defendant physician to obtain a medical examination of the Plaintiff when the defendant already has had the opportunity to examine the Plaintiff? Plaintiff will be able to advocate that had the defendant doctor done a more complete examination when she was providing care that there might not be litigation in which the defendant is now requesting yet another opportunity to examine the Plaintiff. In other words, the defendant already has had an opportunity to examine the Plaintiff and should have to demonstrate good cause why another examination is necessary.

Additionally, it would seem that arguably the burden of demonstrating good

cause for a medical/psychological examination should be viewed similarly to the burden of overcoming a claim of trade secrets. ***In re Continental General Tire, Inc.***, 979 S.W.2d 609 (Tex. 1998) (i.e. the examination is ***necessary for a fair adjudication of the facts***).

A general review of the law pertaining to adverse medical examinations probably will assist in framing this issue. In addition to demonstrating that the Plaintiff has affirmatively placed her mental or medical condition in controversy, the Defendant must also demonstrate good cause for the examination. This requires demonstrating that the examination is relevant; that there is a reasonable connection between the condition and the examination sought which will lead to the discovery of admissible evidence. Also, the movant must demonstrate that it is not possible or practicable to obtain the information sought from the examination through less intrusive means.[17] *See* ***Coates v. Whittington****,* 758 S.W.2d 749,753 (Tex. 1988). The movant also must demonstrate that the medical or psychological condition for which the examination is sought is in controversy.

Coates instructs that there are three essential components of "good cause," and that each must be demonstrated:

a) RELEVANCY:

> An examination is relevant to issues that are genuinely in controversy in the case. ***It must be shown that the requested examination will produce, or is likely to lead to, evidence of relevance to the case.*** *See* ***Schlagenhauf v. Holder,*** 379 U.S. 104, 117-118 (1964) [emphasis added],

b) NEXUS

> There must be shown a reasonable nexus between the condition in controversy and the examination sought.

c) LESS INTRUSIVE MEANS NOT FEASIBLE

> A movant must demonstrate that it is not possible to obtain the desired information through means that are less intrusive than a compelled examination. *See* ***Schlagenhauf v. Holder,*** 379 U.S. 104, 118 (1964)

See also, ***In re Caballero,*** 36 S.W.3d 143, 145, (Tex. App. Corpus Christi 2000, orig. proceeding) (reiterating requirement of meeting three above criteria).

Good cause typically is considered effectively established as a matter of law if the examinee designates a medical expert to prove his/her mental condition:

[17] See also, Tex. R. Civ. P. 192.4 (a).

> "[i]f, however, a [party] intends to use expert medical testimony to prove his or her alleged mental condition, that condition is placed in controversy and the [other party] would have good cause for an examination under Rule 167a."

Coates, 758 S.W.2d at 753. See also, ***Amis v. Ashworth***, 802 S.W.2d 374, 378 (Tex. App. – Tyler 1990, orig. proceeding) (Designating a treating physician to testify about mental state at a particular point relevant to the occurrence is not the same a designating an expert on the plaintiff's mental or medical condition resulting from the occurrence).

Finally, even if the Defendant demonstrates that the Plaintiff has affirmatively placed her medical or mental condition in issue and that there is good cause for the examination, the court should still balance the competing interests.

> The "good cause" requirement of Rule 167a recognizes that competing interests come into play when a party's mental or physical condition is implicated in a lawsuit-the party's right of privacy and the movant's right to a fair trial. ***A balancing of the two interests is thus necessary to determine whether a compulsory examination may properly be ordered.*** [emphasis added].

Coates, 758 S.W.2d 753.

The "less intrusive means" criteria probably would be the focal point in a scenario in which the defendant physician who has designated herself as a testifying expert on injury and causation requests an adverse medical examination. The Plaintiff should be able to make a strong argument that there already has been an examination which the defendant at the time deemed sufficient; therefore, Plaintiff should not be required to submit to yet another examination. A defendant physician would likely counter that she is in need of an examination to determine the current status and extent of the alleged injury. This would be a plausible argument, but if that is the best argument the Defendant can muster, it probably at best should and will result in an examination of limited scope.

9. *DAUBERT/ROBINSON*

In researching this paper, I could not find any reported Texas cases (or for that matter any cases from any jurisdiction) addressing a ***Daubert/Robinson*** challenge to a party/expert.[18] This does not mean there are no such cases out there, but if there are

[18] Reference is made to the gate-keeping role of the trial court in making a determination of whether a designated testifying expert should be allowed to offer opinions to the fact-finder. In this regard, the expert must be qualified and each opinion to be offered to the factor finder must

any in the universe, they are flying under radar. Additionally, if I am correct that there are no such reported cases, it should not be inferred from this that the qualifications and methodology of all party/experts presumptively meet the ***Daubert/Robinson*** criteria as a matter of law, that party/experts are immune from a ***Daubert/Robinson*** challenge, or that party/experts should not be challenged under ***Daubert/Robinson***.

It is beyond the scope of this paper to discuss how to set up a ***Daubert/Robinson*** challenge and how to conduct one. In this connection, I refer you to the excellent work done on this subject by Hon. Harvey Brown, starting with his seminal work, *"Eight Gates for Expert Witnesses."*[19] The eight gates through which an expert's opinions must cross in order to be admissible are as follows:

1. Helpfulness;
2. Qualifications;
3. Relevance;
4. Methodological Reliability;
5. Connective Reliability;
6. Foundational Reliabilty;
7. Reliance Upon Evidence Reasonably Relied Upon by Experts in the Field, Even if Hearsay;
8. Rule 403

Since all testifying experts are subject to the ***Daubert/Robinson*** criteria,[20] it stands to reason that if a party physician/nurse is designated as a testifying expert that party's qualifications and methodology in reaching her opinions too may be challenged.[21]

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be based upon scientifically accepted methodology, and the opinion must be scientifically reliable, must be relevant to the issues in the lawsuit and there must be a nexus between the opinions and the facts in the case. The court should make such a determination whenever there is a challenge to the expert. *See* ***Daubert v. Merrill Dow Pharmaceuticals, Inc.,*** 113 S.Ct. 2768 (1993);); ***Kumho Tire Co. Ltd. v. Carmic*hael**, 526 U.S. 137 (1999); ***E.I. duPont de Nemours and Co., Inc. v. Robinson***, 923 S.W.2d 549, (Tex. 1995*); **Merrel Dow Pharmaceuticals, Inc. v. Havner***, 953 S.W.2d 706 (Tex. 1996); ***Gammil v. Jack Williams Chevrolet, Inc.,*** 972 S.W.2d 713,724 (Tex. 1998) ***Ford v. Ledesma***, 242 S.W.3d 32 (Tex. 2007); ***Whirlpool Corp. v. Camacho***, 298 S.W.3d 631 (Tex. 2009).

[19] 36 Hous. L. Rev. 743 (1999), supra at footnote 9.

[20] Tex. R. Evid. 702.

[21] More than one court has addressed the criteria that should be applied to a treating doctor, reaching a clinical opinion. *See,* ***Moore v. Ashland Chemical, Inc****.,* 126 F.3d 679, 690 (5th Cir. 1997), *on reh 'g,* 151 F.3d 269 (5th Cir. 1998), *cert. denied,* 526 U.S. 1064 (1999); and ***LMC Complete Automotive, Inc. v. Burke****,* 229 S. W.3d 469 (Tex. App.-Houston [1 st Dist.] 2007) (finding treating physician's causation opinion, which was based on his experience, the patient self-reported history, the physician's physical examination of the patient, and some objective

As stated above, most party/experts merely offer conclusory opinions that s/he complied with the standard of care and that their care was not a proximate cause of the Plaintiff's alleged injuries. Such opinions should be challenged first because they do not constitute adequate testifying expert disclosure (see above discussion of expert designation) but also because the party/expert may not be qualified to offer expert opinion on the care she rendered or on the issue of causation. Just because the Defendant is a medical doctor does not mean that s/he is qualified to testified as an expert on all aspects and facets of medicine. *See,* ***Broder v. Heise,*** 924 S.W.2d 148 (Tex. 1996). For instance an emergency room physician-party-expert may be qualified to offer opinion testimony on the applicable standard of care in the emergency department, but she may not be qualified to render an opinion on causation. Similarly, the methodology the physician-defendant-expert used in reaching the diagnosis at issue in the lawsuit may not have been scientifically reliable of generally accepted in the medical field of practice.

If a party physician/nurse designates herself as a testifying expert, serious consideration should be given as to whether a ***Daubert/ Robinson*** challenge should be launched, or whether it may be tactically more advantageous to wait until trial, expose the Defendant's lack of qualification as an expert on the subjects on which she has been designated as an expert or the invalidity of her methodology, and move to strike the Defendant as an expert or to strike or limit the defendant's testimony that the jury may consider.

10. MOTIONS FOR SUMMARY JUDGMENT AFFIDAVITS

I first began thinking and strategizing about the defendant physician testifying as an expert witness when I read some motion for summary judgment cases a number of years ago in which the Defendant/experts in medical malpractice cases filed conclusory affidavits stating merely that they had complied with the standard of care and nothing they did or did not do resulted in the Plaintiffs alleged injuries. A defendant/expert is required to state opinions with the same specificity as a retained expert. Merely setting out conclusory statements that the Defendant complied with accepted standards of care or that the care was not a cause of the Plaintiff's alleged injuries likely will be found insufficient to support a traditional motion for summary judgment. One noteworthy case

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medical evidence of a disc herniation, was sufficiently reliable to justify its admission). Of course, these cases might be distinguishable when applied to a medical/psychological examiner because such an examiner is not a treater and the medical/psychological examiner is not formulating a clinical opinion in the ordinary course of his/her practice (unless it is conceded that they usual practice is limited to performing adverse examinations).

is an unreported case out Corpus Christi in 1999. While not precedent, it is informative.

Wells v. Kilgore, Not Reported in S.W.3d, 1999 WL 34972514 (Tex.App.-Corpus Christi) was a medical malpractice wrongful death action. The gist of the claim was that Defendant had failed to properly diagnose and treat the decedent. The defendant doctor filed a traditional motion for summary claiming that his care did not depart from accepted standards of care and he supported the motion with his own affidavit. The defendant's affidavit is set out in the opinion and is set out here for instruction:

> I am familiar with the standards of care applicable to a family practice physician in Hidalgo County, Texas, during all times relevant to the treatment made the subject of this lawsuit.... In reviewing the records of Larry Wells and my participation as a physician, I am of the opinion that no negligence has occurred as to the care given to Larry Wells.... I am familiar with the standard of care required for patients such as Larry Wells. The standard of care in Hidalgo County, Texas is to treat the type of condition Larry Wells had by prescribing antibiotics for infection, and other appropriate medications to treat diarrhea, nausea, and vomiting. Once dehydration was noted, the proper standard of care is to use I.V. fluids to replenish the body fluids and rehydrate the patient, while monitoring the patient for signs of improvement or for any signs of distress.... Although hospitalization of Larry Wells would not in any way have guaranteed a recovery, Mr. Wells' own repeated refusal to go to the hospital certainly was a factor in decreasing his chance of survival and increasing the probability of his death due to the myocarditis.... Specifically, after I reviewed the medical records of this patient, it is my expert opinion there was no act or omission on my part that contributed to or caused the death of Larry Wells. All of the opinions I have expressed herein are based upon a reasonable degree of medical probability.

The trial court granted the motion and the plaintiffs appealed. The appellate court found

the affidavit to be inadequate to negate the Plaintiffs' allegations. The court noted that the affidavit testimony of an interested expert (i.e. party expert) may support a motion for summary judgment if the testimony is uncontroverted, clear, positive, direct, otherwise credible, free from inconsistencies, and capable of being readily controverted. Tex. R. Civ. P. 166a I.

> An interested expert's affidavit is sufficient to establish compliance with the standard of care if the affiant (1) states that he is familiar with the applicable standard of care, (2) states with specificity each examination and treatment performed, (3) states that the acts of the physician were consistent with the appropriate standard of care, and (4) states that there was no causal connection between the physician's acts and the plaintiff's injury. Mathis v. Bocell, 982 S.W.ed 52,58 (Tex. App. – Houston [1st Dist.] 1998, no pet.); Griffin v. Methodist Hosp., 948 S.W. 2d 72,74 (Tex. App. – Houston [14th Dist.] 1997, no writ).

The court found that the defendant doctor failed to meet the above criteria and therefore failed to sustain his motion for summary judgment burden.

> In particular, Dr. Kilgore did not even mention the diagnosed conditions of dysentery, acute astric, and gastroenteritis, much less elaborate on how he diagnosed such conditions. Neither did Dr. Kilgore detail how his diagnosis of the "type of condition Larry Wells had" was made according to the appropriate standard of care. In addition, with regard to the I.V. fluids, Dr. Kilgore did no more than to assert that a dehydrated patient should be rehydrated by I.V. fluids; he did not explain whether he properly diagnosed Larry Wells as suffering from dehydration or that his method of administering I.V. fluids was within the standard of care. This lack of detail renders his assertions that he did not negligently injure Wells conclusory as to the claims made by the plaintiffs. We sustain the plaintiffs' sole issue on appeal.

11. TRIAL

A. CALLING THE DEFENDANT/EXPERT AT TRIAL

Over twenty years ago, I had a hard fought trial against a blood bank in Dallas defended by a skilled defense attorney. One of the key legal arguments in the trial (which I ultimately lost) involved whether I could call the defendant's expert witness adversely. I lost the argument, primarily because I could point to no precedent that said I could call the opposing side's expert adversely in my case in chief. The result might be different today.

In ***Hooper v. Chittaluru, M.D. et al***, 222 S.W.3d 133 (Houst [14th Dist.], 2006) the Fourteenth Court of Appeals, disregarding defendant's lament that "you cannot hijack her expert," found that where Plaintiff had timely cross designated Defendants' expert following Defendants' designation of the expert, the court knew of no precedent that disallowed Plaintiff from calling Defendants' expert in plaintiff's case in chief at trial. Finding that obtaining testimony from the opposing side's expert could be particularly damning at trial, the court held that the disallowance of the testimony was an abuse of discretion requiring a remand of the case. The Defendant, therefore, should not be able to shield herself from being called in Plaintiff's case in chief by designating herself as a testifying expert. If Plaintiff designates the Defendant as an adverse testifying expert, then Plaintiff should be able to call the Defendant in her case in chief.

B. USE OF BIAS AT TRIAL

Paradoxically, while the Rules of Civil procedure with regard to what may be discovered regarding the bias of a testifying expert are somewhat restrictive, the rules regarding use at trial are comparatively more liberal. Still, the bottom line comes down to whether the trial judge believes the evidence is relevant, Tex. R. Civ. P. 401, and whether the probative value of the potential evidence exceeds its prejudicial effect. *See,* Tex. R. Evid. 403.

The following language from ***Russell v. Young*** is instructive about the ability to challenge an expert's credibility at trial:

> It is true that in order to show bias and prejudice an expert medical witness may be cross-examined regarding the number of times he has testified in lawsuits, payments for such testifying and related questions. ***Traders & General Ins. Co. v. Robinson***, 222 S.W.2d 266 (Tex.Civ.App.1949) writ ref'd; ***Horton v. Houston & T.C. Ry. Co.,*** 46 Tex.Civ.App. 639, 103 S.W. 467 (1907) writ ref'd; and ***Barrios v. Davis,*** 415 S.W.2d 714

> (Tex.Civ.App.1967) no writ hist***. We do not disturb the law governing the cross-examination of witnesses to show bias and prejudice.*** [emphasis added]

Russell v. Young, 452 S.W.2d at 436. See also, ***Collins v. Wayne Corp.,*** 621 F.2d 777 (5th Cir. 1980). The trial court's ruling on admissibility of evidence based on relevancy is going to be given great deference. See e.g. ***Mendoza v. Varon***, 563 S.W.2d 646 (Tex. App. – Dallas). 1978.

Tex. R. Evid 603 also is informative:

> **(b) Examining Witness Concerning Bias or Interest.** In impeaching a witness by proof of circumstances or statements showing bias or interest on the part of such witness, and before further cross-examination concerning, or extrinsic evidence of, such bias or interest may be allowed, the circumstances supporting such claim or the details of such statement, including the contents and where, when and to whom made, must be made known to the witness, and the witness must be given an opportunity to explain or to deny such circumstances or statement. If written, the writing need not be shown to the witness at that time, but on request the same shall be shown to opposing counsel. If the witness unequivocally admits such bias or interest, extrinsic evidence of same shall not be admitted. A party shall be permitted to present evidence rebutting any evidence impeaching one of said party's witnesses on grounds of bias or interest.

The above concepts should apply the same for a physician/nurse defendant/testifying expert as they do for retained experts.